Employee Harmony *In Action*

Case Histories in Successful Labor Relations

Prentice-Hall, Inc.
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Case History No. 1

Qualifications for Promotion

Two job openings and 10 men who think they ought to get them! That was the problem that faced department head Bill Dean. No matter how long he put off tackling it, the problem was still the same: How could he promote two men and keep the other eight from feeling aggrieved that they weren't upgraded?

Sure, the union contract said promotions would be based on seniority if ability and other qualifications were equal. But that wouldn't stop a senior employee from feeling abused if he were by-passed for a junior. Nor would a junior worker be content to see a senior employee promoted if he thought his own ability and qualifications were superior.

Promotions were a headache. An unwise decision now would set off a chain of grievances that the company and union might spend the next six months settling. Employee morale would be undermined; relations with the union would be strained.

Dean wanted to make a fair decision under the contract and to prepare himself to handle future promotion problems. Arbitration awards probably have set some principles concerning qualifications for promotion, he thought, so he turned to them for guidance.

Employer Is the Judge.—Dean found that arbitrators uphold management's right to decide what qualifications an employee needs for promotion. Reason: Management has the sole responsibility for operating the business [Twin Coach Award, 1 ALAA ¶ 67,097].

⋙OBSERVATION→ Most union contracts recognize the employer's right to establish promotion standards. The right may be qualified: consultation with the union may be required. And of course the union can challenge management's actions through the grievance procedure.

It's also management's job to determine the relative physical fitness and ability of employees [Virginia Bridge Award, 2 ALAA ¶ 67,817.2]. And management is the sole judge in the absence of contract limitations [Gardner Richardson Award, 2 ALAA ¶ 67,747].

⋙OBSERVATION→ An employer may be the judge of whether a particular employee can fill a job, but if an arbitrator thinks the employer's decision was wrong, he'll reverse it.

Seniority as an Eligibility Requirement.—Management doesn't like to base promotions on length of service alone, but unions generally hold out for seniority. So they may come up with a contract in which management promises to give "due consideration" to seniority when promoting employees. According to one arbitrator, this obligates the employer to weigh length of service against merit or lack of merit when going down a list of employees eligible for promotion. A company that passed over 11 admittedly "good men" and promoted the 12th on the seniority list wasn't giving "due consideration" to seniority [Charlottesville Woolen Mills, 2 ALAA ¶ 67,794].

What Does "Competency" Mean?—Management fears that efficiency will suffer and workers will tend to do just enough to "get by" if seniority alone governs promotions. So the term "competency" often turns up as a requirement for promotion. One arbitration board says it simply means "qualified to perform the work." Therefore, the board found that the alleged excessive absences of an employee had nothing to do with her competency.

The employee had the necessary seniority, skill and experience to be promoted. Her absences were due principally to illness; the company did not claim that they were unjustifiable. Pointing out that other methods of discipline are available for continuous and inexcusable absences, the board ruled it was unfair to penalize the employee by failing to give her a deserved promotion [Indiana Bell Telephone Award, 2 ALAA ¶ 67,957].

»SUGGESTION→ **"Competency" is a general term. If an employer feels that other qualities such as dependability are important considerations for promotion, he should spell them out in his contract.**

When a contract states that seniority will determine promotions when several employees are competent, the employer can't compare the relative degrees of competency of two or more workers. He should promote the worker with the most seniority [Pittsburgh Plate Glass Award, 2 ALAA ¶ 67,800.7].

How to Measure Qualifications.—One of the snares in a promotion clause providing that seniority prevails if ability and other qualifications are equal is: How can management prove that a worker is or isn't qualified?

One company thought a cutter man on a paper machine wasn't qualified for the job of electrical inspector. The union insisted that he should have the job anyway. But they agreed to have the worker answer 20 questions testing his knowledge and ability. He gave one partially correct and four correct answers. Said the arbitrator: The worker clearly has neither the experience nor the education to qualify for the job and lacks the ability to do the work [Gardner Richardson Award, 2 ALAA ¶ 67,747].

Although management has a right to test its employees' qualifications, it should be certain that the tests are uniform, fair and reasonable. One company tested two senior employees merely through general observation of their work; it gave actual tests to six junior workers and promoted them on the basis of those tests. The arbitrator ruled that the senior employees were entitled to be tested the same way. If their ability equalled the ability of the previously promoted workers, they were to be promoted and given the back pay differential [Curtiss-Wright Award, 2 ALAA ¶ 68,011.11].

A test of an employee's ability wasn't reasonable when it was based on his output on two or three unfamiliar operations. His foreman overlooked the fact that he had had no opportunity to reach productive capacity on these operations [Atlas Imperial Diesel Engine Award, 1 ALAA ¶ 67,209.5].

Merit Rating to Prove Qualifications.—When seniority determines promotion only if the *relative* abilities of two employees are equal, the senior worker who can do the job doesn't necessarily get it. The employer must actually *compare* the abilities of the employees. One way of measuring

relative abilities is by an impartial merit rating system. Any comparison made as a result of a fair merit rating plan can determine which employee should be promoted [Acme Steel Award, 2 ALAA ¶ 67,899].

But don't be misled into thinking that any type of merit rating will fill the bill. Arbitrators will examine your merit rating system closely; if it doesn't measure up, you're out of luck. In the American Potash and Chemical Award [2 ALAA ¶ 67,802] a rating sheet was considered an inadequate basis for promotion. The arbitrator's reasons for rejecting the rating sheet will give you an excellent idea of the differences between valid and invalid rating plans. Here they are:

1. The raters weren't familiar with the work of the men they rated.
2. The raters objected to rating men with whose work they were unfamiliar.
3. The raters knew little about the rating form and had almost no training in its use.
4. The rating covered no specific period of time.
5. It was unjust to base a promotion on a single rating in a work record of over 10 years.
6. The low-rated employee wasn't given a chance to see and discuss his ratings with the raters to correct possible errors of fact.
7. There were no dependable standards, factor definitions or yardsticks by which to measure the relative importance of the various factors as well as the qualifications of the employees.
8. The factors contained in the rating form didn't conform with the factors in the promotion clause of the contract.

»OBSERVATION→ **Merit rating plans [¶ 30.1] are generally tied up with systematic promotion programs. Systematic promotion also requires a fairly extensive and coordinated personnel program. Charting the lines of advancement is meaningless unless the jobs have been defined and rated so that the levels of responsibility are clear. Related personnel records also are needed to provide summaries of the facts on which promotions are based.**

Physical Fitness as an Eligibility Requirement.—Frequently, considerations other than an employee's ability and seniority enter into the promotion question. For example, an employer would hesitate before promoting an employee whose physical fitness for a job was questionable. An employer who had received recent medical testimony that a worker's health, and even perhaps his life, would be seriously endangered by another job could refuse to promote the worker to that job. The employer's decision wasn't to be influenced by the employee's belief that he was in good health and could handle the job, by his wish to be tried out for the job, and by the fact that previous medical diagnosis might have been wrong [Bethlehem Steel Award, 2 ALAA ¶ 67,906.3].

Trial Periods.—Some companies resolve doubts about an employee's qualifications by allowing him a trial period—usually 30 days—in the higher job. If he doesn't make good, he steps back into his old job.

This provision may be written into the union contract. At the Lone Star Gas Co., for example, the contract stated that if there was any doubt

as to the senior employee's qualifications for a promotion, he should be given a 30-day trial. If his qualifications still were in dispute at the end of that period, the issue was to be settled through the grievance and arbitration procedures. An arbitrator ordered the company to comply with this provision when a senior employee claimed he could do a higher job and the company maintained that he couldn't [2 ALAA ¶ 67,966.2].

One arbitrator has ruled that when the contract contains no provision for a trial period, the employer doesn't have to grant one [Imperial Lighting Products Award, 2 ALAA ¶ 67,859.1]. On the other hand, in the Ford Motor Award [1 ALAA ¶ 67,269.4], the arbitrator held that a trial period should not be denied when there is a reasonable doubt about the employee's qualifications and when the trial would cause no serious inconvenience.

Similarly an arbitrator ordered the North Carolina Pulp Co. to give an employee a three-month trial to settle doubts about his ability and his right to advancement [1 ALAA ¶ 67,122.2].

Case History No. 2

Demotions

Because demotions often cause so much resentment and dissatisfaction, many companies avoid downgrading employees at all cost. But some day a company may wake up and find that its no-demotion policy is whittling down its efficiency.

That's what happened recently at one company. Top management realized that by letting men go rather than demote them, it was losing some of its most capable workers. And more discharge disputes than ever before were clogging the grievance machinery.

The industrial relations director was instructed to dig into the demotion question, to find out when and how other companies downgraded employees, to learn what pitfalls to avoid. He asked us for help, and we used arbitration awards as our guide in giving him some assistance.

»OBSERVATION→ We limited our first investigation to the general subject of demotions and left the special problems of downgrading supervisory employees for another session. Case History No. 3, page will give you the results of our study of supervisory demotions.

Demotions for Lack of Work.—A company may demote employees when a decline in work makes it necessary to reduce operations or shut down a department. The Crocker-Wheeler Co. faced a situation like this when material shortages made the services of two professional employees unnecessary. These engineers each had been with the firm over 20 years. They had risen from the ranks, and the company didn't want to turn them out. So it demoted them into the bargaining unit even though, as professional employees, they weren't covered by the union contract.

The union protested. It argued that the contract limited the right to return to the bargaining unit to foremen and other supervisory workers. It saw in these demotions a threat to the integrity of its seniority system since two production workers probably would be displaced to make room for the engineers.

The arbitrator overruled the union's objections and said the company could demote the engineers into the bargaining unit because direction of the working forces was a management prerogative. But the engineers couldn't retain their accumulated seniority since the contract made no provision for this. Their seniority in the bargaining unit would begin with the date of demotion [2 ALAA ¶ 67,584].

➠OBSERVATION→ This gives the demoted engineers very little job security. Since they would have the least seniority in the bargaining unit, they could be the first laid off. But the demotion does give the company a chance to keep these workers on the payroll at a lower rate of pay and to have experienced engineers ready to step back into their own jobs when production perks up.

Your union contract may prevent you from downgrading workers. In the Merrill-Stevens case, an arbitrator ruled that the company could not demote employees for lack of work because the contract provided that employees temporarily transferred to lower jobs should receive their regular pay rates. The company could lay the workers off, and the workers could then exercise the option given them by the contract and accept the layoff or assert their seniority rights in another classification [2 ALAA ¶ 67,946].

➠OBSERVATION→ The state of the local labor market may affect the demotion situation. If skilled workers can easily obtain jobs at the same pay rate elsewhere, they may object to being downgraded to a lower-paying job in your company. You may not even have to discharge them; they may quit voluntarily. Another factor that may influence your workers' attitudes toward downgrading is whether the demotions are for short or long periods. If a demotion is a short-term one, it may pay the worker to stay on the job and retain his seniority rights and other benefits.

Demotions for Lack of Qualifications.—A frequent cause for demotion is unsatisfactory performance on the job. Perhaps an employee once was qualified, but because of age or physical disability no longer can do the work. Or perhaps management erred in promoting or placing a worker who is perfectly capable of turning out a good job in a lower classification but now is way out of his depth.

Arbitrators say that management has a right to determine that it made a mistake in promoting a worker and, therefore, can demote him. The Square "D" Co., for example, was permitted to demote an employee who was a good assembler but who, as a leader, caused the company considerable expense and caused the workers under him to earn less than they should have [2 ALAA ¶ 67,746.1]. It seems that this employee wasn't temperamentally suited to lead a number of workers and "blew up" under stress.

As a result, the production of the group under him declined and their earnings suffered.

SUGGESTION→ One way to prevent these afterthoughts on promotion is to have a general policy of making promotions probationary for a specified period. Then promotions that go wrong can be corrected with the least amount of embarrassment to the employee and trouble for the company. Of course, if you have a union contract, you'll have to spell out this policy in the contract.

OBSERVATION→ Employees shouldn't be thrown into a job and told, in effect, to sink or swim. A company can save itself money and prevent demotions for inability to do the job by installing adequate training programs. This is especially important where an employee is upgraded into a supervisory job. He may be a skilled worker but be completely ineffective in dealing with or leading a group. This know-how can be acquired through a training course.

When your contract requires employees to have specified qualifications for promotion to certain jobs, you need not demote employees in those jobs who don't have the necessary qualifications. An agreement stated that employees should be able to read and write English for promotion to jobs where that knowledge was essential. But an arbitrator turned down a union demand that an employee who didn't read and write English be demoted from a job where the necessity for the use of English was disputed. He had been in the job before the contract was signed; management had the right to keep him there because no promotion was involved [Central Soya Award, 2 ALAA ¶ 67,967.3].

Nor did this company have to demote a foreman when the union claimed he couldn't perform a sewing operation as well as a man who had lost his job because of his inability to sew. The contract provided that foremen should pass through a series of jobs before reaching the top of the promotion ladder. But the foreman had held his job before the contract was signed, and on the few occasions when he had to fill in at a sewing job, he sewed well enough to meet with company approval [2 ALAA ¶ 67,967.4].

Sometimes an employee's physical condition justifies a demotion. When a worker told a Compensation Court that he was physically unable to do his job, the company could demote him to protect him from further serious injury and to protect other employees from unnecessary hazards. But the arbitrator found that the employee was entitled to his old job when a reputable and impartial physician declared him physically able to do his former work [Jersey-Central Power & Light Award, 2 ALAA ¶ 67,736].

Demotion as a Disciplinary Measure.—"Go Slow" on demotions as a disciplinary measure, authorities warn. While it may be more generous to demote an employee rather than fire him, be sure you're penalizing the delinquent employee and not someone else. If by demoting an employee you displace another, you're really penalizing an innocent party.

Another caution to observe: Make it perfectly clear to your employees what the grounds for disciplinary demotion are. If you have a union contract, it should set forth the right to use disciplinary demotions in no uncertain terms. One company, for instance, had a contract providing that employees who failed to qualify on their assignment would be referred for placement or furlough. The company became alarmed about the negligence of some workers and instituted a system for downgrading employees who

made three careless mistakes. You can't do it, ruled the arbitrator; management's right to direct the working force is qualified by the condition that other contract clauses must be observed. He also pointed out that these disciplinary demotions were displacing other employees in the department.

Proving Your Point.—How are you going to prove to your employees, to your union, or to an arbitrator that a particular employee isn't qualified for his job and should be demoted? If you must demote two or three workers out of a group and seniority isn't the only consideration, how can you decide which workers to demote?

You can use merit ratings to determine and to back up your actions—they're an excellent basis for downgrading as well as upgrading workers [¶ 30.1]. But remember that arbitrators won't place any stock in a hit-or-miss system; they know the difference between reliable and unreliable merit rating plans.

The Wright Aeronautical Corp. relied on merit ratings to prove a "demonstrable" difference in the qualifications and ability of two employees, one of whom had to be demoted. The arbitrator said that the difference had to be proved without a doubt. The company had two supervisors rate the workers, but this rating made no impression on the arbitrator. No rating system is mathematically precise, he declared. Slight differences in the ratings of these two workers were insignificant because the raters were inexperienced, rated the men on hearsay rather than personal knowledge, and made only one rating of the employees [2 ALAA ¶ 67,863].

Case History No. 3

Back to the Rank and File

Business analysts tell us that supply is catching up with demand in many lines, and that cracks are showing in the inflationary picture. This means that contraction rather than expansion will be the order of the day in many plants as employers overhaul and tighten up their operations. Inevitably, some departments will be eliminated and others reduced—and foremen and supervisors must go back to the rank and file or look for other jobs.

In many cases, employers want to hold on to their supervisory workers; they want to have their superior skills and ability on tap when and if the plant expands again.

But rank-and-file workers don't always take kindly to the idea of welcoming ex-supervisors into their midst: How will their seniority rights be affected? Will the ex-supervisor get a choice job? What wage rate will he be given?

If business changes will force you to demote some of your supervisory personnel, now's the time to learn the answers to these questions. Arbitrators have had quite a lot to say on the subject; their decisions will give you some sound principles to apply to particular cases.

Seniority for Supervisors.—Seniority for demoted supervisors is the first problem to lick. Once it's settled, other questions are answered more easily. It's important to distinguish between supervisors who came up from the rank and file and those who were hired right into their supervisory posts. In the Briskin Mfg. Award, for example, an arbitrator decided that employees promoted from the bargaining unit to supervisory jobs continued to accumulate seniority and, if downgraded, their seniority should include their supervisory service. However, employees hired directly into supervisory jobs should begin to accumulate seniority, upon demotion, only from the date of demotion [1 ALAA ¶ 67,105].

A demoted supervisor's seniority may depend on whether his supervisory job was included in the bargaining unit. One arbitrator ruled that supervisors who were not covered by the contract could not accumulate seniority under the contract [Cutter Bit Service Award, 1 ALAA ¶ 67,184.1].

Similarly, in the Screw Conveyor Award [2 ALAA ¶ 67,623.1], an employee who was a foreman when the contract was signed couldn't accumulate seniority when he was demoted into the bargaining unit. Said the arbitrator: "It is an accepted principle of collective bargaining that benefits conferred under the terms of a collective bargaining agreement are for the benefit of employees covered by the agreement. To give rights under the contract to others who are not a part of the bargaining unit would nullify the obvious purpose of a contractual agreement."

The most frequent solution to the problem of seniority for downgraded supervisors is this: The seniority he accumulated in his rank and file job is frozen when he's promoted, and he does not add seniority in his supervisory job to this amount; but if he is demoted to the rank and file he picks up the seniority he had when he was promoted [Pierce Governor Award, 1 ALAA ¶ 67,289; Standard Oil of Indiana Award, 2 ALAA ¶ 67,890; New Britain Machine Award, 2 ALAA ¶ 67,829.2].

But in the B. F. Goodrich Award [2 ALAA ¶ 67,846] the arbitrator modified this principle to some extent. He decided that an employee who returned to the bargaining unit from a supervisory job was entitled to seniority rights, but he couldn't exercise them for 6 months if he would cause another employee to be "bumped". So a former supervisor could be returned to his old job, but it had to be on a shift where no union employee would be forced out.

»OBSERVATION→ These awards were generally made in cases where the union contract made no provision for the seniority rights of demoted supervisors or where the contract itself was ambiguous. Of course, there's nothing to prevent an employer and union from agreeing on the seniority rights of supervisors and incorporating appropriate provisions in their contract.

Displacing Another Employee.—If an ex-supervisor takes his place in the bargaining unit according to seniority, a junior employee may have to get out to make room for him. This procedure generally isn't acceptable to the rank and file, but they may not be able to object, unless the contract backs them up.

In one case where a contract had no specific provision and where plant practice was ambiguous, the arbitrators declared that sound labor relations demanded that the company be upheld when it returned a demoted fore-

man to his old job, even though it meant bumping another worker [Link-Belt Award, 1 ALAA ¶ 67,315.7].

In the Diamond Alkali Award, however, an arbitrator ruled that an employee couldn't be demoted to make room for a downgraded supervisor. He pointed out that the contract made provisions for demoting employees for inefficiency and the like, but specifically stated that vacancies within a department should be filled by members of the bargaining unit [1 ALAA ¶ 67,295]. Therefore, an employee could not be reduced from relief lieutenant in the plant protection force to sergeant and displace the guard in that job, but had to be demoted to patrolman.

Another contract provided that a demoted foreman should get a job "generally similar" to the one he held when he was promoted. An arbitrator held that this prevented his demotion to a job better than his old one, and was designed to protect the rank and file workers by not reducing the number of better jobs to which they might be promoted [Ford Award, 1 ALAA ¶ 67,146.2].

Pay Rates.—In most cases, a demoted supervisor will get the pay rate attached to the job to which he is downgraded—but if the job has a rate range rather than a single rate, what should the demoted supervisor be paid? One arbitrator has answered that a demoted supervisor should get the maximum rate of the classification to which he was downgraded [Ford Award, 1 ALAA ¶ 67,146.1]. Here, the contract limited the kind of job to which a foreman could be demoted or transferred, but it did not limit his rate of pay. It merely provided that he be paid the established rate for the job. The maximum of a rate range is within the established rate, said the arbitrator. Moreover, a merit increase within the rate range of a classification wasn't a promotion, and the seniority rights of other employees in the demoted foreman's classification weren't violated by granting the merit increase to the ex-supervisor.

The opposite opinion was held by the arbitrator in the Curtiss-Wright Award [2 ALAA ¶ 68,011.8] who decided that demoted supervisory employees weren't entitled to the top wage of any job to which they were transferred unless this provision was made by the contract.

⋙OBSERVATION→ Obviously, the simplest way to prevent disagreement on pay rates for downgraded foremen and supervisors is to write your established practice—or the practice you'd like to establish—into your contract.

Case History No. 4

Requiring Overtime Work

"Bill Collins, the foreman in Department R, is on the 'phone, Mr. Graham," his secretary told the labor relations manager, "he says it's important."

Graham picked up the receiver and heard Collins rasp, "Can I or can't I make these guys work overtime tonight and tomorrow? We have a rush

job. And we can finish it on schedule if—and this is the catch—I can make a full crew stay tonight and tomorrow night. What do you say, Mr. Graham?"

Graham answered Collins immediately. Could you do the same if one of your foremen asked you a similar question? Do you know if your company can require its employees to work overtime?

The answer depends largely on what your union contract says. In the absence of a contract, you may find it in the interest of sound labor relations to be guided by your past practices or by the customary practices in your industry or area.

⋙OBSERVATION→ Some considerations other than management's right to compel employees to work overtime also enter into the question. For example, are adequate supper or dinner facilities available? Can employees obtain transportation if they work far beyond the usual business hours? Are they given sufficient advance notice of overtime?

Arbitrators aren't agreed—but a glance at some recent awards will show the principles they follow in deciding a company's right to require overtime work. A given set of circumstances may be similar to the situation in your plant or office and may give you a clue as to the right answer in your case.

They Don't Have to Work.—A few arbitrators have held that in the absence of a specific provision in the contract, an employer cannot require employees to work overtime. In the Baker & Taylor Award [1 ALAA ¶ 67,318], the contract provided for a 40-hour, five-day week and eight hours of work a day. Nothing was said about overtime, so employees could refuse to work overtime without being penalized. Moreover, the arbitrator declared that a refusal to stay overtime could not be considered a work stoppage.

⋙OBSERVATION→ In proceedings under the NLRA, courts have held that employees who refuse to work overtime but continue to work during regular hours are not on strike [¶ 21,194.1].

The contract at the Connecticut River Mills also called for a 40-hour week and an eight-hour workday. In a poll conducted by management, a majority of the employees consented to work a 48-hour week with overtime pay for eight hours. The 48-hour week had been in effect for some time when one employee refused to work overtime. She was fired—unjustifiably, said an arbitrator.

He declared that the employees' consent to work 48 hours in no way changed the contractual provisions calling for a 40-hour workweek. The union was the bargaining agent for employees with respect to their hours of employment. It had bargained with the company to fix the hours of daily and weekly employment. Its status as bargaining agent would be meaningless if, in spite of this, the employer could schedule a workweek of any length and discipline employees who refused to work the hours he set [2 ALAA ¶ 67,712.1].

Nor does a management rights clause giving management the exclusive function of the scheduling of production necessarily give it the right to

schedule overtime and discipline employees for failure to work. In the Campbell Soup Award [3 ALAA ¶ 68,112] an arbitrator asserted that scheduling of production refers only to scheduling the ordinary 40-hour workweek set up in the contract. Management could schedule overtime too—but it couldn't compel employees to work. Otherwise, under a clause that contained no checks on management's right to schedule production, the company could go so far as to call for overtime on Sunday or on any and all of the employees' off hours. There would be no cut-off point for the exercise of this right.

⋙OBSERVATION→ This company was engaged in processing a highly perishable commodity. However, the question submitted to the arbitrator was not one of compelling overtime during an emergency, but of compelling overtime on any or all of the 52 Saturdays in the year. The arbitrator cautioned that he expressed or intimated no opinion as to what his conclusion would have been if the issue submitted had been the right to compel overtime work in emergencies.

⋙SUGGESTION→ The employer who wants to protect his right to schedule and require overtime work will find it advisable to include specific provisions in his contract. The arbitrator in the Connecticut River Mills Award noted that these "contracts usually contain provisions affirmatively setting forth the right of the company to schedule overtime work or they contain provisions that overtime will be required of the employees after the amount has been specifically arranged with the union."

They Must Work.—Here's an arbitrator who holds that *unless the right has been bargained away* in the contract, management *does* have the right to assign overtime work and to discipline employees who refuse it [Keokuk Steel Casting Award, 2 ALAA ¶ 67,766].

⋙OBSERVATION→ This reasoning is in line with court decisions under the NLRA which have held that when an employer has not expressly given up his right to require overtime, he may fire employees for refusing to work overtime. One court said: "We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him." [C. G. Conn, Ltd., v. NLRB (USCA-7; 1939) 108 F.(2d) 390, 397].

In the Livermore Chair Award [2 ALAA ¶ 67,948] the company's right to require overtime work was upheld since the employees had agreed to the company's proposal for an extra hour a day, and they had been warned that they would be discharged if they walked out early.

⋙OBSERVATION→ At first glance, this award seems to be directly contrary to the Connecticut River Mills award mentioned previously, since in both cases employees had agreed to the change in hours. In the Connecticut award, employees had been polled by management; here, they voted at a union meeting. In the Connecticut case, the contract specifically provided for a 40-hour workweek; apparently, the contract here contained no such guarantee.

In the Ford Motor Award [3 ALAA ¶ 68,179.1] the arbitrator stated that the company could require employees to work scheduled overtime because it had a contractual right to determine the starting and quitting time and *the number of hours to be worked.* Note that last phrase; it had been de-

liberately added in the 1946 and 1947 agreements, and it carried a lot of weight in the arbitrator's conclusion.

The contract at the Union Malleable Iron Works of Deere & Co. stated that the company might "request" employees to work overtime. This, decided an arbitrator, gave the company the right to schedule overtime and to require employees to work. The union's interpretation of "request" to mean that the company had the right merely to ask employees to work overtime, and employees the right to refuse, would add nothing to the agreement; this would be so even if the contract was silent on the matter [3 ALAA ¶ 68,151.1].

Work Overtime—Or Else?—If a company has the right to require its employees to work overtime, it also has the right to discipline those who refuse. But arbitrators add this caution: The employee who has a reasonable or legitimate excuse for refusing to work overtime should not be penalized. The arbitrator in the Keokuk Steel Casting Award warned that the assignment must be made upon reasonable notice, for reasonable grounds, for reasonable periods, and subject to the employee's reasonable excuse for refusing to work overtime on a particular occasion [2 ALAA ¶ 67,766].

In the Ford Motor Award, the arbitrator declared that there is no rule of thumb; the company must give sympathetic consideration to the individual employee's situation and make-up. If he is given advance notice, the employee can and should alter his plans. If he is not given advance notice, it would be arbitrary to force him to stay, unless his commitments were trivial. Acting on these principles, the arbitrator ruled that an employee who would have missed his ride home and been inconvenienced and delayed in getting another was justified in refusing to work overtime. But an employee who gave no reason for his refusal was properly punished by a one-day suspension [3 ALAA ¶ 68,179.2].

»OBSERVATION→ Transportation home is an important factor in an employee's decision as to whether he can or cannot work overtime. One arbitrator ordered management and the union to work out an arrangement providing adequate transportation facilities for employees working after midnight. They had refused to work overtime because of the lack of public transportation at that time [Full Fashioned Hosiery Award, 2 ALAA ¶ 67,617].

A company is the judge of the reasonableness of an employee's excuse for not working overtime. A disciplinary suspension was justified in the case of an employee who claimed that he was ill, since the company nurse testified she had found no condition in his health which would lead her to recommend that he be excused from work. Although the employee introduced a letter from a reputable doctor indicating a series of treatments for minor disabilities, the doctor's record didn't indicate the employee sought any treatment immediately after his refusal to work. [Union Malleable Iron Award, 3 ALAA ¶ 68,151.2.]

A union's contention that employees were justified in refusing to work overtime because the company had been unfair in refusing to consider Good Friday a holiday was rejected and a two-day suspension upheld, since the contract provided for scheduling necessary overtime at the end of each month [American Steel & Wire Award, 3 ALAA ¶ 68,077].

➠OBSERVATION➔ Commented the arbitrator: This wasn't a case of a few individuals declining overtime work for personal reasons, but an organized, coordinated refusal to force a concession from management on an issue under discussion in the grievance procedure.

Case History No. 5

Medical Examinations

"Annie Evans is on the job again, Mr. Sawyer," the Packaging Department foreman told the Personnel Director when he bumped into him on the cafeteria line. "She says her back doesn't bother her any more."

"That's fine, Joe," Sawyer replied, and then promptly forgot all about Annie and her aching back as he reached for a piece of pie.

But two months later Sawyer remembered Annie's case when her name turned up on some forms to be submitted to the State Compensation Board. Annie was off the job *again,* this time drawing sick benefits from the company and claiming workmen's compensation for a back injury she said resulted from her job.

Was her injury connected with the aching back that had kept her off the job before? Would a careful medical check-up before she returned to work the first time have prevented her reassignment to a job where she might have a recurrence of her previous disability? Would an annual physical examination have shown that Annie never should have been assigned to the Packaging Department in the first place?

Annie's wasn't an isolated case; scores of employees were on sick leave and the absenteeism rate was on the upswing. Poor employee health was costing the company hard cash—recruiting and hiring costs were higher, training and induction were more expensive, relatively inefficient substitute employees had to be used, sick benefits were paid.

Sawyer decided that at the next staff meeting he'd present a medical examination program as the jumping-off point in a long-range plan for improving employee health. Medical examinations would be required before hiring, at periodic intervals after employment, after sick leave and after extended layoffs.

He wanted to know what snags a medical examination program might hit and to profit from the experience of other companies. So Sawyer decided to see what arbitrators have ruled, and he rounded up awards involving medical examinations. This is what he learned:

Employer Can Require Annual Exam.—In a non-unionized company an employer has an absolute right to establish whatever working conditions he wishes, including medical examinations. But even in a unionized company the employer can establish or change working conditions for which

the contract makes no provision [New York Car Wheel Award, 2 ALAA ¶ 67,706.1]. An employer, therefore, can set up a procedure for giving his employees medical examinations at regular intervals. If the union objects to any of his actions, it can challenge them through the grievance procedure.

The arbitrator put his stamp of approval on medical examinations: "It is obvious that an annual physical examination is good for the individual. Most medical authorities strongly recommend that course of action. I think it is a splendid idea for the Company to make such a service available to its employees without cost. And what harm can be done to the individual? These employees enjoy the protection of an adequate grievance procedure and surely we have progressed in our industrial relations beyond the point where the ailments of age are ipso facto cause for discharge."

Refusal to Reemploy After Sick Leave.—A worker who doesn't meet minimum physical requirements after he returns from an extended illness need not be reemployed, arbitrators say. At the Carnegie-Illinois Steel Corp. the contract permitted the company to establish minimum physical requirements for employment. One employee was examined three times after his return from sick leave; each time he failed to meet the minimum standards. Since the union didn't claim that the medical examination was incompetent or partial, or that the standards had been applied in a discriminatory manner, the company didn't have to take him back [1 ALAA ¶ 67,187].

When Reemployment Can't Be Refused.—But companies shouldn't be too cautious about rehiring workers who have been on sick leave. One arbitrator ruled that a company could not refuse to reemploy a senior employee after sick leave on the grounds that her physical condition might be aggravated and the company's compensation risk increased [Lonergan Mfg. Award, 2 ALAA ¶ 67,840].

The company doctor examined the employee who reported for work after a medical leave of absence. He okayed her return to work, but warned the company that she shouldn't be on her feet too much. The arbitrator noted that a part time sit-down and part time stand-up job was available when the employee returned to work, and ruled she should have been given a trial in it.

Doctor's Certificate Carries Weight.—A doctor's word carries considerable weight among the arbitrators. An employee at the Profile Cotton Mills underwent a serious operation, and the company assumed that he was disabled and could not return to his former job. But the employee came back with a doctor's certificate saying that he was able to work. According to the arbitrators, presentation of the medical certificate refuted the assumption that the man was disabled [1 ALAA ¶ 67,216.3].

The Lignum-Vitae Products Award [2 ALAA ¶ 68,021] ordered the reinstatement with back pay of an employee who had been discharged for a physical disability contracted during his former employment in the mines *from the date that he had been given a clean bill of health by a specialist.* The

company opposed the back pay; it said it had been concerned for his health from a humanitarian point of view and was afraid it might be sued for damages if it continued to employ him although it knew his physical condition. The company had acted prudently in not reemploying the worker immediately, decided the arbitrator, but after a specialist gave him a clean bill of health, there was no reason to keep him off the job.

When Doctors Differ.—Employees don't necessarily take the word of the company doctor as final; they're likely to get their own doctors to confirm or deny his findings. Often, opinions conflict. Therefore, many companies give "due consideration" to the opinion of the employee's own physician. This does not obligate the company to accept the outside physician's report, says one arbitrator, but merely to take it into consideration [Bethlehem-Fairfield Shipyard Award, 2 ALAA ¶ 67,552].

Employer Can Require Exam After Layoff.—Arbitrators agree that an employer can require employees to take a medical examination when recalled after a layoff. But they warn that the reasons for rejecting an employee after a layoff are the same as for discharging employees who remain at work.

In the Armour Award [2 ALAA ¶ 67,549] the arbitrator said that a laid-off employee who fails to pass minimum medical requirements of the company may be refused further employment. When the company did not hire or rehire persons with the same or similar failings, no discrimination was shown.

In the Bechtel-McCone Award [1 ALAA ¶ 67,067.3-.4] an arbitrator ruled that the company could require medical examinations after layoff even when the contract did not contain an express provision authorizing the check-ups. Medical examinations are more in the interest of the employee than the employer, he said. Therefore, they can be required. But the company can refuse to reemploy a laid-off employee only if his physical condition is such that the company would have had a right to discharge him or lay him off if there had been no interruption in his work.

The Ford Motor Award [2 ALAA ¶ 67,867] stresses the principle that reasons for disqualifying a laid-off employee are the same as for one at work. The arbitrator ruled that the company could not refuse reemployment to some overweight employees merely because new employees were not hired if they were overweight. Obesity was not a cause for discharge under the contract.

Employee Reinstated by Arbitration Award.—Some union contracts give the employer the right to determine the physical fitness of an employee at any time—and if he is physically impaired, to find other work for him or dismiss him. One company gave a physical examination to an employee ordered reinstated by an arbitration award and fired him for defective vision. The arbitrator concluded that the contract right to dismiss employees for physical reasons had been abused and ordered the worker reinstated with back pay [Sun Shipbuilding & Drydock Award, 2 ALAA ¶ 68,025].

He pointed out that the company did not furnish any information concerning the standards that were used in judging that the employee's vision was defective enough to prevent him from working. The arbitrator found

that the employee's supervisor considered him one of the best welders he had, both as to quality and quantity; there was no evidence that the employee's presence endangered anyone's safety, that his vision had deteriorated since he had been hired, or that he had misrepresented his eye condition when hired. Employment standards were not lax when he was hired, and the only cases cited by the company where a working employee had been picked off the job for a physical examination were not comparable.

The arbitrator made it clear that the company cannot be denied the right to give a physical examination to an employee reinstated by an award. But he remarked: "When an employee is discharged and reinstated with back pay, he is in a different position from an employee who has been laid off for lack of work and recalled. The back pay gives the employee precisely the same status as if he had never been discharged in the first place. * * * if he is given a physical examination and is again discharged as a result of it, the second discharge could be upheld only if there is some fact in the case which would have been good cause for pulling the same man off the job as a working employee and taking the same action."

Case History No. 6

Loafing

Some workers are especially adept on dodging work. Unless the employer nips the practice, loafing catches on. Soon everybody's doing it, and production takes a tumble.

Loafing has so many shapes and forms that it's difficult to pin it down in the rule book. But an all-inclusive rule requiring employees to turn in an honest day's work is probably enough to give an employer the right to discipline day-dreamers, dawdlers, desk-to-desk wanderers, constant conversationalists, washroom regulars, shop sleepers, newspaper readers and personal letter writers.

But when is loafing really loafing and not just the pause that refreshes? How much evidence do you need before you can penalize an employee for loafing? Should the employee who's allergic to work be warned, suspended or fired? How shall an employer decide what penalty to use in specific cases?

We've thumbed through our files of arbitration awards and have come up with these pointers on the care and treatment of work dodgers.

What Is Loafing?—According to the dictionary, "loaf" means "to spend time in idleness." Arbitrators are inclined to interpret the term strictly. A suspicion of loafing, they'll point out, isn't loafing and may not call for discipline.

One worker, for example, took more time than the foreman thought necessary to do an assigned task and was promptly fired. The arbitrator ruled that taking too much time to do a job is grounds for discharge only

if there is positive testimony of loafing. Here, the most that anyone could say was that there was a suspicion of loafing [Bryant Heater Award, 1 ALAA ¶ 67,491].

From the employer's viewpoint, constant chatter in a shop or office may look like loafing. But one arbitrator dismissed a disciplinary layoff for loafing when there was no company rule prohibiting talking and there was no evidence that production was held up [Chrysler Award, 2 ALAA ¶ 67,995.3].

On the other hand, no matter what employees call it, taking time off from work to suit their own convenience *is* loafing. In one case, employees who were caught loitering in a rest room outside of the regular rest periods claimed they were taking the "16% fatigue" allowed under the production standard. Nothing doing, ruled an arbitrator. Rest periods were prescribed by contract and any additional time off was an abuse of the privilege [American Transformer Award, 3 ALAA ¶ 68,102].

Get the Evidence.—Before you penalize an employee for loafing, be sure you have adequate evidence. That's the sum and substance of many an arbitration award. Take the case of J.S., a welder in a shipyard, who was given a warning slip and a 2-week layoff for loafing. The only proof of his alleged delinquency was an assistant foreman's statement that he had seen 8 or 9 men sitting on a plank in the yard. As the assistant foreman came up, J.S., who was tying his shoe, was the only one left. J.S. said he was just fixing his sock.

If 8 or 9 men were sitting on a plank, somebody was loafing, commented the arbitrator, and the presence of J.S. in the group creates the presumption that he too was guilty. But J.S. is a welder; often there are several minutes between welds when the fitter is working and the welder has nothing to do. Unless the welder places himself in a position where he's not immediately available, he isn't loafing.

The critical point was whether J.S. was behind in his work and holding up the fitter. The fitter denied it. This was the weakness in the company's case: It couldn't show, even by circumstantial evidence, that J.S. was off his job for any appreciable amount of time. So its disciplinary action was unwarranted [Sun Shipbuilding & Drydock Award, 3 ALAA ¶ 68,150].

→OBSERVATION→ **The arbitrator admitted that this was a borderline case. But he felt a company should present reasonable evidence of misconduct when the penalty is fairly heavy (here, it was a warning plus a 2-week layoff).**

A similar decision was made in the Mosaic Tile Award [2 ALAA ¶ 67,942.2], where an arbitrator ruled that an employer had not backed up his case with facts. Although production was slowed down, it did not necessarily follow that the slowdown was caused by the 2 workers whom the foreman found doing nothing. There may have been other reasons for the slowdown, or the slowdown itself may have caused the idleness of the 2 employees.

How to Get the Proof.—Suppose you suspect that a worker has been very busy doing nothing—but you're not absolutely certain. Can you check up on him or would that be discrimination? In the Bethlehem Steel Award [3 ALAA ¶ 68,141] an arbitrator decided that a company

has the right to check an employee's work more closely than usual and to keep track of his time off the job when there is reasonable evidence that he has been off the job without good cause and that his production and usefulness to the company have been affected.

⋙OBSERVATION→ The arbitrator pointed out that such a check would be to an employee's advantage if he were innocent, since it would disprove the company's charges.

Give Adequate Warning.—In most disciplinary cases, arbitrators insist that an employee be given adequate warning of his failings before he is suspended or fired. Loafing is no exception. When an employee had not been reprimanded or warned that his work was not satisfactory, his discharge for loafing was reduced to a layoff [Int'l Minerals & Chemical Award, 1 ALAA ¶ 67,415].

But when a worker had been given numerous warnings, her discharge for loafing was upheld by an arbitrator [Sun Shipbuilding & Drydock Award, 2 ALAA ¶ 67,558. To the same effect: Pepperell Mfg. Award, 1 ALAA ¶ 67,329.2; Feather River Lumber Award, 1 ALAA ¶ 67,228.1; Boston Sausage & Provision Award, 1 ALAA ¶ 67,064.1].

Fit the Punishment to the Crime.—In all cases of employee misconduct, employers have the problem of weighing the crime and the punishment. Discharge is a severe penalty, and arbitrators hesitate to uphold it except for grave reasons.

A truck driver who left his truck unguarded for a long period of time while he went to the theater was properly discharged. He also had violated his responsibility as driver and promoted inattention to duty among other workers by inducing his helper to go along with him. The helper got off with a warning since he had no choice but to accompany his supervisor [Coca Cola Bottling Co., 2 ALAA ¶ 67,683].

In another case, a company fired a worker who spent a lot of his working day in the washroom and fooled around on his job. He was insubordinate to his foreman when asked to stop singing and whistling loudly. Reversing the company's judgment in this instance would be a disservice to everyone involved, including the worker, the arbitrator declared, because it would lead to the conclusion that misconduct was treated lightly and had prevailed over the company's managerial rights and functions [Old Colony Furniture Award, 2 ALAA ¶ 67,777].

But 2 workers accused of drinking coffee on the job and throwing snowballs fared better. Reasons: The incidents alone were not serious (even though they had touched a particularly sore spot with management) and the employees had never before been disciplined. [Bethlehem Steel Award 2 ALAA ¶ 67,806].

⋙SUGGESTION→ Loafing, like absenteeism or insubordination, is a symptom, not a disease. It's a strong indication that something is wrong with an individual employee or group of employees. Don't depend on discipline alone to wipe out loafing. Look for the causes—here are a few: physical or mental fatigue; monotonous work; lack of interest in work; unpleasant or uncomfortable working

conditions; insufficient rest periods; improper selection, placement or training; ineffective supervision; resentment of company policies or supervision; lack of clear-cut company policies. If you want to reduce or eliminate loafing, take some positive steps to improve morale.

Case History No. 7

Non-Working Personnel and Vacation Pay

Many employers will spend more for vacation pay this year than they've anticipated. The reason: Failure to foresee that non-working personnel may be entitled to vacation pay—regardless of requirements of continuous employment or listing on the payroll.

»OBSERVATION→ The number of people unemployed and laid-off is now the highest it has been since before the war. Therefore, employers are finding it more important than ever to guard against vacation pay claims by non-working employees.

Furthermore, unless an employer knows his vacation pay obligations thoroughly he may either overpay non-working personnel or, by underpayment, stimulate resentment and grievances.

To help you avoid both of these contingencies, we've gone through our awards on this subject and come up with these answers to your problems:

Vacation Pay an Earned Right.—"The time has passed when a vacation should be considered as anything other than . . . earned" [California Street Cable Award, 2 ALAA ¶ 67,715]. Most arbitrators are agreed that vacations are wages and an earned right that once gained can't be taken away [¶ 65,651.1]. This is a general principle that may be decisive in any case of a non-worker—regardless of whether he is laid-off, sick or injured, discharged, on strike, or a quit.

Type of Termination Important.—The real question for non-working personnel is: Has a vacation right been earned in the first place? This will depend generally on the agreement itself. But the same agreement may be interpreted differently in each different type of termination—layoff, sick leave, discharge, strike, and quit or resignation.

Laid-off Employees.—Being laid-off during a vacation period doesn't deprive employees of a right to vacation pay earned prior to the layoff (this is true even though employees are working elsewhere at vacation time) [¶ 65,651.1]. But will vacation rights continue to accumulate during the layoff? The answer is: Yes and no. One arbitrator said that if seniority rights continue to accumulate during a layoff, vacation rights do also [St. Louis Smelting & Refining Award, 2 ALAA ¶ 67,834]. Another

said laid-off employees were only entitled to vacation pay based on the period actually worked [Waldes Koh-I-Noor Award, 2 ALAA ¶ 67,831].

➠SUGGESTION→ If you provide for continued seniority during a layoff, be sure to indicate whether or not you intend vacation rights to continue too.

Other reasons for holding that vacation rights continue to accumulate during a layoff are: (1) Accumulation of vacation rights depends on continuance of the employee-employer relationship, and NLRA decisions have held that relationship continues during layoff [Stockham Pipe Award, 1 ALAA ¶ 67,264.1; Consolidated Vultee Aircraft Award, 1 ALAA ¶ 67,248.3]; and (2) where the agreement doesn't base vacation rights upon the number of days actually worked, a continuation of those rights during layoff is implied [St. Louis Smelting & Refining Award, 2 ALAA ¶ 67,834.1].

➠OBSERVATION→ Vacation rights may be based on days actually worked by a provision that vacation pay depends on actually working a certain percentage of the pay periods in the year, or a provision that seniority for vacation purposes will be broken by layoffs of over a certain length of time [Andrews Steel Award, 1 ALAA ¶ 67,077.1; Maguire Award, 1 ALAA ¶ 67,345.1]. Moreover, a provision for accumulation of vacation seniority in case of sickness or accident led one arbitrator to conclude that by implication vacation seniority would not accumulate during ordinary layoffs [De Luxe Metal Award, 3 ALAA ¶ 68,065.3].

It is certain that vacation rights will not accumulate during a layoff if the employee refuses other jobs offered to him and the agreement requires "substantially continuous employment" [Yale & Towne Award, 2 ALAA ¶ 67,603]. But what if the employee is improperly laid-off in the first place? An arbitrator in the Bethlehem Steel Award said that since it was clear that except for the improper layoff the employee would have earned vacation pay, it can't be denied to him simply because he later refuses other jobs or even recall to his old job [2 ALAA ¶ 67,769.1].

A recent case permitted vacation rights to accumulate during layoff, but only if employees actually returned to work. The arbitrator in that award said that vacation rights depended on accumulation of seniority which was broken at the beginning of the layoff period if employees failed to return [Central Packing Award, 3 ALAA ¶ 68,137].

The question of accumulation of vacation rights during layoff may be complicated by more specific factors. For example, requirements of continuous service with the company or a listing on its payroll at vacation time have sometimes led arbitrators to bar vacation pay from men on layoff when otherwise these men would be eligible [Lewis Knitting Award, 3 ALAA ¶ 68,170]. But more often than not, these requirements have been watered down. In the Chamberlin Award, "continuously in the service" of the company was interpreted to mean continuously available for service. This barred accumulation by employees on sick leave, but not by those on temporary layoff [2 ALAA ¶ 67,841]. The McQuay-Norris Award presented the same question and answer. The contract stated that "employees who had been on the payroll continuously for a year" would be entitled to a week's vacation. The company claimed this excluded men laid off indefinitely prior to the vacation period, but the arbitrator didn't

agree. He said: If all the other conditions for vacation pay are met (one condition was a minimum of 600 working hours during the vacation year), employees would be considered "on the payroll continuously" so long as they were in a position to receive wages provided work was made available to them [2 ALAA ¶ 67,787].

An arbitrator in the Andrews Steel Award interpreted "consistent employment" to mean employment for only 60% of the pay periods of the year [1 ALAA ¶ 67,077.1]. And an arbitrator in the Dutton Award construed a condition that employees be "on the payroll" for vacation pay to require that the employee-employer relationship still exist or the employee still be on the employment roll. Accordingly, he gave vacation pay to laid-off employees on the recall list [3 ALAA ¶ 68,124]. This was contrary to the Lewis Knitting Award. An arbitrator in that award said the payroll was a weekly list of people entitled to payment from a company, and a requirement that employees be on the payroll would bar vacation pay from laid-off employees [3 ALAA ¶ 68,170].

⋙OBSERVATION→ Best bet on this controversial point may be to scrutinize closely past awards of arbitrators in your area and industry and adopt their holdings.

Discharged Employees.—Discharged employees, of course, cannot be denied vacation pay they have earned [¶ 65,651.8]. But suppose an employee is discharged with less than the year's service that the agreement requires for vacation pay? Is he still entitled to pro-rata pay for the portion of the year he did work? Not if the one-year requirement is clearly spelled out; otherwise an arbitrator may hold vacation pay earned from day to day and give a proportional part of it [Tenney Award, 2 ALAA ¶ 67,988.1; Babcock Printing Award, 2 ALAA ¶ 68,017.3]. Even if there is a clear one-year requirement, an arbitrator may feel obliged to grant pro-rata pay since termination by the company prevents the employee from completing his service requirement, making a situation similar to layoff.

Employees Who Quit or Resign.—Employees who quit or resign are entitled to accumulated vacation rights. It is immaterial that termination is by action of the employee except where termination prevents completion of a service requirement [McMahon-Hennecke Award, 2 ALAA ¶ 68,018; Washington Photo Engravers Award, 1 ALAA ¶ 67,438; Indiana Gas & Chemical Award, 2 ALAA ¶ 67,662]. An arbitrator in the McMahon-Hennecke Award pointed out that to deny vacation pay to workers who quit could lead to the unjust result of giving vacation pay to an employee discharged for gross misconduct and withholding it from a faithful worker who resigned for a perfectly legitimate reason.

Employees On Strike.—An employee's earned right to vacation pay may be forfeited by a strike in violation of a no-strike clause. An arbitrator came to that conclusion when he decided that a deliberate violation of a no-strike clause was enough of a material breach of contract to prevent employees from enforcing other terms of the agreement [Thomas Car Award, 2 ALAA ¶ 67,818]. Another arbitrator has said that time during a strike can't be counted for vacation purposes if the employer is innocent of unfair labor practices [St. Louis Tool Award, 2 ALAA ¶ 67,877.1]. But contrariwise, an arbitrator has said that vacation rights continue to ac-

cumulate during a strike since strikers are still "employees" as required for vacation pay even though they fail to return to work at the end of the strike [American Blower Award, 2 ALAA ¶ 67,968.1].

Employees Discharged Because of Permanent Shutdown.—Vacation rights will not accumulate after a permanent shutdown, since this is not the same thing as a layoff. In the Lowe Award, an arbitrator said that permanent separation from work, when the company closed and dismantled its plant and gave employees notice of this long in advance, prevented further continuation of rights to vacation pay [2 ALAA ¶ 67,740].

Sick or Injured Employees.—Some agreements provide that absences of 60 days and less for illness will be counted as service for vacation purposes [Maguire Industries Award, 1 ALAA ¶ 67,345]. Even in the absence of a similar clause, an arbitrator may be inclined to waive time requirements for vacation pay. The arbitrator in the Eppenbach Award did just that. He said that reason and equity rather than a technicality as to date of termination of employment should determine his decision on an employee's right to vacation pay. Accordingly, he gave pro-rata pay to an employee forced to give up his job because of ill health [1 ALAA ¶ 67,352]. Another arbitrator has said that vacation rights may accumulate during a sick absence and even after the death of an employee [Cudahy Packing Award, 2 ALAA ¶ 68,015]. And if the employees' failure to meet the time requirement is caused by injuries sustained in the course of employment, an arbitrator is likely to be even more sympathetic [Stockham Pipe Fitting Award, 1 ALAA ¶ 67,264.2].


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