The question is whether strict observance of the parol evidence rule is consistent in principle with the Supreme Court's admonition regarding arbitrability. I should hasten to note that in the *Warrior and Gulf* case there was some difficulty about whether the Court should examine and evaluate evidence of bargaining history at all to determine the meaning of a contractual provision.[19] Nothing in the opinions, however, suggests arbitrators ought to refuse testimony as to bargaining history by conveniently relying on the truncated parol evidence rule. I say "truncated" because, when the rule is used to exclude extrinsic evidence, the exception for mistake is ignored. Permitting introduction of parol evidence does not, of course, ensure that this evidence will be sufficiently weighty to counter clearer, less ambiguous language of the contract.

The problem that exclusion avoids is a determination that the language of the disputed clause was not what the party offering the parol evidence agreed to. Thus, there was no meeting of minds by the parties and therefore no *contract* on that issue. Perhaps in those cases we should just say that and refer the matter back to the parties for bargaining. Use of the rule to exclude is a little like last-offer interest arbitration, except that excluding parol evidence is a convenient way of choosing the written version even if it resulted from mistake or fraud.

II. Strike-related Discipline

A. Gabriel N. Alexander*

We have been impanelled by the Program Committee to examine the experiences and pronouncements of arbitrators with respect to discharges for misconduct by striking employees excluding wildcat strikes. Our discussion will cover the following questions:

1. Is there a common law of arbitration in alleged strike-misconduct cases?
2. What are the criteria in deciding these cases?
3. Are the standards of 1955 applicable to cases today?
4. How do these procedural standards help when there are multiple arbitrators?

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[19] *Id.*, at 2427 (concurring opinions of Justices Brennan, Harlan, and Frankfurter).

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I am the survivor of a panel of four members of the Academy who rendered judgments resolving approximately 244 discharges of striking employees effectuated by the Southern Bell Telephone Company during a 72-day-strike in the spring of 1955. For data describing the project, and to refresh my recollection of the experience, I rely on a thesis completed in 1962 by Ronald Smith at the New York State School of Labor and Industrial Relations. I am grateful to him and to Cornell University Library for the loan of that thesis.

The Agreement To Arbitrate

At the expiration of their labor agreement in August 1954, Southern Bell and the Communications Workers of America (CWA) came to an impasse over the terms of a new contract. In prior years the day-to-day relations between the company and the union had not been satisfactory to either side. The existing grievance procedure did not culminate in arbitration, and the union was not bound by a no-strike promise. As a consequence there were intermittent "quickie" strikes over unresolved grievances during the contract term. Looking back from today that situation has an unreal aura about it. Even in 1954 the "quid pro quo" of grievance arbitration in exchange for a prohibition of strikes during the term of an agreement was well established in the major industries of the United States; thus the contrasting scene at Southern Bell was behind the times. In 1954 negotiations for the renewal contract dragged on for several months. Major obstacles to settlement were the union's refusal to accept the company's demand for a comprehensive no-strike pledge without a counterbalancing grievance arbitration procedure, and the company's refusal to accept arbitration as the final step in the grievance process. The upshot was the CWA employees went out on strike on March 14, 1955, and stayed out for 72 days.

Southern Bell was, at that time, a wholly owned subsidiary of American Telephone and Telegraph Company (ATT) operating in nine states. As a public utility provider of communication services essential to public safety and health, the company could not respond to CWA's walkout by suspending operations and waiting for the pressures of unemployment to wear down the determination of the striking employees. To maintain telephone service while the union's members withheld their labor, it reas-

signed excluded personnel and imported qualified telephone workers from other regional ATT companies. Feelings in support of as well as in opposition to the strike ran strong in many communities, and friction between strikers and scabs erupted into numerous verbal expressions of antagonism and some violence, as a consequence of which the company gave notices of discharge to 244 of the striking employees.

[Parenthetically, I was struck by the different reactions of local law enforcement officers toward misconduct by striking employees among the numerous communities where Southern Bell telephone exchanges were located. Some communities seemed to be "company towns," where strikers were closely watched, harassed, and arrested, while others bore the indicia of "union towns," where the authorities "looked the other way" with respect to misconduct by striking employees. Community feelings ran high in one direction or the other in many localities.]

As the strike wore on, both the company and the union were subjected to considerable pressure to end the walkout. Private and public pronouncements by the governors of the nine states, and intervention by the Federal Mediation and Conciliation Service (FMCS) ultimately bore fruit. The settlement agreed upon as of May 25, 1955, revised the contract grievance procedure to include arbitration and a no-strike clause was also agreed upon. A separate agreement provided for arbitration of grievances arising out of the discharges of striking employees for alleged misconduct as picketers. For those grievances the parties agreed upon a panel of arbitrators to act in three districts: Whitley McCoy (Georgia, Alabama, Florida, and the Carolinas), Carl Schedler (Louisiana and Mississippi), Gabriel Alexander (Kentucky and Tennessee), and Dudley Whiting (as an alternate for any).

A preliminary hearing was scheduled in Atlanta on July 18 and 19, 1955. Thereafter additional hearings were held all over the southern tier of states. The last hearing was in April 1956, and the last decision was issued in July 1956. At the preliminary hearing the parties argued substantive and procedural issues affecting the entire project. They acceded to a suggestion by the arbitrators that all decisions should be reviewed by all the arbitrators to avoid conflict or inconsistency. The company argued that the issue in each case was whether it had committed an unfair labor practice by discharging the employee. The arbitrators, however, rejected that argument and decided that

the company would be required to "make a prima facie case of guilt," but not necessarily "guilt beyond a reasonable doubt." Thus, the burden of persuasion on the issues of guilt and punishment was placed upon the company, not the grievants.

Another issue was whether the company would be permitted to present evidence of misconduct other than that which had previously been made known to the union. The arbitrators decided that evidence as to misconduct discovered by the company after it had invoked discharge would be admitted only if the matter had been made known to the union promptly after the execution of the agreement to arbitrate.

In all, 228 cases were heard, and 127 decisions were issued. Of those only about 35 were published in volumes 25 and 26 of BNA's *Labor Arbitration Reports*. The large majority of cases turned on determinations of fact in the face of conflicting testimony. In only a few did the decisions rest on direct application of the agreed-upon criterion, "reasonable cause for discharge." The final results were 228 cases tried, 53 discharges affirmed, 83 discharges revoked with full restitution, and 92 discharges modified to suspensions ranging from one to ten weeks.

Analysis of the Cases

In his thesis Ronald Smith classified the misconduct charges as follows:

1. Harassment
2. Intimidation and threats
3. Trivial (minor) violence
4. Serious personal violence
   - —without provocation
   - —with provocation or mitigating circumstances
5. Damage to property
   - —of the company
   - —of nonstrikers

Harassment included verbal taunts, profanity, and obscenities—misconduct for which discharge was not reasonable. If nothing more serious was charged and proved, the result was modification to a suspension for a few weeks.

Intimidation and threats were serious enough to justify discharge in 5 cases. We differentiated between following scabs merely to encourage support of the strike in the absence of a general atmosphere of violence, and following scabs in a milieu

where general violence had occurred or was currently a serious threat. Discharges were sustained on this latter ground in 5 cases.

Trivial or minor violence was involved in 36 cases; in only two were the discharges sustained. Jostling and scuffling at the approaches to workplaces and throwing eggs, tomatoes, and other nonlethal objects were in this category.

The remainder of the 55 sustained discharges were based on findings that the strikers had committed serious personal violence without provocation (25 cases), damage to company property (15 cases), or damage to the property of nonstriking employees (7 cases). The 35 decisions appearing in *Labor Arbitration Reports* are representative of the 127 issued by the arbitrators.

Precedential Value?

At the beginning of my research for this discourse I thought the Southern Bell decisions would constitute precedents dealing with strike-related discipline and would be helpful to a new arbitrator in a similar situation. But upon examination of half a score of recent, unpublished awards in strike-misconduct discharge cases, I found no citations of precedential decisions by other arbitrators. However, those arbitrators did use the same broad lines of demarcation between serious, premeditated misconduct, sabotage, vicious or planned violence, and severe harassment on the one hand, and impulsive emotional interaction on the other. An exception was the decision of a full panel upholding the discharges of all postal workers who struck in violation of a federal statute.

I have a predilection against use of the phrase, "common law of the shop" in arbitration. Justice Douglas's coinage of that phrase failed to recognize that custom and usage, the bricks and mortar of any common law, differ among industries and occupations. Customs of the telephone industry are not the customs of steelmaking, beef slaughtering, or automobile manufacturing. The criteria utilized in the Southern Bell cases differentiated between the exuberant on the one hand and the vicious on the other. Whether that broad line of demarcation is an accepted standard today, I leave to my fellow panelists.

Finally, whatever standards may be gleaned from these precedents are as helpful today as they were 35 years ago to arbitrators called upon to deal with strike-related discharges.

B. JERROLD A. GLASS*

Arbitration of strike-related disputes in the airline industry encompasses a broad range of issues including strike violence, wildcat walkouts, sympathy actions, and violation of no-strike clauses. While there have been numerous strikes in the airline industry during the last 30 years, since 1981 just seven strikes have occurred. My review of arbitration awards reveals there are few strike-related discharge cases emanating from lawful Railway Labor Act strikes. The main reason for this relative dearth is that the overwhelming majority of these discharges are settled by the parties as part of an overall settlement or back-to-work agreement at the conclusion of the strike.

Rather than review every case on the subject, I selected a representative sample of 12 arbitration decisions issued by 11 different arbitrators. These awards run the spectrum of discharge cases, ranging from terminations for threatening or assaulting fellow workers who cross picket lines to discharges based on participation in a sympathy action. A number of common factors appear to guide arbitrators in reaching their conclusions.

First, the majority of discharge cases that are arbitrated result in split decisions. Grievants' terminations often are reduced to suspensions with little or no back pay. Second, the use of merely verbal threats without physical violence usually is insufficient to maintain a discharge. A grievant who is accused only of making vague threats to fellow workers about imminent harm coming to them if they cross a picket line generally will be returned to the job. However, when criminal activity is involved, there is a much greater likelihood that the discharge will be upheld. Third, most arbitrators will look to see whether the employer has sought and received an injunction from a district court, and whether the collective bargaining agreement contains no-strike language. When a no-strike clause has been violated, few arbitrators will reverse a discharge and put an employee back to work. A final

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factor affecting the outcome will be whether a lead or chief steward was involved in a strike-related discharge case.

Given these factors, how are strike-related disputes decided? The answer to this question can be divided into three parts. When a strike-related discharge is based solely on abusive or threatening language, most arbitrators have returned employees to work. For example, in 1985 the International Association of Machinists (IAM) struck Alaska Airlines. The strike, which lasted for 92 days, was an extremely bitter one. In one strike-related discharge case Arbitrator William Eaton's award stated that discharge was too severe a penalty to impose on an employee who had made threatening telephone calls to a worker crossing a picket line. In that decision the arbitrator noted: "Arbitrators are reluctant to sustain a penalty so severe as discharge where the infraction proved is mild or relatively vague threats, and where there has been no attempt to carry out the threat."[1] Eaton noted that the grievant had a clean employment record, and there was no proof that the grievant had intended to carry out the threat. The arbitrator reduced the termination to a 30-day suspension. Eaton's award cited a decision of fellow panelist, Gabriel Alexander, in the Southern Bell arbitration, addressed here today, wherein Alexander concluded that "verbal brickbats by strikers towards nonstrikers" fall within the "allowable animal exuberance" expected during a strike.[2] Some would argue that in the heat of strike action employees are apt to say things they have absolutely no intention of carrying out, especially if they are on the picket line and other workers are performing their jobs and collecting their pay.

In another case resulting from the IAM strike at Alaska Airlines, Arbitrator Charles Rehmus upheld the discharge of an employee who had thrown rocks at a car and a security guard. The grievant was arrested and later pled guilty to two misdemeanors. The union, citing the tension generated by the company's decision to operate the airline, asked the arbitrator to consider the tense strike environment in evaluating the existence of just cause. In response, the arbitrator stated: "While the fact that tensions are often associated with long continuing strikes is undoubted, I do not think this in any way requires that I

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[1]Alaska Airlines, 86 AAR 0079 (Eaton 1986).
[2]Southern Bell Telephone and Telegraph, 25 LA 474 (Alexander 1955).

condone [the grievant's] act. Such an act is wrong regardless of the provocation."[3]

It could be argued that, because of the seriousness of the offense, the company carried the highest burden of proof. Rehmus found that Alaska Airlines had met that burden. The grievant had pled guilty to two misdemeanors, had a blemished employment record, and had a history of alcoholism. However, if the employee had maintained a clean record, had not pled guilty to the charges against him, and was not an alcoholic, would that have changed the arbitrator's decision? Under the precedents rendered in the Eaton and Alexander cases, I believe this discharge still would have been upheld because the grievant engaged in strike-related behavior that exceeded the bounds of decency by attempting to inflict physical harm and property damage.

If the burden of proof falls on the company in cases involving threats of violence or vandalism, under what circumstances does the burden of proof fall on the union? In a number of strike-related arbitration decisions, the burden fell on the union when it engaged in sympathy strike action, or when the company went to court and obtained a preliminary injunction against the union for certain strike-related activity. For example, in 1983 the IAM went on strike against Continental Airlines. A number of carriers, including Northwest Airlines, had performed ground handling services for Continental at locations where Continental did not have its own ground personnel. Once the strike began, IAM personnel at Northwest refused to handle Continental flights, arguing that they should not be made to perform "struck work." Since the union had refused to work and perform job assignments, it clearly was in violation of a negotiated no-strike clause as well as other pertinent provisions of the agreement. According to Arbitrator David Beckman,[4] the burden of proof shifted to the union once the company proved that an employee had refused a lawful order to perform the work in question. Said differently, insubordinate action by a grievant places the burden of proof on the union.

A unique aspect of strike-related arbitrations is the increased likelihood that a union officer will have been involved in the

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[3]Alaska Airlines, 87 AAR 0019 (Rehmus 1986).
[4]Northwest Airlines, 83 AAR 0386 (Beckman 1983).

conduct and activity resulting in the discharge. This is true because union officials invariably play a crucial role in calling a strike and preventing the strike from becoming violent. There are differing opinions among arbitrators with respect to the responsibility of chief stewards or leads, and whether union officials should be held to a higher standard in strike-related discharge cases. For example, in a case involving a chief steward who had failed to get the employees to return to work from a strike by the IAM against Eastern Air Lines, Arbitrator Harry T. Edwards stated the following:

> Even though a chief steward may not be an "officer" of the union, he is nevertheless designated by contract as an official representative of the union for certain purposes. As such, he is in a position of leadership and trust and he should be held to a higher degree of responsibility in honoring and protecting the integrity of the grievance procedure. Thus, if the chief steward betrays his position of trust by actively leading a work stoppage, he may be properly terminated.[5]

In a case at American Airlines[6] involving a crew chief and local union chairman, Arbitrator Emmanuel Stein upheld the discharge of the grievant for instigating and initiating a work stoppage. However, the opinion did not mention that, because the grievant was a crew chief and was involved with a strike-related discharge, he should be held to a higher standard.

Not all arbitrations uphold strike-related discharges for violation of the collective bargaining agreement. In a case involving American Airlines and the Transport Workers Union, Arbitrator Harry Dworkin ruled that discharge was excessive for an employee who "committed numerous acts of misconduct in that he encouraged and promoted a work stoppage at American Airlines." While the arbitrator agreed that "a substantial measure of corrective discipline was warranted," he could not uphold the discharge. This decision is consistent with other arbitration rulings in a strike setting:

> The grievant's position as local union president in no respect accorded him immunity against discipline for misconduct, nor that his union office provided a shield that would safeguard him from the consequences of infractions and acts that constitute a breach of the collective bargaining agreement; in fact, as local union president, the grievant owed a special obligation to personally uphold the

[5]Eastern Air Lines, 73 AAR 0026 (Edwards 1973).

[6]American Airlines, 73 AAR 0385 (Stein 1973).

> collective bargaining agreement, and encourage other employees to preserve the integrity of said Agreement.[7]

Despite this strong statement concerning a union leader's responsibility, the discharge was reduced to a suspension because the grievant was a 19-year employee with a clean record.

As noted earlier, arbitrators generally consider several criteria in making a determination as to whether an employee should be returned to duty. For example, did the carrier seek and obtain a court order prohibiting the action by the employee that resulted in the discharge? In the Rehmus decision at Alaska Airlines the company went to court and obtained an order warning picketers against acts of violence. The grievant acknowledged that he had seen the union's warning at the union hall to avoid acts of vandalism, yet had engaged in the offense.

A related question arises in cases where the employer seeks a court order but fails to obtain it. Does that failure confuse the members and insulate them from discharge even if an arbitrator later rules they violated the no-strike clause? In a 1961 arbitration involving Northwest and the IAM, Arbitrator Saul Wallen ruled that discharge was too strong a disciplinary measure for a group of employees who had engaged in a sympathy strike. He argued that since the company went to district court in an attempt to force the workers back to work and the court refused to issue an injunction, the employees "may have been uncertain and confused about their obligations under their agreement."[8] Wallen stated that one of the IAM contracts did not include a no-strike clause and the company was unable to obtain an injunction; therefore "the omission [of a no-strike clause] may have led the men to fail to understand their status when they failed to report for work out of respect for the [union's] picket line."

On the issue of a no-strike clause, there were several cases in which arbitrators upheld employee discharges emanating from violation of no-strike clauses. Arbitrator Leo Brown ruled that, when nine boiler operators at Northwest Airlines violated the no-strike clause in the contract, discharge was not too severe a penalty.[9] Distinguishing this case from the Wallen decision, Brown noted the company had obtained an injunction and a no-

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[7]American Airlines, 74 AAR 0121 (Dworkin 1974).
[8]Northwest Airlines, 61 AAR 0018 (Wallen 1961).
[9]Northwest Airlines, 62 AAR 0031 (Brown 1962).

strike clause was contained in the collective bargaining agreement.

Some of the strongest language on the issue of violating a no-strike clause comes from Arbitrator Peter Kelliher, who upheld the discharge of 20 out of 23 IAM-represented employees discharged for violation of a no-strike clause at United Airlines in 1964. In that decision the arbitrator stated the following:

> A strike in violation of a collective bargaining agreement is considered a very serious offense. In the transportation industry a violation of a no-strike clause is of more serious consequence because of the nature of the industry itself and the important position transportation holds in the economy as a whole.[10]

While Kelliher did not hold union officials to a higher standard in a strike-related situation, as many other arbitrators have done, he argued they should know their responsibilities to employees because workers who acted on the orders of higher union officials did so at their own peril with "presumed" knowledge of the consequences. In the conclusion to his decision, Kelliher noted: "This arbitrator, as well as numerous other arbitrators, is on record that where sufficient evidence is presented, discharge is the only appropriate penalty for violation of a no-strike clause absent the most unusual mitigating circumstances."

I'd like to offer one final comment on strike-related arbitration decisions. When more than one employee is involved in strike-related activity, the question arises—is the company obligated to hand out identical punishment to all involved? Kelliher's United Airlines decision, in which 20 of 23 discharges were upheld, cited a 1958 award he had issued in *Lone Star Steel Company* where the employer had discharged 2,500 participants. He stated: "Arbitrators do recognize that there are certain grades and degrees of offenses that make different penalties appropriate."[11]

In a slowdown-related arbitration award involving Transamerica and the Association of Flight Attendants,[12] Arbitrator Geraldine Randall noted that the company, after initially terminating three other flight attendants, had reinstated them with only a one-month suspension. This seems to be one of the reasons Randall reduced the grievant's termination to a suspen-

[10]United Airlines, 64 AAR 0024 (Kelliher 1964).
[11]30 LA 519 (1958).
[12]Transamerica, 83 AAR 0275 (Randall 1983).

sion, despite the fact there were glaring inconsistencies in the grievant's testimony and the grievant had been suspended on five occasions during her career.

The representative sample of cases reviewed here cover the period from 1961 to the present. The standards that arbitrators have been using during the past 30 years have remained relatively consistent. Intimidation and threats of violence usually are not deemed serious enough on their own to sustain a discharge. However, if those threats are coupled with specific serious misconduct that an employer can prove, the discharge is almost always upheld. It is interesting to note that many arbitrators rely greatly on the company's ability or inability to obtain court orders in the face of an impending strike or acts of vandalism and violence.

In conclusion, strike-related discharges are somewhat different from other discipline cases because the circumstances under which the violations are committed—that is, where an employer is attempting to operate and the striking employees are losing their income—creates abnormal pressures on both labor and management. However, as in other areas of labor arbitration, neutrals apply certain general principles while retaining the discretion to modify any punishment that the company has imposed.

C. SETH D. ROSEN*

My perspective on the subject of strike-related disputes and particularly discharge cases arising from strikes is based on personal experience gained during my 20 years of employment with the Air Line Pilots Association (ALPA). Almost from the beginning, when I first worked for ALPA in Los Angeles, I became involved in airline strikes.

Prederegulation

To understand the body of law that has developed, we must first review the evolutionary forces at work in the industry over the last two decades. The operating environment was different in the 1970s; the airline industry was a highly regulated indus-

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try. Most major and national carriers were members of the Mutual Aid Pact, a strike fund created by the carriers and payable to struck carriers, pursuant to an agreed upon formula. In part as a result, most major or national carriers when faced with a strike either shut down operations entirely or greatly reduced operations and attempted to staff the operations with a combination of management and unrepresented or crossover employees. During the regulated period strikes, with rare exception, ended with back-to-work agreements including resolution of all outstanding disciplinary matters. This evidenced a desire on the part of the parties to resolve matters and resume normal operations as soon as possible. Indeed, my research revealed that prior to the 1980s there were no pilot strike-related discharge cases.

The first strike I was personally involved in was at Hughes Air West in 1972. AMFA, an independent union representing the mechanics, struck Hughes Air West, and pilots and flight attendants honored the picket line. The company ran a partial operation, marked by a flurry of legal proceedings, operational problems, and considerable emotion on both sides. Nonetheless, in the end ALPA and AMFA executed a typical back-to-work agreement designed to settle their differences, to patch up labor relations as best they could in these circumstances, and to rebuild the airline quickly. Certain provisions of that agreement bear noting:

1. There shall be no reprisals or recrimination by either side as a result of activities during the strike.
2. A mutual effort shall be made to consolidate and resolve any pilot grievances arising from the strike by conferences between the company and association, before submitting such grievances to the System Board of Adjustment.
3. All discharge notices and related documents issued during the strike will be removed from pilot personnel files.
4. Pilots shall accrue seniority for the period of the strike and until recall for purposes of bidding, sick leave, and furlough pay.

Even in the much more confrontational labor relations environment of the 1977 Trans International Airlines strike, there was a genuine desire to resolve all strike-related disciplinary matters and to restore the operation to normality as soon as possible.

Deregulation

After the advent of deregulation in 1978, the strike arena changed dramatically when management adopted new strike plans for the 1980s. The precursors of the new era were seen at Northwest in 1978 and Continental in 1980. At Northwest in the last strike before passage of the Deregulation Act, the pilots settled their contract differences without executing a back-to-work agreement. The labor relationship was so damaged that two years after the strike a pilot was discharged for vandalizing a pilot scab's car in the company parking lot. At the time I considered this case to be a sport, an aberration from the norm. Interestingly enough, the case turned on the company's disparate treatment of pilots involved in union and strike-related activities.

In the 1980 flight attendant strike at Continental, the company executed a new strike plan designed to allow full operation during the strike. The hiring of permanent replacements was a key component in that strategy. Without support from the other employee groups, the strike was broken in a matter of days. This strategy became more prevalent subsequent to the PATCO strike in August 1981.

The labor relations climate that followed deteriorated significantly and became very confrontational, with management almost inviting unions to strike and suffer the consequences. A new body of arbitration cases involving strike-related discharges developed out of the series of strikes beginning with Continental (1983) and United (1985), and ending with the recent strike at Eastern (1989). Indeed, when the strike ended at Continental in 1985, Bankruptcy Court Judge Roberts issued an order establishing a special procedure to handle such cases:

> *Terminated Pilots.* All striking pilots terminated for cause between September 24, 1983 and the date of this Order and Award, except those convicted of a felony offense, shall have the right to submit their cases to arbitration, as provided in Section V below; such pilots shall not be eligible to elect to return to work unless and until reinstated as a result of such arbitration.
>
> *Dispute Resolution Procedure.* Any disputes which may arise concerning the interpretation, or application of the terms of this Order and Award, other than cases which may arise pursuant to Paragraph I.A.3. or I.B.8(b) of this Order and Award, may be submitted by the affected pilot in writing to the Company. If the dispute is not

> satisfactorily resolved within five (5) days, the affected pilot may submit the dispute forthwith to the Bankruptcy Court as an adversary proceeding.
>
> Disputes which arise pursuant to Paragraphs I.A.3. or I.B.8(b) of this Order and Award may likewise be submitted by the affected pilot in writing to the Company. If the dispute is not satisfactorily resolved within five (5) days, the affected pilot may submit the dispute forthwith to arbitration for final and binding decision. * * * Any resulting arbitration award shall be subject to enforcement or review in the Bankruptcy Court.
>
> The affected pilot(s) may appear or participate in the dispute resolution process in the Bankruptcy Court or in arbitration by any personal representative of his choice.

Before review of the eight cases decided pursuant to these procedures it should be noted that the entire body of case law comprises twelve cases: one at Northwest for poststrike misconduct, eight at Continental, one at United for poststrike misconduct, and one during the Eastern strike. Of the four other discharge cases at United and Eastern, three were settled and one at Eastern is still pending.

Applicable Legal Standards

Regardless of the just cause standard applied in a peaceful industrial setting where the employees work under a collective bargaining agreement, just cause becomes narrower when the contract expires and the parties resort to economic warfare. However, arbitrators' rulings on strike-related misconduct run a wide gamut. Some arbitrators uphold discharge and severe discipline, while others are reluctant to do so unless the behavior appears to be of a serious nature, such as violence. The leading cases remain *American Standard*[1] and *General Electric*.[2] As Arbitrator Levin stated in *American Standard* in 1982:

> A major holding of the arbitrators reviewed is that a strike situation encompasses an environment vastly different from one existing during normal operations of a company when both parties are working together within the confines of a collective bargaining agreement. Not only is there an absence of supervision but there is also an emotionally charged atmosphere involving heightened group loyalties which may result in inflamed group passions. Thus

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[1]79 LA 601 (Levin 1982).
[2]38 LA 1181 (Holly 1961).

the majority of arbitrators tend to view the misconduct within the context of an extremely difficult and volatile setting.[3]

Many arbitrators recognize the standards enunciated by Levin—an 11-point test for determining just cause with regard to discipline for strike-related misconduct. Nine factors were stated by Arbitrator Holly in *General Electric* in 1961, and two additional factors were stated by Levin in *American Standard*. The 11 factors are:

1. How credible is the evidence? Testimony by civil law officers is generally considered more persuasive since they have no personal interest in the strike. The majority of arbitrators employ the "clear and compelling evidence" standard and exercise a high degree of close scrutiny when viewing the evidence.
2. How serious was the offense in terms of injury to persons or damage to property? Injury to persons is always considered more serious, particularly when persistent assaults have been made upon management personnel.
3. Was the act provoked or unprovoked? An unprovoked act is considered a more serious violation. The majority of arbitrators do not view the company's decision to continue operations as provocation.
4. Did the incident involve a premeditated act of aggression, or was it a spontaneous reaction to an unanticipated event? Spontaneous acts, even when injury or damage results, are less serious than those involving premeditation.
5. Were remedies at law available for the violation and, if so, were they exercised? While many arbitrators feel that a penalty is necessary, if the grievant has paid restitution through due process of law, the suspension is usually less severe to avoid issues of double jeopardy.
6. Was the conduct disruptive of good community relations? It is considered more serious if the actions have resulted in increasing community fears or have subjected the community to an atmosphere of terror.
7. What was the extent of participation? One incident, even though injury or damage results, is considered less serious than a striker's involvement in several incidents. It is considered more serious if participation in the violent incident is of prolonged duration.
8. Was the discipline administered without discrimination? It is considered less serious if the violence occurred in a mob situation and others were involved. Discharge is a more severe penalty for a long-time employee with five or more years of service than for one who has less service. Thus, while the company is under some obligation to impose like penalties for those

[3] *Supra* note 1, at 602.

in similar situations, this does not always mean absolutely equal or identical penalties.

9. What will be the effect of the penalty? It may be the company has imposed the penalty in a spirit of retaliation rather than as a corrective measure. The majority of arbitrators believe the penalty should increase respect for law and justice but should not create further ill feelings between the parties. A common theme throughout these awards is that the decision of the arbitrator should help to encourage an on-going peaceful relationship between the parties once the strike is over.
10. What was the attitude of the grievant? If the grievant demonstrates a repentant attitude, admits guilt, or apologizes to the parties involved, the penalty may be reduced. This is particularly true if the injured party accepts the apology without harboring ill feelings.
11. Was the act so destructive of employer-employee relations that it precludes reabsorption into the work force? If the violence was directed at company personnel, it may not be possible to reduce the penalty from discharge since future relationships must be taken into consideration. The authority of management must not have been so damaged that it will not be able to perform efficiently and effectively.

In addition to applying the *American Standard* analysis, which relates principally to the substance of the alleged misconduct, the arbitrator must determine whether the procedural requirements of a just cause standard have been met by asking such questions as:

1. Did the company, before administering discipline, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
2. Was the company's investigation conducted fairly and objectively?
3. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
4. Has the company applied its rules, orders, and penalties even-handedly and without discrimination?

Company provocation has become a more important factor with the implementation of the 1980s management strategy evident in the PATCO strike in 1981. Arbitrators have held that employers who choose to operate and employ permanent replacements during a strike are at least partially responsible for misconduct occurring in such a highly charged environment.[4] A

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[4]*Cf.* A. Finkl & Sons, 90 LA 503 (Wolff 1988); Chromalloy American Corp., 72 LA 838 (Cohen 1979); Washington Scientific Industries, Inc., 67 LA 1044 (O'Connell 1976); General Electric, 45 LA 490 (Gomberg 1965); J.R. Simplot, 64 LA 1061 (Collings 1976).

few arbitrators have held that continued operations during a strike are inherently provocative, and when violent incidents result the employer may be "contributorily negligent."[5]

In *J.R. Simplot* Arbitrator Kent Collings based his conclusions on a study published in 1973 by Professor H.M. Gitelman, who argued that usually violence occurs only when management decides to replace strikers or employ armed guards. Collings observed that the company had a legal right to remain open, but in doing so it must share responsibility for "creating an environment conducive to violence."[6]

The Pilot Cases

A review of airline decisions concerning strike-related misconduct reveals that some level of misconduct above what would "normally" be accepted should be tolerated both during and in the aftermath of a strike. As Arbitrator Seibel noted in the following unpublished decision at Continental:

> Almost all arbitrators recognize that strikes are highly charged, emotional circumstances under which normal supervisory controls are suspended. While employers are not required to tolerate severe forms of misconduct, neither may employees be discharged because their behavior fails to comport with the normal standards of the workplace.[7]

Just how much deviation from the norm must be tolerated, however, is a difficult question to answer. No absolute standards exist to distinguish what is acceptable from what isn't; and, when mitigating factors are asserted, the point of division becomes more blurred. Even though the precise line between the tolerable and the intolerable is hard to state abstractly, the line is nonetheless real.

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[5] J.R. Simplot, *supra* note 4.
[6] *Id.*
[7] Continental Airlines v. Richard P. Mahoney, Cal. 50-84 (Seibel, 1987) (unpublished).

Comparable Just Cause Standards

After carefully rereading the eight Continental cases, the one United case,[8] and the one Eastern case,[9] I am not convinced that the arbitrators' analyses and standards reflected any significant deviation from the norms applied in discharge cases generally. The three principal factors invariably applied to the facts of these cases were the same standard ones applied to any discharge case: (1) credibility, (2) the nature of the offense, and (3) provocation. In no case was a single incident, even one involving some property damage or threatening conduct, considered just cause for discharge.

However, there was an apparent lack of genuine appreciation for the emotion generated by a very bitter and long strike. None of the arbitrators discussed or even mentioned the continuation of the operation or the employment of permanent replacements as a factor or even a backdrop for consideration of the alleged conduct. None mentioned the employment of permanent replacements by Continental as an aggravating factor contributing to the bitterness of the strike.

In addition, the arbitrators offered little analysis and virtually no application of legal standards or insight in their decisionmaking. In general, the decisions were superficially written with hastily drawn conclusions, analyzing very few facts. Only one arbitrator cited any case law at all. The analysis reflected little distinction between these cases and normal workplace discharge cases. In the three cases where discharges were sustained, the arbitrators accepted the company's assertion that the grievants' conduct was governed by four of the general rules of employment at Continental:

> Rule 6. Horseplay, scuffling, fighting or committing any act of violence on Company premises is prohibited.
>
> Rule 7. Using threatening or abusive language or intimidating, coercing or interfering with other employees or their work is prohibited.

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[8]The *United* case involved post-strike conduct. A pilot was discharged after a heated exchange with a management pilot over wearing a yellow ribbon in support of the flight attendants who were not returned to work after the strike. Clearly an overreaction, discharge was reduced to a short suspension. United Airlines v. Donald Fischer, UAL 85-28 (Rock, 1986) (unpublished).

[9]In the *Eastern* case, the arbitrator found that the company failed to carry its burden of proof and that the discharged pilot was actually provoked by a scab pilot. Eastern Airlines v. John D. Sorensen, EAL 75-89 (Holden, 1986) (unpublished).

> Rule 16. Be courteous and helpful to customers, visitors and Company employees.
> Rule 17. Perform no act which is detrimental to the welfare of or reflects unfavorably on the Company or its employees.

Obviously, these rules were developed for the normal work environment, but none of the arbitrators rejected them as inapplicable to the special circumstances existing during the long and acrimonious Continental strike.

Conclusion

In summary, the case law does not reflect any real appreciation of the emotional climate that exists on both sides during a strike. Perhaps it reflects a lack of personal experience with strikes by most arbitrators. Certainly when we look at the fact that almost all these cases grew out of the most bitter airline strike in recent history at Continental, we would have expected the company's conduct to be at least a minor factor in the arbitrator's consideration.

We hope that future labor relations will be returned to a more responsible level and that such disputes will be resolved without need for arbitration. I believe that would be in the best interests of both labor and management.