Cynthia Horvath Garbutt is an attorney and labor arbitrator in Chicago, Illinois. Lamont E. Stallworth is an associate professor at the Institute of Industrial Relations at Loyola University of Chicago, a labor arbitrator, and president of the Society of Professionals in Dispute Resolution (SPIDR). *The authors wish to thank Carolyn Hernandez for her assistance in the preparation of this article.*

Theft in the Workplace: An Arbitrator's Perspective on Employee Discipline

CYNTHIA HORVATH GARBUTT AND LAMONT E. STALLWORTH

The primary purpose of this article is to analyze the manner and the basis upon which arbitrators decide discipline and discharge cases involving employee theft. The discussion focuses on the degree of proof necessary to sustain a discharge for theft, what effect the existence of a clear-cut company policy might have on an arbitrator's decision, and what circumstances may lead an arbitrator to overturn management's discipline.

The authors offer practical guidelines for instituting a policy that clarifies each party's responsibilities in handling employee theft cases. In addition, steps are suggested that management can take to substantially minimize incidents of theft of company property.

Employee theft costs employers billions of dollars each year. Disputes involving employees disciplined and/or discharged for theft can present troublesome issues for arbitrators, among them the degree of theft involved (ranging from pilfering a small item from the company to grand larceny); exceptional circumstances where the general rule of summary discharge for theft may not apply; complications involving the presentation of evidence and the degree of proof; and protecting the employee's right to privacy and industrial due process. Furthermore, because of the potentially devastating effect on the employee's professional and personal life, arbitrators frequently require substantial proof of the employee's guilt before upholding a discharge for theft.[1]

Employee theft cases are difficult for all parties concerned. An increased awareness of the inherent issues involved, however, may help labor arbitrators and labor and management advocates to deal more effectively and more appropriately with the problem. In addition, it is hoped that this article will provide some insight into the arbitral resolution of grievances arising from employee theft cases.

". . . because of the potentially devastating effect on the employee's professional and personal life, arbitrators frequently require substantial proof of the employee's guilt before upholding a discharge for theft."

TYPES OF THEFT: DEFINITION

Employee theft is generally recognized as the unauthorized taking, control, or transfer of money and/or property belonging to the employer (or belonging to fellow employees on company property) that is perpetrated by an employee during the course of his or her employment.[2] Some common types of employee theft are: (1) stealing money or company funds;[3] (2) pilferage of company goods or services;[4] (3) theft from fellow employees;[5] (4) falsification of time cards or other company documents;[6] (5) off-duty theft or misconduct;[7] and (6) tolerating coworker wrongdoing.[8]

GUIDELINES

It is well-established among labor arbitrators that employee theft is one of the few offenses for which summary discharge is appropriate; progressive discipline does not apply in these cases. There are instances, however, when arbitrators must consider exceptional circumstances or mitigating factors, even when upholding the discharge penalty. In *American Welding & Manufacturing Company*, Arbitrator Dworkin wrote:

> [T]here is practically no category of misconduct which automatically justifies employment termination. Every employee faced with discipline is entitled to judicious consideration of individual mitigating factors. Of course, some offenses are more serious than others and most likely to justify discharge. Theft is such an offense. *Generally, stealing from an employer is so contrary to an employee's responsibilities that it literally cancels the employment relationship.* Only in exceptional circumstances will an arbitrator reverse an employer's decision to fire a proven thief. But even a thief is entitled to thorough examination of mitigating factors (emphasis added).[9]

An arbitrator is duty-bound to consider all the circumstances presented, especially given the severe stigma attached to employees dis-

[1] As will be discussed later in this article, arbitrators' views of the proper standard of evidentiary proof required in employee theft cases vary widely, and this is reflected in their decisions.

[2] See Richard Hollinger and John Clark, *Theft by Employees* (Lexington, MA: Lexington Books, 1983), at 2. In addition, an employee who occupies a position of trust (for example, a cashier) may also be subject to discharge for theft that occurs off duty and away from company property.

[3] See Kansas City Area Transportation Authority, 82 LA 409 (Maniscalco, 1984).

[4] See American Welding & Manufacturing Co., 89 LA 247 (Dworkin, 1987); Illinois Power Co., 84 LA 586 (Penfield, 1985); and Beatrice/Hunt-Wesson, 89 LA 710 (Bickner, 1987).

[5] See Rohr Industries, Inc., 82 LA 136 (Darrow, 1984); and Bethlehem Steel Corp., 81 LA 268 (Sharnoff, 1983).

[6] See Pringle Transit Co., 81 LA 393 (Duda, 1983); and Vulcan Materials, 81 LA 165 (Jewett, 1983).

[7] See Means Services, Inc. 81 LA 1213 (Slade, 1983); Hilton Hawaiian Village, 76 LA 347 (Tanaka, 1981); and Vulcan Asphalt Refining Co., 78 LA 1311 (Welch, 1982).

[8] See C & P Telephone Co., 51 LA 457 (Seibel, 1968); Spiegel, Inc., 44 LA 405 (Sembower, 1965); and Scott & Fetzer Co., 83-1 ARB ¶ 8184 (Kossoff, 1983).

[9] *Supra* note 4, at 252.

charged for theft.[10] Initially, however, the arbitrator must consider an employer's stated policy, if any, regarding employee theft and how that policy is promulgated and enforced.

Company Policy on Theft

Many companies have written rules of conduct for their employees to follow. The rules are usually disseminated to new employees and posted at the plant. Rules of conduct typically include a prohibition against theft and specify that immediate discharge will result for any employee caught stealing.

In *Kansas City Area Transportation Authority*, Arbitrator Maniscalco summed up the prevailing arbitral attitude toward employee theft:

> An employer is entitled to expect honesty on the part of employees; and employees have the basic responsibility not to steal from their employer. Courts and legislatures have fashioned distinctions between petty and grand larceny. In industry, however, theft, regardless of the value of the item, is virtually always considered grounds for immediate discharge.[11]

The type or degree of theft involved apparently does not affect an arbitrator's decision to uphold an employee's discharge. Theft which is *mal en se*, a wrong in itself, is treated much the same as a *mal en lex* crime, an action prohibited by law.

For example, in *Star-Kist Foods, Inc.*,[12] an employee was caught with a piece of raw tuna loin in his lunchbox. The company had a written policy that an employee could be dismissed without prior warning for theft of company property. The company also required an employee to obtain a company-property pass prior to removing company property from the premises. The arbitrator upheld the grievant's discharge, finding that the grievant was aware of the company-pass requirement, did not possess a pass, and therefore violated a company rule that required termination. Regardless of the value of the theft involved, arbitrators emphasize the employee's knowledge (actual or implied) of company rules prohibiting such conduct when upholding the discharge penalty.[13]

---

[10] It is not uncommon, for example, for an employee who is apprehended for alleged shoplifting to find his or her name in a local newspaper.

[11] Kansas City Area Transportation Authority, *supra* note 3, at 413.

[12] 81 LA 577 (Hardbeck, 1983).

[13] Compare Canteen Corp., 89 LA 815 (Keefe, 1987), wherein the arbitrator found that the company improperly discharged the grievant for stealing food. The grievant credibly claimed that the food was lunch (which the company provided), which she had not had time to eat. The employer did not assert that the grievant had failed to obtain a company pass for the removal of food. In upholding the grievance, the arbitrator noted that "if management feels this opens the door to trumped up excuses permitting theft to become widespread, it can publish and enforce a clear-cut rule requiring passes" (*id.* at 820).

Some employers, however, do not have any written rules of conduct for their employees. Nevertheless, in the absence of a written policy on employee theft, arbitrators consistently hold that employees are responsible for their actions. Theft is theft. Barring exceptional circumstances, if an employee's guilt is established by the company, the employee's discharge is invariably upheld.

Exceptional Circumstances

Arbitrators may deviate from the general rule of summary discharge for employee theft when exceptional circumstances exist. Such exceptional circumstances include cases where (a) the company condones or is somehow involved in the misconduct; (b) the company discharges an employee for off-duty misconduct that has no connection to the employee's job; and (c) there are mitigating circumstances related to disability resulting from alcohol or drug abuse.

Company Condones Conduct. When an employee is charged with theft of company property but the company has condoned the practice or is in some way involved in the misconduct, arbitrators frequently find that summary discharge is inappropriate.

For example, in *Carnation Company*,[14] an employer discharged a union steward for theft of 14 pads of paper, which he obtained, without authorization, from a company supplyroom. The union steward intended to use the pads for an official company–union conference. The arbitrator found that the employer improperly discharged the union steward, because in the past the employer had condoned the practice by union stewards of taking office supplies from the storeroom. Furthermore, the union steward did not intend to steal the pads for his personal use. Rather, they were to be used for company-related business purposes, which was consistent with the past practice of the parties.

Off-Duty Misconduct. Cases involving an employee arrested for theft while off duty can present special problems for the arbitrator. Generally, an arbitrator must examine two separate but interrelated considerations: the alleged misconduct of the employee, and the effect of that misconduct on the employer's business.[15]

In grievance arbitration, the findings and determinations in a criminal forum are not dispositive of the merits of the case. Rather, employers generally are required to prove that the employee's misconduct is significantly related to on-the-job considerations, or that a "nexus requirement is established between the conduct complained of and some legitimate facet of the employer's business."[16] The "nexus," or connection, must be reasonable and discernible—the misconduct must be injurious to the employer's reputation or its product, or the incident must cause the employee to become incapable of performing his or her job at the same level of competency.[17] Some arbitrators apply the "beyond a reasonable doubt" standard of proof when deciding off-duty misconduct cases.[18]

In a recent unpublished award, one arbitrator reinstated a grievant discharged for shoplifting while off duty. The employer, a food retailer, argued that it had a long-standing practice of discharging employees for serious off-duty misconduct because such conduct affects their employment relationship with the company. In this case the arbitrator overturned the discharge penalty because the

". . . employers generally are required to prove that the employee's misconduct is significantly related to on-the-job considerations, or that a 'nexus requirement is established between the conduct complained of and some legitimate facet of the employer's business.'"

[14] 84 LA 80 (Wright, 1985).

[15] Marvin F. Hill, Jr., and Anthony V. Sinicropi, *Management Rights* (Washington, DC: BNA Books Arbitration Series, 1986).

[16] *Id.* at 217.

[17] *Id.*

[18] A more detailed discussion of the differing types of evidentiary proof found in employee theft cases is provided in note 26, *infra*.

employer's investigation of the alleged off-duty theft was not thorough, and there was insufficient evidence of the grievant's intent to steal.[19]

Similarly, arbitrators may also overturn an employer's discharge decision if the penalty is found to be too severe. For example, the arbitrator in *Means Services, Inc.*,[20] held that the penalty of discharge was too severe for a route driver who had pleaded guilty to theft while off duty. Although the arbitrator noted that theft of any kind raises serious doubts about an employee's trustworthiness in the workplace, the evidence of the employee's conviction did not establish that the grievant's ability to perform his job competently was impaired, or that the employer's business was adversely affected by the grievant's off-duty misconduct. In so holding, the arbitrator emphasized the grievant's clean work record and the fact that the crime was a first offense. Arbitrator Slade found that

> while the employee may have been guilty, the act he may have committed when ameliorated by the mitigating offsets [that is, the grievant's work record and first-offender status] was not serious enough to justify the supreme penalty of discharge.[21]

Mitigating Circumstances Related to Alcohol or Drug Abuse. Arbitrators confronted with an employee claiming alcohol or drug abuse as a defense must consider the individual circumstances presented before deciding whether to uphold a summary discharge for theft.

As James R. Redeker states:

> Alcoholism as a defense may or may not be effective, depending on the circumstances of the case. The conduct or work performance which result from the alcoholism is the basis for discipline, not alcoholism itself. . . .
>
> When the aberrant behavior is so severe that it would normally justify summary discharge, alcoholism will be an effective defense when raised for the first time at the discharge hearing, unless the conduct was so hazardous to other employees or shocked the conscience of the arbitrator that discipline is viewed primarily as punishment.[22]

Some arbitrators do not view evidence of alcohol or drug abuse as mitigating factors in employee theft cases.[23] When rendering their decisions, a number of arbitrators consider the length of the employee's service, his or her work record, and the severity of the abuse problem. In addition, these arbitrators may also consider whether the employer has an established employee-assistance program and whether the employee has asked to participate in the program in lieu of immediate discharge. If a discharged employee is reinstated, the reinstatement is almost always conditioned on the employee's willingness to seek—and have a reasonable probability of successfully completing—an alcohol or drug treatment program.[24]

[19] See, also, Great Midwest Mining Corp., 82 LA 52, 55 (Mikrut, 1984); and Lee Dodge, 84 LA 1073, 1077 (Chandler, 1985).

[20] *Supra* note 7.

[21] *Id.* at 1216. Compare Hilton Hawaiian Village, *supra* note 7, in which the arbitrator upheld the discharge of a hotel employee who pleaded guilty to assisting in the sale of a stolen gun because the grievant's misconduct was related to his job. The grievant possessed the hotel's master key, which gave him access to valuable property. Evidence established that the grievant's supervisor and coworkers no longer trusted him, and the employer would risk liability for possible further crimes committed by the grievant on its premises if it chose to re-employ him.

[22] James R. Redeker, *Discipline Policies and Procedures* (Washington, DC: Bureau of National Affairs, 1983), at 86.

[23] See Rohr Industries, Inc., *supra* note 5, in which an employee's discharge for stealing from a fellow employee and for destruction of company property was upheld, notwithstanding the grievant's claim that he may have been under the influence of a controlled substance.

[24] See, generally, Tia Schneider Denenberg and R. V. Denenberg, *Alcohol and Drugs: Issues in the Workplace* (Washington, DC: Bureau of National Affairs, 1983). In Frank Elkouri and Edna Asper Elkouri, *How Arbitration Works*, supp. to 4th ed. (Washington, DC: Bureau of National Affairs, 1988), at 133, the authors note that in Crown Zellarbach Corp., 87 LA 1145 (Cohen, 1986), the arbitrator held that drug use does not necessarily involve moral turpitude and that such issues should be decided on a case-by-case basis. Additionally, some arbitrators find that the employer's burden of proof in discharge cases involving drug or alcohol abuse may be greater—that is, beyond a reasonable doubt—than in more general types of discharge cases. See Maverick Tube Co., 86 LA 1 (Miller, 1985).

PROVING EMPLOYEE THEFT

Burden of Proof

It is a well-established arbitral principle that discharge is tantamount to industrial capital punishment and "is such serious punitive and final action that the employer must carry a heavy burden in supporting such action."[25] In cases involving employee theft, some arbitrators require clear and convincing evidence of the employee's guilt, while others hold that proof must be beyond a reasonable doubt.[26]

Circumstantial Evidence

Quite often, arbitrators are presented with only circumstantial evidence in employee theft cases, as direct evidence and eyewitness accounts are not always available. Using criminal law standards for guidance, Arbitrator Holman, in *General Telephone Company of Southwest*, found that "circumstances relied upon must be consistent with the theory of guilt and inconsistent with any reasonable theory of innocence."[27] In that case, the arbitrator held that suspicions alone are not enough to support a discharge. Because the employer had failed to show that the employee intended to steal a teledialer, and there was only inconclusive, circumstantial evidence to support the discharge, the grievance was upheld.[28]

Intent

Arbitrators usually require evidence of an employee's intent to steal company property or to act in a dishonest manner before upholding a discharge. As discussed previously, the burden is on the employer to present such evidence. In both *Carnation Company*[29] and *General Telephone Company of Southwest*,[30] the absence of proof that the employees intended to steal company property for their own use resulted in the reversal of the employers' discharge decisions.

James R. Redeker notes that in cases where an employee is accused of falsifying company records, the most crucial factor is proof of intent. Specifically, he states:

> An employee may be discharged or otherwise disciplined for dishonesty or falsification of company records where the employer can sustain its burden of proving that the employee acted with *knowledge* of wrongfulness of the act and with *intent* to defraud the company. A prior good work record may be insufficient to mitigate a discharge, because the offense is perceived as too serious.[31]

Consistency of Application

It is the duty of the arbitrator in employee theft cases to safeguard the interests of the discharged employee by making reasonably sure that the discipline is just and equitable, and that the offense would appear to reasonable and fair-minded persons to warrant discharge.[32] An arbitrator must not only determine an employee's guilt but also decide whether the employer acted in an arbitrary, capricious, discriminatory, or unreasonable manner.[33] If the employer discriminates against the aggrieved employee by treating him or her differently from other employees guilty of the same or similar offenses, the arbitrator has the authority to modify the discharge decision and to reduce the penalty to a suspension.

Employers have a vested interest in treating their employees alike in cases of employee theft. Discharging employees who cannot be trusted and who do not take seriously their responsibility to their employers is a sound business decision—it sends a clear and unequivocal message to other employees that such conduct is not tolerated. Some employers, however, may "look the other way" for a time with certain employees and then suddenly decide to punish an employee for behavior that is well established in the workplace. To most arbitrators, this constitutes inconsistent and disparate treatment and often leads to the sustaining of theft-related grievances.

In *Vulcan Materials*,[34] the employer discharged an employee for falsifying log books in order to cover

---

[25] General Telephone Co. of Southwest, 79 LA 102, 105 (Holman, 1982), citing Schnuck Markets, 73 LA 829, 832 (1979). It should be noted that true industrial capital punishment is "blacklisting," wherein employers have a generally known and accepted understanding that certain employees shall not be hired.

[26] *Id.*, citing Gardner–Denver Co., 51 LA 1019 (Ray, 1968), and Continental Conveyor & Equipment Co., 69 LA 1143 (Tucker, 1977). See, for example, Martin F. Scheinman, *Evidence & Proof in Arbitration* (Ithaca, NY: NYSSILR, Cornell University, 1977), at 11, wherein it is stated: "Once it has been established which party has the burden of proof, the next question is, what shall be the proper standard of that proof? That is, what shall be the yardstick to determine whether each party has met its respective burden? There are generally considered to be three degrees of proof that a party may be required to sustain: proof 'beyond a reasonable doubt' is the strictest quantum of proof; 'preponderance of evidence' or 'fair preponderance' is the minimum quantum of proof acceptable in most arbitration cases; 'clear and convincing evidence' lies somewhere between the two."

These three degrees are defined as follows in *Black's Law Dictionary* (St. Paul, MN: West Publishing Co., 1979): *beyond a reasonable doubt*—"fully satisfied, entirely convinced, satisfied to moral certainty;" *fair preponderance*—"evidence sufficient to create in the minds of the triers of fact the conviction that the party upon whom is the burden has established its case;" and *clear and convincing evidence*—"generally, this phrase and its numerous variations means 'proof beyond a reasonable', *i.e.*, a well-founded doubt. Some cases give a less rigorous, but somewhat uncertain meaning, *viz.*, more than a preponderance but less than is required in a criminal case [beyond a reasonable doubt]."

There is an active debate being waged over the appropriate standard in arbitration and whether that standard should change according to the alleged infraction, especially if the allegation might lead to criminal prosecution (*id.* at 10–13). See, also, Marvin Hill, Jr., and Anthony V. Sinicropi, *Evidence in Arbitration*, 2d ed. (Washington, DC: BNA Books Arbitration Series, 1987), at 32–39.

In Elkouri and Elkouri, *How Arbitration Works*, *supra* note 24, the authors note that arbitrators continue to require proof beyond a reasonable doubt in discharge cases involving criminal misconduct, although there is still a division of opinion on the topic. See Atlanta Linen Service, 85 LA 827 (Statham, 1985); Avis Rent a Car System, 85 LA 435 (Alsher, 1985); Utility Trailer Manufacturing, 83 LA 680 (Richman, 1984); and Kroger Co., 88 LA 463 (Wren, 1986).

[27] *Supra* note 25, at 105.

[28] Compare Kansas City Area Transportation Authority, *supra* note 3, in which the arbitrator found, based upon strong circumstantial evidence presented by the employer, that the company acted properly in discharging a maintenance employee for appropriating company money in violation of its rule against theft. See, also, Chicago Transit Authority and ATU, Local 308, 76–2 ARB ¶ 6049 (Larkin, 1976).

[29] *Supra* note 14.

[30] *Supra* note 25.

[31] Redeker, *Discipline Policies and Procedures*, *supra* note 22, at 119. See, also, Pringle Transit Co., *supra* note 6, in which a discharge penalty was upheld where an employee knowingly filed improper mileage claims for over a year to obtain company monies not due him.

[32] Elkouri and Elkouri, *How Arbitration Works*, *supra* note 24.

[33] Safeway Stores, 84 LA 910 (Staudohar, 1985).

[34] *Supra* note 6.

up an accident. In arbitration, the grievant was found guilty of deliberately falsifying an official company record; however, because the arbitrator found that the company had condoned the falsification of log books in the past and had not discharged other guilty drivers, the discharge was reduced to a suspension. The arbitrator stated that "falsification of log books, lies and other violations of company regulations must be treated uniformly."[35] By enforcing theft/dishonesty policies inconsistently, employers run the risk that their discharge penalties will be reduced.

Use of Polygraphs

On June 27, 1988, the Employee Polygraph Protection Act of 1988 was signed into law.[36] The act prohibits most private employers from using polygraph tests to screen job applicants or to test current employees, unless the company reasonably suspects that the employee was involved in a workplace theft or incident causing economic loss to the employer.

Previously, the overwhelming weight of arbitral authority held that polygraph evidence was inadmissible to establish the guilt or innocence of a grievant because of the inherent unreliability of the test.[37] Arbitrators therefore generally refrained from punishing employees for refusing to submit to a polygraph examination, despite their duty to cooperate during an investigation into the theft of company property.[38]

In the past, arbitrators have considered polygraph testimony when the parties stipulated to its reliability and the evidence was used only to determine the truthfulness of the grievant.[39] With the passage of the new law and its exceptions regarding employees suspected of theft in the workplace, arbitrators increasingly may find polygraph evidence to be an integral but unstipulated part of the employer's case. Under section 7(d) of the new law, employers may request that an employee submit to a polygraph examination if (1) the employer is involved in an ongoing workplace investigation of theft or other incidents that cause economic loss to the employer; (2) the em-

[35] *Id.* at 168.

[36] Pub. L. 100-347-102, Stat. 646.

[37] Hill and Sinicropi, *Management Rights, supra* note 15, at 273–274. More recently, however, there appears to be some indication that arbitrators are admitting such evidence into the record, but are affording little weight to the polygraph test results, much like hearsay evidence admitted "for what it is worth." See note 43, *infra*. Compare the contrary statistical findings on the admissibility of polygraph test results in arbitration proceedings in the following two articles: Kimberly Janisch-Ramsey, "Polygraphs: The Search for Truth in Arbitration Proceedings," *The Arbitration Journal* 41 (March 1986): 34; and Herman A. Theeke and Tina M. Theeke, "The Truth About Arbitrators' Treatment of Polygraph Tests," *The Arbitration Journal* 42 (December 1987): 23.

[38] See Glen Manor Home for Jewish Aged, 81 LA 1178 (Katz, 1983).

[39] Hill and Sinicropi, *Management Rights, supra* note 15, at 274. See, also, Brink's Inc., 70 LA 909 (Pinkus, 1978); and Kisco Co., 75 LA 574, 582 (Stix, 1980).

ployee had access to the property under investigation; (3) the employer has a "reasonable suspicion" that the employee was involved; and (4) the employer provides the employee with a written statement giving its reasons for testing particular employees.

Additionally, arbitrators should note that under section 8(a)(1) of the law, the exemption in section 7

> shall not apply if an employee is discharged, disciplined, denied employment or promotion, or otherwise discriminated against in any manner on the basis of the analysis of a polygraph test chart or refusal to take a polygraph test, without additional supporting evidence. The evidence required by such subsection may serve as additional supporting evidence.

Arbitrators should be aware that the law specifically prohibits employers from disciplining, discharging, discriminating against, or denying employment or promotions to prospective or current workers *solely* on the basis of polygraph test results. Consequently, an interesting development to monitor will be what degree of evidentiary weight, if any, arbitrators will accord polygraph test results under the new law.[40]

"Discharging employees who cannot be trusted and who do not take seriously their responsibility to their employers is a sound business decision—it sends a clear and unequivocal message to other employees that such conduct is not tolerated."

Testimony of Witnesses

When grievants testify on their own behalf, arbitrators must carefully consider the testimony to ascertain whether the grievants are being truthful or prevaricating to save their jobs. Similarly, when other witnesses are called, the arbitrator must also pay close attention to their testimony. The arbitrator must determine whether the witnesses are disinterested parties or bear some ill will toward the grievant that may color their testimony.[41]

When witnesses are called to testify in employee theft cases, the arbitrator credits the testimony of all disinterested witnesses and weighs the evidence carefully. If there is a discrepancy among the witnesses, it is the arbitrator's function to determine the veracity of the testimony and the most plausible condition of the disputed events.[42] The arbitrator alone must sift through all the testimony and make a logical and well-reasoned conclusion.

Testimony by Other Employees. Occasionally, coworkers are called to testify against a grievant. The arbitrator must determine whether there is an ulterior motive behind such testimony (for example, if the witness harbors any ill will toward the grievant, or if the company induced the witness to testify against the grievant). The arbitrator must also know if the witness saw the crime firsthand or is only offering hearsay evidence.[43]

If an employee is called to testify for the grievant, it is usually to support the grievant's good character or to provide an alibi. Whether the witness is called to testify for or against the employee, however, the arbitrator must make a credibility judgment regarding the witness and the proffered testimony before reaching any final conclusions.

Testimony by Supervisory Employees/Security Guards. More frequently, supervisory employees or security guards are called to testify against the grievant. In *Beatrice/Hunt-Wesson*,[44] the arbitrator upheld the discharge of an employee who was caught stealing

---

[40] According to Norman Ansley, *Quick Reference Guide to Polygraph Admissibility, Licensing Laws, and Limiting Laws*, 14th ed. (New York: American Polygraph Association, 1989), there is a division among the federal circuit courts and the state courts as to the admissibility of polygraph evidence. Compare, for example, United States v. Winter, 633 F.2d 120 (1st Cir. 1981), *cert. denied*, and United States v. Early, 657 F.2d 195 (8th Cir. 1981); In re Kathleen, 235 Cal. Rptr. 205 (Cal. App. 1987) (new state law permits admissibility on stipulation, but not over objection, except in juvenile cases), and Smith v. United States, 389 A.2d 1356 (D.C. App. 1978). See, also, United States v. Williams, 737 F.2d 594 (7th Cir. 1984) (appellate court will not overturn decision by trial court to exclude polygraph evidence as such decision is within the trial court's discretion). What is apparent from the courts' differing views on the admission of polygraph evidence is that if such evidence is admitted, it is not given much weight—much like the current arbitral trend.

[41] Safeway Stores, *supra* note 33, at 913.

[42] See South Penn Oil, 29 LA 718, 720 (Duff, 1957), and Mark VII Sales, 75 LA 1062, 1066 (O'Connell, 1980), for criteria used in determining veracity.

[43] Hearsay is defined as "testimony given by a person who states, not what he knows of his own knowledge, but what he has heard from others." Dallas L. Jones, ed., *Problems of Proof in Arbitration*, Proceedings of the 19th Annual Meeting of the National Academy of Arbitrators (Washington, DC: Bureau of National Affairs, 1967), at 249. Hearsay is usually admitted by arbitrators "for what it is worth," in order to make the record complete. See Continental Paper Co., 16 LA 727 (Lewis, 1951).

[44] *Supra* note 4.

plywood—a decision that was based upon the eyewitness testimony of the company security guard. The arbitrator found the guard's testimony to be plausible, believing that he had ample opportunity to see the grievant remove the plywood and that he had no reason to fabricate his story. In considering the testimony of supervisory employees or security guards, arbitrators must consider the witnesses' motives for testifying and whether they have firsthand knowledge of the incident. Where a credible supervisory witness presents an eyewitness account of the offense, an arbitrator has little choice but to uphold the discharge decision.

Problem of Missing Witnesses. If a key witness in an employee theft case is missing, the arbitrator may find that there is insufficient evidence to support the discharge penalty. In *Hawaiian Airlines, Inc.*,[45] the arbitrator held that the airline had failed to establish the discharged employee's theft of a box of fish. The company provided only circumstantial evidence of the employee's alleged crime. It failed to call a key witness—a security guard who was no longer employed by the company—to testify as to the grievant's alleged actions, instead presenting a hearsay document in lieu of the guard's testimony. The arbitrator, noting that the company could have compelled the guard to testify through the arbitrator's subpoena power,[46] concluded that to consider only the document (which could not be cross-examined by the union) would be unfair, improper, and prejudicial. Accordingly, because the company failed to meet its burden of proof, the arbitrator sustained the grievance.

Witnesses who are either no longer employed by the company or are fearful of testifying because of possible retaliation may be compelled to testify by subpoena. Either party may request that the arbitrator issue a subpoena, or the arbitrator may decide to subpoena a witness on his or her own initiative.

To avoid compromising their neutral image, arbitrators should carefully consider possible negative consequences before subpoenaing a witness without a request from one of the parties. Howard R. Sacks and Lewis S. Kurlantzick note that:

> [T]he missing witness creates a serious and complex dilemma for the labor arbitrator. As a practical matter, it forces consideration of the question of the arbitrator's relationship to the parties as well as the question of calling the witness. There is no quick and easy answer to this dilemma. We have examined three possible simple solutions—to ignore the problem and rely on acceptability to the parties, to follow the law, and to do as judges do—and found them all wanting.[47]

If an arbitrator believes that a missing witness' testimony is crucial to the outcome of an employee theft case, he or she may unreservedly subpoena the witness. In so doing, the arbitrator must be mindful of his or her responsibility as a neutral and role as a gatherer and determiner of fact. On the other hand, an arbitrator who believes that the parties should present their cases unaided may only subpoena a missing witness if requested to do so by one of the parties.[48]

A probably more acceptable manner in which to obtain the testimony of an otherwise missing witness is through the use of a formal deposition, wherein a sworn statement is taken from a witness who would rather not appear at the arbitral proceeding. In deposition proceedings, the representatives of the parties are given the opportunity to question a witness on direct examination and cross-examination in the presence of a certified court stenographer. From an arbitrator's perspective, this is preferable to one side submitting a written statement or a sworn affidavit of the missing witness. (More often than not, the opposing advocate will raise objections to the introduction of such statements because, among other reasons, "it is not possible to cross-examine a piece of paper." Indeed, this is a legitimate objection, and most arbitrators would be reluctant to admit such documents into evidence.[49]) The taking of a deposition, although not an ideal solution, presents a reasonable option to the missing witness problem under certain circumstances.

RIGHTS OF EMPLOYEES

A full discussion of the rights of employees in theft cases is beyond the scope of this article. An examination of an arbitrator's perspective on employee theft, however, would not be complete without a brief summary of some of the constitutional issues involved. These include privacy rights of employers against unreasonable search and seizure actions, the Fifth Amendment right against self-incrimination, and due process concerns.

Privacy Rights

Searches and surveillance are generally viewed by employees as an invasion of privacy, yet they are considered by employers to be a necessary evil to prevent theft. It is the function of the arbitrator to decide whether the employer's actions violate the employee's contractual or civil rights, while balancing the employer's right to discipline an employee for theft.

In *American Welding & Manufacturing Company*,[50] Arbitrator Dworkin found that the employer's search for missing tools in the grievant's tool container (which was open to everyone in the shop) "was not notably

---

[45] 80 LA 280 (Damon, 1983).

[46] See Hill and Sinicropi, *Evidence in Arbitration*, *supra* note 26, at 285–286. The authors note that the subpoena power of an arbitrator is outlined under the U.S. Arbitration Act, 9 U.S.C. § 4. See, also, Timothy Heinsz, David R. Lowry, Joan Torzewski, "The Subpoena Power of Labor Arbitrators," *Utah Law Review* 1(4) (1979): 29, for a general discussion of this topic. See, also, Timothy Heinsz, "The Use of Arbitral Subpoenas," in Tim Bornstein and Ann Gosline, gen. eds., *Labor and Employment Arbitration*, vol. 1 (New York: Matthew Bender & Co., 1988).

[47] Howard R. Sacks and Lewis S. Kurlantzick, *Missing Witnesses, Missing Testimony and Missing Theories* (Boston: Butterworth Legal Publishers, 1988), at 39–40.

[48] See, also, Heinsz, "The Use of Arbitral Subpoenas," in Bornstein and Gosline, gen. eds., *Labor and Employment Arbitration*, *supra* note 46.

[49] As noted in Elkouri and Elkouri, *How Arbitration Works*, *supra* note 24, at 327, affidavits are used in arbitration but are subject to the same limitations as other types of hearsay evidence. See South Haven Rubber Co., 54 LA 653, 654–655 (Sembower, 1970); and Borden Co., 20 LA 483, 484 (Rubin, 1953).

[50] *Supra* note 4.

invasive or in violation of his civil rights." The arbitrator further found that "opening grievant's lunchbox was certainly not the equivalent to breaking into a washroom locker containing only personal belongings."[51] Dworkin, concluding that the grievant's civil rights were not violated, denied the grievance.[52]

If an employer's search and/or surveillance is deemed unreasonable by an arbitrator because it is too invasive, the discharge penalty may be reduced to compensate the grievant for the violation of his or her rights. Such cases, however, turn entirely upon individual circumstances and must be decided on a case-by-case basis.

Fifth Amendment Rights

In *Illinois Power Company*,[53] the employee refused to cooperate in the employer's investigation of charges that the employee was off his route and stealing gas service. Arbitrator Penfield noted:

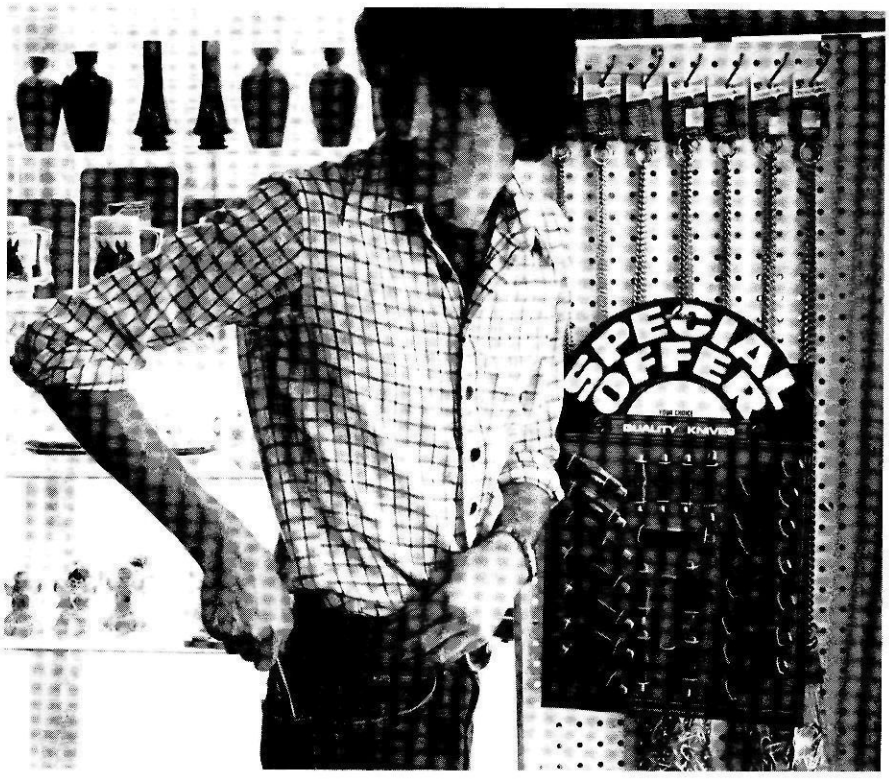
> While the Constitution protects an accused in criminal proceedings, it does not guarantee that an employee who invokes the Fifth Amendment during the investigation of infractions of company rules and policies will continue to be employed.[54]

The arbitrator in *Illinois Power Company* concluded that while the employee had the right to invoke the Fifth Amendment to defend himself from criminal charges,[55] he could not use it to protect himself from losing his job for refusing to support the company's legitimate investigation. Accordingly, the arbitrator upheld the discharge penalty.

The *Illinois Power* case demonstrates that constitutional protections against criminal charges do not always extend to the workplace. As long as the employer conducts a legitimate investigation, supported by reasonable cause, the employee must cooperate in the process—even if it leads to self-incrimination—or risk losing his or her job.

Industrial Due Process

The notion of industrial due process—that an employee has a right to be heard and that the employer must follow established procedural rules, if any, before discipline is issued—is not always applicable in employee theft cases. Summary discharge for a serious offense such as theft is the general rule. However, if the contract contains procedures that must be followed before discipline can be issued (for example, allowing the employee to be heard), an arbitrator must ensure that the employer has complied with its contractual requirements before initiating removal proceedings.[56]



PREVENTING EMPLOYEE THEFT

There are definite steps that employers can take to prevent or reduce employee theft. These include a thorough interview and hiring process, monitoring employees, and promulgating a clear-cut policy covering employee theft. It is imperative that such rules and policies be established, and, if need be, that the employer can prove that all employees have been informed of such policies.[57] Additionally, employers should be aware that the personal climate of their workplace may also help decrease incidences of employee theft.

---

[51] *Id.* at 252.

[52] See, generally, Alan F. Westin, *Individual Rights in the Corporation: A Reader* (New York: Pantheon Books, 1980), and Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967). See, also, Alan F. Westin, *Resolving Employment Disputes Without Litigation* (Washington, DC: Bureau of National Affairs, 1988).

[53] *Supra* note 4.

[54] *Id.* at 590. See, also, Simonize Co., 44 LA 658, 663 (McGury, 1964).

[55] The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[56] See American Welding & Manufacturing Co., *supra* note 4.

[57] This may be accomplished by having employees acknowledge receipt of company handbooks that include, among other things, clear-cut rules and policies prohibiting theft and dishonesty.

Hiring Policies

Perhaps the best way to prevent employee theft is to implement a detailed hiring process. The use of personal interviews, resumes, and references are helpful, but carefully screening applicants and taking enough time to make an informed selection is critical. In the hotel and restaurant industry, some employers also use an "honesty questionnaire" to screen applicants, which has been helpful in identifying dishonest candidates. The test consists of "yes/no"-type questions that inventory attitudes about honesty. Additionally, cross-checking references, and asking those references about other people to contact, is another valuable method for collecting information to determine a potential employee's fitness for hire.[58]

Monitoring Employees

There is some disagreement regarding the scope and effectiveness of employee monitoring. The most common and effective types of employee monitoring in the workplace are computer, telephone, and video monitoring.[59]

The downside of monitoring employees is that it produces tremendous stress and diminishes productivity. Employees generally view such monitoring as intrusive and as a sign that their employers do not trust them. Monitoring employees is most effective when it is humanized. Informing employees in advance of the monitoring and giving them a chance to rebut any findings is important. Being sensitive as to where *not* to place the monitors (for example, restrooms or employee lounges) may also decrease the negativity attached to employee monitoring.

Promulgating a Clear-Cut Policy

Arbitrators find it difficult to overturn an employer's discharge decision if the company has a well-defined policy on employee theft and the grievant had knowledge of the policy prior to his or her proven offense. The employer should make clear that theft *of any kind* is not allowed, including small items such as food or office supplies.[60] The policy should be in writing, posted in a conspicuous place, and disseminated verbally to the workers. Moreover, the employer should communicate its intolerance for theft clearly, forcefully, and in a *consistent* manner. Any incidence of employee theft should be dealt with swiftly. If not, fellow employees may grow resentful and morale will suffer.[61]

Personal Climate of the Workplace

In their three-year scientific study on employee theft, Richard Hollinger and John Clark found that "employees who felt that their employers and supervisors were concerned genuinely with the workers' best interests reported the least theft and deviance."[62] On the other hand, "when employees felt exploited by the company or by their supervisor (who represents the company in the employees' eyes), we were not surprised to find these workers more involved in acts against the organization as a mechanism to correct perceptions of inequity or injustice."[63]

Employers should not underestimate the power of positive action and reaction. By establishing and enforcing a well-defined policy, employers may be able to reduce employee theft. In addition, by genuinely caring about the concerns of its workforce, employers may be able to minimize substantially incidents of employee theft.

CONCLUSION

From an arbitrator's perspective, an employee theft case can be one of the most difficult type of discharge case to decide. An employee who is permanently tagged with the stigma of being a thief might find it difficult to ever again secure meaningful employment. Indeed, discharge for theft is effectively a form of "industrial capital punishment."

Because of the negative import of sustaining such an adverse employer action, arbitrators are generally very circumspect in examining and weighing the quality and quantity of evidence presented by an employer in such cases. Both labor and management should be mindful that the burden of proof falls on the employer to justify its actions in such cases.

In general, where the employer has produced evidence that an employee unequivocably has committed theft, arbitrators are not reluctant to sustain an employer's discipline, including discharge. After all, the proverbial pendulum of fairness and trust swings both ways. Just as an employee is expected to have trust in the employer, the company also has a reasonable basis for expecting honesty from its employees. This is arguably a fundamental *quid pro quo* of the employment relationship. Once the *quid pro quo* is breached, the employment relationship may legitimately be terminated.

Notwithstanding this reciprocal relationship of trust, there are instances where arbitrators are led to reverse an employer's adverse action in theft-related cases, either because of insufficient evidence or because of unclear or inconsistent application of employee theft rules. Invariably, in such cases, a mixed message may be perceived by employees concerning the consequences of employee dishonesty.

On this score, an arbitrator may attempt to clear such misperceptions by expressing—or restating—the general industrial relations principle that employee theft and/or dishonesty is "wrong in itself" (that is, *mal en se*) and is the basis for the discharge. In those instances where an otherwise guilty employee is reinstated, it is suggested that both the employer and the labor organization have the mutual responsibility for restating and promulgating the principles and rules concerning theft and dishonesty as well as the consequences for not abiding by these principles. ■

---

[58] *CHRAQ News & Reviews* (November 1986): at 13.

[59] *Individual Employee Rights Manual* (Washington, DC: Bureau of National Affairs, 1988), at 509.

[60] To give an example, theft policies might include a provision that scrap or leftover items are company property and cannot be removed without permission.

[61] *Supra* note 58.

[62] Hollinger and Clark, *Theft by Employees*, *supra* note 2, at 142.

[63] *Id.*