CHAPTER 4

ARBITRATION AND THE ABSENT EMPLOYEE

ABSENTEEISM

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I. Introduction

The most common arbitration case involves discipline for absenteeism. One would think, given the huge amount of precedent on this subject, that the principles would be well settled and that arbitrators would have little difficulty with such cases. But neither of these observations is true. Absentee grievances confound us not just because of the extraordinary variety of fact situations and management responses but, more importantly, because of the absence of any shared understanding of the conceptual issues which underlie so many absentee disputes. The purpose of this paper is to explore those conceptual issues, the choices the arbitrator must make and the rationales behind the different choices.

The initial question in a discipline grievance is whether the employee is guilty of misconduct. The difficulty for the arbitrator arises from the fact that absenteeism may or may not be misconduct depending upon the circumstances of the case. A failure to report for work for good reason is often characterized as an excused absence. A failure to report without good reason is characterized as an unexcused absence. The excused absence is generally ignored; the unexcused absence may or may not be ignored depending again on the circumstances. Occasional unexcused absences are usually disregarded. But where such behavior becomes excessive or disruptive, discipline is likely to follow.

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These distinctions draw management into a web of uncertainty. It must ask the employee for an explanation of his absence. It may seek proof of his explanation, typically a doctor's note confirming an illness or injury. It must then evaluate his explanation (or his proof) to determine whether he was truly unable to work. If it concludes that his absence is unjustified, it must decide whether such behavior has become excessive. Employees ordinarily are not disciplined for a single instance of unjustified absence. And if management believes the absentee is guilty of misconduct, it must decide what discipline is appropriate. That decision must take into account the discipline imposed on others for absenteeism. Otherwise management runs the risk of being cited for disparate treatment of its employees.

This partial list of what management must do in handling absenteeism suggests the administrative problems inherent in any absentee program. The difficulty is compounded by certain realities arbitrators are well aware of. We offer a few examples. Doctors' notes tend to be vague and incomplete. Such notes are on occasion sheer fabrications, excuses written for a price. Employees' stories are frequently impossible to check. They fall ill on a weekend when a doctor is not readily available. They contract an illness which they know will run its course in 24 or 48 hours and do not need a doctor's services. Their desire for privacy may interfere with a full explanation of their absence. Their credibility becomes an issue.

It is not just management which is frustrated by absentee administration. Employees are also unhappy. They complain they are not told of the attendance standards by which they are being judged; they complain that the distinction between excused and unexcused absence is unclear and unarticulated; they complain of a lack of uniformity in discipline for absenteeism; and so on. They seem to be seeking firm rules, fixed standards against which to measure their own behavior. But when management attempts to follow such a course and adopts an absentee plan which specifies the point at which any absenteeism will result in discipline and the progression of penalties for such continued abseenteeism, employees then protest that the plan is inflexible.

Notwithstanding these problems, management must seek to control absenteeism. The adverse impact of poor attendance on an employer's operations should be familiar ground to this audience. The absentee must be replaced. That often means

calling in a replacement or holding over someone from the previous shift. In either event, overtime costs are incurred. Or perhaps the vacancy can be filled by transferring an employee from some other job. But that solution often involves an inexperienced replacement who may affect the quantity or quality of the product. All of these arrangements impose administrative burdens on management, particularly when seniority rights or overtime distribution rules must be applied. Thus, absenteeism is bound to lessen productivity and increase costs.

II. Some of the Elements

Casual Absenteeism

Absenteeism has many faces. Some are more troublesome to management than others. For purposes of this discussion, absenteeism can be divided into two broad categories. *Casual* absenteeism refers to intermittent, repetitive, or short term absences of one, two, or three days. *Extended* absenteeism refers to a relatively fixed or lengthy period of absence ordinarily prompted by illness or injury.

Casual is the most common type of absenteeism. Because of its random and unpredictable nature, it tends to be very disruptive. It causes unexpected vacancies and hence last minute adjustments in the work force. That imposes real burdens upon the employer. Management must either operate short-handed or use less experienced people or incur overtime costs. These are precisely the kinds of considerations which undermine management's quest for maximum efficiency. Hence, it is hardly surprising that a primary concern of employers is to reduce casual absenteeism to an absolute minimum. Most employer attendance control programs focus on this problem.[1]

Extended absenteeism is viewed somewhat differently. Although it may produce higher absentee rates than casual absenteeism, it is far less disruptive. Because it is known in advance, it can be factored into the scheduling of the work force. It does not cause unexpected vacancies or last minute force adjustments. Extended absences are ordinarily exempt from

[1]This emphasis on casual absenteeism is evident from most published absentee figures, including data used for comparative purposes in absentee cases. Such figures (or data) are generally based on casual absenteeism.

discipline until they become chronic or excessive. Indeed, most collective bargaining contracts authorize a leave of absence for any employee whose extended absence is due to illness or injury.

Excused Versus Unexcused Absence

Many employers attempt to distinguish between excused and unexcused absences. This means the employee must explain his absence and the employer must evaluate the explanation and determine whether the employee had good reason to be absent. The usual scenario involves an employee asserting he had the "flu" or "diarrhea" and he was not well enough to work. Or he claims his car would not start or broke down on the highway. Because of his poor record, his excuses are not accepted by the employer and discipline follows.[2]

Whether an absence should be excused or unexcused is a question of fact. The difficulties in resolving this question stem largely from two considerations—the employee alone is aware of the pertinent facts and the employee's account of his absence is self-serving. Given this situation, the employer understandably asks for some objective proof that the absence was unavoidable. It insists on a doctor's note when the employee claims illness; it insists on repair or tow truck bills when the employee claims car trouble. Without such evidence, the employer refuses to accept the employee's account. It seeks to place this burden of proof on the employee.

Arbitrators have difficulty with such cases. For they must decide not only what weight to give the employee's testimony but also, more importantly, what significance to attach to his failure to produce the kind of proof sought by the employer. All of this must frequently be done on the basis of limited evidence, little more than the employee's own account.

To be more specific, the employee appears at the arbitration hearing and states he is the innocent victim of a random virus or a careless car manufacturer. Because he is the only person who testifies with first hand knowledge of what happened, his grievance will sometimes turn on his own credibility. Hence, the employer's cross-examination may be crucial. For that is the only way in which the employee's account of his illness or car trouble can be scrutinized in detail. Only through such scrutiny is the

[2]The same excuses by an employee with a good attendance record are almost always accepted.

arbitrator likely to get some feeling as to whether the grievant's story holds together, whether his absence was truly unavoidable.

Fortunately, the evidence often includes something more than the grievant's testimony. The union may introduce a doctor's note, a subject dealt with elsewhere in this paper. Or it may, absent such a note, introduce a letter from the grievant's wife, neighbor, or pharmacist in an attempt to prove he was sick. The employer, as we noted above, insists that only a doctor's note is acceptable proof. The employee replies that he became ill on a weekend when his doctor was not available or that he knew his illness would not last more than 48 hours and saw no need to spend money unnecessarily for a doctor's services.

There is no easy answer to this kind of problem. The extreme positions seem unreasonable. Employers cannot be allowed to require doctor's notes for every illness absence. Similarly, employees cannot be allowed to escape responsibility for every illness absence through their own statements or those of friends or relatives. We believe a doctor's note can be required in appropriate circumstances. The arbitrator would have to consider the nature of the illness, the employee's past experience with such illness, the availability or need of a doctor's services, the employee's attendance record, and the presence of any other special circumstances. We suspect that arbitrators are less likely to accept an employee's illness claim, without a doctor's note, if he has a history of casual absenteeism. We suspect that arbitrators are more likely to accept his excuse, without a doctor's note, if he has a good attendance record.

Doctor's Notes

Perhaps the most common means by which an employee seeks to excuse his absence is a doctor's note. The dispute occurs when the employer disregards the note and disciplines the employee for his absence. A grievance is filed protesting the discipline and the case reaches arbitration. The union's defense is the doctor's note and the employee's testimony that he was ill and unable to work. Of course, the doctor does not appear as a witness. Either he refuses to interrupt his busy schedule to attend the hearing or the union is unwilling to pay the substantial fee he requests to testify. The employer argues that the note is vague and incomplete and that the employee's testimony is self-serving. What is the arbitrator to do?

To begin with, employers rarely complain of a doctor's failure to appear or their inability to cross-examine the doctor's note.[3] They seem to recognize the difficulty of getting a physician to be a witness. Indeed, employers themselves often introduce medical documents (hospital records or doctors' reports) without any testimony from the people who prepared them. The real problem is that the doctor's note is frequently too sketchy. Such a note, to be valuable, must reveal when the employee was seen, what the doctor's diagnosis was, and whether the employee was disabled (i.e., unable to work) at the time of his absence. Without such detail, the note is not likely to prove that the absence was justified. For instance, a solitary reference to an "upset stomach" does not necessarily mean the employee was disabled. Or an undated reference to the employee being "disabled" by the "flu" does not necessarily mean he had the "flu" on the day he was absent.

When confronted by these gaps, the arbitrator's choices are limited. He may ask the parties to provide the missing data through a post-hearing inquiry of the doctor. Or he may shun such activism, disregard the note because of its uncertainty, and decide the case on the basis of his evaluation of the employee's testimony. The post-hearing inquiry seems preferable because it promises to provide the detail needed for an informed decision.

We recognize that employees occasionally obtain a doctor's note even though they are not ill or disabled. Such notes may be available for a price. However deplorable this practice may be, the arbitrator cannot identify the situations in which notes are being improperly issued. That is a matter of proof. Only if the employer takes the initiative and develops evidence of fraud can the arbitrator respond.

Finally, the question of when the employee delivers a doctor's note should be given some consideration. Prompt delivery allows the employer time to make inquiries of the doctor or to request the employee to provide a more detailed note. Late delivery, often not until the arbitration hearing itself, places the

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[3]Where an employer complains of the doctor's failure to appear, the arbitrator may choose the following courses of action. He may recess the hearing to give the union an opportunity to bring in the doctor as a witness; he may arrange to have the parties' spokesmen question the doctor on the phone or in the doctor's office with the arbitrator present for such questioning; or he may receive the note in evidence and discount its importance to some extent on account of the doctor's absence. We do not believe the arbitrator should refuse to accept the note in evidence.

employer at a disadvantage and raises the suspicion that crucial evidence has been deliberately withheld. This may have some relevancy in determining the weight to be given to a particular note.

Measure of Absenteeism

The parties all too often present raw, unrefined absentee data. They identify only days of absence. They fail to show days of work, vacation, suspensions, leave time, and so on. It is difficult to gain a clear view of the absentee's behavior in these circumstances.

We believe arbitrators should ask for the missing data. Only then will they be able to measure absenteeism in a way which aids analysis. The most useful measurement is the absentee rate expressed as a percentage, that is, days absent divided by days scheduled.[4] For example, someone absent 25 of 250 scheduled days in a year has an absentee rate of 10 percent. This rate is a useful tool for determining the seriousness of a given employee's absenteeism by permitting comparison to a national, industry, or plant rate, all of which are customarily expressed in the same percentage terms. Indeed, with sufficient information, the arbitrator can compare a grievant's absentee rates between successive disciplinary actions. This is a useful tool for determining whether an employee's absenteeism is improving or deteriorating, whether he is or is not responding to corrective discipline.

Period for Absentee Measurement

There is no special period for the measurement of an employee's absentee rate. Management often refers to a work period of one month, three months, six months, one year, and so on. It may also ignore any such calendar unit and discipline an employee immediately after a given absence. In that event, the period for the measurement could be of any duration.

The problem is that management sometimes fails to give the employee sufficient time within which to demonstrate his willingness to improve his attendance. For instance, "A" receives a one-day suspension on January 2 for excessive absenteeism. He

[4]By days scheduled, we include all days the employee was scheduled or would have been scheduled had it not been for his absence.

returns to work on January 3 and is absent again on January 7. Assume he did not have a legitimate reason for not working that day. Management imposes a three-day suspension for the January 7 absence. Although it is true "A" had an absentee rate of 20 percent in the week following his one-day suspension, that week is hardly an adequate measuring period for determining whether he is capable of responding to the corrective discipline he'd received on January 2. Arbitrators will be understandably suspicious of such rapid-fire discipline.[5]

Generally, a reasonable period of time should elapse between successive disciplinary actions so that the absentee rate will be a meaningful evaluation of the employee's behavior.

Meaning of "Excessive" Absenteeism

Where should the line of demarcation be drawn between reasonable absence and excessive absence?[6] Few questions in the administration of discipline are more frustrating for the parties. Unions often ask management to define this line in such a way that employees will be aware of what is or is not permissible. Employers resist such a definition for fear it will encourage absenteeism by indicating that absences up to this line of demarcation are permissible.[7] Given this conflict, the arbitrator seldom has any accepted yardstick with which to determine excessive absence.

Statistical comparisons are a useful tool. We refer to the relationship between an employee's absentee rate and the average absentee rate in his department, plant, company, or industry. Or to take this one step further, we might refer to the relationship between the employee's rate and the average rate nationwide. The most appropriate comparison would appear to be the department or plant. For those averages will include only that part of the work force which most closely resembles the disciplined employee in such critical factors as the place and nature of the work. Surely, urban blue collar workers should not be

[5]The more blameworthy the absence, the less likely the arbitrator will be troubled by the shortness of the measuring period.

[6]For purposes of this discussion, excessive absence excludes approved leaves of absence for illness, injury, jury duty, and so on.

[7]From management's standpoint, this is one of the deficiencies of a no-fault absentee plan.

judged by the absenteeism standards of suburban white collar workers.

The greater the difference between the rates in the comparison, the more likely the arbitrator will find excessive absenteeism. Suppose "B" and "C" have absentee rates of 4 percent and 8 percent, respectively, as contrasted to a plant average of 3.5 percent. Only "C" is likely to be viewed as being guilty of excessive absence.

Such comparisons, however, have shortcomings. They cannot always be applied without regard to some larger conception of what constitutes excessive absence. Consider, for example, a department in which the average absentee rate is just 1 percent. That could hardly justify disciplining an employee whose absentee rate was 2 percent even though his attendance was twice as poor as the department average. Consider also a department in which the average absentee rate is 9 percent. That certainly should not prevent management from disciplining an employee with a 9 percent absentee rate merely because he was no worse than the department average.

The complexity of the problem is enlarged by other factors as well. Managements seldom act on the basis of absentee rates alone. They almost always evaluate the reasons behind the absences. Suppose "D" with an otherwise good attendance record misses four days in several different weeks because of a recurring illness. His absentee rate for this period is 16 percent. "E" has an 8 percent absentee rate, none of which seems to relate to illness or injury. We believe only "E" would be charged with excessive absenteeism even though "D"'s absentee rate is twice as high. The point is that excessive absence is more than a mere quantitative concept; it is also qualitative.

No sound definition of "excessive absence" is possible. There are too many variables. Statistical comparisons, the nature of the absences, the past attendance record, and so on, all influence the arbitrator's decision. The facts of the particular case are the controlling consideration.[8] Those asked to define "excessive absence" can respond only with some variation of Justice Potter Stewart's comment on pornography: ". . . perhaps I could never succeed in intelligibly [defining it] . . . but I know it when I see it. . . ."[9]

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[8]"Excessive absence" is, from this standpoint, much the same as "just cause."
[9]*Jacobellis v. Ohio*, 378 U.S. 184, 197 (1963).

Corrective Discipline

Corrective discipline calls for progressively harsher penalties for repeated offenses, culminating in discharge when the possibility of correction appears to have been exhausted. Its object is to discourage misconduct by impressing upon the employee the need for improvement and the probable consequences of further wrongdoing.

In absentee cases, there may be a relationship between employee culpability and the proper use of corrective discipline. Consider first unexcused absence by a chronic offender, the absence-prone employee. Because his absence is willful, a full range of corrective discipline is appropriate. Management starts with oral and written warnings, increases the pressure through one or more suspensions, and finally imposes discharge.

Occasionally, however, employers choose to bypass the suspension step(s). They simply go from warnings to discharge or they provide a further warning "in lieu of a disciplinary suspension." They argue that suspending an employee who has little interest in working regularly serves no purpose, that the suspension merely provides him with an acceptable reason for another absence. This argument is not convincing. If discipline is to be effective, it must emphasize management's ever more serious view of the absenteeism. A series of warnings, without more, does not project that view. A suspension, a further turn of the screw, is needed to make clear management's impatience with the absenteeism and its intention to invoke the ultimate penalty if the employee fails to improve.

Consider next the employee whose absence is unavoidable due to illness or injury. Because his absence is not willful, he is ordinarily not disciplined. But if such absenteeism continues for a long period, if the employee becomes a chronic excessive absentee, managements frequently resort to discipline. They take the same disciplinary steps mentioned above—warnings, suspensions, and discharge. However, some employers believe this is inappropriate because the employee is not guilty of any misconduct. They choose instead to place the employee on notice that he must correct his health problem or face discharge. That seems like an acceptable alternative. But the employer who follows this course risks a later arbitration in which the union may convince the arbitrator that the discharged employee did not receive the benefit of corrective discipline.

Occasionally, the parties disagree on the very nature of the action taken against an employee who is a chronic, excessive absentee due to illness or injury. The employer urges that because no misconduct is involved, its action should be characterized as a nondisciplinary separation not subject to the customary "just cause" requirements. The union says this is a pure and simple discharge. Realistically viewed, the employer has terminated the employee against his will. He did not quit. He was involuntarily removed from the rolls because of his behavior, because of his attendance record. In other words, he was discharged. To rule otherwise "would allow management to separate [the employee] without any apparent basis for arbitral review. . . ."[10]

Disparate Treatment

The consistent application of an employer's attendance policy is a factor of major importance in arbitral review of absentee cases. As a general rule, all other considerations being equal, employees guilty of the same offense should receive the same treatment. Conversely, mere variations in discipline do not prove disparate treatment when a reasonable basis exists for the different penalties imposed. Thus, if "F" and "G" both display a Friday-Monday absentee syndrome and both are relatively short-term employees, they can expect substantially the same treatment. On the other hand, different management responses would be justified if "F" were a long-term employee with a good prior attendance record, if "F" reported off but "G" did not, or if "G" had received prior warnings. The point is that uniformity of treatment may not be appropriate when the circumstances differ.

The dilemma confronting managements which strive for consistency in administering absentee policy, and confronting arbitrators who must review management's decision, is threefold. First, it is difficult to evaluate the seemingly endless variety of reasons for absenteeism. This evaluation often presents credibility questions as well as honest differences of opinion as to whether an absence should be excused. Second, it is difficult to compare absentee records which almost always differ in significant respects. This comparison involves an intuitive weighting of

[10]*Caterpillar Tractor Co.—UAW*, Case No. PA–79–P–004 (Mittenthal, unreported).

similarities and dissimilarities. Third, it is difficult to determine the point at which absenteeism warrants discipline. This determination turns on other variables—the reasons for the absences, the characterization of the absenteeism (excused or unexcused), the overall attendance record, and so on.

Consider, for instance, four employees with a 10 percent absentee rate. "H" was absent due to family problems which required his personal attention. "I" was absent due to a chronic illness. "J" was absent because of a number of minor ailments all of which were verified by doctor's slips. "K" was absent because of a claimed sickness for which he sought no medical help on account of his religious convictions. If only "H" or "K" is disciplined, can management successfully resist a union claim of disparate treatment? To state the question is to suggest the difficulties management faces in attempting to achieve consistency.

Unfortunately, there is no simple formula for achieving consistency. All that can be expected is an objective investigation of the relevant facts and a reasonable exercise of discretion. Anyone who has struggled with absentee cases knows that rigid uniformity in the application of discipline is not a realistic or desirable goal. However, that does not justify a random imposition of disciplinary penalties. What is important, as Ben Aaron has stressed, is consistent purposes rather than uniform penalties.[11] The humane exercise of discretion in individual cases may justify different responses to situations with a surface similarity.[12] Such civilized differentiation is not disparate treatment.

Typical Absentee Case

The *typical* absentee dispute involves some combination of two or more of these elements. Management says the employee is guilty of excessive absenteeism, citing his attendance record and claiming a lack of justification for many of his absences. No attempt is made to define what is "excessive" absence. Nor is

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[11]Aaron, *The Uses of the Past in Arbitration*, in Arbitration Today, Proceedings of the Eighth Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1955), 11.

[12]*See, e.g., Shakespeare & Shakespeare Products Co.*, 9 LA 813 (Platt 1948), where the arbitrator reinstated two employees with full back pay but sustained the discharge of a third employee even though all three took time off for the same reason.

there ordinarily any single triggering event for the discipline. Rather, management's action is prompted by all of the absences over a given period of time.

The union's customary response is to deny management's allegations. It states that many of the absences were unavoidable, that they should be deemed excused (i.e., justifiable), and that the remaining absences cannot be considered excessive. The decisive factor may be the employee's explanation for missing work, the presence (or lack) of objective proof to support his explanation, the scope and pattern of his absenteeism, the treatment of others in like circumstances, and so on. The union may even concede the propriety of discipline and merely challenge the severity of the penalty.

When the case unfolds in this manner, the arbitrator's ruling will likely turn on a question of fact. There is no need for broad pronouncements. There is no need to impose principles or rules upon management's administration of discipline.[13]

Some absentee cases, however, embroil the arbitrator in larger contractual and policy issues. They are *atypical* but not uncommon. They are the subject of the rest of this paper.

III. Excessive Absence Due to Illness or Injury

Sickness and accident are commonplace hazards. Absences prompted by these causes are ordinarily not grounds for disciplinary action. For such absences are usually beyond an employee's control. So long as this kind of absence remains within manageable proportions, it tends to be ignored.

The problem occurs when employees become *chronic* and *excessive* absentees due to illness or injury. Consider, for instance, an employee with a heart or kidney disease which renders him unable to work for several lengthy periods each year. His absentee rate is 40 percent in each of the past three years and no improvement is in sight. All of his absences are due to disabling illness. Management is often unwilling to overlook this kind of absenteeism. It sees the absentee is a part-time employee who disrupts operations and who is unable to satisfy minimal standards of attendance. Its response, assuming the employee's attendance does not improve after warnings or suspensions, is to

[13]One obvious exception to these observations would of course be the arbitrator's insistence on the need for applying corrective discipline in absentee cases.

discharge him. The union's position is that illness is always an excuse for absence, regardless of frequency or duration. It believes that such absences, however large in number, are blameless and that the employee is not guilty of any misconduct.

These conflicting views have produced many arbitration cases. The awards reveal differences of opinion among arbitrators. A *minority* find that discharge is unwarranted for excessive absenteeism due to illness. Arbitrator Edes expressed this point of view as follows:

> "The position of the Company . . . is that Little was discharged 'for excessive absenteeism' and that his absence over an extended period of time regardless of reason had reached such proportions that a proper employer-employee relationship ceased to exist.
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> "I cannot support a position so absolute. An employer, of course, has the right to command reasonable standards of attendance and punctuality on the part of his employees. And I would not dispute, but would endorse, the view that no matter how legitimate the necessity for absences, an employee cannot expect to be kept on the rolls when the number of such absences exceed what can be deemed to be reasonable. This is subject, however, to one major exception and that pertains to cases where the employee is personally disabled by injury or sickness from attending [work]. An employee cannot hope to be carried along indefinitely when he cannot come to work regularly and promptly for family reasons and like circumstances. In such cases the employee's obligation to his job is overriding and management's tolerance must inevitably be superseded by the obligation to operate its business efficiently. *Where an employee, however, is himself incapacitated by injury or illness, the matter stands upon a substantially different footing. Discharge in such a situation is not warranted. A leave of absence is the appropriate course both in the interest of the employee and in the interest of the employer. This is not merely a matter of academic industrial philosophy. It is a principle expressly recognized and guaranteed in Section [14.1] of the contract between the parties which provides that in the case of 'physical disability' a leave of absence 'shall be granted automatically' . . . .*"[14] (Emphasis added.)

Arbitrators who embrace this position rely on contract provisions which protect the disabled employee. These provisions

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[14]*Caterpillar Tractor-UAW*, Case PA–65–P–015 (unreported). *See also General Motors-UAW*, Decision No. R-3 (unreported). There, a discharge for chronic, excessive absenteeism was held to be unjustified. Arbitrator Stark emphasized contract language requiring that an ill employee be "granted sick leave automatically for the period of continuing disability" and that he "accumulate [seniority] during sick leave" with such seniority to be "broken" only when his sick leave extends for "a continuous period equal to the seniority he had acquired at the time of such [sick leave] . . . or eighteen . . . months whichever is longer."

may include, as in Edes' case, a clause automatically granting a leave of absence to the disabled employee or a clause calling for accumulation of seniority for those on sick leave or a clause establishing a comprehensive disability protection plan.[15] A forceful argument can be made for the proposition that these clauses represent the agreed-upon method of handling the problem of disabled employees. And if that is the contractual response to disability, the parties could hardly have contemplated discharge for the very same disability. Thus, the argument runs, so long as the disabled employee is entitled to a contractual benefit by reason of his disability, he cannot be terminated. Behind all of this lies the equitable notion that an employee who is truly disabled and who has not through carelessness brought about his own disability is simply a victim of forces beyond his control.

Such an argument is consistent with the symmetry of the promises implicit in the hiring of a new employee. Management surely does not guarantee there will always be work for the new hire. It promises only that there will be a job for him so long as the enterprise is economically healthy. The employee likewise does not guarantee he will always be able to work. He promises only that he will report each day so long as he is physically and mentally healthy.

The *majority* view, however, is that discharge is justified for chronic, excessive absenteeism even when such absence is due to illness. Arbitrators who embrace this position focus on the adverse impact of such absenteeism on the employer's business. Their argument typically stresses the following points:

> "one of the obligations of employment is that an employee will regularly come to work. Successful operation of a plant depends on regular attendance. Frequent absences may cause a loss of production, a disruption of work schedules, a decline in efficiency, etc. These harmful effects occur, whether or not there is good reason for an employee's absence. An employee cannot expect to remain in the Company's employ when his absences, whatever the cause, take place so often that his services are of little value to the Company. No matter how good the excuse for the absence may be, Management is entitled to insist upon certain minimal standards of attendance.

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[15]We refer, for example, to a plan that provides initially for sickness and accident benefits and then for long-term disability benefits.

Hence, merely because an employee's absences are due to illness does not mean he cannot be guilty of excessive absenteeism."[16]

The majority acknowledge that absences on account of illness are usually disregarded. But they believe when a pattern of such absenteeism continues month after month and year after year, a point is reached where discipline becomes appropriate. They urge that, as a practical matter, some limitation must be placed on chronic, excessive absenteeism even when due to illness. Arbitrator Alexander has expressed this concept in compelling terms:

"it cannot reasonably be denied that some limits must be put on the extent to which an employee may retain his full employment rights in face of a long history of excessive absenteeism, no matter how innocent or respectable is the cause for such absenteeism. . . . Conceivably an employee otherwise highly regarded might experience some ailment which will reduce his ability to attend work to one day per week, or to one hour per day each workday in the week for the rest of his life. It could not be reasonably argued . . . that the status of such an employee is nevertheless unaffected. If the example which I pose is extremely unlikely, it nevertheless points up what I conceive to be the fallacy in the proposition asserted by the Union, that illness is always an excuse for absence, regardless of frequency and duration."[17]

In applying the majority view, it is necessary to determine when the point of "excessive" absence has been reached or whether the chronic absence is excusable and hence not "excessive." The answers to these questions will of course depend on the particular circumstances of each case. That would include the absentee rate, the frequency and duration of the absences, the history of the illness, the prognosis, the employee's record, and so on. Equity is bound to play a role in this inquiry.

Consider a long-service employee who has been absent for a four-month period in each of the past two years because of serious surgery and lengthy rehabilitation. Compare him with a short-service employee who has been absent every third week for two years because of a variety of illnesses and injuries. Both of them have an absentee rate of 33 percent; both were absent on account of disabilities. But the resemblance ends there. Only

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[16] *R.C. Mahon*, XII Steel Arbitration Reports, Pike & Fischer, Inc. 1819 (Mittenthal). See also *Cleveland Trencher Co.*, 48 LA 615, 618 (Teple 1967); *United States Plywood Corp.*, 46 LA 436, 439–440 (Anderson 1966); *Keystone Steel & Wire Co.*, 43 LA 703, 714 (Klamon 1964); *Kurtz Brothers, Inc.*, 43 LA 678, 680–682 (C. Duff 1964).

[17] *Great Lakes Steel (Div. of National Steel)-Steelworkers*, Case No. 66–A–230 (unreported).

the junior employee's absenteeism is likely to be considered "excessive"; only he is likely to be subject to discipline.

Consider also two employees whose absentee rate on account of disabling illness has been 40 percent for several years. One has an excellent prognosis, his doctor believing his physical difficulties are close to being solved. The other has a poor prognosis, his physician seeing little chance for improvement. Management would have good reason to treat them differently. The former employee's absenteeism is about to cease and his future dependability seems assured. The latter's absenteeism is almost certain to continue unabated and he probably will never be dependable. This is the kind of distinction upon which arbitral awards are likely to turn.

There are other qualifications as well. The absentee is entitled to adequate notice of management's concern before he is discharged. He must be told that his absenteeism is no longer acceptable and that he should take whatever medical steps are necessary to get himself in physical condition to work a regular schedule. Without such notice, the absentee has no reason to change his ways. It certainly would be unfair to discipline him without first calling his attention to management's changed view of his absenteeism and the need for him to find some solution to his health problem.

However, because so many arbitrators have upheld discharges for this kind of absenteeism, the majority view tends to be overstated. Elkouri & Elkouri refer to "the right to terminate employees for excessive absences, even where they are due to illness. . . ."[18] Arbitrators sometimes describe this "right" in broad terms. They have held that absenteeism of sufficient proportions over a sufficiently long period of time is enough to justify discharge. They have suggested, in other words, that this is largely a numerical exercise.[19] The difficulty with this approach has been forcefully pointed out by Arbitrator Garrett:

> "Reliance on such broad and misleading generalizations may obscure the fundamental consideration that the true issue, under . . . the . . . Agreement, is whether the employer has established 'just cause' for the given discipline in the specific case. The presence or absence of 'just cause' is a fact question which properly may be determined only after all relevant factors in a case have been

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[18]How Arbitration Works, 3rd ed. (Washington: BNA Books, 1973), 545.

[19]*See, e.g., Minnesota Mining & Mfg.*, 41 LA 1257, 1267 (Solomon 1963).

> weighed carefully. The length of the employee's service, the type of job involved, the origin and nature of the claimed illness or illnesses, the types and frequency of all of the employee's absences, the nature of the diagnosis, the medical history and prognosis, the type of medical documentation, the possible availability of other suitable . . . jobs or a disability pension, the employee's personal characteristics and overall record, the presence or absence of supervisory bias, the treatment of similarly situated employees, and many other factors all may be relevant in any given case."[20]

A few other comments are appropriate. Arbitrators who affirm a discharge for excessive absenteeism due to illness seem to be accepting the no-fault concept discussed below. They disregard the fact that the employee's absence was beyond his control, that he was in no way culpable. They consider the reasons for his absence to be irrelevant. These principles are the root of any no-fault plan. Our suspicion is that many arbitrators who adopt this majority view and sustain discharges of disabled employees who are not at fault for their absence, would nevertheless find a no-fault plan unreasonable. This appears to be a conceptual contradiction, but close analysis suggests there really is no contradiction. These arbitrators recognize, first, that excessive absenteeism due to illness can, in *appropriate* circumstances, constitute "just cause" for discharge, and second, that a rigid no-fault plan, by ignoring the surrounding circumstances in *all* cases, is inconsistent with the "just cause" standard.

Finally, our reference to minority and majority viewpoints is somewhat arbitrary. For these viewpoints are not necessarily incompatible. Even those arbitrators who believe discharge can be justified for excessive absenteeism due to illness would probably rule differently if the contract before them contemplated that this kind of excessive absentee would continue on the employer's rolls.

IV. No-Fault Absentee Plans

Preliminary Observations

No-fault plans are precisely what those words suggest. They provide fixed disciplinary standards for excessive absenteeism regardless of whether the absences are the employee's fault. They thereby eliminate the distinction between excused and

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[20]*United States Postal Service*, 73 LA 1174 (Garrett 1979).

unexcused absence. Before turning to a discussion of these plans, pro and con, a few preliminary observations are in order concerning the basic problems they attempt to solve.

Management's effort to administer a uniform and consistent absentee policy poses difficulties not easily resolved. The crux of the problem is that supervision, being responsible for discipline, is confronted each week by a maddening variety of absentee situations that demand the kind of insight, judgment, and intuition expected of a trial judge. Supervision must decide which of the employee's absences are justified, whether his absenteeism has reached an unacceptable level, what kind of discipline is appropriate, and so on. Uniformity is almost impossible, for no two situations are exactly the same. Some supervisors are more lenient (or severe) than others, and each supervisor must exercise his own discretion in dealing with each absentee issue.

Employees, on the other hand, resent searching interrogation into the reasons for their absence. They believe such questioning is a reflection on their integrity or perhaps even outright harassment. They are not sure what the absentee limits are, why legitimate absence should subject them to disciplinary action and, above all, why seemingly inconsistent penalties are meted out.

Management understandably finds it hard to design and implement an attendance policy that deals effectively with a limitless variety of absentee situations and with the conflicting perceptions of supervisors and employees. No matter how well conceived, such a policy is likely to demand more of supervision than it is capable of giving. Supervisors are not lawyers, investigators, or psychologists. Their primary interest is the quantity and quality of some product or service. They are not trained to make the sophisticated judgments necessary in the administration of an absentee policy. Nor is such a policy likely to win employee approval. For what supervision sees as individually tailored responses to absenteeism will be seen by employees as disparate treatment. What supervision sees as "excessive" absenteeism will be seen by employees as an unduly restrictive limitation on the time they may be off work.

In an attempt to deal with these conflicts and uncertainties, many employers have established no-fault plans. The right of management to adopt reasonable rules and regulations not in conflict with the collective bargaining contract is too well settled to require discussion. Therefore, our attention is focused upon

questions that arise after a no-fault plan has been adopted. But first a few observations as to the characteristics of such plans are in order.

Plan Characteristics

While no-fault plans vary widely, they share the principle that an employee's reason for being absent is irrelevant. They do not excuse absences due to illness or injury for which there was no hospitalization. They do not excuse absences for personal reasons—family emergencies, court appearances, car breakdowns, and so on. The employee's absence is charged against him even though the absence was not his fault.

Most plans, at least those which have been approved by arbitrators, contain the following common denominators. First, a specific number of absences[21] is allowed before discipline is imposed. Second, certain types of absence are excused and are not counted against the employee. Examples of this are absence due to industrial injury, jury duty, and authorized leave time. Third, a full range of progressive discipline is employed for absences beyond a certain number. The penalties become more severe, from warnings to suspensions to discharge, for each successive absence. Fourth, the employee can "cleanse" his record periodically by perfect attendance. The reward for a month without absence, for instance, is to move the employee to a lesser level in the progressive discipline procedure.

The terms of the no-fault plan can be written to meet the perceived needs of the particular employer. The goal, in any event, is to provide objective standards for measuring excessive absenteeism (i.e., the number of attendance infractions needed to trigger discipline) and for determining the appropriate penalty for a given infraction. Through such standards, management seeks to establish an absence control system which applies uniformly to all employees. The plan is a means of placing everyone on notice as to precisely what kind of absentee behavior is unacceptable and what the consequences of an infraction will be.

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[21]The term "absence" is used in the plans to encompass not only a failure to work a scheduled shift but also tardiness and leaving early.

Arbitrability

A grievance protesting the discipline of an employee pursuant to a no-fault plan can ordinarily be taken to arbitration. No one would dispute that. Occasionally, however, a union makes a far broader challenge to the propriety of the plan itself. Some employers resist this challenge on the ground that the grievance, not having been filed on behalf of an individual employee, is premature and that the arbitrator is therefore without authority to rule on the issue.

We do not agree. The employer's reasoning might well apply to a rule covering a matter which entails the exercise of managerial discretion. Then, a persuasive argument could be made for the proposition that management should be given an opportunity to demonstrate how its discretion would be exercised on the facts of a given case before a grievance is processed. Here, however, one of the purposes of a no-fault plan is to eliminate supervisory discretion. Employees are informed that discipline will be applied automatically pursuant to the objective standards in the plan. In such circumstances, we believe fairness demands that a union be permitted to test the reasonableness of the plan even though no one has been disciplined. Otherwise, employees are confronted with unsatisfactory alternatives. Either they comply with a rule they deem unreasonable or they refuse to comply and risk disciplinary action. Surely, they should be free to ask an arbitrator to tell them whether or not they are required to abide by the plan. The union's complaint should be considered arbitrable.

Reasonable or Unreasonable

Collective bargaining contracts permit management to establish "reasonable" rules for employee conduct. Many employers exercise this right and promulgate rules to govern absenteeism. Typically these rules are written in vague and general terms. They prohibit "excessive" or "habitual" absenteeism without defining these words. They do not bar consideration of fault in evaluating an employee's absences. Such rules can withstand union challenge because it cannot be seriously argued that employers do not have a legitimate interest in curbing "excessive" absenteeism.

Some employers go further. They introduce a no-fault plan which defines "excessive" absence and triggers discipline automatically at fixed levels of absenteeism without regard to fault. The union objects to the plan. The resulting dispute turns on the question of whether the plan can meet the test of reasonableness.

In order to understand the various arbitral responses to this question, we have developed a no-fault plan for discussion purposes. Of course no two plans are exactly alike. The principal difference is the permissible ceiling on absence before discipline is imposed. This ceiling could range, in terms of absentee rates, from a restrictive 4 percent to a liberal 8 to 10 percent.[22] The following plan incorporates, in abbreviated form, the main features of a no-fault system:

1. Points are automatically assessed for each attendance infraction—one point for each "absence occurrence" and one-half point for each tardiness or leave-early. An "absence occurrence" is defined as one or more days of consecutive absence.

2. No discipline is imposed for the first five "absence occurrences," i.e., five points, in a running 12-month period. Thereafter, progressive discipline is invoked as follows—

6th "absence occurrence"	—oral warning
7th occurrence	—written warning
8th occurrence	—5-day suspension
12th occurrence	—10-day suspension
14th occurrence	—discharge

3. Absence for any of the following reasons is not considered an "absence occurrence": industrial injury, hospital confinement, jury duty, military duty, paid funeral leave, official union business, vacation, and holidays.

4. Employees can earn credits for perfect attendance. An employee's record is reduced by one point, i.e., one occurrence, for any calendar month in which he is not absent. For example, if he had received a written warning for a 7th occurrence and then earned this credit, he would be placed back at the 6th occurrence level.

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[22] *See*, in this connection, the valuable analysis by Arbitrator A.D. Allen in *Sperry Vickers Division*, 81–1 ARB 8252. He notes that no-fault plans frequently attempt to peg permissible absenteeism at certain percentage levels in relation to the national average. He approved a plan which allowed "casual absence" of 6 to 7 percent, i.e., 35 hours of absence in a 90-calendar day period, prior to any discipline being assessed. He compared this to the average absentee rate of approximately 4.5 percent for manufacturing companies.

Some arbitrators, a minority according to the reported decisions, find this kind of no-fault plan unreasonable. They rely on two lines of argument. First, they assert that the plan's terms appear on close analysis to be inconsistent and arbitrary. They believe that, given these defects, the plan must ultimately produce unfair results. Second, they contend that such a plan is inconsistent with the "just cause" requirements of the collective bargaining contract.

As for the first argument, the following excerpt from an unpublished award explains in detail the unreasonable aspects of a plan very similar to the one mentioned above. It is worth quoting at length:

> "The anomaly created by this 'no-fault' system can be easily demonstrated. Consider how the following two employees are treated. One is absent five times because of disabling illness but his sixth absence is unjustified. The program requires that he be disciplined. The other is absent five times with no justification whatever but his sixth absence is due to disabling illness. The program does not permit discipline in his case.[23] Thus, because the reason for the first five 'occurrences' is immaterial, the man with the better record is disciplined while the man with the poorer record is not.
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> "Furthermore, this 'occurrence' system focuses on only one aspect of absenteeism. It deals with the number of occasions on which an employee is absent one or more consecutive days. It disregards total days of absence, i.e., the absentee rate, which is a far more accurate index of the seriousness of an employee's attendance problem. Consider two men, each of whom accumulates six 'occurrences.' One is absent one day on each 'occurrence', a total of six days, while the other is absent four days on each 'occurrence', a total of 24 days. They receive the same level of discipline even though one man's record is four times worse than the other's.
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> "The point can be made even more forcefully in terms of the absentee rate. Assume an employee who is discharged after his *14th 'occurrence,'* all one-day absences, within a twelve-month period. Assume also that he worked 50 weeks in that period with overtime every other week. His absentee rate would be approximately 5 percent. That is certainly not the kind of absenteeism which prompts discharge in American industry today. Assume, on the other hand, an employee who had *13 'occurrences,'* all four-day absences, in the same twelve months. Assume that he too worked the same 50 weeks with the same overtime frequency. His absentee rate would be approximately 20 percent. But he would avoid discharge with a far worse record than the employee described above.
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> "Also the weight given to different 'occurrences' has little connection to reality. Two tardiness violations of two minutes each, four

[23]Under this plan, fault is considered when an absence calls for disciplinary action.

minutes' lost time, will produce one 'occurrence.' An unwarranted absence of four days, 2560 minutes' lost time, will likewise produce one 'occurrence.' There is no real equivalence between these offenses, either from the standpoint of their innate seriousness or from the standpoint of their impact on plant operations. Either tardiness is being treated too harshly or the absence is being treated too leniently.

"Finally, leaving early has been joined together with absence and tardiness. The three offenses do have one thing in common, namely, the failure to work scheduled time. But they are dissimilar in critical respects. Management has no control over absent or tardy employees. It often does not know where they are or why they are not at work. It cannot command their presence. However, Management does have control over the employee who reports and later wishes to leave early. That employee, I presume, cannot just walk off the job. No doubt he must inform supervision of his wishes. The evidence does not reveal whether supervision automatically grants his request or whether it insists on some explanation so that it can determine if his request is justified. In either case, supervision is in a position to grant or deny the employee's request to leave. If he leaves with supervision's approval, he has received permission for his absence and Management is somehow implicated in the situation. If he leaves notwithstanding supervision's disapproval, his offense is more serious than a mere attendance control matter. All of these relevant distinctions are ignored by placing leaving early in the same category as absence and tardiness."[24] (Emphasis in original.)

As for the second argument, it begins with the proposition that the concept of "just cause" requires the arbitrator to make two essential inquiries. They are: (1) whether the employee is guilty of misconduct, and (2) assuming guilt, whether the discipline imposed is a reasonable penalty under the circumstances of the case. A no-fault plan precludes either inquiry. For the arbitrator who accepts such a plan is concerned with two entirely different questions: (1) whether the employee was absent, and (2) if so, whether the absence falls within any of the plan's express exclusions.[25] Should these questions be answered in management's favor, the arbitrator has no choice but to affirm the penalty prescribed in the plan. The crucial issues of whether the employee's absence is misconduct[26] and whether the penalty

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[24]*Stroh Brewery Company*, unreported (Mittenthal).

[25]These questions can hardly be considered questions at all. The employee's grievance would not have reached arbitration if he was not absent or if his absence fit any of the plan's exclusions.

[26]By the plan's definition, the absence is necessarily misconduct. In this way, the plan predetermines the crucial issue of employee culpability.

is reasonable are removed from the arbitrator's reach. All that is left is a hollow mechanical function, a mere reading of the plan's listed penalty for a numbered "absence occurrence." Thus, the plan seems inconsistent with the "just cause" standard.[27]

Most arbitrators, referring again to the reported decisions, have found no-fault plans to be reasonable in principle. They approach the problem from a highly pragmatic point of view. They stress the damage caused by absenteeism, the need for objective attendance standards, and the actual experience under the plan. They have given considerable weight to proof by the employer that the plan has been reasonable in operation or to the absence of proof by the union that the plan has worked a hardship in particular cases. This rationale is perhaps best summarized in the following words by Arbitrator James Duff:

> "If a plan is fair on its face and its operation in the concrete cases at hand produces just results, and other common tests of reasonableness are satisfied, a plan ought not to be declared invalid based on the mere existence of some remote possibility that it could operate perversely in the indefinite future under hypothetical circumstances which have not as yet materialized."[28]

Unions criticize no-fault plans on the ground that harsh results are inevitable. A number of arbitrators have responded by ruling that the no-fault plans they have approved should be considered "a norm rather than a rigid and inflexible rule"[29] and that an unreasonable application of this norm could be reversed through the arbitration procedures.[30] Indeed, arbitrators who have declared a plan reasonable have not hesitated to reject a perverse application. A good example of this can be found in the *Park Poultry* case. There, an employee became extremely ill at work, was sent by the employer's medical department to a hospital, was not admitted, but rather was treated as an outpatient. Under the applicable no-fault plan, the employer

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[27]See *Hoover Ball and Bearing Co.*, 66 LA 765 (Herman 1976), stating that the no-fault plan "does not offer the reasonableness and fairness which the collective bargaining agreement contemplates." See also *St. Charles Furniture Corp.*, 70 LA 1099 (Fitzsimmons 1978).

[28]*Robertshaw Controls Co.*, 69 LA 77, 79 (Duff 1977).

[29]*Cannon Electric Co.*, 46 LA 481, 484 (Kotin 1965); *Park Poultry, Inc.*, 71 LA 1, 8 (Hyman Cohen 1978).

[30]In addition to *Cannon Electric* and *Park Poultry*, see *Cincinnati Tool Co.*, 61 LA 79, 86 (Bradley 1973); *Jeffrey Mining Machinery Co.*, 61 LA 221, 224 (Kabaker 1973), where the employer conceded that the "just cause" provision was available to correct improper discipline or wrongful discharge under the plan; and *Firestone Tire & Rubber Co.*, 64 LA 1283, 1288 (Bailey 1975).

deemed this "early quit" as one-half of an "absence occurrence" which, when added to her point accumulation, prompted her automatic discharge. The arbitrator reinstated her with the following explanation:

> "the Grievant's 'early quit' would be excused if she was admitted to the hospital on January 25 [when she was sent there] but not the following day. If the Grievant went directly to the hospital and is not admitted but given medication and sent home, her 'early quit' would not be excused. She would still receive one-half of an occurrence despite following her doctor's instructions. Yet her 'early quit' would be excused if she 'sticks it out' at the plant, even though she cannot perform any useful work. In my judgment, discharge for 'reasonable cause' cannot depend upon such arbitrary finite distinctions."[31]

In *Oshkosh Truck Corp.*, an employee was placed in a "no win" situation when he was summoned to court and had to choose between honoring the summons and being disciplined for an absence or ignoring the summons and being cited for contempt.[32] Arbitrators understandably resist strict application of a no-fault plan when an employee is confronted by such a dilemma. In *Menasha Corp.*, a 58-year old with 27 years' service and a bad absentee record experienced further absenteeism because of suspected cancer and was discharged under a no-fault plan. The suspected cancer turned out to be benign. The arbitrator, stressing the employee's age and seniority, reinstated him and ruled that "the Company owed this Grievant more than just a mechanical application of its policy. . . ."[33]

Based upon our own experience and a review of the dicta in several no-fault arbitral decisions, we find that employers themselves often make exceptions to the automatic operation of the plan when it produces a harsh or arbitrary result. In one case, the employer responded to the union's concern about the plan's impact on long-term employees as follows:

> "it was not our desire to have this program terminate a long-service employee who had a series of unfortunate circumstances, and that we would have to leave a crack in the door and if and when we came to the point where we saw this happening, we would be the first to want to talk to the Union about not applying the formula."[34]

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[31] *Park Poultry, Inc.*, *supra* note 29 at 8.
[32] 78–2 ARB 8561 (Berteau).
[33] 71 LA 653, 658 (Roumell 1978).
[34] *Cameron Iron Works, Inc.*, 56 LA 1157, 1162 (Oppenheim 1971).

Thus, all parties concerned with no-fault plans appear to acknowledge that a plan considered reasonable may occasionally produce unreasonable results that should be mitigated.

An Attempt at Reconciliation

These conflicting views, when first examined, seem to be irreconcilable. *Theoretical* considerations, particularly in relation to "just cause" requirements, undermine no-fault plans. *Pragmatic* considerations, particularly the need for objective standards in absentee administration, support such plans. To stress theory at the expense of practicality is unnatural for arbitrators trained to do the *sensible* thing. But to stress practicality at the expense of theory is equally unnatural for arbitrators trained to act as *contract readers.*

We cannot give unqualified approval to the typical no-fault plan because of its potential for inequitable results in exceptional cases and because such results cannot be harmonized with "just cause" requirements. Management cannot expect blind arbitral support for a mechanical application of penalties up to and including discharge. It is precisely this rigid, unbending application of penalties which gives us pause. But arbitral insistence on an appropriate degree of flexibility does not mean the no-fault concept is rejected. We recognize that notice of realistic attendance standards can be beneficial to everyone. Such standards aid employees who are entitled to know what is expected of them; they aid supervisors who strive for uniformity in the enforcement of rules. In short, although the ordinary no-fault plan can provide a practical solution to the need for specific absentee criteria, it cannot fully comply with traditional notions of "just cause."

However, as we have already noted, arbitrators who affirmed no-fault plans have often tempered those plans by, in effect, imposing a "just cause" requirement in the case before them. The employer won approval of its plan with this single modification,[35] while the union won approval of its view that fault must be taken into account in appropriate situations. Such a compro-

[35]One might argue that the employer won nothing given the arbitrator's action. The answer to this argument is that the plan stands as a general statement of absentee policy and that an employee risks strict application of the policy unless he can show his situation calls for an exception.

mise may not be aesthetically appealing, for it enables the arbitrator to introduce the foreign element of fault into a pure no-fault system whenever he feels it proper to do so. But the end result seems sound. A rule calling for automatic enforcement of penalties is modified by a provision for equitable exception to the rule as a safeguard against perverse applications. There is no reason why an employer, like the arbitrator, could not write such an equitable exception into its no-fault plan. That would be a major step in answering the objections raised to such a plan.

To summarize, we believe no-fault plan criteria can offer useful guidance to both employees and supervision and should be looked upon favorably by arbitrators provided the plan: (1) contains reasonable provisions for the customary absentee situations in a particular plant or office,[36] and (2) permits a "just cause" review when appropriate. All of this simply means that the concept of fault cannot be completely eliminated from no-fault plans. The employer's quest for absolute uniformity in enforcing absentee criteria can only be achieved at the cost of occasional but inevitable perverse applications. Legal history has taught us that if such absolute uniformity were possible, equity would become an obsolete branch of Anglo-American law.

V. Conclusion

Labor and management like to believe that their contracts provide fixed principles to guide the arbitrator in resolving grievances. They believe they have placed careful limitations on the exercise of arbitral discretion. As regards a number of common contract provisions, however, these beliefs are more wishful thinking than a description of reality. The "just cause" requirement illustrates the point. For it leaves the arbitrator free to make an extraordinary range of judgments on the basis of his own sense of fairness. Nowhere is this discretion more apparent than in absentee disputes. The arbitrator in such cases is called upon to define absentee policy. He decides at what point absenteeism becomes punishable (absentee rates), which absences can be used against an employee (excused versus unexcused absence), whether a no-fault absentee plan meets the test of

[36]For example, a plan which called for discipline to commence at a 2 percent absentee rate would not be reasonable. Or a plan which called for written warnings followed by discharge would not be reasonable.

reasonableness, and so on. He thus forges an absentee program, case by case, without the benefit of a detailed analysis of the needs of the enterprise and the attendance patterns of its workers. His discretion is enormous.

Much the same comment could be made of the arbitrator's role in dealing with other aspects of employee misconduct. But arbitral discretion seems to be magnified in absenteeism disputes. The greater the discretion, the more likely an award will impose upon the parties rules better left to their own devices. The best solution to the problem is for labor and management to provide more guidance to arbitrators, to agree on absentee standards. That kind of help is unlikely. Without it, the arbitrator's success will depend on the wise exercise of discretion. This paper is an attempt to analyze the criteria which guide arbitrators in the exercise of their discretion in absenteeism cases.