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## Labor Arbitration - Controlling Principles in the Arbitration of Classification Grievances

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## LABOR ARBITRATION

## I

CONTROLLING PRINCIPLES IN THE ARBITRATION OF  
CLASSIFICATION GRIEVANCES

*Albert B. Tarbutton, Jr.\**

SINCE classification grievances arise from a disagreement in the administering of a job classification or job evaluation plan, an explanation of just what is a job classification plan should be made before we discuss the principles which have been determined through arbitration of these grievances.

The purpose of a job classification plan is to establish an equitable rate structure which shall insure fair compensation for the employees for work performed, and shall also insure a fair day's work to the company for the money expended. To accomplish this purpose, it is necessary that the various jobs be described. For the job to be properly described, the job description shall include: the department to which the job belongs; the job title; the primary function of the job; the tools and equipment used; the materials handled; source of supervision; direction exercised; and the employees working procedure.

After the job has been described, it is then possible to classify or evaluate it. The classification of the job may be accomplished by using one of several methods, which are usually distinguished as being either a ranking method; or a classification method; or a point rating method; or a factor comparison method.

The method with which I am most familiar is that used in the steel industry. This method was worked out by engineers from United States Steel Corporation and United Steelworkers of America. It is a point plan method, and was adopted in 1947, and is now universally used in "basic steel."

In using this method, twelve basic factors are considered and given a numerical value. These factors are: (1) preemployment

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training; (2) employment training and experience; (3) mental skill; (4) manual skill; (5) responsibility for materials; (6) responsibility for tools and equipment; (7) responsibility for operations; (8) responsibility for safety of others; (9) mental effort; (10) physical effort; (11) surroundings; (12) hazards.

Each described job is considered in the light of these factors, a value given each factor, and a total numerical value established for that job. This numerical value placed upon the described job, determines the rate of pay for that job, and the numerical values run from job class one through job class thirty.

Regardless of the type of job classification plan an employer may have in effect, he is likely to run into some difficulties in the day-to-day operation of it, particularly if the employees are represented by a union.

In the remainder of this discussion, an attempt will be made to set out what may be the controlling principles in the arbitration of grievances that arise in administering a job classification plan. It should be noted that in general, labor arbitrators have been reluctant to agree that prior arbitration awards have authoritative force. However, it must be admitted, that in a particular labor dispute the reasoning and opinions of the other arbitrators, who have dealt with a problem where the facts are similar and the contractual provisions are also similar, do have persuasive force. The arbitration awards from which I have selected these principles appear to me to be controlling.

With that in mind, I should like to discuss as the first problem: what right does management have to create new jobs and job descriptions and to change existing jobs and job descriptions?

Unless the contract states specifically that the existing and agreed upon job descriptions are to continue in effect as agreed upon, and are not to be changed without the mutual consent of the parties, arbitrators will uphold the right of management to unilaterally establish new job descriptions or change existing ones.<sup>1</sup>

This may be true even in those instances where the job descriptions and their classification were negotiated originally and have become a part of the contractual relationship between the parties

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<sup>1</sup> Diemolding Corp., 2 Lab. Arb. 274 (1945).

by a clause in the contract which usually reads as follows: "Rates of pay, in the respective classification, shall be set forth on Exhibit A which is hereto attached, and by this reference, made a part hereof." If such is true, certainly this right of unilateral action of making a change, is subject to the grievance procedure to establish appropriate rates for the changed jobs or new jobs.

I am basing my judgment of the above statement's being true upon an award rendered for the Dow Chemical Company<sup>2</sup> in which the arbitrator states what may be the controlling principle when he wrote the following: "I cannot hold that because the parties have agreed upon certain job titles, descriptions and rates applicable thereto, that the company does not have an entirely free hand to introduce new jobs and new descriptions or to take apart existing jobs and to establish different jobs and job descriptions, subject however, to appropriate rates as determined by grievance procedure, and if necessary by arbitration."

This right to question the unilateral action of management in creating new jobs or changing existing ones through arbitration exists even though the contract provides that management may by unilateral action change existing jobs and create new ones.<sup>3</sup>

In the case of *Republic Steel Corporation*,<sup>4</sup> an arbitrator was called upon to interpret a contract clause which read as follows: "The job description and classification for each job in effect as of the date of this agreement, and of those hereafter agreed upon, shall continue in effect unless management changes the job content to the extent of one full job class or more." The arbitrator in commenting upon this clause stated that on first consideration of this clause, he was of the impression that the right of management to change a job content was unqualified. However, after further consideration, he now understood the clause to give management alone the right to change the job *only* if the employees receive a wage advantage of at least one job class in return. If the employees do not receive a wage advantage, mutual agreement to make the change is required.

This clause appears in most steel contracts, and in *Lone Star*

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<sup>2</sup> Dow Chemical Co., 22 Lab. Arb. 336 (1954).

<sup>3</sup> Emhart Manufacturing Co., 23 Lab. Arb. 61 (1954).

<sup>4</sup> 11 Lab. Arb. 698 (1948).

*Steel Company*<sup>5</sup> the arbitrator held that a change in job content either up or down one full job class would permit the company to reclassify the job without the mutual consent of the union. Of course, if the union does not agree with the classification, it may file a grievance.

Up to this point, only the right of management to change or create new jobs has been discussed. The difficult question arises in those instances where management attempts by unilateral action to eliminate a job classification. This usually arises when management combines the duties of two jobs into one job and gives it a new title; and there exists in the contract a clause similar to the one first mentioned, which ties in the classifications and rates by reference. Such a situation often develops when a technological change is made, and a part of the job duties are done away with due to this change.

The weight of authority holds that management cannot unilaterally *eliminate* a classification. Arbitrator Whitley P. McCoy discussed this question in *Esso Standard Oil Company*.<sup>6</sup> In that case, the identical clause as first quoted above was in the contract, i.e., "Rates of pay, in the respective classification, shall be set forth on Exhibit A which is hereto attached, and by this reference, made a part hereof." The "Exhibit A" mentioned was headed "Wage Rates," and consisted of 37 pages in two columns, the first column containing the wage rate, and the second column containing the classification. Among the classifications listed was that of "Welder 1st Class" with the rate of \$2.60 opposite. On the same page appeared the classification "Burner 1st Class" with the rate \$2.245 opposite.

The company decided, and notified the union, that it would add the burning duties to the welder classification, giving the burners the option of becoming welders at the higher rate. Those burners not becoming welders were "red circled," which means that a man holding that job now will continue to hold it, but as those jobs become vacant, they will not be refilled. The company was in the process of abolishing the job by not filling vacancies.

Mr. McCoy had this to say: "The question here is not the same

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<sup>5</sup> 23 Lab. Arb. 164 (1954).

<sup>6</sup> 9 Lab. Arb. 569 (1952).

question as the right of the company to abolish jobs, create jobs, or combine jobs. Jobs must be distinguished from classifications. Combining the duties of classifications recognized in the contract is a different thing from combining the duties or job content of various jobs or abolishing jobs.

“The contract does not expressly freeze the classification but the weight of arbitration authority is to the effect that such contract provisions do evidence an intent to agree upon the classifications as well as the rates. If a fair interpretation of the contract provision quoted above, together with Exhibit A, which is a part of that contract, freeze the classifications as well as the rates, then the company was in violation of the contract in adding the duties of the Burner classification to the duties of welder.”

This case is important for it shows that management cannot gradually eliminate a classification, even in case the action taken does not create a hardship upon any employee. The case is also interesting for the explanation given by Mr. McCoy in distinguishing the *Esso* case from that of one decided by him for International Harvester Company.

The attorneys for Esso Corporation called to the attention of Mr. McCoy in their brief, that in case decided by him,<sup>7</sup> he had upheld management in unilaterally changing a job in the classification of Drill Press Operator.

Mr. McCoy explained that in the *International Harvester* case he was speaking of jobs and not classifications. He pointed out that the question was not whether the company could add the duties of some other existing classification to those of a Drill Press Operator, but whether the company could change the various piece work jobs belonging within the classification of Drill Press Operator. He pointed out that decisions relating to jobs within a classification are not in point.

This same principle as stated in the *Esso* case was stated by arbitrator Doyle in *Nebraska Consolidated Mills Company, Inc.*,<sup>8</sup> wherein he said, “The prerogatives of management do not include the right to obliterate classification boundaries.”

The best summation of management’s rights in such a situation,

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<sup>7</sup> International Harvester Co., 13 Lab. Arb. 414 (1949).

<sup>8</sup> 22 Lab. Arb. 785 (1954).

and a summation with which most arbitrators will probably agree, is that given by arbitrator Harold M. Gilden in *Lone Star Steel Company*. He says, "Certainly the existence of a job description and classification in the plant's rate structure provides no assurance that such character of work will always be available. If, through the introduction of improved manufacturing processes or advanced techniques, a given category of work disappears, it would be futile to argue that the company nevertheless is obligated to retain employees in that classification. The decision to abolish specific jobs properly rests with the company, and if the same is dictated by sound operating practices and is free from arbitrary, capricious or discriminatory taint, there is no room for censure. So too, when by reason of technological advancements, job content is so drastically altered as to reduce it to a mere shadow of its former dimensions, the continued survival of trivial job elements does not require the company to persist in assigning employees to that job title. In either of these contingencies, however, the abandoned job description and wage rate are not discarded—they simply remain in a dormant state as an integral part of the rate structure awaiting any further resumption of that type of work."

Just how much of the job content would be considered a "mere shadow of its former dimensions" is hard to say. Certainly, so long as the job functions of established categories persist in significant portions, they may not be abolished through the expedient either of merging them with other jobs, or by combining them under a new title.

If the union will not mutually agree to the combining of the job duties under a new classification, it appears that the only alternative is to await contract negotiations. However, it may be possible to successfully argue before an arbitrator that the reallocation of duties from two jobs creates a new job. Support for such can be found in *Mengel Company, Inc.*<sup>9</sup> In that case an arbitrator held that where a contract gives the employer the right to set a new rate when a new job is created, the employer has the right to set a new rate when he takes certain duties from one job

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<sup>9</sup> 17 Lab. Arb. 361 (1951).

and reallocates them to another, because this reallocation of duties creates a new job. It would have to be argued that the old classification was not eliminated but is only dormant, and is awaiting use should management see fit to realign the duties. I do not think such an argument would carry too much weight with a majority of arbitrators; not because the classification is not dormant, but because this is not a new job.

We shall turn now to a different type of classification grievance and probably the most frequent type of grievance in the operation of a job classification plan. That is whether a given change in job content is substantial enough to warrant a reclassification.

There is no exact guide to help in determining whether a reclassification is called for. Arbitrators generally uphold the union's request for re-evaluation of a job where they find that a job requires considerably more responsibility and discretion, or more time and effort than it did before. Arbitrator Prasow in *Lockheed Aircraft Corporation*<sup>10</sup> says, "... the test is not necessarily the volume or percentage of time devoted to the performance of the new duties, but whether the services are essential to the job rather than merely sporadic, occasional or isolated. The principle involved is that it is improper for an employer to make periodic and recurring use of an employee's skill which is higher than that embodied in the existing job classification, even for a small proportion of the employee's total time." These types of classification grievances arise mainly when a new machine is installed or a change is made whereby not as many employees are needed to cover the job.

The introduction of a new type of machine on a certain job does not necessarily call for a reclassification. However, if it results in a "material and significant increase" in the skill and labor required for the job then the arbitrators will usually say it should be reclassified.<sup>11</sup> It is no defense to say the employee is doing the same type of work, and there has been no limit placed on the amount of work he will do.

Once the union has raised a question of reclassification, and it is turned down by an arbitrator, it appears that the only recourse

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<sup>10</sup> 11 Lab. Arb. 490 (1948).

<sup>11</sup> Hershey Chocolate Corp., 17 Lab. Arb. 268 (1951).



is to bring the matter up again in contract negotiations. The arbitrator in *Federal Bearing Company, Inc.*<sup>12</sup> told the union that there was no reason to re-evaluate a job that another arbitrator had ruled was properly classified under a prior contract. The union did not question the classification during negotiations, and there had been no material change in the job since then.

In the creation of a new job, can management unilaterally classify this job and set the rate?

This problem will arise in those cases where the contract is silent concerning the creation of a new job. Arbitrators are uniform in holding that management does not have the right to unilaterally classify or evaluate a job under the management right's clause; that the union, as the bargaining agent, has the right to negotiate upon the wages that will be paid an employee in the bargaining unit, and this right includes the rate to be paid for a new job.<sup>13</sup>

This same principle applies in the case of a change in the workload of a job that has been previously classified.<sup>14</sup>

A point that may be of interest, and should be mentioned while on this topic, is the question of whether management must permit a union analyst on job classifications to conduct on the job studies.

The U. S. Court of Appeals in the case of *National Labor Relations Board v. Otis Elevator Company*<sup>15</sup> held that collective bargaining provisions of the Labor-Management Relations Act required an employer to make available to a union the time study data in the possession of the employer used in setting up work standards. It further held that these statutory provisions did not impose a duty upon the employer to open its plant to union representatives to enable them to make new time studies for the purpose of obtaining data on which to formulate new standards.

The employer, relying upon this case, refused to allow the union's analyst to study a disputed job which was pending a hearing as a classification grievance. The union filed a refusal to bar-

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<sup>12</sup> 22 Lab. Arb. 721 (1954).

<sup>13</sup> *Linde Air Products*, 2 Lab. Arb. 223 (1946); *Wetter Numbering Machine Co.*, 13 Lab. Arb. (1949); *Crossett Lumber Co.*, 14 Lab. Arb. 544 (1950); *Virginia and Carolina Chemical Co.*, 23 Lab. Arb. 228 (1954).

<sup>14</sup> *Wheeler Insulated Wire*, 23 Lab. Arb. 782 (1955).

<sup>15</sup> 208 F. 2d 176 (1953).

gain complaint and the National Labor Relations Board trial examiner, whose findings are pending review by the board, found that the company violated the Act. The trial examiner distinguished this case from the circuit court case in that the information sought in the earlier case was not related to a particular grievance, whereas in this case it was. In the examiner's opinion, the company had refused to bargain collectively.

A question that may arise at various times is whether an employee can be downgraded. Occasionally an employee is paid at the rate of a higher classification than he is actually working. Most arbitrators are likely to permit the downgrading if it is clear that the employee actually belongs in a lower classification. However, if the company delays an unreasonable length of time after discovering the error, the arbitrator may not allow the downgrading.<sup>16</sup> In the case of *National Tube Company*<sup>17</sup> an arbitrator decided that six years was too long a period to wait before correcting a classification error. He pointed out that the wrong classification had continued for several years as a direct result of the failure of management representatives to discover and correct the error earlier. The arbitrator agreed with the company that it had the right to correct its mistakes, but said that management had more than reasonable opportunities in the past to make adjustments.

What right does management have to assign employees work outside their job classification?

When the contract establishes job classifications, arbitrators generally hold employers to the observance of classification lines in the assignment of work.<sup>18</sup> Exceptions to this rule have been permitted, however, in case of emergencies,<sup>19</sup> or when the assignment outside a classification was only temporary.<sup>20</sup> It has been held that an assignment for less than a week would be considered a tempo-

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<sup>16</sup> *Carnegie Illinois Steel Co.*, 17 Lab. Arb. 5 (1951); *Erie Forge and Steel Co.*, 22 Lab. Arb. 551 (1954).

<sup>17</sup> 7 Lab. Arb. 575 (1945).

<sup>18</sup> *Chrysler Corp.*, 14 Lab. Arb. 163 (1950); *Sayles Biltmore Bleachers Inc.*, 17 Lab. Arb. 451 (1951).

<sup>19</sup> *Caterpillar Tractor Co.*, 19 Lab. Arb. 802 (1952).

<sup>20</sup> *Dayton Maleable Iron Co.*, 17 Lab. Arb. 666 (1951); *Neville Chemical Co.*, 22 Lab. Arb. 358 (1954).

rary assignment.<sup>21</sup> One arbitrator, however, while upholding the right of an employer to use employees in one classification on work in another classification temporarily, nevertheless told the employer that it was bad labor relations to do so without consulting the union.<sup>22</sup>

### CONCLUSION

In summarizing the foregoing, the controlling principles in the arbitration of classification grievances appear to be: that unless the contract prevents such, there is nothing to prevent an employer from establishing new classifications or changing old ones; that if the classification plan is tied into the contractual relationship, the employer can change the job content, abolish jobs, and create new jobs, subject to the grievance procedure. However, he cannot eliminate a job classification without mutual consent of the union, and when changes in job content are made, a reclassification of the job will be allowed by most arbitrators if a reclassification is requested. In the installation of a new job, the employer must bargain with the union on the rate to be paid; and, except in cases of emergency or temporary change, arbitrators hold that an employee shall work only in his classification.

## II

### CRITERIA FOR THE SETTLEMENT OF WAGE DISPUTES

*Chris Dixie\**

**A**RBITRATION has not been necessary for the settlement of wage disputes in most of American industry and during most American history. However, in certain industries, especially utilities and others affected with a public interest, and at some times, especially in war and during sharp economic fluctuation, arbitration of wages has been found preferable to work stoppage.

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<sup>21</sup> *Huntington Chair Co.*, 23 Lab. Arb. 581 (1954).

<sup>22</sup> *Bethlehem Steel Co.*, 8 Lab. Arb. 113 (1947).

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In this article, the merits and demerits of various criteria used in the trial and decision of wage arbitration cases are not discussed. Instead, this is a brief survey to identify and explain the various factors which have been in fact prominent or instrumental in the shaping of arbitration awards.

Fortunately for this purpose there has recently been published a work by Irving Bernstein entitled *The Arbitration of Wages*†—an excellent monograph which not only analyzes the historical merit of wage arbitration but also collates on a statistical basis a substantial group of arbitration awards which have been handed down in this country.

Since this paper is primarily a book review of Mr. Bernstein's work, it ought to be recognized as such. And I wish to add that any person interested in taking any practical steps with reference to wage arbitration will not want to overlook close review of this volume.

Mr. Bernstein compiled his figures by extracting from the first fourteen volumes of the Labor Arbitration Reports every case pertaining to wage arbitration—209 in number. The period of time covered is from V-J Day to the Korean War (1945 to 1950), a period of substantial economic fluctuation with an abundant sampling of both wartime and peacetime conditions. From the 209 awards considered he designed an inventory of contentions and rulings something in the nature of a box score which reflects how various arguments have been received in these cases.

In the beginning, it should be noted that the submission agreement is the all important document. It may fix and determine the criteria and therefore the course of a wage arbitration, or it may permit the litigation to roll over a very wide area of miscellaneous economic argument.

In addition, the submission agreement, if tightly drawn, can profitably confine the arbitrator to a consideration of the difference between the parties. For example, if good faith and serious negotiations have resulted in a last offer by the union of a fifteen

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† BERNSTEIN, IRVING, *THE ARBITRATION OF WAGES*, University of California Press, Berkeley, California (1954).

cent increase and a last offer by the employer of ten cents, the arbitrator may well be confined to the five cent difference in his award.

## I

Turning now to the factors which have most often been cited by the parties and relied upon by the arbitrator, we find that far and away the most prominent factor has been that of comparison. This includes comparison of wage levels or wage changes in other firms in the same industry, other industry, other plants of the same company, other locals of the same union or other unions in the same or similar jurisdiction.

Comparisons of wages with other firms in the same industry account for fully 50% of the arbitrator's decisions. Another 10% of the cases have been decided by comparison between industries. Therefore, in a total of 60% of the cases the comparison factor has been the decisive element. It has overcome a great variety of contrary arguments and seems to be regarded by the arbitrators as the most reliable and sensible of all tests.

It is easy to make strong arguments against such predominance of this factor. As a practical matter, however, it ought to be acknowledged that the arbitrators are doing no more than reflecting the importance which has been voluntarily accorded to this subject by industry and labor at the bargaining table for a good many years. No one familiar with labor relations will deny the close, sometimes microscopic, attention that both sides have given to inter-industry and intra-industry comparisons. In some quarters it has become fashionable to go so far as to entertain wage inequity arbitrations, that is, to allow regular arbitration of a union's claim that a given job or jobs is not at a par with the wage paid by selected competitors for the same or similar job.

## II

The second most prominent factor in the decisions has been the cost of living, i.e., a movement up or down in some selected index of consumer prices. This argument has been advanced by the union in 27% of the cases and by the employer in 8% of the

cases. It has been adopted as the primary basis for decision by the arbitrators in about 35% of the cases. In a very rough way it may be said therefor that cost of living has become a prominent factor in the arbitrators' minds practically every time the subject has been raised by either side.

Here again it is fair to say that the arbitrators are reflecting the facts of life at the bargaining table. The decisions reflect a few scattered attacks on the various systems of determining consumer prices, but these arguments have made little or no headway.

### III

The next factor of prominence in the field of wage arbitration is the matter of financial condition of the employer i.e. the firm's ability to pay, inability to pay, or its competitive position, price and otherwise. The importance of this factor, however, is mostly in the fact that it has been urged by employers in 32% of the cases. Unions have tendered it in only 3% of the cases. It has been adopted by the arbitrators in only 4% of the cases as the decisive factor, which is strongly suggestive that the employers' argument on this score has not heavily prevailed at least in this sampling of cases which is weighted with utility cases. Arbitrators have almost always recognized this factor as one of weight, but they have seldom been willing to accept it as a permanent depressant on wages of sufficient weight to overcome all other facts in the case. Especially in the public utility cases, the reasoning seems well worked out that the question of a proper wage settlement must not be controlled by ability to pay because the arbitrator may not assume that the utility regulatory body will not do the fair and proper thing on rates.

The above three criteria are the only really frequent factors in the reported cases. From here on, there is miscellany of arguments which may be quite pertinent indeed to the specific case but which have actually been selected as the decisive factor in less than 3% of the cases.

### IV

Differential features of the work have been considered. These include special conditions of employment such as skill, physical

strain, availability of overtime, the attractiveness of fringe benefits, etc. Employers particularly have urged this argument in about 11% of the cases, but arbitrators have accepted it in only 1%.

## V

The argument of substandards is made. The claim is that the existing wage rates are below a proper standard of living and should be raised to approach or reach some established budget level. Unions have urged it 9% of the time but arbitrators have accepted it only 2%.

## VI

The factor of productivity involves the argument that output per man hour has risen or declined within the firm or the industry. Although this factor has received trivial weight up to now, it is my opinion that it is one which is becoming more and more prominent at the bargaining table and one which will inevitably be reflected in arbitrators' awards as time passes. In 1948, the General Motors-UAW Agreement incorporated the idea of a 2% annual improvement factor. This 2% is a fuzzy figure which has been arrived by some economists from incomplete and fragmentary data as the national average of improvement in all industries from year to year. Productivity has also come into special consideration in the growing variety of incentive plans adopted by large segments of American industry. Above the standard pay for a "fair day's work" many employers have been willing to pay to their employees a participating share in extra production resulting from special effort. As this practice increases, it seems almost a certainty that the future will see more emphasis on the idea of productivity in the arbitration awards, especially where incentive programs do not exist.

Productivity increase however, is a combination of gradually increasing skill on the one hand and modernization and improvement of equipment on the other. The subject becomes easily embroiled in many serious arguments that push in opposite directions. The workers, of course, want higher wages, but on the other hand consumers are entitled to expect lower prices from our tech-

nological progress. Management expects higher salaries and last but not least, the investors in this new equipment want higher dividends. No doubt productivity is just as difficult to apply as it is easy to recognize as a factor.

## VII

Hours of work is a factor. This involves the regularity of employment or the length of the work week. In the construction industry particularly, the unions have argued that special consideration must be given to the fact that employment is irregular and greatly affected by weather conditions. Employers have occasionally brought forward the argument that weight should be given to the fact that they maintain the practice of giving the employees regular overtime work. Neither argument has scored very often.

## VIII

General economic considerations include the argument that a particular wage adjustment, up or down, would have a favorable or unfavorable effect upon the economy as a whole. Undoubtedly, statesmanlike, this consideration has seldom been able to penetrate into the practical affairs of men bargaining wages and of arbitrators dealing with cases one at a time.

## IX

The union behavior argument is that the union strike record is good or bad and should be rewarded or penalized. This argument has made little progress.

## X

Manpower attraction is the argument that existing wage rates are high enough to recruit the necessary labor supply, hence, no increase is warranted. This has been largely ignored.

## CONCLUSION

In brief summary therefore the record appears to be that parties who submit wages to arbitration are more apt to deal with



the relevant and the weighty if they concentrate on comparisons and cost of living. In my opinion, we will hear more in the future from the productivity argument. The other factors listed are of limited and special application to unique situations, few and far between, and have not had serious effect on the main current on wage arbitration.

I will add this one observation: arbitration of wages has been widely suspected as an impractical excursion into abstract ideas of justice and economics unrelated to the hard facts of business life. However the record is substantially otherwise. If one phrase will describe the results so far, it is that wage arbitration awards tend to reflect faithfully the wage picture at the bargaining table.

### III

#### THE ARBITRATION OF DISCHARGE CASES

*Guy L. Horton\**

##### PREPARATION BY COUNSEL

**A**S a preliminary to this subject, it should be observed that the respective rights of the parties as well as the jurisdiction of the arbitrator may vary according to the language of the particular contract. The most common provision in regard to discharge in contracts in this area is the "just cause" provision. This reserves to management the right to discharge for just cause and extends to the employee the protection that he will not be discharged except for good cause. In view of these corresponding rights and the fact that discharge is recognized as the extreme industrial penalty, it is only natural that discharges are the frequent cause of arbitration.

The joint authors of one book on the subject of labor arbitration<sup>1</sup> make the observation that perhaps the greatest single cause of disputes is the imposition of discipline such as discharge or

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<sup>1</sup> UPDEGRAFF AND MCCOY, *ARBITRATION OF LABOR DISPUTES*, 131 (1946).

layoff. However, in a study of ten years of grievance arbitration between the Bethlehem Steel Company and the United Steel Workers of America by the United States Department of Labor, completed in 1954, which involved a total of 1003 grievances, only 89 involved discipline. Perhaps there has been a gradual reduction in this type of dispute, but they are by no means infrequent, and are probably the most hotly contested type of labor-management dispute.

Discharge cases almost invariably involve a disputed question of fact, and it necessarily follows that preparation by counsel is largely confined to assembling the facts in the case. This involves interviewing those persons who have knowledge of the circumstances causing the discharge. It is only by interviewing such persons that counsel for the parties obtain a proper understanding of the issue.

Often counsel is not engaged until the case has been taken to arbitration, and due to the time consumed by the preliminary steps of the grievance procedure, he may not have the opportunity to interview witnesses until some time following the discharge. However, as in any type of investigation, it is important for witnesses to be interviewed as soon as possible. Written statements should be taken from the witnesses while the facts are fresh in their minds. An honest witness may be afflicted by a poor memory. For that reason a wise counsel never depends on a witness testifying in exact conformity with his initial statements. He will have a final interview with his witnesses just prior to the hearing.

While, doubtless, there is a division of opinion on the subject, most arbitrators are ordinary human beings with normal reactions. It is therefore advisable in the final interview with witnesses to discuss with them the importance of their demeanor while testifying. It should be emphasized to them that the rights of the party who calls them depend to a great extent upon their ability to relate fairly and intelligently the facts as they understand them.

If plant rules are involved, counsel should advise himself of the same, the date and manner of their publication, and whether under like circumstances they have been enforced. This may enable him to prove or disprove discrimination concerning the

record of the employee, and this may prove important to the case.

The discharge may be based on the charge of negligence or incompetence in regard to the performance of the employee's duties, and this may involve a mechanical or chemical process concerning which counsel and, incidentally, the arbitrator has little or no understanding. In this type of case it is essential that the advocate seek the assistance of those who understand such operations so that he may know how to develop the facts and present them as clearly as possible to the arbitrator.

Most collective bargaining agreements contain language which provides, in substance, that upon reinstatement of a discharged employee he shall be made whole for wages lost. Some arbitrators are of the opinion that under such a provision earnings by the employee subsequent to the discharge are not deductible, but it appears that the majority believe otherwise. For this reason counsel for both company and union should be able to establish the amount of earnings of the discharged employee subsequent to the discharge. The company does not imply a weakness in its case by introducing evidence of this nature. As in other fields of law careful preparation is vitally important and is usually a necessary precedent to a convincing presentation.

### BURDEN OF PROOF

Ordinarily in the arbitration of labor disputes there is no burden of proof resting on either party. But in regard to discharge cases there appears to have emerged the rule that the burden of proof rests upon the company to establish the commission of the offense by some quantum of required proof.<sup>2</sup>

There is authority for the view that when the company has established the commission of the offense, the burden of proof shifts to the union to show that the penalty of discharge is too severe for the act committed.<sup>3</sup> There is a variety of opinion as to the quantum of proof necessary to sustain a discharge. It has been

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<sup>2</sup> Campbell, Wyant and Cannon Foundry Co., 1 Lab. Arb. 254 (1945); Armen-Berry Casing Co., 17 Lab. Arb. 179 (1950); Bell Aircraft Co., 20 Lab. Arb. 448 (1953); Swift and Co., 12 Lab. Arb. 108 (1948); American Smelting and Refining, 7 Lab. Arb. 147 (1947); Carolina Coach Co., 20 Lab. Arb. 451 (1953).

<sup>3</sup> Swift and Co., 12 Lab. Arb. 108 (1948); Carolina Coach Co., 20 Lab. Arb. 451 (1953).

held to be by "a fair preponderance of the evidence,"<sup>4</sup> "decisive factual proof,"<sup>5</sup> "clear and convincing evidence,"<sup>6</sup> "evidence sufficient to convince a reasonable mind of guilt,"<sup>7</sup> and "beyond a reasonable doubt."<sup>8</sup>

There is also authority to the effect that an arbitrator may require a higher degree of proof in one case than in another.<sup>9</sup> One author has made the statement that if the agreement contains a specific requirement of "just cause," a higher degree of proof may be required than otherwise would be the case.<sup>10</sup> The same author states that in the final analysis it would appear that the degree of proof required will depend upon the individual arbitrator's view of the seriousness of the charge, the equities reflected by the circumstances of the case, and the discharge clause of the collective bargaining agreement. There is no doubt that the question of burden of proof as well as quantum of proof may depend on the provisions of the contract, and most likely this accounts at least in part for the divergent views on the subject as stated in awards.

It is the opinion of the writer that the majority of arbitrators take the view that under a "just cause" type of agreement the burden of proof is on the company to prove that the discharged employee committed the act for which he was discharged by a fair preponderance of the evidence. It is also believed that when guilt is established or admitted a like burden of proof is on the union to show that the penalty of discharge is too severe for the act committed.

### PROCEDURE

When the arbitration hearing has convened, it is customary for the parties to first furnish the arbitrator with a list of appearances. If there is not a submission agreement, the parties should

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<sup>4</sup> Campbell, Wyant and Cannon Foundry Co., 1 Lab. Arb. 254 (1945).

<sup>5</sup> American Liberty Oil Co., 5 Lab. Arb. 399 (1946).

<sup>6</sup> Aviation Maintenance Corp., 8 Lab. Arb. 261 (1947).

<sup>7</sup> Stockham Pipe Fittings Co., 1 Lab. Arb. 160 (1945).

<sup>8</sup> A. S. Beck Shoe Corp., 2 Lab. Arb. 212 (1944).

<sup>9</sup> American Smelting and Refining Co., 7 Lab. Arb. 147 (1947).

<sup>10</sup> ELKOURI, HOW ARBITRATION WORKS, 167 (1952).

furnish him with a copy of the contract so that he may be apprised of the pertinent provisions relating to discharge.

Following this, each of the parties should make opening statements briefly outlining their respective positions in regard to the dispute. At this point there is sometimes injected the question of which party has the duty to proceed with the evidence. As a general proposition, the party having the burden of proof has the duty to proceed with the evidence, while the duty to proceed, on the other hand, is generally considered to rest with the party who advanced the grievance. If this question is raised, it would appear to be a proper ruling, supported by custom, to require the union to proceed to the extent of showing that the employee was discharged and at least a denial by him of any known justification for discharge. The duty of proceeding with the evidence should not be confused with the burden of proof.

There is valid criticism of the rule that the union should have the burden of going forward in a discharge case. The union may not know all the facts on which the company relies for the discharge. In blindly attempting to anticipate all the evidence on which it believes the company may rely, the union may waste a great deal of time on matters which in the end prove irrelevant to the issue, or it may be compelled to put on its principal case in rebuttal. It is obvious that a discharge case would require less time and be presented with greater clarity if the company should assume the duty to proceed. This might be opposed by the union in the belief that it is to its advantage to open and close. It has been suggested that arbitrators have the right to require the company to open,<sup>11</sup> but in the absence of an agreement as to procedure the writer doubts that an arbitrator has this authority.

If the company enters a plea to the jurisdiction of the arbitrator based on some proposition such as timeliness, the jurisdictional question should be presented at the outset of the hearing. If the arbitrator is satisfied that he does not have jurisdiction, the plea will be sustained and the hearing terminated. If he is in doubt, he will reserve his ruling and proceed to hear the case on its merits.

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<sup>11</sup> UPDEGRAFF AND MCCOY, *op. cit. supra* note 1, at 97.

The procedure in regard to the introduction of testimony and evidence is similar to that followed by courts, with the exception that arbitration hearings are informal in nature and legal rules of evidence are not strictly enforced. The practice of accepting virtually anything in the way of evidence offered by either party often shocks the lawyer without former experience in labor arbitration, and he will consume considerable time in voicing objections unless assured by the arbitrator that such evidence will be given only such weight as it rightly deserves. In overruling objections to evidence, such as affidavits and hearsay, the arbitrator usually advises the parties that he is accepting such only for "what it is worth." If either party tenders evidence of "offers of compromise," the arbitrator will advise the parties that such will be given little or no consideration, and that if the parties make a practice of offering this type of evidence, it will destroy the effectiveness of the grievance procedure preceding arbitration. If parties know their offers of compromise will be so disclosed, such naturally erects a barrier to amicable settlements which otherwise may be reached.

After the parties have completed the introduction of evidence they have the privilege of argument. They may agree upon the amount of time to be used by each side or ask that such be fixed by the arbitrator.

One or both of the parties may ask for time within which to file post-hearing briefs. Occasionally one of the parties will object to the filing of post-hearing briefs. The rule seems well established that either party may claim this right, and if one party does, the other has the choice of filing a post-hearing brief or of permitting his opponent's brief to go unanswered. The usual arrangement in regard to the filing of briefs is for the parties to agree that each will deposit his brief in the United States mail on the same agreed date.

### THE DECISION

Making the decision, of course, concerns the most important and difficult part of the duties of an arbitrator. Strong rights exist on both sides of a discharge case, and the burden of making the decision is often a very heavy one.

Sometimes the first and principal question is whether the discharged employee committed the alleged offense. This involves the evaluation of the evidence and, usually, the credibility of witnesses.

In determining the weight of the evidence an arbitrator will consider those same rules which are set forth by a court in its instructions to a jury. Where there is an issue in the evidence involving the credibility of witnesses, the average arbitrator will instinctively call to his assistance the various elements contained in a court's instructions to a jury on that subject.

It should be observed that a witness may be entirely honest in testifying to facts he believes to be true and yet be mistaken. A witness may be completely truthful and know the facts but through lack of ability to express himself, appear hesitant or uncertain and leave the impression to some that he is testifying falsely. There is also the witness who is glib and assured, and yet is not telling the truth.

Sometimes an arbitrator is confronted with the problem of having two witnesses with equal appearance of credibility testifying in direct opposition to each other under circumstances that demand the conclusion that one is unquestionably lying. It has been the experience of this writer that the answer to which witness is falsifying is not often found in the major points of their testimony, for such a witness has prepared himself on these, but will be found in their testimony on minor or collateral matters.

In order to resolve the question of the credibility of witnesses the arbitrator must depend, in the final analysis, on whatever native ability plus whatever skill and training he may have acquired to arrive at the truth, as must every person be he arbitrator or judge, who is placed in a similar position.

A discharge case may involve only the question of guilt, for the offense may be of a type that, if committed, no reasonable person would contend that discharge was not the proper penalty. Other cases will involve the issue of whether discharge is the proper penalty for an offense proved or admitted. Where this is the question the arbitrator must of necessity weigh the nature of the offense against the severity of the penalty of discharge. In doing

this he must give consideration to the rule that it is primarily the function of management to decide upon the proper penalty but that this does not mean that the company's discretion can never be questioned. The company's discretion must not be abused, but must at least be reasonably and fairly exercised.

The correct answer may be found in the company's actions in the past in regard to similar wrongdoing, but even this principle has its imperfections. In failing to assess the penalty of discharge in all cases involving a particular infraction, the company may either discriminate among employees or subject itself to such a charge. But to hold that management must always assess the same penalty for the same offense ignores the fact that there may be either mitigating or aggravating circumstances. The rigid application of the same penalty for the same infraction without regard to all the circumstances of the case is not to the best interests of either management or the employees. The test is that of fairness and consistency, considering the facts of the particular case.

The question of whether the penalty of discharge is appropriate punishment cannot be generalized. As stated by one arbitrator, what constitutes "just cause" must be decided on the basis of the individual merits of each case.<sup>12</sup>

An arbitrator should remain mindful of the rights of management in regard to determining the appropriate penalty, but management, by agreeing to submit to an arbitrator the question of whether the discharge of an employee was for "just cause," vests in the arbitrator the right and duty to determine this question.

The proper guide for deciding the question has been stated by arbitrator Harry H. Platt as follows:

What a reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances, and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just.<sup>13</sup>

The jurisdiction of the arbitrator to reduce penalties, including that of discharge, is often the subject of dispute. While certainly the arbitrator should not compromise his convictions and commute

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<sup>12</sup> Power Equipment Co., 2 Lab. Arb. 558 (1945).

<sup>13</sup> Riley Stoker Corp., 7 Lab. Arb. 764 (1947).



a discharge to suspension in a vain attempt to please both parties, his jurisdiction to substitute an intermediate penalty under a "just cause" contract appears to be established by a great majority of awards.<sup>14</sup>

In the study of ten years of grievance arbitrations between the Bethlehem Steel Company and United Steel Workers of America, which involves a "just cause" contract, of the 89 grievances involving discipline, 16 were granted, 15 partially granted, 54 denied and 4 dismissed as untimely.

In a study by Professor J. M. Porter, Jr., of 197 discipline cases during the years 1946 and 1947, the discipline was mitigated in 50 per cent of those cases in which management was not completely sustained.<sup>15</sup> This lends support to those who contend arbitrators all too frequently try to take a middle course. An experienced arbitrator will realize that while the employee who deserved to be discharged may appreciate clemency, neither the company nor union will be deceived and will thereafter be hesitant to submit their rights to him for decision.

There are cases where the employee is guilty of misconduct which merits punishment but not to the extent of discharge. Certainly under such circumstances he should neither be discharged nor permitted to escape punishment, and an intermediate penalty would appear to be the only proper solution.

Facts usually considered by arbitrators in connection with the penalty of discharge are the seriousness of the offense, the past record of the worker, plant rules, notice of the same and the past practice of the company in regard to similar misconduct.

If the parties prefer that a discharged employee be either reinstated or his discharge confirmed, the arbitrator's jurisdiction can be so confined by the simple expedient of adding appropriate language to the contract, including the same in the submission agreement, or by orally advising the arbitrator that the parties have so agreed.

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<sup>14</sup> Klauser Cooperage Co., 14 Lab. Arb. 838 (1950); Gordon Pew Fisheries, 11 Lab. Arb. 15 (1948); Curtis Wright Corp., 11 Lab. Arb. 139 (1948); Victor Industries, 11 Lab. Arb. 997 (1948); Goodyear Clearwater Mills, 12 Lab. Arb. 1 (1949); Calvine Cotton Mills, 12 Lab. Arb. 21 (1949).

<sup>15</sup> Porter, *The Arbitration of Industrial Disputes Arising From Disciplinary Action*, PROCEEDINGS OF SECOND ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, 262 (1949).