

THE ARBITRATION OF INSUBORDINATION CASES

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ABSTRACT

This article discusses the complex concept of insubordination by analyzing 227 arbitration cases involving that issue decided between 1980 and 1990. It looks at the elements that must be present before insubordination is established, and the differences between "major" and "minor" insubordination. The article also indicates various exceptions to the "obey now, grieve later" rule in insubordination, such as safety and health exceptions, contract violation exceptions, constitutional exceptions, and union officer exceptions. Abusive language is reviewed as another aspect of insubordination, and is contrasted with "shop talk." Finally, factors mitigating discipline for insubordination are discussed.

The arbitration of insubordination cases represents one of the most sensitive issues for employers. This is because insubordination brings into question authority and/or respect for management, without which it is difficult to efficiently direct the workplace. More than forty-seven years ago, arbitrator Shulman wrote one of the most widely quoted opinions concerning insubordination. He stated in part [1, p. 781]:

..... an industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for the exhaustion of the grievance procedure.

In the 1940s, when Shulman wrote the words above, the view held by employers was that management's authority was absolute. Discharge was the preferred penalty for any type of insubordination. Some fifteen years after the Shulman award, Orme Phelps observed [2, pp. 93-94]:

Defiance of authority is a major industrial crime, for which the time-honored penalty has been summary discharge, a carry-over from military organization, and the associated concept of unquestioning obedience to orders. The parallel was never too perfect—except perhaps on shipboard and in a few other employments where the group hazard was similarly obvious—so that in recent years problems of insubordination have been examined more carefully, with extenuating factors given greater weight [citations omitted].

By 1959, Phelps had already recognized that there were mitigating circumstances to some employee behaviors that would otherwise be considered by management to be “insubordination.” In 1985, arbitrator Chalfie put insubordination issues in this context [3, p. 3604]:

An industrial plant is not a feudal or military organization; therefore, it is not suggested that an Employee must humble himself before Supervision. But it is an established principle in industrial relations that deliberate and overt challenges to supervisory authority by an employee cannot be tolerated; such challenges are destructive of all plant morale.

Thus, the contemporary arbitral view of insubordination holds to the concept that management is to be accorded respect, and that orders are to be followed. However, gone is the idea that management’s authority is absolute and no circumstances exist to justify refusal to obey orders. Apparently, also gone is the notion that insubordination is a “major industrial crime,” as many arbitrators hold that discharge for insubordination is justified only if it is willful, shows great disrespect, or is committed in connection with abusive language or threats (see section entitled “Appropriateness of Penalty”).

It is the purpose of this article to develop and review the elements of work order insubordination, and to examine the various schools of thought among arbitrators where substantial controversy exists. Exceptions to the “obey now and grieve later” rule are also reviewed. Besides work order insubordination, insubordination for abusive language is also considered, as is the refusal to submit to a search. Finally, mitigating circumstances that tend to reduce penalties for insubordination are discussed. The basis for the conclusions in this article are published arbitration awards from the Bureau of National Affairs (BNA) and Commerce Clearing House (CCH) covering the years 1980 to 1990. A total of 227 cases was utilized in this study, representing the most recent arbitral thinking regarding the topic of insubordination.

THE ELEMENTS OF INSUBORDINATION

A review of the arbitration case literature shows that any number of arbitrators have ventured definitions of insubordination. The major problems with these definitions are that they lack universally accepted criteria, and are not specific

enough to entertain all of the mitigating and other circumstances contained in the cases. Arbitrator Sergent explained some of the definitional difficulty [4, p. 5281]:

The question of whether certain types of conduct or behavior constitute insubordination is often a matter of impression rather than definition. Conduct that might be considered disobedient and disrespectful in one context could be perfectly acceptable in another.

Rather than attempting a definition of work order insubordination, the elements normally required by arbitrators for properly disciplining employees for this issue are explained. Arbitrator Statham offered the following.

There must be:

1. A direct order by management to an employee.
2. The order should be clearly understood by the employee.
3. The employee should acknowledge that he/she understands the order before refusing to obey the order.
4. Manager repeats the order and ask the Grievant if he/she understands, and advise the employee that failure to comply shall constitute grounds for insubordination, which can result in discipline up to and including termination.
5. If the Grievant fails to respond to the order at this time, the manager then takes the appropriate action [5, p. 3901; *see also* 6, p. 4363].

While most arbitrators would generally agree with Statham's requirements for sustaining discipline for work order insubordination (other forms of insubordination are discussed later), there are issues in the various elements explained above that engender sharp differences in arbitral opinion.

1. *The direct order.* Statham required only that a "direct order" be given to an employee. No additional demands are placed on that order as to whether the order necessarily be job-related or not. Bankston, however, has asserted that [7, p. 3986]:

Acts of insubordination are usually directly related to the job and the work to be done.

Arbitrator Strasshofer echoes this point of view by stating [8, p. 5161]:

... that any reasonable request that is job-related and is made to an employee during normal working hours is properly considered as "work properly assigned."

In a similar vein, arbitrator Cohen argued [9, p. 3829]:

. . . arbitrators state that insubordination which justifies discharge occurs when an employee refused to obey instructions relating to job duties.

Arbitral insistence that an order by management be work-related may create still another requirement, namely, that for insubordination to occur, there must be a loss of production or impaired efficiency. Arbitrator Wyman is an adherent to this school of thought, He states [9, p. 4314]:

Paramount to the issue is that a refusal must have a negative impact upon productivity or output, either of the subordinates who failed or refused [a work order], or the negative impact upon co-workers resulting from the failure or refusal.

Arbitrator G. Cohen, in overturning the discharge of a worker who had refused to release to the company a tape recording of a session with a plant nurse regarding a work-related injury, maintained [9, p. 3829]:

It was obvious here that Grievant's refusal, even if it had occurred, was not related to any production work of the company.

Similarly, arbitrator Bankston decided that an employee had been improperly suspended after refusing on several occasions to return a file concerning a discrimination case to the Equal Employment Opportunity Commission (EEOC) office. Bankston explained [7, p. 3986]:

Here, grievant's objectionable acts did not concern his job and were not work-related and there was no impairment of productive activities.

Bankston also took into account the fact that the grievant apologized to his supervisor and gave him the EEO folder the next day. In still another related case, arbitrator Belcher reduced a five-day suspension to a written reprimand when an employee and her supervisor had a confrontation regarding the use of a phone. As the supervisor left to get a steward, the grievant told him that she was going to use the phone to call home to check on her teenager. The supervisor did not respond to the declaration, nor was the grievant ordered back to work. Belcher found it significant that no loss of production occurred while the grievant called home [11].

However, not all arbitrators limit insubordination to refusals of orders that are job-related and when failure to obey causes a loss of production. Eva Robbins, a long-time arbitrator and past president of the National Academy of Arbitrators, observed [12, p. 3218]:

This arbitrator cannot accept the theory at least implied in the opinion of the other arbitrator that to be sustained a claim of insubordination must show that the employer suffered harm through insubordination before it can form a base

for disciplinary action. Nor can she accept that in all cases, a showing of “willful neglect” of a duty must be made. “Insubordination” is the failure or refusal of an employee to obey a proper order given by a proper party, unless the following of the order might jeopardize life or limb.

As Robbins also pointed out: “Employees do not have the right to pick and choose those directions they will follow, and those they will not” [2, p. 3218]. Indeed, the basic industrial relations rule is that when given an order, an employee should “obey now and grieve later” if he or she questions the propriety of the order (some possible exceptions to this rule are discussed later). This is true regardless of whether the order is directly related to the performance of the job or simply business-related.

2. *The order should be understood by the employee.* Arbitrators generally require that the order be within the employee’s capacity to perform, as well as otherwise understood by the employee. For example, in one case, an operator did not climb down from a public utility tower when told to do so [13]. He did not understand that the order originated with his acting foreman. Moreover, the foreman did not reprimand the operator directly after the incident.

Orders should also be clearly given. A foreman first told the grievants they could not leave the plant, then said that they could leave [14]. However, a three-day suspension was properly imposed for an unauthorized departure from the job [15]. The supervisor’s comment that the grievant should leave if she could not perform the work was not found to be a condonation of the behavior, as the grievant knew that the facility was short-handed and the comment was made in “exasperation.”

Normally, an order must also be “reasonable.” A medical technologist was ordered to complete a project which required that she obtain patient data from another hospital, but she had no effective means to obtain the needed information. Arbitrator Denson reinstated the technician with back pay under these circumstances [16].

Work orders are most effectively issued by an employee’s own supervisor, otherwise the employee can claim that he or she did not obey because the person giving the order was not known (see, for example [17]). However, an employee will be disciplined or discharged when he or she is competent to perform the work but engages in self-help by refusing to perform it [18].

One arbitrator has even gone so far as to impose a requirement on management that in order to prove an employee’s insubordination, it must have a witness to the issuance of a direct order [19, p. 282]. While hardly any arbitrators would join in arbitrator D’Spain’s requirement, having a witness to the order may materially strengthen the company’s case when the content of the order is in controversy.

3. *Refusal to obey the order.* It would also appear that arbitrators will not consider employee behavior to be insubordinate if employees do not refuse to perform work or actually perform the work (see section regarding “passive

insubordination”). In one case, an employee was discharged for voicing complaints to the company’s president. In reversing this disciplinary action, the arbitrator pointed out that the grievant never refused to perform any tasks [20]. In a related case, a maintenance man refused to interrupt his lunch break to respond to a trouble call, and used profanity to a supervisor in the course of the refusal [21]. Nonetheless, the arbitrator modified the discharge and converted it into a five-day suspension on the basis that the grievant offered to perform the task after lunch, and thus, the insubordination was not “willful.”

In some cases, compliance with an order, even if not carried out properly, will not be considered insubordination. When an employee was issued a directive to fill in some holes but failed to complete the work [22], the arbitrator found that the employee was guilty of performing unsatisfactory work, but was not insubordinate.

4. *Warnings of consequences for refusing an order.* Arbitrators may require that an employee to be properly disciplined for insubordination, must be advised of the consequences of a refusal to comply with a directive. For example, arbitrator Laybourne ruled that an employer improperly discharged a grievant who was not warned that refusing to unlock a drawer where he kept his tools would lead to his dismissal [23]. Similarly, a grievant was reinstated (without back pay) after the arbitrator noted that he was not forewarned of the consequences of his behavior, and no clear-cut order had been given [24; see also 25-29].

Nevertheless, not all arbitrators require that a warning be made to employees under all circumstances. The termination of two employees for refusing to attend a safety meeting was converted to a two-month suspension based on their “many years of good service” Arbitrator Groshong pointed out [30, p. 4360]:

The employee need not be told ‘that’s an order’ every time an instruction is given nor need he be warned each time that failure to follow an instruction may result in discharge.

In another case, an employee refused to pick up a part for the company, declaring that he was not hired as a delivery man, and that the company’s truck was not safe to drive. The union contended that he was not warned of the consequences of his actions. However, arbitrator Rothschild stated that the grievant was intelligent and “was not unaware of the risk his continued refusal to obey a direct order constituted” [31, p. 5590]. He (grievant) was found to be properly terminated despite his long service and good work record.

Arbitrator Ross upheld the five-day suspension of three employees who elected to go home rather than load a trailer. The arbitrator brushed aside the union’s claim that the discipline was defective because no forewarning of it was given by the supervisor. Ross noted [32, p. 4065]:

It is absurd for Grievants to believe that they can decline a work assignment and go home without subjecting themselves to penalty.

Similarly, where an employee walked off the job in protest of a dispute he was having with his supervisor, he was issued a three-day suspension. His excuse for leaving the shift early was that he had “never been told to stay.” However, arbitrator Cantor was unimpressed with this excuse, noting that the grievant was an experienced employee and knew that he had to stay for a full shift [33].

In a related case, a supervisor engaged in a discussion with an employee, wherein the employee told the supervisor that he “did not feel good” and that he “did not feel like f_____ with him [the supervisor],” then turned and left the plant [34]. Later, the union claimed that no order had been given for him to stay at work and that the grievant had not been warned of the consequences for his leaving the shift. Arbitrator Wilcox (1989) stated [34, p. 4219]:

While there may be some limited circumstances in which a direct order to “stay here and listen to me” is necessary to support a charge of insubordination when an employee walks away, they were not present here. Employees can be presumed to be on notice that they are supposed to listen to their supervisors and that discipline might result if they do not.

Thus, arbitrators may waive the forewarning requirement when they believe that the employee knew or should have known that failing to comply with an order would subject him or her to discipline.

5. *Imposing the appropriate penalty.* A controversy seems to exist among arbitrators regarding the degree of the penalty that may be imposed for insubordination. As previously noted, management considers insubordination such a significant offense that the preferred penalty is often discharge. However, arbitrators do not always agree. For example, arbitrator Caraway remarked [35, p. 4129]:

Turning to the question of the appropriateness of the penalty, the commission of an act of insubordination generally does not justify termination of the employee. His misconduct must be accompanied by some aggravating conditions such as the use of profane and abusive language, gross acts of disrespect to the supervisor, embarrassing or demeaning the supervisor before other employees. A termination may be justified where the employee has a past history of committing acts of insubordination in the past [citations omitted].

Arbitrator Howell obviously agreed with Caraway’s analysis when he wrote [36, p. 5626]:

When profane, obscene, or abusive language is coupled with a refusal to obey an order or other insubordinate act of the employee, arbitrators typically uphold a discharge or other severe penalty.

If these decisions are to be relied upon, insubordinate acts, standing by themselves, would seldom justify discharge for a first offense unless an employee had a history of such offenses, or the insubordination was combined with abusive or obscene language. Arbitrator G. Cohen would permit discharge for a first offense, but only when there is a refusal to obey orders relating to the performance of job duties [9, p. 3829].

However, the published cases reveal examples of situations when employees were discharged for a single offense of insubordination in the absence of abusive language, and in some instances, when the order was not even directly work-related. For instance, a discharge was upheld for an employee who was denied his third week of vacation but took it anyway [37]. Termination was upheld when an employee was directed to return to work when his paternity leave was denied [38]. The employee did not come to work, claiming he was ill, but failed to supply the requested physician's verification of his illness. Two employees were discharged who took vacation at a time (plant overhaul) the company required them to be at work [39]. An employee who was told that his job would be in jeopardy one month before the date he requested a day off was properly terminated when he took the day off anyway. The arbitrator described the grievant's actions as "aggravated, intentional and calculated in nature; insubordination in its most flagrant form" [40, p. 5392].

Discharge was also upheld for employees who took their lunch breaks after being told not to do so because shift time had been shortened [41]. They walked off the line while it was running. While the arbitrator noted that they had had no previous disciplinary problems, their defiant leaving of the job could have resulted in a substantial loss of material [42].

A lighting engineer was fired for his failure to return keys during a sympathy strike [43]. Arbitrator Milentz upheld the discharges of an entire shift of painters who refused to abide by the company's decision to change their work schedules so that a training program could be established [44].

An employee was properly discharged after reporting for work wearing tennis shoes despite safety rules requiring leather shoes and specifically prohibiting tennis shoes [45]. In a similar case, an employee was told not to wear shorts when he came to work the next day. When he did come in wearing shorts, he had a loud confrontation with his supervisor. The arbitrator characterized his actions as "willful disrespect" and defiance of a proper supervisory order [46]. Another employee was terminated when he refused a work order, claiming that he had already met the production standard. Arbitrator Groshong in sustaining the discharge, pointed out that his eight-hour shift had not been completed, whether he had met the production standard or not [47].

MAJOR VS. MINOR INSUBORDINATION

Arbitrators will sometimes make a distinction between so-called “major” and “minor” insubordination. Major insubordination [10, p. 4314]:

... encompasses three situations: direct, overt refusal [of an order], usually with a proffered reasoning that has legitimate exclusions; refusal to perform *when* the supervisor requires the task to be performed; and refusal to perform a task in the manner required by the superior.

On the other hand, minor insubordination [10, p. 4314]:

... occurs when the subordinate, for one reason—legitimate or otherwise—fails to perform the activity assigned: there is not an overt refusal to do what has been assigned.

Thus, the key difference between major and minor insubordination is that in the former, the employee refuses to perform a task as he has been directed, but minor insubordination involves only a failure to perform the assignment, and not an overt refusal. Arbitrator LaCugna put the matter this way [48, p. 4012]:

... [a]n employee is [guilty of major] insubordina[tion] when he consistently, willingly, knowingly, expressly, consciously and without anger or emotion, refused to obey a work order that does not threaten his health or safety.

However, an employee’s termination was reduced to a ten-day suspension. He previously had given the “bird” (obscene finger gesture) to a supervisor in response to an order to perform an unpleasant job. The arbitrator noted that the employee did not refuse to do the job [49].

PASSIVE INSUBORDINATION

One issue that occasionally arises in the arbitration of insubordination cases is that of the timeliness with which the employee follows the order. Supervisors expect prompt compliance with their directives. When an employee delays fulfilling an order, but completes the work nonetheless, it has been held that the employee is “passively” insubordinate (instead of being guilty of gross or major insubordination). For example, a car salesman was reinstated, but without back pay, the arbitrator noting [50, p. 3359]:

As to supervisory orders, an employee must be given a reasonable opportunity to comply with such orders before the employee can be considered insubordinate for failing to carry out the orders. However, where it is clear that the employee will not carry out the order, the employee’s conduct must be considered as insubordinate.

A discharge was also converted to a suspension without pay after an employee refused to interrupt or defer his fifteen-minute break to clean two trucks [51]. The arbitrator found it significant that the grievant did not refuse to perform the work, and there would be only a short delay for the work to be completed. Arbitrator Yarowsky stated: “The central mitigating circumstance here is the debatable nature of the supervisor’s order in terms of the time frame and the haste in which the discharge was effectuated” [51, p. 5563].

On the other hand, the actual time that passes before the job is completed, even though small, may not be mitigating. For instance, a three-day suspension given to an electrician who failed to report to the scene of an emergency was upheld [52]. The union’s claim that no real harm was done as the employee was only seven or eight minutes late. Arbitrator Taylor noted that in an emergency, every second counts [52]. In a related case, an employee was given a work order, and forty-five minutes elapsed before he actually began the work. Arbitrator Gardiner pointed out [53, p. 4328]:

The central fact remains that for a significant period of time he refused to obey a legitimate directive given by his supervisor. His ultimate compliance is no basis to forgive his primary refusal.

Also, a written warning was upheld for an employee who took four hours to remove the contents of two file drawers to another location [54]. A photographer was properly suspended, despite the union’s argument that no insubordination was present because he had taken the photographs that were required. Nevertheless, an arbitrator found that the photographs were taken one half to one hour later than they were scheduled, and that the time for taking the pictures was part of the work order [55].

EXCEPTIONS TO OBEY NOW AND GRIEVE LATER

The reported cases contain a number of stated exceptions to the “obey now and grieve later” rule. The major exceptions are:

1. orders that, if complied with, would endanger the safety and/or health of the employee [10, 56, 57]; and
2. orders that, if complied with, would result in an illegal or immoral act being performed [10, 56, 57].

No cases were reported in the ten-year period under study involving orders in the second category listed above. Orders that arguably might endanger health or safety are discussed in detail elsewhere in this article. In addition, a number of other “exceptions” were mentioned by the arbitrators. These include:

3. orders that, if complied with, would humiliate or demean the dignity of the employee [10, p. 4315].

4. orders that, if complied with, would deprive an employee of a once-in-a-lifetime opportunity [56, p. 4482]; and
5. orders that, if complied with, would lead to the irretrievable loss of a benefit or privilege [57, p. 4230].

The arbitrators did not explain these last two exceptions to the “obey-now-and-grieve-later” rule, and no cases contained references to such exceptions. This article focuses on exceptions to the “obey-now, grieve-later” rule, for which [sample] cases exist that discuss the application of these exceptions. The exceptions reviewed here include those for health and safety, contractual violations, constitutional reasons, and because union officers were involved.

Safety or Health Exceptions

The majority of arbitrators agree that a management directive which, if complied with, would jeopardize an employee’s health or safety, constitutes a bona fide reason for refusing the work order. Needless to say, under the circumstances, when an injury or health hazard would result from complying with the order, it is not possible to “obey now and grieve later.” If the expectation of danger is a certainty, arbitrators will void the discipline for refusing to obey. The arbitral controversy exists as to the degree of certainty needed to make the employee’s expectation of danger “rational” and not based on unfounded fear. Some arbitrators require that the dangers be “real” and proven by the employee to exist, while others require only that the danger be perceived in the mind of the employees.

Arbitrator Baroni has written an excellent summary of the various schools of arbitrator thought in this regard. He states [58, p. 4519-4520]:

Some [arbitrators] have required that the employee objectively and concretely demonstrate the existence of the [safety or health] hazard. According to this line of arbitral reasoning, unless the employee can objectively prove that a “real and imminent danger to life and limb” actually does exist, the safety exception will not be entertained [citations omitted].

Thus, under this approach, the employee must not only state his fears, but also his reasons for being fearful and be prepared to substantiate his statements with evidence.

At the other end of the spectrum of arbitral reasoning are those decisions of arbitrators who resort to the use of a purely subjective test in reaching their conclusions on the safety exception [sic]. Under this approach, the complained of hazard is viewed as it is perceived in the mind of the employee. Thus, the fear need only be made in the mind of the employee, even though it may be based upon misconceptions [citations omitted].

Baroni resolves the controversy in this way [58, p. 4520]:

In fact, a review of the body of arbitration awards reveals that the greatest number of arbitrators take some form of “reasonable man” approach on the safety question. Under this approach, the arbitrator attempts to determine whether the facts and circumstances known to the employee at the time of the incident would have prompted a reasonable man to fear for his personal safety [59, p. 673]. Therefore, the safety exception can be relied upon, only if a reasonable man would have arrived at the same circumstances as those encountered by the grievant [citations omitted; 58, p. 4520].

For example, arbitrator Nicholas set aside a discharge imposed on an employee who left work before the end of his shift because of fear being hit by lightning. The arbitrator observed [60, p. 3208]:

Moreover, it seems quite reasonable that the storm was moving through the Beaumont area and, therefore, a strong probability for lightning striking the immediate area of the plant was brought to bear.

In the above case, the arbitrator mitigated the employee’s discharge, based not on a real (actual) hazard, but on a potential one. Similarly, in another case, a forklift operator refused to move barrels filled with flammable materials when the area around the barrels was covered with snow. The operator feared that if he attempted to remove the barrels, he might puncture them with the forks of his truck and the barrels might ignite. Under these circumstances, the arbitrator reversed the discipline [61].

Arbitrators will also require that, when refusing a work order, the employee’s reason for declining is that the task assigned presents dangers outside those involved in the normal scope of his duties. In one case, a firefighter was held to be properly disciplined for insubordinately refusing to participate in a training program as a hose nozzleman. He claimed that this duty in the training program was a dangerous one, but the arbitrator found that the risks were no greater than those faced on the job [62]. However, when a job assigned is within the normal scope of duties, but there is an unusual potential for danger, discipline will be reversed. For example, a suspension was rescinded for a border patrol agent who refused to escort a flight with forty-seven alien criminals on board. There was only one other patrolman along, there were inadequate restraining devices for the criminals, and neither agent carried sidearms. The arbitrator observed the situation was “like putting pheasants in a fox’s coop” [63]. A three-day suspension was upheld, however, for an employee who refused to perform because of the lack of safety equipment [64]. However, the company required employees to pay for protective equipment, and the employee had not purchased the needed welding material.

Alleged Contract Violations as a Defense to Insubordination

A sharp controversy exists among arbitrators as to whether or not an employee may properly refuse to comply with a work order based on an allegation that the

order would violate the terms of the parties' collective bargaining agreement. The mainline view is that such an allegation is not a defense to "obey now and grieve later," as the grievance procedure is the proper forum for resolving contract interpretation or application questions. Arbitrator Shulman discussed the reasons for this conclusion [1, p. 781]:

Some men apparently think that, when a violation of contract seems clear, the employee may refuse to obey and thus resort to self-help rather than the grievance procedure. That is an erroneous point of view. In the first place, what appears to one party to be a clear violation may not seem so at all to the other party. Neither party can be the final judge as to whether the contract has been violated. The determination of that issue rests in collective negotiation through the grievance procedure. But, in the second place, the more important, the grievance procedure is prescribed in the contract precisely because the parties anticipated that there would be claims of violations which would require adjustment. That procedure is prescribed for all grievances, not merely for doubtful ones.

For example, a thirty-day suspension for refusing alternative work was proper, despite the fact that the collective bargaining agreement permitted employees the option of going home during a power failure. The arbitrator pointed out that the supervisor did not give the employee that option. Arbitrator Dworkin pointed out: "The employee had no right to enforce his contractual privilege through disobedience" [57, p. 420]. Similarly, the discharge of a union shop steward was upheld when he refused to cease the physical obstruction of a worker's attempt to carry out an order which would have led him to perform out of classification. Arbitrator Kubic stated [65, p. 3076]:

In any event, an order that is inconsistent with the collective bargaining agreement to perform a routine work task is not among the circumstances in which disobedience is privileged.

On the other hand, a few arbitrators will permit an employee to refuse a direct order. A suspension of three days was reduced to one day for an employee who believed that complying would endanger the status of a union job and union security [66]. Similarly, arbitrator VerPloeg [67] reduced a discharge to a suspension for a female employee who refused to attend an alcohol assessment program because she was persuaded that she had the right not to attend under the collective agreement. A firefighter could not be discharged for refusing to agree to a penalty of working 144 hours of overtime without pay [68]. Arbitrator Hoffman explained [68, p. 5476]:

This is not a simple case of worker refusing a typical order regarding work during the normal work day. To the employee this was a case of a most unusual order, extremely severe, if not harsh, of questionable validity, very

likely in breach of contract, and the question is whether refusal to obey such order justifies the ultimate penalty of dismissal.

Similarly, the suspensions of two employees who refused to use their personal vehicles for company business at a rate of twenty-five cents per trip was improper [69]. Arbitrator Stutz pointed out that they did not refuse to obey, and that they could not work now and grieve later because the use of their own personal vehicles was a “condition of work subject to bargaining between the Union and the Company” [69].

Constitutional Exceptions

Public sector arbitration cases involving insubordination have found employees raising a variety of constitutional defenses for their refusal to obey a work order. For example, a three-day suspension was issued to a city employee for publicly disparaging his supervisor in the newspaper and calling the chief financial officer of his department “the head inquisitor” [70]. The *Los Angeles Employee Manual* prohibited such public announcements. Nevertheless, the grievant claimed that he had a First Amendment right to make a public declaration regarding his employer pursuant to *Pickering v. Board of Education* [71]. Arbitrator Weiss observed, however [70, p. 3927]:

Calling the Grievant’s Chief Financial Officer, ‘the head inquisitor’ does not rise to the level of ‘legitimate public concern’ that was involved in *Pickering*.

The arbitrator’s point was that the grievant’s behavior in disparaging his supervisor did not promote the public welfare to provide him First Amendment protection. He ruled that the interests of the state in promoting efficiency of its public services outweighed the narrow interests of the employee. The three-day suspension was upheld [70].

Another First Amendment case involved an employee who was terminated when he refused to make arrangements for back tax payments to the Internal Revenue Service [72]. The grievant belonged to a group that questions the constitutionality of statutes providing for tax withholding. He also threatened to sue the employer. It was argued by the union in the arbitration that the grievant had a First Amendment right to refuse to have payments to the federal government deducted from his pay. However, arbitrator Richman in denying the grievance, observed [72, p. 5584]:

The Arbitrator cannot accept the Union’s First Amendment arguments since the issue is not Grievant’s philosophy but Grievant’s insistence that the Employer join in that philosophy. To the extent that anyone’s First Amendment rights would be impinged upon, it would be that of the Employer who apparently does not share Grievant’s philosophy.

It was pointed out by the arbitrator that if the employer had complied with the grievant's requests, it, too, would have become embroiled in the battle with the federal government.

Fifth Amendment rights were at issue in a case decided by arbitrator Rotenberg [73]. A police information operator had been discharged for refusing orders to be interviewed as part of her employer's investigation of a homicide that occurred adjacent to her residence. The arbitrator ruled that the operator was a public employee who had a fifth amendment right not to testify against herself, and that the employer had failed to grant immunity from prosecution if she did testify. Therefore, the employer was not entitled to compliance with its order [73].

Union Officer Exceptions

Union stewards or other local union officers frequently claim special exceptions for behavior deemed insubordinate by the employer, based on alleged privileges of union office. They may also insist that the employer's discipline was motivated by antiunion animus. Latitude may be extended to union officials in the conduct of union affairs, but the right is not unlimited. Arbitrator Hemer points out [74, p. 3614]:

There is considerable precedent in arbitral decisions which holds that union officials in the conduct of union business are exempt from the obey now—grieve later rule if the order issued to them is in conflict with the Union's rights.

For example, a discharge of a union steward was set aside, who respectfully, but forcefully, declined an order to return while investigating a grievance [75].

Some arbitrators would also reduce or mitigate discipline imposed on union officials who refuse work orders based on their belief that their behavior is for the preservation of an important contract right. Arbitrator Hemer explained [74, p. 3614]:

However, these cases [16 LA 307 and 47 LA 587] do indicate that there is substantial precedent for the proposition that in cases where they obey now—grieve later rule is violated by a Union official engaged in legitimate union activity directed at the protection of a significant contractual right, that fact should be considered in mitigation of the offense, and similarly in the determination whether the penalty issued was appropriate to the offense committed.

In arbitrator Hemer's case, a union president was ordered not to phone to cancel a meeting in view of an emergency situation. Hemer stated [74, p. 3614]:

However, the right to conduct union business is not unqualified, but is regulated. By contract or practice union activities are permitted and scheduled in order not to interfere unduly with production.

The union president's five-day suspension was reduced to one day, as arbitrator Hemer observed that the grievant had the right to make the phone call "... but not then or there" [74]. In a related case, a suspension was reduced to a written reprimand for a union president who refused to leave a supervisor's office when he was so ordered. The arbitrator ruled that his actions were made "in good faith" and that he was not attempting to provoke the supervisor or cause a disruption [76].

Union office does not provide a complete shield from discipline for insubordination, however. In one case, a union president was properly suspended for one day after he insulted a supervisor, degrading and undermining his authority [77]. Discharge was likewise upheld for a union steward who posted a notice on the bulletin board critical of the fact that the company had cancelled the health insurance of a sick employee [78]. Arbitrator White found that the language used by the steward maligned the company, and that when he was ordered to remove the notice, the steward refused to do so. A suspension was also warranted for a union steward who refused to perform work after an arbitrator had determined that there was no discrimination based on his union activities [79]. A twelve-day suspension was held to have been properly imposed on a union committeeman who refused to leave the site of a co-worker's injury and return to work after being ordered to do so by management. His excuse that he needed to confer with management did not prevail in view of the fact that management officials were busy caring for the injured employee and the committeeman's presence was a hinderance under the circumstances.

The existence of union animus provided a partial defense in one case, where arbitrator Eisler ruled that he discharge of a union steward for turning off a machine that an operator had asked the plant manager to watch was too harsh [81]. The manager told the steward to restart the machine, and the steward stated that the plant manager was not the operator. After the order was repeated, the grievant made no immediate response. Then, the plant manager told the (machine) helper to start the machine, but once again, the steward stated to the manager that the helper was not the operator either. After ninety seconds, the operator returned. Arbitrator Eisler reduced the discipline based on his contention that the insubordination was not blatant or repeated. Moreover, he found a history of animus existing between the manager and the steward [81].

ABUSIVE LANGUAGE

Abusive language, obscene gestures, and the like directed at members of management are considered by most arbitrators to represent a form of insubordination.

This is because such behaviors diminish the stature and respect for management in the eyes of the employees. Charges of abusive language are aggravated when the language (or gestures) are made in the presence of coworkers. For example, arbitrator Fitzsimmons remarked [82, p. 1024]:

There is nothing that can be more destructive of the labor management relationship than insubordination of an employee, particularly when that insubordination takes place in front of fellow employees.

For abusive language to become a matter for severe discipline, some arbitrators require that it be directed to management and be used to “embarrass, ridicule or degrade a supervisor” [83]. Other arbitrators will not sustain discharge on the basis of words alone, but only when the words are used in connection with a refusal to obey a work order [36]. Arbitrator Howell contends:

A review of arbitrators’ decisions involving the use of profane, obscene and abusive language discloses that in almost every instance more than words is required to render the employee subject to discharge. [36, p. 5626; For an excellent review of cases involving profanity directed toward management, prior to 1965, see [84].

Nevertheless, summary discharge was justified when an employee twice responded, “F ___ off” to a supervisor who had criticized an improper weld and five minutes later told the supervisor to, “go f ___ yourself” [85].

In defense of employees charged with directing profanity toward their supervisors, unions will sometimes claim that the employees’ expressions were merely “shop talk,” i.e., common language used by employees and supervisors alike when addressing one another or in job-related discussions. Arbitrator Daniel traced the changing concept of shop talk. He reveals [86, p. 5041]:

This arbitrator has, for many years, watched the development of the concept of “shop talk.” In its early beginnings, it was an explanation for why an employee might talk in a particular way without meaning the exact or literal sense of words used. It accepted the proposition that persons working in a hard, masculine, tense, and aggressive environment might resort to talk which was generally offensive and socially unacceptable and should not be blamed. Perhaps this was in recognition that some of the workers, with a lesser degree of education or social awareness, could not express themselves in any language other than that. The concept also recognized that where the employer had permitted such “shop talk” over a period of time it would not be unexpected that other employees, who did not have such a natural tendency, would fall into the habit or use such language simply out of cowardice or defense.

Now, gradually the profile of the industrial worker has changed—better educated and sensitive with increasing numbers of women. There is a demonstrated unhappiness in the workforce over “old ways” and a reluctance to automatically adapt to customs. It would not be unexpected that in the future there will be increasing complaints over such things as “shop talk.” To

many it will seem as much of a pollutant of the work place as toxic fumes. It will not be enough to mouth buzzwords such as “shop talk” to turn aside such complaints.

If arbitrator Daniel is correct, the number of so-called “shop talk” cases should be increasing. Defining shop talk can be a difficult endeavor, prompting arbitrator Strasshofer to observe that, “Shop talk is like pornography. It may be hard to define, but after twenty-four years of arbitrating I know it when I hear it” [87, p. 514]. For obscene language to be considered shop talk, it should be: 1) language commonly used (i.e., language used and condoned by management); 2) be said in a friendly or joking manner and not in a threatening or malicious manner; and/or 3) be a comment borne of frustration or aggravation of the moment. However, when shop talk is used in anger and as part of a deliberate attempt to ridicule or demean a supervisor, it loses whatever protected status it may have enjoyed [87, p. 4182]. Arbitrator Lipson would also consider shop talk to be out of bounds when it “. . . rises to the point of disrupting the work place” [88, p. 5745]. For example, discharge was not warranted for an employee who referred to his supervisor by his (supervisor’s) nickname of “mule” [89]. The grievant knew the supervisor did not like to be called “mule,” but nevertheless, the name was not vile or an epithet, nor was it threatening. Arbitrator Madden reduced a disciplinary penalty when a grievant said, “I don’t have time for that s___,” after he was told to prepare a prisoner’s transfer. The arbitrator reached his decision based on the fact that the deadline for the transfer was on a day the grievant was not scheduled to work, and the vulgarity was not directed to management, only toward the situation [90; see also 91]. Arbitrator Nathan set aside a suspension for insubordination for a union steward who merely asked if he could change the time and place for a meeting. The steward was not defying management’s authority [92]. And, a discharge was reduced to a sixty-day suspension for an employee who banged on the office manager’s door and called him an obscene name, on the basis that the employee had been the victim of numerous payroll mistakes [93].

REFUSAL TO SUBMIT TO A SEARCH

Another form of insubordination can involve the refusal of an employee to submit to a search after being ordered to do so by management. (Other examples of insubordination, such as refusal to submit to a medical or drug/alcohol test or refusal to work overtime, are not included in this article.) Arbitrator Brisco states [94, p. 1208]:

Arbitrators have consistently held that the employer has a right to conduct a search of lunch boxes, lockers and persons that refusal [sic] to permit a search may include discharge.

For example, discharge was upheld for a grievant who refused to allow two security guards to search his lunch and a brown bag as flagrant insubordination [95]. Another employee was discharged for refusing to open his lunch box during an unannounced search [94]. Arbitrator Milentz upheld the discharge for an employee who refused to comply with an order to open his car, which was in the parking lot, after marijuana was seen in the ashtray and on the dashboard. Milentz explained [96, p. 570]:

The refusal to permit the search of his privately owned vehicle after being directed to do so several times, must be considered to be an act of insubordination which is also considered serious enough to warrant discharge. His repeated refusal to permit inspection was in spite of warnings that continued refusal would result in serious disciplinary action, including termination.

An order to open lunch pails must be obeyed, despite the supervisor's casual behavior toward the employees involved [97]. The arbitrator stated that "casualness" had nothing to do with it, as there was no evidence that employees had previously been given orders which they were free to disobey.

MITIGATION

As with any other form of discipline or discharge, arbitrators may mitigate penalties imposed in various circumstances. A review of the case material shows that the most common reason for mitigating discipline for insubordination has been an employee's long service and/or good work record [35, 98-108]. Discipline may also be mitigated when a supervisor provokes the insubordination [109-112]. For example, an employee's two-week suspension was reduced to three days after he pushed a supervisor in the chest in response to the supervisor's act of pouring his coffee down the drain [109].

Management may also unwittingly contribute to an insubordinate climate by tolerating insubordinate behavior [113-116]. For example, a discharge was converted to a six-month suspension for an employee who refused to complete required reports and became abusive to management. The arbitrator noted that management had tolerated similar behavior on the grievant's part for ten years without giving him a warning or other discipline [116].

Naturally, discipline may also be mitigated if various elements of insubordination are missing from the employer's case, such as the case where no direct order was issued [103, 117-119], or that in which the order was unclear [14] or conflicting with other orders issued to the grievant [20]. Mitigation may be found if the employee is not familiar with the member of management issuing the order [17]. It may also be found when the employee does not refuse to perform the work [20, 21, 51]. Discipline may be reduced when an employee is not forewarned of the consequence of a refusal to obey [23, 26, 28, 29]. When an employee actually

performs the work, albeit somewhat tardily, the degree of discipline may also be decreased.

Employers using progressive disciplinary systems cannot combine discipline for insubordination with a lesser infraction in order to issue a suspension [121]. Moreover, management may not discipline an employee by withholding monetary benefits to which he or she is entitled. For example, a machinist was told to clock out before going to the doctor, but the employee did not do so. He was issued a three-day suspension and the serving of the suspension was timed so that he would have to forfeit holiday pay [122]. Nor can an employer impose an indefinite layoff for insubordination or any other infraction. Arbitrator Bressler observed that, "A disciplinary layoff, to be just, must be for a specific term and the employee and the Union are entitled to know the exact length of the disciplinary layoff" [123, p. 326].

Employers may not validly impose discipline on a selective basis. A discharge of a meat cutter was not justified when he refused to wash hog abscesses, where evidence showed that the established practice was that employees were not discharged for refusing to perform this duty [124]. Similarly, the discharge of a local union officer was reduced to a seven-day suspension. The officer was denied a half hour's early release by his supervisor to attend a union election, but the employee left anyway. There existed a longstanding practice to honor a thirty-minute lead time, and the arbitrator observed that, while the supervisor and his orders must be respected, the refusal to obey an order that was contrary to a longstanding practice should not result in so harsh a penalty as discharge [125].

DISCUSSION

A review of recent arbitration cases spanning the years from 1980 to 1990 demonstrates the complexity, if not the variety, of issues involved in insubordination. To justify discipline or discharge for work order insubordination, there must be a direct order given to the employee, the order should be understood by the employee, and the employee must refuse to comply. While some arbitrators would impose an additional requirement that the order must be related to the employee's job or otherwise be work-related, others simply assert that any business-related order requires compliance. Moreover, a minority of arbitrators demand that a loss of production must result from the failure to comply with an order before the behavior becomes insubordinate.

Insubordination also requires that an order be refused. An employee who does not refuse to obey an order is almost never found to be guilty of "gross" or "major" insubordination. Nevertheless, an employee can be passively insubordinate not by refusing, but by simply failing to carry out the directive. Arbitrators have pondered the time frame during which an order must be carried out before the employee is guilty of passive or minor insubordination. While no precise time-limit standards were determined, even a short time delay in an emergency can

prompt a finding of passive insubordination. A long time span might also be permitted, depending on the circumstances. But, if time constraints were part of the original work order, then the employee should not take long to fulfill the task assigned.

Many arbitrators seem reluctant today to sustain discharge for a single act of insubordination unless it was aggravated by profane or abusive language, gross disrespect, and/or demeaning the member of management before other employees. However, there are a number of reported cases when employees were terminated for a first offense of insubordination, even in the absence of aggravating factors.

While most arbitrators agree with the concept of obey now and grieve later, there is disagreement as to the circumstances that serve as exceptions to the principle. Most arbitrators, however, agree that fears for safety and health properly allow an employee to decline a work order. However, while some arbitrators impose a requirement that the danger must be an actual one and provable by the employee raising the defense, other arbitrators go to the other extreme and simply state that the employee must perceive a danger to life or limb. The dominant arbitral view is somewhere in between these extremes, namely, that the employee's fears should be rational (i.e., what a reasonable person might perceive as a danger). The danger presented by the work order must also be in excess of those dangers normally encountered in the course of an employee's job duties.

Most arbitrators will not permit an exception for an alleged contract breach to the "obey now and grieve later" principle on the basis that the grievance procedure has been established to resolve questions of contract interpretation and application. Arbitrators are inclined, however, to grant exceptions to the principle if the order is in conflict with union rights, such as investigating a grievance.

Abusive language is a form of insubordination universally recognized by arbitrators. It is considered such because it may have the effect of demeaning management, particularly when it occurs in the presence of other employees. To be abusive, language must be directed at management and not at a situation in general, and must be spoken with the intention of embarrassing or humiliating management. Unions will attempt to defend employees charged with abusive language on the grounds that the words were simply "shop talk" and were not meant to be demeaning. For language to be considered "shop talk," the words must be those commonly used (condoned) by workers and management alike, and must be said in a friendly or joking manner and/or born of the frustration of the moment.

The sample cases show that discipline meted out for insubordination will most commonly be mitigated because of the involved employee's long service and/or good work record. It may also be mitigated because the insubordination was provoked by management. When insubordination has been condoned by management in the past, suddenly imposing discipline will not be permitted by arbitrators. Discipline will also be reduced or eliminated when the employer fails to prove that

an order has been given, when there was no refusal to perform the task, or when the task is performed.

* * *

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