

conservative role. We are letting the cases turn on their facts, and we're going with reasonableness, quite as we always have in regard to any shop rule. I have found no decision which says that the reasonable course is to let an employee decide for himself how long to let his hair grow and whether he wants to grow a beard and what kind of beard he wants to wear. In overview terms, it is correct to say that neither any new arbitral law nor any departures from established arbitral standards and principles have emerged in the hair-and-beard area.

Some will raise the question of whether it should be otherwise. They will wonder about wisdom and the need for greater sensitivity, and they will argue that there is little chance for ameliorating some of the conflicts in our society if arbitrators show themselves to be establishment people.

My own guess is that the decisions in the hair-and-beard area will not change course. I doubt that preference as to hair-and-beard style will engender compelling passions or be seen as the sort of sociopsychological phenomenon which requires a drastic reorientation as to plant life. This is not to say that we're out of tune with gradualism; we haven't been and we won't be. But I think that, when we're up against any particular hair-and-beard case, we will continue to be as concerned for reasonable rules and regulations as for self-expression.

Lest someone will charge that these remarks—or, for that matter, my own hair style—reveal a prejudice, I add that I share offices with a long-time friend and a valued colleague who wears a generous walrus mustache and who, not long ago, was wearing a sizable beard. By the way, the one hair-and-beard experience he was able to share with me concerned, not a case he had arbitrated, but the occasion when *he* was asked, by his then-principal clients, to take off the beard. I do not know how much soul-searching went into it, but the fact is that he complied with the request.

II. DRUGS, BOMBS AND BOMB SCARES, AND PERSONAL ATTIRE

THOMAS J. McDERMOTT *

In his paper on "Hair and Beards in Arbitration," Rolf Valtin has pointedly expressed the difficulties that arise when attempt-

* Member, National Academy of Arbitrators; Professor of Economics, Duquesne University, Pittsburgh, Pa.

ing to delineate between the problems connected with the new life styles and those that represent extensions of old styles. As an example, cases involving sex and sex perversion have long been a recognized topical index for arbitration, and they continue to be. However, it is impossible to tell from the cases reported whether such cases have been on the increase with the greater freedoms being exercised, or whether the presence of the new freedoms have relegated to the back burner this type of infraction. Also, it would be interesting to know if arbitrators themselves have become infected with these insidious new freedoms, with the result that they now approach such cases with markedly greater tolerance in recent years than they have demonstrated in the past.

Rolf has found that hair and beards have become an area of frequent and recurring difficulty in labor-management relations. With that finding I wholeheartedly concur, for throughout my research on new life styles, I have found hair cases to be considerably more plentiful than the types of cases for which I was searching.

Although I am not appearing as a discussant on this panel, I cannot resist the opportunity to comment on a few elements brought out in Rolf's paper. In referring to Arbitrator Robert E. Burns's decision in *Greyhound Lines, Inc.*,¹ Rolf points to the fact "that arbitrators will scrutinize the need which management asserts for hair-and-beard regulations." Such scrutiny is indeed necessary. A company does have the right to protect its legitimate business interests and, as a matter of right, to insist on proper attire and appearance. However, the exercise of this right must be accomplished in such a fashion that what is claimed to be proper and needed is not simply arbitrary and without relationship to actual impacts on legitimate business interests. If management is to claim that its requirements relating to external appearance result in some form of adverse impact on its business interests, it should be required to submit specific proof to support this position.

I find substantial difference between cases where the challenged hair or beard is alleged to reflect on the company image because it is different and may be considered offensive by some people and where the basis for the objection is one of safety or

¹ 56 LA 458 (1971).

sanitation. Thus in the *Kellogg Company* case,² I can fully understand John Shearer's position. Being a satisfied customer of Product 19, which was the one cereal found to contain all the vitamins and minerals it claimed to have, I am horrified at the thought of finding a hair in my bowl. As a result, I am fully convinced that the rule that prohibited men working around Product 19 from having beards, hair below the back of the collar, and sideburns to the earlobe was reasonable, and that without it untold harm could result to the company. The question of whether the rule should have allowed for another quarter inch of sideburns is not, in my mind, a factor to consider. Where the rule itself did not call for unreasonably short sideburns, and it was reasonable because of the seriousness of what the company was seeking to prevent, the exact cutoff point for a sideburn obviously must be somewhat arbitrary. As long as it is "reasonably arbitrary," I would not object.

Thus there is a difference between John Shearer's decision and Leo Kotin's.³ In the latter's case the basis for the rule was solely one of appearance. In such a subjective area as that, it is easy to understand that a tolerance of three eighths of an inch is not excessive, where such tolerance does not result in the employee's having the appearance of an odd-ball. For the question of food sanitation, I agree with Rolf's comments—that, indeed, the answer is "Damn right" to the contention "only a mere quarter inch too long."

Also, on the question of what to do in these hair-and-beard cases with the principle of obey orders and grieve later, I tend to support Rolf's implication. If the individual must remove undesirable hair and grieve later, then what is the basis for the grievance? The hair is gone, and what the grievant would be asking is "May I grow it back again?" If he is willing to remove it, what does this do to the principle he is expounding, which is that it was his freedom he was protecting when he refused to comply with the order to remove the hair?

Then, if the arbitrator says, "Yes, I agree that your freedom was infringed upon by the order to remove the hair," is he not also obliged to establish the limits on how long it can be and still remain acceptable? If he does not do so, then the grievant may end up with a crop that never would have withstood the test of

² 55 LA 84 (1970).

³ *United Parcel Service*, 52 LA 1068 (1968).

reasonableness. Finally, with the hair gone, can the arbitrator really determine what the grievant looked like when he had the hair, and whether his appearance actually represented a detriment to the company's image? I am not sure that pictures, stealthily obtained, would be adequate for making such judgment.

But, as Rolf has pointed out, the changing life styles have given rise to many new types of situations appearing in arbitration cases, even if they have not resulted in any new ground being broken by arbitrators in the handling of such situations. Among these other areas are three that I would like to examine. They are the problems of drugs, bombs and bomb scares, and the question of improper personal attire and emblems.

Drugs

Although we are well aware of the growing use of drugs in our society, the number of arbitration cases that have been reproduced in the reporting services is surprisingly small. It may be that the problem of drugs has not become critical at the plant level, as one would believe, or it may be that cases involving the use of drugs are not getting to arbitration but are being resolved in the grievance procedure. Perhaps the antipathy toward drug use held by most blue-collar workers is reflected in their handling of cases that arise in the plant, and it results in a greater willingness to go along with management in such cases.

As would be expected, arbitrators have tended to be more tolerant in cases involving marijuana than in cases involving the harder varieties. This is particularly true where the offense upon which the disciplinary action was based involved conviction for the possession of marijuana outside the plant. Here arbitrators have applied the general rules relating to conduct off the premises, namely, that what an employee does on his own time and off the employer's premises is not a proper basis for disciplinary action unless it can be shown that it has had an adverse impact upon the employer's business or reputation, the morale of other employees, or the inability of the employee to perform his regular work duty. Where adverse impacts have not been shown, arbitrators have reinstated convicted employees.⁴

⁴ *Linde Co.*, 62-1 ARB 8163, 37 LA 1040 (1962), H. Wyckoff; *Movie Lab., Inc.*, 50 LA 632 (1968), J. E. McMahon; *Kentile Floors Inc.*, 71 ARB 8632, H. S. Block; and *Vulcan Materials Co.*, 56 LA 469 (1971).

In one case, however, the arbitrator held that the marijuana conviction reflected the possession of "an unacceptable moral standard."⁵ He found that the employee had been responsible for a series of cumulative acts of misconduct, an unsatisfactory work record, false statements regarding his absences from work, wrongfully accepting holiday pay, and falsification of employment record. It was his conclusion that while the narcotics conviction alone was not sufficient to warrant discharge, the man's general pattern of unsatisfactory conduct and performance represented a preponderance of evidence that justified the company's discharge action.⁶

On the other hand, another arbitrator gave substantial stress to the fact that the judicial authority had seen fit to free the grievant on probation under suitable restrictions, which were evidently based on a thorough investigation, evaluation, and recommendation by the Probation Department.⁷ The cause for discharge in this case was the charge that the grievant was an undesirable employee. This represented his second conviction for the same offense. The prior one took place five years earlier, and he had spent 45 days in jail for that one. Although the arbitrator reinstated the employee, the question he did not answer was whether an employer can discharge or discipline an employee as being undesirable solely on the basis that his outside behavior is contrary to currently accepted community codes of behavior.

In another case the arbitrator apparently said yes, for he found that while conviction for the possession of marijuana off the plant premises did not support discharge, it "was serious and constituted valid grounds for some disciplinary action short of discharge."⁸ He did not, however, set forth the extent of disciplinary suspension that should be applied because he found procedural defects present, wherein the employee had been given initially a disciplinary warning, and he held that such action precluded the arbitrator from imposing a period of suspension. This, of course, raises the question of whether or not possession of marijuana or conviction for the same constitutes in itself a behavioral action that warrants disciplinary suspension or, for that matter, discipline of any kind. While one may not approve of the

⁵ *Aeromotive Metal Products*, 64-3 ARB 8898, 43 LA 170 (1964), A. A. Koven.

⁶ *Id.*

⁷ *Linde Co.*, *supra* note 4 at 3652.

⁸ *Vulcan Materials Co.*, *supra* note 4.

use of marijuana, it is difficult to find that possession off the premises, whether convicted for such or not, represents a cause for disciplinary action. Where there is no evidence of injury to the company, its reputation, or its employees, and where the employee was placed on probation, it would appear that no basis exists for a disciplinary action.

For the use of harder drugs, arbitrators have shown considerably less tolerance. In one case, Arbitrator Duff upheld the discharge of an employee with 16 years' service who was arrested and indicted on two counts of trying to get cocaine by fraud and misrepresentation on a doctor's prescription. The employee was convicted and sentenced to jail for a period of one to 23 months, and shortly after his conviction he was discharged by the company with the reason that he did "plead guilty of a felony."⁹

The decision recognized the reluctance of arbitrators to sustain discharges based on off-duty conduct of employees, unless a direct relationship between off-duty conduct and employment is proved. Arbitrator Duff then went on to state the following:

"Discretion must be exercised, lest employers become censors of community morals. However, where socially reprehensible conduct and employment duties and risks are substantially related, conviction for certain types of crimes may justify discharge."

The arbitrator held that the medical evidence supported the conclusion that the grievant was a drug addict and that his craving for narcotics had reached the point where he would commit a felony to obtain a supply. He further found that there existed potential industrial hazards in having a cocaine addict as a fellow worker. Cocaine produces excessive activity and masks symptoms of fatigue, the development of hallucinations and illusions. Cocaine addicts can be dangerous, and in advanced stages they may attack friends or innocent bystanders. Even though there was no evidence in fact that there had been adverse effects on the employee's ability to work, the arbitrator concluded that the degeneration of the addict could at any time reach the point where it would seriously endanger the health and safety of fellow employees and company equipment.¹⁰

The possession and sale of amphetamines on plant premises also was not looked on with favor by Arbitrator Byron R. Aber-

⁹ *Chicago Pneumatic Tool Co.*, 62-2 ARB 8636, C. V. Duff.

¹⁰ *Id.* at 5355.

nathy.¹¹ In assessing the burden of proof that should prevail in such cases, he stated that the company must meet a high standard of proof:

"... the proof of guilt should go beyond a mere preponderance of the evidence. The proof of guilt should be clear and convincing. But it is not a sufficient defense in such a case to merely establish that there can be a basis upon which doubts could rest. There must be factual evidence which necessarily creates material and significant doubts—doubts sufficient to leave the company's case against the grievant something less than wholly convincing."¹²

In the case before him he found that the evidence of guilt of possession and sale of the pills on the plant premises was clear, convincing, and overwhelming, and that such action supported discharge for proper cause.

Arbitrator Richard Mittenthal unquestionably has had one of the most difficult cases to resolve, for at issue was the element of the company's obligation to support rehabilitation.¹³ The grievant was discharged for being under the influence of a dangerous narcotic drug and for falsification of his arrest and conviction record. He had been in the employ of the company for a period of two years, having been hired on the basis of a letter from a probation officer. The grievant had a 10-year past history of drug addiction, with several convictions for stealing and possession of narcotics. Several years earlier he voluntarily entered a federal public health service hospital for drug addiction, but after his release he returned again to drugs. His drug abuse again led him to crime, and he was again arrested, convicted, and sentenced to jail.

It was following his release from jail that he was hired by the company. In his employment interview, the grievant told of his early drug addiction and hospitalization, but not of his later one. His physical examination turned up no needle marks on his arm. During the course of his two years of employment he was disciplined three times for absenteeism, of which one was initially a discharge but later was reduced to a 26-day suspension. Several months after his employment, he began taking heroin again, but after one year he went on a methadone program. He did not at any time inform the company of his action.

¹¹ *Bell Helicopter Co.*, 69-2 ARB 8608, B. R. Abernathy.

¹² *Id.* at 5066.

¹³ *Great Lakes Steel Corp.*, Steelworkers Arbitration Awards, at 12, 441.

His discovery came when the company suspended another employee for drug abuse because of a urine sample which indicated the presence of methadone. In the course of the investigation of the case, the employee contended that the sample belonged to the grievant. Then, in an interview, the grievant admitted that he was in fact on the methadone program in an effort to overcome his heroin addiction and that he was taking methadone daily in the manner prescribed by the Mental Health Drug Abuse Center. Following this, the grievant was suspended and then ultimately discharged.

Arbitrator Mittenthal stated that a company is within its rights in barring a heroin addict from a plant and that a true addict is unfit for employment. He cannot work and he does constitute a threat both to himself and to the security of the plant. However, the issue, as he viewed it in this case, was whether the controlled use of methadone "impairs an employee's reactions, judgment, perception, etc., in such a way as to prevent him from effectively or safely performing his work." After reviewing the medical testimony, the arbitrator concluded as follows:

"A new device for social rehabilitation of addicts has been created. It has been in existence just six years and its use is spreading. Whether methadone maintenance will prove effective and safe over the long run is impossible to say at this time. Further research and experience will finally provide the answer. Meanwhile, however, there is a means available for transforming the addict into a productive member of the community."¹⁴

The company position was rejected on the basis that the controlled use of methadone had not impaired the employee's reactions, judgment, perception, etc., and that the grievant could perform his work as a janitor safely and effectively. He was, however, guilty of falsification of his employment record to the extent that he had not advised the company of his second return to the use of a drug. As a result, the grievant was reinstated with back pay less a suspension of one day for his falsification.

From these cases it would appear that arbitrators have made a clear distinction between marijuana and the harder drugs. Where possession and use of marijuana off plant premises are involved, the burden is on the company to demonstrate that such use or conviction for possession does result in adverse impacts on the

¹⁴ *Id.* at 12, 444.

company's reputation, production efficiency, or employer-employee relationship. No cases were found that involve the possession and/or use of marijuana on plant premises, but it is undoubtedly safe to conclude that, absent other circumstances, such possession and/or use does constitute just cause for disciplinary action. With the evidence mounting that the use of marijuana is not as dangerous as the use of other drugs, it is probable that arbitrators will apply the concepts relating to the possession and use of alcohol in resolving such cases.

With regard to other narcotics, however, it would appear that few, if any, arbitrators will require employers to continue employing persons subject to addiction to habit-forming hard drugs. Arbitrator Mittenthal's opinion on the rights of employees who are on a properly supervised and officially sponsored methadone program probably represents the first crack in placing on employers some degree of responsibility for assisting in the rehabilitation of employees with drug addiction problems. Certainly its message is clear. Where an employee had already submitted to a lawful and approved program of drug rehabilitation, the employer does have an obligation to retain the employee and to do what it can to attempt to assist that employee to become "a productive member of the community." Needless to say, it is safe to conclude that the Mittenthal decision will serve as an important precedent for future cases. It remains to be seen whether other arbitrators will go further and apply the same responsibilities relating to alcoholic employees to those with problems of drug addiction. Arbitrator Mittenthal's stress on the right of an employer to bar hard drug addicts from his plant would indicate that he, himself, is not ready to take that step.

Bombs and Bomb Scares

Perhaps nowhere are we more conscious of the new life style than with the prevalence of bombs and bomb scares. Needless to say, employers have not been immune to such activities, and employee problems growing out of such have become a matter for arbitration. Under ordinary circumstances, one would assume that employees found guilty of planting bombs or similar devices on company property would be subject to discharge, and that that action would be upheld in arbitration. In one such case, the arbitrator did just that.¹⁵ Over a period of six weeks, a printing

¹⁵ *Publishers Bureau of N. J., Inc.*, 62-1 ARB 8303, B. B. Turkus.

company was subject to a series of very loud firecracker explosions in its composing room. Usually there would be three explosions, with two of them taking place during the night shift and one occurring after the start of the following shift. The culprit was caught in the act when he sought the cooperation of another employee for lighting one of the fuses after he had left work. That employee refused to join in the sport, and he reported the incident.

The discharge was challenged on the grounds that the employee was only engaging in a bit of horseplay. This contention received no sympathy from Arbitrator Burton Turkus, who found that the grievant had wired and improvised delayed fuses for the firecrackers. He then "planted the installations with the skill of an expert sapper, setting off explosions night after night although fully aware that detection would cost him his job." There were present no mitigating or extenuating circumstances to justify anything less than discharge.¹⁶

Another case involved an employee who was detected planting an incendiary bomb in a pile of rubble adjoining a parking lot on company property.¹⁷ The Police Department bomb expert, who testified at the hearing, stated that the bomb was a sophisticated timed device with a sensitive mercury switch that could easily be activated accidentally. If the bomb had exploded, any persons within 30 feet could have been seriously injured. The plant guard and the maintenance leadman discovered the bomb after observing the grievant with a package at the dump. The police were called, and the bomb was removed and defused by a special bomb-disposal group appropriately clothed for such work.

The grievant's story was that the bomb was a "noisemaker" constructed for use in connection with a beer party that was planned to be held on the employee parking lot at the end of the work shift. The idea was to have the bomb go off just as the employees were coming into the lot. It would then ignite attached bottles filled with kerosene and result in a very spectacular display. The union contention was that it was only a matter of some horseplay and that the exploding of fireworks was not uncommon among the employees.

The arbitrator stated that he was influenced by the union

¹⁶ *Id.* at 4139.

¹⁷ *The Coleman Co.*, 70-1 ARB 8315, A. L. Springfield.

argument to the effect that the company was "overplaying the bomb concept." This was based on the fact that the company had been subject to several prior bomb scares. Also, the presence of the bomb-disposal squad in special attire tended to establish a psychological setting that caused the company to overreact to the incident.

In his decision, the arbitrator held that the bomb was not a deadly weapon and that it was nothing more than what the grievant had claimed it to be, namely, a "noisemaker."¹⁸ He did, however, feel that some employees were exposed to danger and that the grievant exercised poor judgment and acted irresponsibly. He further held that the company's failure to take disciplinary action in the past against employees who had engaged in horseplay and shot off firecrackers had contributed to the incident before him. As a result, the employee was reinstated and given a 60-day suspension, which represented a back-pay award of around 55 days. It would appear from this decision that there is at least one arbitrator who does not consider the planting of incendiary bombs on company property to be all bad, and that it does not constitute proper cause for discharge when the purpose was only to scare some fellow employees at a beer party. One thing for certain—the arbitrator in this case cannot be accused of being a "square" with a stuffy middle-class mind.

There were only two decisions found which involved disciplinary action for the planting of bombs. It could be that bomb planting in workplaces has not become a popular pastime, or more likely it could mean that bomb planters are not being detected, and if they are, that unions are not pursuing such cases to arbitration.

On the other hand, bomb scares have become widespread and out of them have arisen questions for arbitrators to resolve. One such case involved the discharge of one employee and the suspension of four others for refusal to return to work following the evacuation of a building as a result of a bomb scare.¹⁹ Although the building had been searched and cleared by the police, the four employees refused to return to work because they feared for their personal safety, and as a result they left the premises. The following day, however, they returned to work, at which time the disciplinary actions were taken.

¹⁸ *Id.* at 4054.

¹⁹ *LaClede Steel Co., Steelworkers Arbitration Awards*, at 12, 250, M. M. Volz.

Arbitrator Marlin N. Volz, in upholding the grievances, stated that there existed a national hysterical fear of bombing, and the fact that no bomb was found and that other employees completed the work shift without incident was not determinative. The question, he wrote, "is whether the Grievants, individually or collectively as normal, ordinary persons, honestly believed with a reasonable factual basis for such belief that a return to work involved a danger to their health or safety, which danger was not inherent in their normal job duty." He went on to state that supervision could not give the employees complete assurance that no danger existed and that not every nook and cranny of the plant had been thoroughly searched. He then stated the following: "The unknown is more frightening than the known, and the possibility that a bomb might be hidden somewhere in the plant by some unknown person was a sufficiently real present danger as to cause apprehension in the normal ordinary person."²⁰

A much more frequent case arising out of bomb scares involves the question of eligibility for reporting pay where the scares have resulted in companies either shutting the plant down and sending the employees home or in giving the employees the right to decide to stay and work or to go home. In these situations, the contract language has proven to be the all-important factor. However, the question does raise the issue of strict versus liberal construction of contractual terms in the resolution of these cases.

In one case the contract exempted the company from having to pay reporting pay in cases of an act of God, an explosion, or a failure of power beyond the control of the company. When employees reported to work for the third shift, they were told that because of a bomb threat they would have the option of going home and being paid for the actual time they spent on the premises, or of remaining at work for the full shift. On two previous bomb threats, the company had paid the four hours' reporting time provided in the contract. This time, however, the company was convinced the bomb scare was a hoax.²¹

Even though the contractual provision referring to matters beyond the company's control related to a power failure, Arbitrator Clarence Updegraff held that the company had no liability

²⁰ *Id.* at 12, 252.

²¹ *General Cable Corp.*, 70-2 ARB 8533, C. M. Updegraff.

beyond what was offered to the employees. He noted that the contract excused the company from liability if an explosion actually occurred. He then went on to reason as follows:

"If this be true, it would seem that all the more so should the Corporation be excused from paying the Reporting Pay because of a mere threat of explosion in circumstances which made it almost certain that the same was another mere hoax. If the opposite conclusion were reached, any mischief maker with access to a telephone could drive the Corporation out of business with threats of one sort or another."²²

On the other hand, Arbitrators Alexander Porter and Joseph Brandschain took the strict constructionist approach to similar situations. In Brandschain's case the contract did not include a general coverage "Circumstances Beyond the Company Control" but did list as one of three specific exceptions the "Breakdown of Machinery." Here the company had received a bomb-scare call, and by means of a radio announcement it notified all employees not to report to work. However, a number did report; they stated that they had not heard the announcement. As a result, they filed for reporting pay.

Arbitrator Brandschain did not accept the company's contention that if there had been a bomb, it would have damaged the machinery and therefore that was justification for its actions. Instead, he took the position that the contract provided only specific exceptions and that it did not contain the broader and more comprehensive exclusionary provision. As a result, he concluded that he was prohibited from adding another exception to the contract.²³

Alexander Porter's decision involved contract language that was much closer to that contained in the Updegraff case.²⁴ Here the contract language that the arbitrator found to be applicable contained exceptions for "Emergency Breakdown" and causes beyond the control of the company, but such term "will apply only to such occurrences as fire, flood or external power failure." On the basis of this language, Arbitrator Porter concluded that the company was obligated to pay the eight hours of reporting pay to the workers on the graveyard shift who were sent home

²² *Id.* at 4753.

²³ *The Tappan Co.*, AAA Summary of Arbitration Awards, No. 146-1, J. Brandschain.

²⁴ *Reynolds Metals Co.*, Steelworkers Arbitration Awards, at 12, 257, A. B. Porter.

after waiting around for three hours as a result of a bomb scare that caused the plant to be evacuated. In this case it was the first bomb scare received by the company.

According to the arbitrator, the bomb scare did not fall within the exception provided because the local authorities had narrowed potential arguments that would arise under the broad term "beyond the control of the Company" by specifying what that broad phrase was intended to mean. The exceptions listed, he stated, represented "concrete external events" whose existence and after-effects were ascertainable and measurable. This would be true of a bomb explosion but not of a bomb *threat* or *scare*. He then went on to state the following:

"The 'occurrence' of a bomb threat or of a threat of fire, flood or external power failure is simply not in the same category as the actual happening of an explosion, fire, flood, or power failure. The difference consists not only of the difference between a potential event which may never materialize and one which actually has materialized. A bomb threat also involves psychological and pathological elements which are difficult to evaluate with certainty and which may or may not entail a disruption of operations. In other words, the Company may or may not decide to continue operations in the face of such a threat. But in the case of fire, flood or power failure, the decision to continue or discontinue operations is generally taken out of the Company's hands by virtue of the physical facts surrounding the fire, flood, etc." ²⁵

It is evident by the positions taken by the arbitrators in these cases that the approach to be followed will depend upon how strictly or broadly the individual arbitrator views his authority to interpret contract language. Arbitrator Updegraff took the position that when the contract language was adopted, the parties could not have anticipated such things as bomb scares. Thus, where the particular company had had two prior scares and concluded that the third one was a hoax, he was more concerned with the potential injury to the company that could result from any action in the arbitration that would encourage such hoax scares to continue. It may be questioned whether he would have followed this path of equity, rather than a more literal interpretation of the contract language, if only one scare had taken place. On the other hand, Arbitrators Porter and Brandschain did not consider the question of equity or of the future possibility of encouraging more calls from "bomb scare nuts" which might

²⁵ *Id.* at 12, 260.

result from the knowledge that employees would be receiving reporting pay in such cases. Instead, they relied entirely on the contract language that was before them. Which road should be taken is certainly an interesting subject for discussion.

Personal Attire and Emblems

Outside of hair, perhaps no other problem is more directly traceable to the new life style than the cases which have grown out of the insistence of employees on wearing a certain mode of dress or emblems that attract substantial attention. It may be such a simple matter as the wearing of pants suits by female employees. Women who are firm supporters of such attire will be happy to know that most arbitrators would agree with Arbitrator Kerrison, who found that the wearing of street slacks beneath a factory-provided smock that reached to mid-calf did not represent a threat to sanitation in a bakery.²⁶

Also, short shorts are not unsuitable attire for females who operate a power driven sewing machine while sitting on a stool, or who serve as an inspector for the proper sewing of cushions in a factory that makes automobile upholstery.²⁷ Arbitrator M. S. Ryder probably expressed the sentiment of most of us when he stated that: "Short shorts or just shorts worn by some women can be pleasantly attractive as well as distractive; and that short shorts or just shorts worn by some other women can be unpleasantly attractive as well as negatively distractive."²⁸

On the other hand, where reasonable circumstances are present for the existence of a rule governing dress, arbitrators are not so lenient. This is particularly true where the employment situation involves contact with customers or the general public. In one case Arbitrator Kleinsorge held that a rule prohibiting the wearing of blue jeans by telephone servicemen was not an unreasonable one. Also, the fact that in the past there had been no such rule did not prevent the company from adopting it in the present. According to the arbitrator, times change and so also do standards. As a result, he upheld the company's suspension of seven employees who continued to insist on wearing blue jeans to work.²⁹

Arbitrator Clair Duff took the same approach when he was

²⁶ *Drake Bakeries Division of Borden*, 71-1 ARB 8169, I. L. H. Kerrison.

²⁷ *Mitchell Bentley Corp.*, 45 LA 1071 (1965), M. S. Ryder.

²⁸ *Id.* at 1073.

²⁹ *West Coast Telephone Co.*, 64-3 ARB 9179, P. L. Kleinsorge.

faced with two grievants who were stock boys in a supermarket and who insisted on wearing "ragged, dirty, frayed and patched blue jeans" to work after being warned not to do so, and where their attention was called to the rule requiring the wearing of neat clothing. He pointed to the distinction followed by most arbitrators with respect to the determination of appropriate clothing when he stated the following:

"When workers perform their job duties in full view of the customers, they help to establish the company image, and the clothing they wear, their manners and courtesy all are factors that are of importance. . . . In restricted shop areas, the personal whims and fancies of workers concerning dress and fashion should be left relatively unrestricted, even if they are displeasing to management officials."³⁰

It is perhaps the more bizarre cases that cause difficulties for arbitrators. These are generally cases wherein employees, displeased with some situation, decide to adopt some form of dramatic protest through the wearing of ridiculous clothing and emblems.

Arbitrator Bert Luskin was faced with one employee who wanted to protest the institution of a mandatory eye protection program requiring the wearing of safety glasses. Approximately 40 minutes before the beginning of his scheduled shift, he appeared at the plant, donned a German helmet, a Nazi arm band, and an Iron Cross. He then proceeded to march to his department where he was seen talking to employees, giving Nazi salutes, and yelling "Sieg Heil." Supervision gave him a direct order to remove the gear and stop his activities, and when he refused, he was escorted out of the plant and suspended for three days. Needless to say, Arbitrator Luskin had little sympathy for the protestor, and he found that his actions were clearly disruptive and caused an interference with production. As a result, the disciplinary action was upheld.³¹

Arbitrator Duff was equally unsympathetic with an employee who wanted to protest the company's requirement that he keep his long, shoulder-length hair covered by a head cover because his work placed him in close proximity to machinery and hand tools.³² The employee kept refusing to follow instructions, and

³⁰ *Thorofare Markets*, 71-1 ARB 8130, C. V. Duff.

³¹ *Republic Steel Co.*, *Steelworkers Arbitration Awards*, V. 15, at 11, 341, B. Luskin.

³² Co. name withheld, C. V. Duff, unpublished.

finally the rule was laid down by the production manager on an "or else" basis.

The next day the employee reported to work dressed in bell bottom trousers with stars and stripes in brightly colored red, white, and blue, a blue shirt, and a stiff paper Uncle Sam hat with red and white stripes. When the department manager learned of his attire, he reassigned him to work outside his usual work station as a janitor sweeping the area. His appearance created a minor sensation and resulted in employees' stopping their work and going over to look at him. When it was apparent that production was being impeded, the employee was escorted from the plant and sent home. The following workday he was discharged. Arbitrator Duff held that such flaunting of one's self before others results in attracting attention that disrupts production, and under such circumstances management has the right to institute disciplinary action. The offense, however, was not serious enough to constitute grounds for discharge. This was particularly true where supervision had removed the individual from his regular work station and assigned him to work that could not help but attract attention. As a result, a 60-day suspension was substituted for the discharge action.

Our Panel Chairman, Jim Vadakin, considered discharge much too severe a penalty for a comparable type of infraction.³³ In his case the employee was preparing to leave for a two-week vacation, and he was off duty when he appeared at the company's office to collect his paycheck. He was attired in "hippie garb" and attached to the seat of his pants was a 4- by 6-inch American flag. His excuse was that because policemen display the flag on their motorcycles, he was entitled to wear it wherever he wanted.

Arbitrator Vadakin pointed to the requirement that off-duty conduct must have some effects of a job-related nature and that the conduct adversely affected customer or employee relationships. Two instances were cited by the company in support of its case. One was a letter from an employee of a bank in the building, who called the grievant's action a disgrace. Another was from a passenger credit card holder who commended the company on its patriotism for discharging the grievant. He had read of the incident in an underground newspaper published in New Orleans. Arbitrator Vadakin did not consider these two letters

³³ *National Airlines, Inc.*, J. C. Vadakin, unpublished.

sufficient to support the claim that the attire was "shocking the sensibility . . . of uncounted potential customers and adversely affecting employer-customer relationships."³⁴ Neither was there evidence to support the conclusion that employees would refuse to work cooperatively with the grievant or that there resulted a disruption of productive activity. The grievant's action was stupid, but it did not warrant a penalty of more than a warning.

The last case to be treated in this category is another of Clair Duff's.³⁵ It involved initially a black bus driver whose regular route ran through a white neighborhood and who, for a period of several weeks, wore on his regular uniform shirt a very large round button with the words "Free Angela Davis" and her picture on it. A passenger complained to the director of transit operations, and the driver was told that the wearing of such a badge was prohibited by the company's uniform regulations; he was asked to remove it. The driver refused to do so unless he could be shown the written regulation which specifically prohibited the wearing of such a button.

The regulations did not specifically refer to the wearing of buttons, and when the employee continued to refuse to remove it, he was not allowed to take out his bus. He contacted his union representative who also told him that if he wanted to work, he would have to remove the button. The result was that he continued to wear the button, and the company continued to refuse to allow him to drive a bus.

This went on for a few days. Another black driver reported for work wearing the same button, and he also was not allowed to work. Still another black driver appeared with another button, with the words "Remember Malcolm." He was not noticed by the supervision until he had completed one trip, at which time he was told to remove the button or stop driving. He, too, refused. Then a third driver reported for work wearing a large piece of paper containing a picture and the wording "Free Angela Davis" pinned to his uniform shirt (it seems he could not obtain a "Free Angela Davis" button). He, too, was not permitted to drive his bus. The trio was then joined by two additional drivers who reported for work wearing "Malcolm X" buttons, and they, too, were not allowed to drive. In the meantime the five employees

³⁴ *Id.* at 7.

³⁵ *Port Authority of Allegheny County, Pa.*, C. V. Duff, unpublished.

were given two-day suspensions: this resulted in several drivers' showing up wearing buttons and decorations of various sorts. However, all these employees removed their decorations when they were told that they could not drive their buses with them on.

On the Monday following this week of activity, a wildcat strike took place at the garage, with the five grievants, who were then on suspension, actively participating in the picketing. This strike resulted in none of the 175 buses at that garage being able to operate that day—or for an entire week. A court injunction was secured, and the union sought to get the drivers to return, but none would do so. Finally an agreement was reached in which the original driver, who set off the disturbance, was permitted to continue to wear the "Free Angela" button, and it was agreed that no other driver would wear anything other than his union pin or an American flag as a shoulder patch. All drivers other than the five grievants were to receive two days' pay for the first two days of the strike, and the remaining three days would be charged against their vacation time.

Arbitrator Duff held that a public transit company has the right to establish and enforce reasonable rules concerning uniforms. However, he also found that there was no clear-cut evidence as to an established policy with respect to the wearing of buttons. In the past, drivers wore such things as green ties and shamrocks on St. Patrick's Day, American Legion, Knights of Columbus, and other types of buttons, and at no time had there ever been any suspension. As a result, he held that there was no insubordination in the wearing of the button. However, he did criticize the method used to test the dress code violation and the resort by the employees to self-help. This did represent a serious infraction, and as a result he rescinded the two-day suspension and held that there would be no allowances granted any of the grievants for the additional time lost, either for the days they were not permitted to drive the buses or for the week of the wildcat work stoppage.

In this case the inadequacy of the dress code and the lax practices of the past provided the solution to the situation. However, what if the code had been clear and specific and provided that only the designated bus company insignia and patches could be worn? What if a number of drivers took to wearing American

flag patches on their shoulders, even though such was not a designated item? Then, if a driver appeared with a political button of the "Free Angela" variety, would there be justification for finding a laxness in the enforcement of the uniform regulation? It is easy to surmise that the grievant would probably present the claim that the wearing of the flag insignia was a political action, which would therefore warrant his doing the same thing. The case does open some interesting possibilities.

Conclusions

As Rolf found in his study of hair-and-beard cases, so also no new or startling arbitration principles have resulted from new-life-style cases involving drugs, bombs, and personal attire. For drug cases, arbitrators generally have not viewed convictions for the possession of marijuana off the plant premises and off duty as warranting disciplinary action. However, in the cases involving the harder drugs, they have not been so tolerant. Where employees are found using the hard addictive drugs, it would appear that most would agree with Arbitrators Duff and Mittenthal that employers have no obligation to continue employing persons who are addicts.

Arbitrator Mittenthal's finding that the employer has an obligation to assist an employee who is participating in a properly established Methadone program does open the door to the consideration of the proposition that an employer has some responsibility toward the rehabilitation of employees who have been drug addicts. Whether this responsibility will be projected further than requiring the continued employment of a person already on a drug cure program remains to be seen.

With respect to disciplinary actions taken against employees who engage in the joyful horseplay pastime of setting off bombs or similar dangerous instruments, it is doubtful that most arbitrators will show much tolerance of such activities. Where the Mittenthal decision on Methadone is likely to serve as an important precedent, I doubt if the *Coleman Co.* decision, which reinstated the fire bomber, is likely to be followed by very many arbitrators.

The problem of disciplinary action against employees who refuse to enter a plant after a bomb scare and the question of eligibility of employees for reporting pay when allowed to go

home after such scares will continue to present questions for arbitrators. In the former situations, arbitrators will likely continue to examine the facts to determine if there does exist reasonable justification for the employee's fears and, if there does, to uphold his right to refuse to work. In the latter, however, the conflict between strict and liberal constructionists is likely to continue where contractual terms relating to reporting pay do not include the all-inclusive exception "conditions beyond the control of the employer."

In the cases involving personal attire and the wearing of emblems, arbitrators will continue to require that companies must demonstrate that the wearing of the attire or the emblem either is disruptive of the production process or is needed because of adverse impacts on legitimate business interests. Where such proof is offered, disciplinary actions are likely to be supported, but the case will have to demonstrate a genuine and serious injury to the company's interest before discharge will be upheld.

Overall, therefore, while the new life style has given rise to changed situations in arbitration cases, it would appear that arbitral standards and principles already established are adequate to cope with most of the cases that arise. From this study I conclude that two basic questions emerge. One is to what extent should employers be required to assist employees addicted to narcotics to eliminate the habit and rehabilitate themselves to become productive members of society. The other is to what degree should arbitrators adopt a liberal construction approach to contract language when they are faced with a case involving a situation that the parties obviously never dreamed about when they were writing their contract language and where an adverse decision could result in serious injury to the employer or employees.

III. ARBITRATORS AND CHANGING LIFE STYLES— ESTABLISHMENT OR IMPARTIAL?

MARTIN A. COHEN *

In 1970, at the 23rd annual meeting of the Academy, Ralph Seward, in his address "Grievance Arbitration—The Old Frontier," asserted: "We are a part of the Establishment—so much a

* Member, National Academy of Arbitrators; Associate Professor of Economics, Stuart School of Management and Finance, Illinois Institute of Technology, Chicago.