CHAPTER IV

THE ARBITRATION OF ALLEGED SECURITY RISKS

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Under this subject matter we are interested in the problems confronting the arbitrator in two types of proceedings flowing from the allegation that an employee is an industrial security risk. The first type is a sequel to cases processed under the Government industrial security program. Here the denial of opportunity for continued employment either at the worker's regular job or anywhere in the plant follows a refusal to grant clearance by the appropriate governmental agency or from a revocation of a prior clearance by a governmental agency.

The second type is an original proceeding, to determine whether or not there was a just cause, proper reason, or reasonable cause, etc., for the action taken against an employee and in which a broader question of security risk may be involved, although not technically.

Cases Under the Government Industrial Security Program

To establish a proper frame of reference, I must assume, with apologies, that a review of the Government industrial security program as it affects the personnel of contractors or subcontractors for a military procurement agency will not be amiss, and I hope, helpful. What do the industrial security regulations call for, and what problems confront the arbitrator within his delimited scope of authority in an arbitration proceeding that involves the denial or revocation of clearance in a plant which has classified Government work?

Classified Security Information

Let us first look at the meaning of industrial security as stated in the uniform Joint Regulations of the Armed Forces issued under the

National Security Act of 1947, as amended (18 FR 6528, October 14, 1953). It is defined as concerned with the effective protection of classified security information in the hands of United States industry, and with resources, premises, utilities and industrial facilities essential to support a mobilization program from loss or damage by elements, sabotage, or other dangers arising within the United States, "except armed insurrection and other serious disturbances which require the use of organized military forces to restore domestic tranquility."

The current Presidential Executive Order on the subject (10501), effective December 15, 1953, and entitled "Safeguarding Official Information in the Interests of the Defense of the United States," (18 FR 7049) has decreed that official information which requires protection in the interests of National Defense is to be limited to three categories. In a descending order of importance, these are: Top Secret, Secret, and Confidential. The respective classifications of information are to be designated by the appropriate authority.

This Executive Order defines these terms, and does so in somewhat more detail than is found in the "Industrial Security Manual for Safeguarding Classified Information," issued by the Department of Defense. The latter sets forth the uniform practice to be followed in defense work plants under the "Security Agreement" that each contractor must sign.

Top Secret is defined as information or material which requires the highest degree of protection, "the defense aspect of which is paramount, and the unauthorized disclosure of which would result in exceptionally grave danger to the Nation." This type of information is illustrated as that kind leading to a definite break in diplomatic relations affecting the defense of the United States, armed attack against this country or its allies, or some compromise of the military and defense plans or intelligence operation or scientific or technological developments vital to National Defense.

Secret is defined as, "All information and material, the unauthorized disclosure of which could result in serious damage to the Na-

tion." This is illustrated as information that would jeopardize the international relations of this country, endanger the effectiveness of a program or policy of vital importance for National Defense, or compromise important military defense plans, scientific or technological developments important to the National Defense, or where information would reveal important intelligence operations.

Confidential is defined as, "All information and material, the unauthorized disclosure of which could be prejudicial to the Defense Interests of the Nation." The Executive Order does not illustrate this last type, but it obviously is the catch-all category intending the broadest sweep.

To round out our definition of terms there is "Classified information", which as used in the Manual governing the conduct of employers having defense contracts, covers all three types and means official information which requires protection in the interests of the National Defense. The authority to slot defense information into the proper category is limited to the Departments or agencies of the specified executive branch that is handling the contract.

The Security Agreement

Every contractor for supplies or services with the Government, through the Department of the Army, Navy, and/or the Air Force, must enter into a "Security Agreement" with the Department of Defense (Form DD 441). It defines and sets forth the precautions and specific safeguards that must be taken by the employer to preserve and maintain the security of the Government, through prevention of improper disclosure of classified information derived from matters which affect the National Defense, sabotage, or any other act which might be detrimental to the security of the United States. The contractor undertakes to maintain security controls in accordance with the requirements of the "Industrial Security Manual for Safeguarding Classified Information," which is made a part of the Security Agreement.

Additional agreements may be made to adapt the Manual to the

employer's business and the necessary procedures thereunder. Each contractor must also prepare a "Standard Practice Procedure" for its own use, consistent with the Manual. The Government, in turn, undertakes to notify the contractor of the security classifications of the supplies, services, and other matters to be furnished by the employer to the Government or by the Government to the employer.

There is also provided that security classifications are to be assigned to the least restrictive category, consistent with the proper safeguards. The employer obligates himself to determine that any subcontractor, sub-bidder, individual, or organization which may furnish supplies or services involving access to classified information in its custody has also executed a "Security Agreement" prior to being accorded access to such classified information.

This security contract may be terminated by either party upon 30 days' notice, but the conditions must remain in effect so long as the contractor retains classified information in his possession or under his control. Finally, the Government does not obligate itself for any costs or claims arising out of the "Security Agreement" or any instructions issued thereunder, but recognizes that the parties may provide by written contracts for security costs which may be properly chargeable to it.

Effect Upon Collective Bargaining Agreements

As a matter of public policy, unions and employers must recognize that this "Security Agreement" must be superimposed upon their collective bargaining agreement, which, in turn, must be viewed as being modified to the extent that this contract with the government proscribes the employer's discretion in the employment or continued employment of employees on classified information and who are subject to the requirements of the Manual. Job security clauses in union contracts must be read with consistency.

It follows that arbitration similarly must be excluded from areas encompassed by the "Security Agreement" and the Manual incorporated into it by reference. Consequently, we must explore the Manual

and the underlying regulations before permitting ourselves to arrive at any conclusions as to the scope of authority of an arbitrator hearing matters affecting employees who have been denied security clearance or have had such clearance revoked.

Security Requirements

The term "security" as used in the Manual refers to the "safeguarding of information classified by the Government as Top Secret, Secret, or Confidential against unlawful dissemination, duplication or observation because of its importance to national defense." The employer must determine which of his employees requires possession of or access to any element of the classified information under his control, and must prevent supply or disclosure of such information to any unauthorized person. The requirement of clearance for an individual results from the employer's determination of the employee's need for access to classified information in the performance of his assigned duties.

Under Section 6c. of the Manual, the employer must exclude from any part of his plants, facilities, or sites at which classified work is being performed, any person or persons designated in writing by the Secretary of the Military Department concerned, or his duly authorized representative. Significantly, it also parenthetically adds that: "This does not imply the dismissal or separation of any employee."

It is the obligation of the employer immediately to submit to the security office of the cognizant military department a confidential report of any information coming to his attention concerning any of his employees having access to classified information, or who are in the process of being cleared for such access, if the information indicates that such access is not or would not be clearly consistent with the interests of National Defense. Access to classified information can only be had by an individual after clearance by the government or the employer, as the case may be, and then only to the extent of the clearance.

Security Clearance, Denial and Revocation

The Personnel Security Clearance is an administrative determination that the employee is eligible from a security point of view for access to classified security information in the same or lower category as the clearance is granted. An Interim Personnel Security Clearance is granted on a lesser standard.

Personnel Security Clearances are the responsibility of the contracting military department, except for those requiring access only to Confidential information. Employees other than immigrant aliens, doing work in this category must be cleared by the employer upon the finding that the individual's employment records are in order as to citizenship, and that ". . . there is no information known to the Contractor which indicates that the employee's access to Confidential information is not clearly consistent with the interests of National Security." The employer may not deny a personnel clearance of an employee. This authority is reserved by the Government. Moreover, the employer has no authority to revoke a clearance once it has been granted.

Either a Personnel Security Clearance or an Interim Personnel Security Clearance can be granted. The latter is on a temporary emergency basis with lesser investigative requirements, pending completion of the full investigation. When clearance is granted by the contracting military department it issues a Letter of Consent. Applications for such clearances must be made by the employer to the Security Office of the cognizant military department. There can be no clearance initiated prior to an individual's employment.

In the event that derogatory information is obtained during the course of an investigation, the military department cannot deny or revoke a clearance to an employer's personnel, except in an emergency situation. Other than in an emergency, the military department may recommend a denial of clearance, based upon the disclosure of derogatory information, to the regional Industrial Personnel Se-

curity Board.[1] A full report must accompany the recommendation. A Personnel Security Clearance can be revoked only by the appropriate regional Industrial Personnel Security Board, except under emergency conditions as described above. The emergency is defined in the Joint Regulations of the Armed Forces as, "any situation in which a failure to act until the above authorization is obtained presents a serious threat to the security interests of the United States."

If an employee is denied clearance, or it is revoked, the employee and the employer may appeal such action to the Industrial Personnel Security Board concerned. He has a right to a hearing, at which he may be represented by counsel or other representative.

At this point, it may be recalled that under the "Security Agreement," the Manual provisions alone are not necessarily controlling. There may be an additional agreement between the military depart-

[1] On February 2, 1955, the Secretary of Defense approved the "Industrial Personnel Security Review Regulation," effective sixty (60) calendar days thereafter, prescribing uniform standards and criteria for determining eligibility for access to classified information, and establishing administrative procedures in cases where a military department or activity thereof had recommended or determined a denial, suspension or revocation of a clearance or a denial or withdrawal or an authorization for access by certain other individuals. It established an Industrial Personnel Security Review Program consisting of the Office of Industrial Personnel Security Review, The Industrial Personnel Security Screening Board, The Industrial Personnel Security Hearing Boards and The Industrial Personnel Security Review Board.

Cases involving recommendations by an activity of a military department that clearance be denied or revoked or where a clearance was suspended by said activity, among others, must be forwarded to the Director of the Office of Industrial Personnel Security Review who will forward them to the Screening Board for appropriate action in accordance with the prescribed standards and criteria. A favorable determination at this stage must be unanimous. If the security finding is unfavorable to the person concerned, a Statement of Reasons will be forwarded to him with opportunity to reply and to request an appearance before a Hearing Board in person and/or by counsel or a representative of his own choosing. In cases in which the Director is satisfied with the record and there is a unanimous determination by the Hearing Board, its determination is final. If the determination is not unanimous, the case must be forwarded to the Review Board. The Director may also forward any cases presenting novel issues or unusual circumstances. The Secretary of Defense or the Secretary of any military department or the Director may request consideration by the Review Board. Reconsideration by the Hearing Board also may be requested by the Director on newly discovered evidence or other good causes shown.

The Review Board will review a case on the written record and may adopt, modify or reverse the Hearing Board. Its determination is final subject to reconsideration on its own motion or upon request of the person concerned to the Director based on newly discovered evidence or other good cause shown, or at the request of the Secretary of Defense or the Secretary of any military department. The Review Board may be reversed by the Secretary of Defense or by joint agreement of the Secretaries of the three military departments at the request of one of them.

ment and the employer. This is permitted in exceptional cases where it may be warranted because of the nature of the item, or the conditions under which it is being produced. Consequently, where the question arises as to whether or not a person is being denied access to classified information in accordance with the procedures required under the "Security Agreement", inquiry may be made into whether or not there are additional or lesser security safeguards required based upon any supplementary agreement between the government and the employer.

Scope of Review in Arbitration

Where employment is affected as a result of a failure to obtain security clearance or where said clearance is revoked, it would appear that the first avenue of review may be whether the employer's discretionary determination of an employee's need for access to classified material was proper. If so, an arbitrator must ascertain whether or not the denial or revocation was in conformance with the Manual, or with any supplementary agreement between the employer and the Government, with appropriate reference to the underlying regulations.

If clearance was not denied or revoked pursuant to the processes prescribed by the Government, as contracted under the "Security Agreement" and supplements, if any, the employer's failure to permit an employee to work at his regular job or elsewhere in the plant may create the task of determining whether this was violative of the job security provisions of the collective agreement. The elements that might be considered in such an instance are similar to those that will be discussed below in connection with the second type of case to which reference was made earlier.

Turning to a submitted dispute in which a clearance is denied or revoked in accordance with the requirements of the "Security Agreement", it is clear from the Manual in Section 6c., that this does not compel an automatic discharge or separation. Obviously, such employee cannot be permitted to work on classified material or infor-

mation, nor can he have access to classified security information. Access had been defined in the Manual as, "The ability and opportunity to obtain knowledge of classified information." The underlying regulations state: "An individual does not have access to classified security information merely by being in a place where such information is kept, provided the security measures which are in effect prevent him from gaining knowledge of such classified security information."

The security measures that must be taken are set forth in the Manual under Sections 22 and 23. Areas containing material classified as Top Secret or Secret must be designated as "Closed Areas." They must be segregated or separated from adjacent areas by a physical barrier which prevents observation or entrance by unauthorized individuals. Admittance must be controlled by the posting of guards at all unlocked entrances during working hours. During non-working hours entrances and exits must be locked and armed guards on patrol. Personnel assigned to the area must challenge the presence of unauthorized individuals.

Confidential material must be in areas defined as "Restricted Areas." These also must be segregated by physical barriers to prevent observation or entrance by unauthorized individuals, and the assigned personnel must challenge the presence of unauthorized individuals, but admittance during working hours has to be controlled by employer-authorized personnel at unlocked entrances during working hours, and in non-working hours, entrances and exits must be locked and patrolled. Areas not falling within the above, or those containing classified material which is not accessible, are labeled "Open Areas." These need not be segregated or separated.

It now becomes clear that, in essence, where persons have been denied clearance or have had clearance revoked, and where a discharge is not justifiable on other grounds, the function of the arbitrator generally is to determine whether or not there are "Open Areas" in the plant, areas in which there will be no access to classified information, to which the grievant can be assigned for employ-

ment. This is a factual question with variations in set-up probably equal to the number of plants that may be involved. It must be examined with great thoroughness by the arbitrator. This, of course, imposes upon him a somber responsibility.

It is interesting to note the following language in Section 22 of the Manual: "Industrial plants *may* be divided into the following areas as circumstances require." (Emphasis added.) The three categories of areas are then listed. This language would seem to imply that discretion in the designation of areas may be left with the employer, the exercise of which may be questioned.

If it is found that there is work in Open Areas that can properly be assigned to the employee, other correlative questions may arise. They could involve problems of crossing classifications, rate of pay, seniority and a host of others flowing from the various provisions of the particular contract. Does this employee continue to accrue seniority in his previous job if there is a cross classification transfer? When work becomes available for him in his regular classification is he to be returned with accrued seniority? Does his seniority under his original classification apply to the classification in which the work is available for him?

Presuming that some junior employee must be bumped in order to permit him to be assigned to non-classified work in an "Open Area", and it results in a downgrading or a layoff or both, what are the rights of the affected individuals? Should they be permitted to suffer a loss of employment or a layoff through no lack of work or without fault of their own or of the company's doing, but solely due to another employee's failure to meet the necessary standards required to perform his regular work? These are only some of the provocative problems that must be encountered.

Finally, there may be tangential dilemmas created by adverse employee reaction to the retention of certain employees. These dilemmas may advance issues other than government relationship, as will be seen in cases discussed below.

Assuming there is no available work for the employee denied

clearance or having his clearance revoked, what shall his status be? Should it be that of a laid off employee, because there is no work available for him that he can perform? Is he a suspended employee because he has failed to meet a newly imposed condition of employment? Does he go on a leave of absence? Can he be discharged because there is no anticipation that his services will be required for a sustained period of time in view of the employer's long term government contracts? These are questions that have accompanying implications arising out of the terms of the collective agreement. These problems involve substantive rights as well. They cannot be answered in the abstract. They must be dealt with as they arise, in the light of the individual union contracts, and under the circumstances as they are found in each case.

There is a paucity of reported arbitration cases on these problems so that no adequate analysis of current arbitration thinking can be made available. It is virgin territory challenging original thinking and presents much food for objective and provocative discussion.

Cases of Discharge for Just Cause

Employee Unrest

There have been some published arbitration cases, but relatively few in number, that concern themselves with so-called Security Discharges, although not premised upon any "Security Agreement" requirements. An example is the matter of *Jackson Industries, Inc., and the United Steel Workers of America, Local 2815 (CIO),* (March 1, 1948, 9 LA 753). The Local's President was charged in a local newspaper with being a member of the National Committee of the Communist Party and active in soliciting Party membership. A few days later a second article reported that he and others had been ousted from the Local Industrial Union Council after a Council investigation. None of those involved denied their Communist leanings. Additional newspaper articles reported the controversy over the ouster.

Resentment against being compelled to work with the former

Local President arose among members in the plant and increased as a result of the articles. There was talk of resignations and walkout. An employee petition was presented to the company requesting his discharge. After the discharge a second employee petition was presented to the company opposing reinstatement. At the arbitration hearing the discharged employee was not charged by any witness with being a Communist and in his testimony the discharged employee did not state whether he was or not. Neither party treated it as an issue.

The reason assigned by the Company for the discharge was the unrest and disturbance created in the plant as a result of the newspaper articles. The arbitrators sustained the action and emphasized that the termination was not because of charges made against the grievant, but because the charges, the report of his ouster from the Council and the continued publicity caused dissension in the plant, tended to disrupt morale and production, and brought about demands from employees, including Union members, that he be discharged.

Addressing themselves to the argument that this permitted a simple expedient for a Company to rid itself of an employee, the arbitrators counseled that there were laws to protect persons from libel and slander, and that the dismissed employee had nearly four months from the appearance of the first article and two months from the date of his discharge to obtain a retraction, and had not done so. It was held that the Company was not bound to retain an employee whose presence in the plant caused, and presumably would continue to cause, unrest, dissension, and resentment which tended to incite quits, lower morale, and the consequent loss of business; that his loss of a job resulted from the natural consequences of his own voluntary acts. The discharge was held to be for legitimate reason, ". . . the self-preservation of the Company."

Another aspect of this problem of employee unrest is contained in the comment of the arbitrator in the matter of *Chrysler Corporation, Chrysler-Jefferson Plant and United Automobile, Aircraft and Agri-*

cultural Implement Workers of America, Local 7 (CIO) (October 23, 1952, 19 *LA* 408). In that case the employee who was claiming loss of pay for being sent home on one day had been mentioned at a Congressional Committee hearing as a Communist and reported in the local newspapers. When he reported back to work there was unrest in the shop and by agreement he was permitted to pass out of the plant. He went to the Union office and made statements denying that he had been a member of the Communist Party since a certain date and signed an affidavit that he was not a Communist.

He reported to work the next day. The Union claimed that on that day there were no disturbances. It had taken steps to inform its membership that no conduct was to be taken which would interfere with the employee's return to work. It insisted that on the second day, the agitation against the employee was started by local supervision. Management maintained that a majority of the men refused to start work on that second morning because they suspected this employee of being a Communist and that when he was removed by his own consent the employees returned to their former occupational activities.

The arbitrator found that the employee was not sent home as a disciplinary measure or with any intent of the Company to penalize him but under the belief that his continued presence would result in trouble. The arbitrator could not conclude whether or not this would or would not have been the case since the evidence concerning the attitude of the men was conflicting. He found that tension did exist to an extent that the Company's belief that serious trouble and interference might occur was understandable, but concluded that the action taken by the Company resulted in the imposition of a penalty which was not against those who may have threatened trouble or interference with production but against the employee who was willing and properly performing his job which was available and for whom discipline "declaredly was not intended." He reimbursed the employee for the lost time.

Company Reputation and Prestige

Another phase of the problem was examined in the matter of the *Burt Manufacturing Company and the United Steel Workers of America (CIO)* (December 5, 1953, 21 *LA* 532). The discharged employee had been a local Communist Party official, had run for local office on the Party ticket, and had resigned from office in the Union after it became necessary to sign a non-Communist affidavit to remain in office. At one time he also distributed copies of *The Daily Worker* in the plant. There apparently had been feeling against him in the plant for several years as a result of his known sympathies and suspected affiliation. In October, 1953, he declined to answer questions before the Ohio Un-American Activities Commission concerning his affiliation with the Communist Party and newspaper releases carried the story.

The Company was engaged in defense work and, although the Union contended that he did not have access to classified information, a Company official testified without refutation to the contrary. A poll of the employees conducted by the President of the Local Union showed a concensus of opinion opposing his return to employment after his discharge. Some employees testified at the arbitration hearing that violence was threatened by a number of employees if he should return.

Among other things, the arbitrators held that unless proscribed by the contract, Management had a right to protect its reputation and prestige, and that no employee could jeopardize such prestige or reputation without risking discharge for just cause. The Company had stated that it suffered considerable embarrassment over the unfavorable publicity, and was concerned with jeopardizing the security of its defense contracts with the Government by having questionable employees in the plant. Also, that it risked financial loss from deprivation of civilian business.

The arbitrators held that a Company was in business to serve and that its profit was a result of behavior patterns which permitted it

to serve competitively; that it had a responsibility to develop and maintain its good reputation among the public and that this only could be done by having work performed by capable and loyal employees; that loyalty went beyond the employer, and, ". . . is above all to our form of government in these United States." They laid down the principle that an employee must recognize that he has responsibilities as well as rights, foremost among those being loyalty to the country. Denouncing "witch-hunts," the arbitrators stressed that the discharged employee had been given ample opportunity at the hearings to state his position regarding any activity but declined to make any statement as to whether his Communist affiliations which were part of his past, were or were not present at that time.

Communist Party Membership per se

In contrast to these cases, there was the matter of *Spokane-Idaho Mining Company and the International Union of Mine and Smelter Workers, Local 18 (CIO)* (November 29, 1947, 9 *LA* 749). There the Company discharged the employee for distributing admittedly Communist literature on the Company's premises in violation of a posted rule against distributing literature of any kind without the permission of the company. The arbitrator held that this did not constitute proper cause for discharge.

The arbitrator found that the discharged employee was a Communist. Emphasizing his own disagreement with the economic and political beliefs of the grievant, he upheld the employee's right to hold those beliefs and express them, distinguishing this case from the government policy at the time of separating Communists from governmental positions and as officers of Labor Unions, where a relationship of public trust and competence was involved. He asserted that our government apparently still realized, ". . . *that labor or the right to labor is a valuable property right, which should not be denied* or withdrawn from laboring people because their political or economic philosophies do not accord with those of a majority of our citizens." (Emphasis added.)

From the decision, it is apparent that the elements of employee unrest, dissatisfaction, or the patent threat of interruption of work resulting from retention on the job were not present. Nor were the public reputation, prestige and potential earning positions of the Company referred to as being urged upon or considered by the arbitrator.

In the matter of *Consolidated Western Steel Corporation and United Steel Workers of America, Local 2058 (CIO)* (November 10, 1949, 13 *LA* 721) among the causes for discharge, the Company alleged that the employee's behavior before a Federal Grand Jury included refusal to answer specific questions and the grounds assigned by him for his refusal, as well as the inference derived from this behavior which indicated close affiliation with the Communist Party, and in addition some but not all additional facts in the proceedings which were indicative of his Communist activities. In his discussion, the arbitrator stated that the real issue was whether the Company may decide whether an employee is disloyal or not and take action against him on its own decision even though the employee had his rights in the job under the collective bargaining agreement.

This was a Company that, in part, did vital war production. It stated that it had an established policy of employing only loyal employees. It maintained that it was entitled to demand as a condition of employment, disassociation from a criminal revolutionary conspiracy, and that it had not been satisfied by the employee's personal avowal of loyalty which was made at the arbitration hearing.

The arbitrator observed that no private Company was at liberty to try, convict and punish an employee for criminal acts which were matters for the courts to decide upon and that the same was true with respect to the charge of Communism. He asserted that the charge of Communism was a very grave one and that persons subjected to it were entitled to the due process, and reasonable uniformities of interpretation which our legal processes afforded. He was of the opinion that the usual arbitration procedure did not pro-

vide anything approaching due processes, guaranteed rights, and just uniformities which are furnished by the courts. He felt that the arbitrator should follow patiently behind the law in disciplining an employee on suspicion of Communism.

Exceptions were noted by the arbitrator to the extent that an employee could be disciplined by the Company on its own judgment when there was a specific directive from the Federal Government to exclude suspected Communists or where the Company's suspicions were aroused by a violation of plant rules which would result in disrupted production, damage to property and the like. He noted that in those cases the discipline is really based on the violations of rules. A third exception was that in which prosecution for being a Communist or Communist activities of an employee were actually damaging the reputation of the company with specific harmful effects on its business.

In a very thorough and well reasoned analysis of the entire question in the *Yale Law Journal* of May, 1953, in an article on "Loyalty and Private Employment", this comment is made with respect to these cases in which membership in the Communist Party was not held to be cause for discharge:

> The question of whether or not mere membership in the Communist Party would constitute "good cause," absent any showing of injury, however, remains somewhat in doubt. Arbitrators in several of the pre-1950 cases refused to allow discharges purely on that basis, pointing out that the Communist Party had not been outlawed. And one case suggested that although disloyalty might be sufficient cause for discharge, only the Government has a right to prove such disloyalty. But the Internal Security Act of 1950 and the prosecutions under the Smith Act indicate a shift in public policy toward the American Communist Party. Moreover, one state actually has outlawed that organization; and the Subversive Activities Control Board recently branded it as a "subsidiary and puppet of the Soviet Union."
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> Therefore, it is possible that arbitrators today might equate membership in the Communist Party with disloyalty and hence

> allow discharge without proof of injury or prospective injury. Yet, in point of fact, such a case is not likely to arise. Often an employer can show actual injury resulting from employment of a publicly known communist. And if showing of potential injury is accepted as constituting "good cause," virtually any discharge of a known communist might be so justified (pp. 979-980).[2]

Newspaper Cases

Some of the noted elements, plus the failure to deny Communist Party membership, are found in the several reported newspaper discharge cases. In the matter of the *Los Angeles Daily News and American Newspaper Guild and the Los Angeles Newspaper Guild (CIO)* (August 12, 1952, 19 *LA* 39), two editorial writers had been identified before the Un-American Activities Committee in Washington as Communist Party members. This was reported in all of the metropolitan newspapers in Los Angeles. At the arbitration hearing both discharged employees declined to answer the question as to whether they were or had ever been members of the Communist Party, although one of them was offered immediate reinstatement upon utterance of a categorical denial. The other was on the rehire list and was not actively employed by the paper at the time.

[2] Shortly after completion of this paper, the California Supreme Court reversed a judgment confirming an arbitration award in favor of a discharged employee, on the grounds that on the undisputed evidence and findings of fact, the arbitrators exceeded their powers, that the award was contrary to law, and that it would contravene public policy as expressed in federal and state laws for the courts to enforce reinstatement of a Communist Party member dedicated to its program of "sabotage, force, violence and the like", in a plant producing antibiotics used by the military and civilians; that the award was illegal and void and unenforceable. The findings of the arbitrators that the discharge was for labor union activities was held untenable; that from the evidence and facts they ". . . were not in truth union labor activities but were Communist Party activities." It concluded that the contract would not be construed or enforced ". . . to protect activities by a Communist on behalf of her party whether in the guise of unionism or otherwise."

The dissenting justices asserted that the court had abrogated the right of employers and unions to contract for the employment of Communists as well as the right of the Communists as a class to enter into binding contracts by invoking public policy violative of legislative stated policy; that private litigation did not lend itself to solving the problem of what to do with Communists; that Congress was aware of the problem and in the enactment of the Internal Security Act of 1950 established the United States policy on employment of Communists. *(Black et al on behalf of Bio-Lab Union of Local 225, United Office and Professional Workers of America v. Cutter Laboratories, January 19, 1955, 35 LRRM 2391.* See also 15 *LA* 431, 16 *LA* 208 and 22 *LA* 4).

The arbitrator held that the question was not whether or not they had been members of the Communist Party, but whether or not in self defense against anticipated serious financial repercussions from unfavorable public opinion, the publisher had a right under the contract to ask that they clear themselves of the serious charges made under oath against themselves in order to continue their employment with the publisher. It was found that a newspaper, being peculiarly susceptible to such criticism from the public, advertisers, subscribers and readers, differed in this respect from many other types of American enterprises; that it had, in fact, a quasi-public responsibility of printing the news and without bias. It was concluded that in the face of the accusation, the least the discharged employees could have done was to answer the charges "forthrightly," denying them if they truly could, but that both had refused to do so.

In the *United Press Association and American Newspaper Guild (CIO)* (July 1, 1954, 22 *LA* 679), a "newsman" who was subpoenaed to appear before the Un-American Activities Committee of the House, refused to answer any questions as to whether or not he was a member of the Communist Party or belonged to so-called Communist or Communist Front organizations. He had signed an employer's application form in the negative to the inquiry as to whether he had ever been a member of the Communist Party or any Communist Front organizations, the German-American Bund, or other organizations listed by the Attorney General of the United States as being subversive.

The arbitrator cautioned that no adverse inference could be drawn from a refusal to testify in reliance upon the privilege against self-incrimination, a Constitutional right. He noted that in this case, as contrasted to the Los Angeles Daily News case, the discharged employee testified under oath that he would answer inquiries on the subject and did so when he negatively answered the question concerning Communism on the application form which he made in good faith.

However, the arbitrator stated the belief that an employee had no right to work for an employer whose business could be injured by the exercise of his Constitutional right. He expressed the opinion that there would be just and sufficient cause to discharge the employee upon his having testified as he did before the House Un-American Activities Committee. He stressed the need for the news service to give straight and unbiased news, and for its customers to believe that it was such. He felt that for a news reporter to take a determined side of a highly controversial question as this employee did, even though it might be correct, indicated to the public in general and to the employer's customers that his writing might be slanted by his strong views; that even though their belief might not be the fact, the United Press would have just and sufficient cause to discharge the employee.

Nonetheless, the arbitrator ruled that the ground on which the employee was discharged was his having intended to create a doubt as to the honesty of his answer to the application question. He found there was no proof to support the subjective intent, and that since he had no right to do so, he could make no finding on the grounds proved at the hearing. He awarded that the cause for the discharge assigned by the employer did not constitute just and sufficient cause under the collective bargaining agreement between the parties.

Concluding Comments

The common threads that appear to be woven into the cases in which discharges have been sustained might be summed up as the existence of adverse publicity, a failure to secure a retraction or to make a denial, at least at the arbitration hearing as a last opportunity, and in some cases employee unrest and disruption. In the United Press case, because of the nature of its services, the adverse publicity standing alone was deemed to be sufficient, a sworn denial to the contrary being considered immaterial because of the damage done by the unfavorable publicity in and of itself.

The reasoning in support of the arbitrators' conclusions in the main has been the necessity for the Company to take its action as a matter of self-preservation. Other than in cases of actual adverse employee reaction, the need is premised upon the potential risk of economic reverses or disadvantage. Preservation of an employer's business as an element in resolving questions of discharge is also basic in the run-of-the-mill cases of dismissal. It exists, whether expressed or implied, in terminations for poor work, insubordination, continuous lateness and absence, interference with the work of others, holding back production, disorderly conduct on the premises, and a long list of other types of conduct, all of these stemming from the need to maintain discipline in order to operate economically and competitively, and to permit the attainment of the profit objective. But in these latter instances, there is usually tangible or observable factual information presented from which conclusions can be drawn. But how far does an employer have to go in these so-called security discharges to prove its case? Obviously, in these cases self-preservation had not been limited in its context to the individual employer, but extended to the grave considerations of the national defense.

Two most recent cases illustrate somewhat different approaches to a phase of this problem as used by adjudicators of employee discharges. In the matter of *J. H. Day Company Inc., and United Electrical, Radio and Machine Workers of American, Amalgamated Local 766 (Independent)* (June 7, 1954, 22 *LA* 751), the employee had refused to testify before the United States House of Representatives Committee on Un-American Activities on the grounds of the Fifth Amendment. This was reported in the newspapers. The business of the employer did not include dealing with the public nor did it currently have any government contract work which required employee security clearances. There was no evidence of employee antagonism at the plant.

During the course of the hearing, questions were asked of the Company witness with regard to the effect of the publicity on its business, public relations, financial loss, the obtaining of war con-

tracts or discouragement of persons seeking employment with the Company. The arbitrator found that on the basis of this testimony with regard to damage to the Company, there was no distinction in any way between damage due to its association with the United Electrical Workers and the damage due to the activity of this employee outside of the plant. He decided that the testimony was inadequate to sustain *the burden resting on the Company of showing damages.* He pointed out that no single customer was named or that those who were met at business meetings talked about the situation and that financial damage was disclaimed. It was found that there was totally absent any evidence that there was any relation between this employee and the failure of the Company to receive any government contracts. He concluded that this discharge was without just cause.

In the matter of the *United Electrical, Radio and Machine Workers of America, et al, versus General Electric Company* (December 30, 1954, 35 *LRRM* 2285), the Union instituted an action before the United States District Court, District of Columbia, for a declaratory judgment, injunctive relief and damages based upon a claim that an employee was discharged improperly on the grounds of the company's "Policy concerning Admitted Communists, Saboteurs and Subversives; and Employees Who Invoke the Fifth Amendment in Order to Refuse to Testify on such Subject," and which action was brought under Section 301 of the Labor Management Relations Act, 1947. The Court while denying the relief sought by the Union went further and made findings with regard to what it considered was "obvious cause" for dismissal.

The Company had issued its policy in December, 1953. It provided for discharge of admitted Communists and saboteurs. Any employee who had been identified as a Communist by testimony under oath at a public hearing of a Congressional Committee or other governmental authority, and who thereafter declined to accept an opportunity to testify under oath before such Committee, or had invoked the Fifth Amendment in refusing to testify concerning

affiliation with Communists, espionage or sabotage, was to be suspended for a period of 90 days without loss of pay. The employee could be reinstated if within that 90-day suspension, he appeared before the Committee or authority and fully answered the questions under oath asked of him concerning Communist affiliation, espionage or sabotage and in the course of which he did not admit being a Communist or being engaged in such espionage or sabotage. The employee as an alternative could obtain from the accredited security agency of the United States to the Company, a certificate or statement that an investigation of the employee had been conducted and no evidence found to indicate that he was a Communist or otherwise a risk for employment in industries essential to national defense. In the event that the employee did not become entitled to reinstatement within those 90 days, he was to be discharged. The employee in question in this case had failed to clear himself within the 90 days and was discharged.

Under the contract between the parties with respect to disciplinary discharges, an employee was entitled to a warning notice and then to notification one week in advance of any penalty discharge, ". . . except for discharge for obvious causes . . ." The Court held that this exception also excluded review by an arbitrator of discharges for "obvious cause." It was its opinion that the company had restricted its right to discharge but had reserved the right to discharge immediately for obvious cause.

During the course of the trial there was testimony that the defendant was criticized by its customers after its employees had relied upon the Fifth Amendment before Congressional Committees, and that there had been unrest among fellow employees and in one instance a refusal to work on the same job with an employee who refused to testify regarding his Communist affiliations. The Court concluded that:

> The threatened loss of good will, displeasure of stockholders and prospective customers, disruption of plant morale and the grave doubts as to the security of employees and its plants, all

resulting from the refusal of this employee to testify before Congressional Committees, justified defendant in immediately discharging such employee for obvious cause.

It can be seen from a review of all of these illustrative cases that the decision of an arbitrator in these situations is not easily reached. There are a great many facets that have not been explored for lack of time. But there is sufficient food for thought and discussion which should provoke much comment on the permutations of this very delicate problem.

Discussion—

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If Ben Roberts' paper on the arbitration of alleged security cases makes any one thing clear, it is that he cannot, by any stretch of the imagination, be called "The Answer Man".

Against a broad frame of reference, he has presented for your consideration various stimulating and provocative questions, thereby neatly passing the well-known buck. However, since his paper shows much thought and very careful preparation, I am certain that if you should turn the tables on him by asking him for the answers to some of his questions, you will find him well prepared.

His paper establishes a frame of references which factually is like a pudding enriched with raisins, but one more raisin won't hurt, and so I would like to refer to an item which can perhaps be developed somewhat further than has been done. This is the "confidential" category of classified information which you have heard described as a catch-all category and defined as all information and material the unauthorized disclosure of which would be prejudicial to the defense interests of the nation.

It should be noted that while the government itself investigates and clears or refuses to clear all employees whom the employer wishes to use for secret or top secret work, the contractor himself is obli-