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# Obscenities in the Workplace: A Comment on Fair and Foul Expression and Status Relationships

JAMES B. ATLESON\*

*The right of management to run its business presumes respect on the part of employees for their supervisors. Profanity, epithets and verbal abuse interfere with the kind of continuous control which management must have over its workforce.<sup>1</sup>*

*[A]rbitrators have almost unanimously supported the notion that the hourly employee should not exhibit willful, personal disrespect of the foreman's position. . . .*

*[I]t seems reasonable to conclude that the existence of a union does not obviate employee respect of supervision.<sup>2</sup>*

*Russell, this is not the type of language we use in a civilized society.<sup>3</sup>*

## INTRODUCTION

IT has often been said that arbitrators are neutral decisionmakers; as servants of the parties, they discover the intentions that lie behind often vague or inconclusive contractual language. If the oft-professed neutrality of arbitrators refers to their lack of bias in any particular outcome in a particular case, then the characterization may be apt. If, on the other hand, the designation "neutral" implies the absence of a set of assumptions about the nature of the enterprise and the role or station of employees, then the statement is clearly wrong.<sup>4</sup>

A number of areas involving normal arbitral decisionmaking

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\*Professor of Law, State University of New York at Buffalo. The author would like to express his gratitude to Clyde Summers for his always generous comments and assistance. I alone, of course, am responsible for the views expressed in this article. The author wishes to thank Herbert Eisenberg, Mary O'Connell and Virginia Seitz for their assistance.

1. L. STESSIN, *EMPLOYEE DISCIPLINE* 59 (1960).

2. Jennings, *Verbal and Physical Abuse Toward Supervision*, 29 *ARB. J.* 258, 271 (1974).

3. *Hobart Corp.*, 75 *Lab. Arb. (BNA)* 907, 908 (1980) (Curry, Arb.).

4. See Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 *INDUS. REL. L.J.* 450 (1981); Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 *INDUS. REL. L.J.* 483 (1981); Stone, *The Post-War Paradigm in American Labor Law*, 90 *YALE L.J.* 1509 (1981).

could highlight such an assertion. For instance, many arbitrators take the position that certain ideas, sometimes designated "managerial prerogatives," exist or "remain" within the authority of the employer so long as the agreement does not restrict such exercises of power and, usually, irrespective of the impact upon employees or contractual interests.<sup>5</sup> Thus, to give one example, employers are normally (but not uniformly) given the power to subcontract out bargaining unit work if the contract is silent as to that issue. Arbitrators do often place limitations on employers' power to subcontract, but generally these "implied" limitations are overcome or satisfied when the employer proves that the motivation for the move is economic or based on efficiency rather than discrimination or antiunion animus.<sup>6</sup> The conclusion, therefore, is that many arbitrators see their role as upholders of economic efficiency, at least as defined by the employer, when the agreement is silent on the matter.<sup>7</sup> There are various ways, of course, to view economic efficiency, and the efficiencies or interests of the employees are not obviously the same as those of the employer. Arbitrators, however, tend to adopt the notion of efficiency which is held by employers. As Sanford Kadish noted in contrasting criminal and industrial forms of punishment:

In an industrial community, on the other hand, the social values are imposed by the nature of the enterprise—an efficient and profitable operation, although, of course, within the limits set by the human and contractual claims of the workers and the union. It is not and cannot be a wholly libertarian community; it is a special purpose community with a job to do.<sup>8</sup>

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5. See, e.g., J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 122, 222 nn.56-58 (1983); F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 457-63 (4th ed. 1985); Killingsworth, *The Presidential Address: Management Rights Revisited*, ARBITRATION AND SOCIAL CHANGE, PROCEEDINGS OF THE TWENTY-SECOND ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1 (G. Somers ed. 1969).

6. See Dash, *The Arbitration of Subcontracting Disputes*, 16 INDUS. & LAB. REL. REV. 208 (1963); Fairweather, *Implied Restrictions on Work Movements*, 38 NOTRE DAME LAW. 318 (1963); Greenbaum, *The Arbitration of Subcontracting Disputes: An Addendum*, 16 INDUS. & LAB. REL. REV. 221 (1963); Wallen, *How Issues of Subcontracting and Plant Removal Are Handled by Arbitrators*, 19 INDUS. & LAB. REL. REV. 265 (1965); Note, *A Standard for Arbitrators in Subcontracting Disputes*; 39 IND. L.J. 561 (1964).

7. See Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017 (1961).

8. Kadish, *The Criminal Law and Industrial Discipline as Sanctioning Systems: Some Comparative Observations*, in LABOR ARBITRATION-PERSPECTIVES AND PROBLEMS, PROCEEDINGS OF SEVENTEENTH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 132 (M. Kahn ed. 1964).

A second area which could have been chosen to explore arbitral values involves employees or union representatives who refuse to carry out managerial work "orders" on some ground, for instance, because they feel the order contravenes the collective bargaining agreement or invades the work jurisdiction of another group of employees.<sup>9</sup> One way to treat this area would be to test in an arbitration proceeding both the propriety of the managerial order and the justification for the refusal. Under this approach, employees would have just as much right to uphold the contract by *refusing* work orders perceived to violate the agreement as supervisors would have to order work and thereby uphold their view of the agreement. This approach would in no way interfere with the grievance arbitration process, because, should the dissenting employee be disciplined, the justification of the work order and the employee's refusal could be tested in arbitration.

The normal approach since the early days of arbitration, however, is precisely the reverse. Employees may not refuse a work order except in narrow, exceptional cases, paralleling the right to refuse orders in the military. For example, a person may refuse to obey unlawful orders or orders subjecting the employee to unsafe or unhealthy conditions.<sup>10</sup> Employees are required to follow work orders by most arbitrators and then to grieve. It does not matter that there is often precious little the arbitrator can do if the work order is found improper. After all, the work has been done, the employee has been paid, and a cease and desist order means little at this point. The power of management to direct employees is made painfully clear in these cases. Should the employee refuse a work order, and should discipline follow, most arbitrators assume that the sole issue is to determine the extent of discipline. That is, the arbitrator will look to see whether or not a clear order was given and refusal followed. If so, some discipline is held appropriate by the vast majority of arbitrators.<sup>11</sup> Whether the employee's ground for refusal was legitimate is simply not relevant, although it is possible that it is of some relevance in determining the appro-

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9. See *Nathan Mfg. Co.*, 7 Lab. Arb. (BNA) 3 (1947) (Scheiber, Arb.); Atleson, *Threats to Health and Safety: Employee Self Help Under the NLRA*, 59 MINN. L. REV. 647, 675 (1975).

10. See Gross & Greenfield, *Arbitral Value Judgments in Health and Safety Disputes: Management Rights Over Workers' Rights*, 34 BUFFALO L. REV. 645, 647-52 & nn. 6-33 (1985). See also F. ELKOURI & E. ELKOURI, *supra* note 5, at 199-203.

11. See Gross & Greenfield, *supra* note 10.

priate remedy.

The situation in a certain sense parallels the requirement that citizens abide by judicial injunctions even though the injunction or the statute on which it is based may be unconstitutional.<sup>12</sup> In the subsequent contempt proceeding, the legitimacy of the opposition to the injunction or the unconstitutionality of the injunction or statute is simply irrelevant. Employers, therefore, are to be given the same kind of deference that citizens must grant courts.<sup>13</sup>

The justification for such an approach, clearly expressed in a well known decision by Harry Shulman, is that any other approach would be inconsistent with the grievance system.<sup>14</sup> Thus Shulman argued that to permit an employee to resist a work order would be to "substitute individual action for collective bargaining and to replace the grievance procedure with extra-contractual methods."<sup>15</sup> "[P]roduction," said Shulman, "cannot wait for exhaustion of the grievance procedure."<sup>16</sup> The valuation made by Shulman is clear, but just as important is the notion that the interpretation of the agreement and of workplace rights is not to be a mutual process.<sup>17</sup> The King may be dead, but in his place reigns something more like a constitutional monarchy than a participative democracy. Management has the power to act and the union may uphold its contrary view only by going through the often long and expensive grievance procedure. The union contract, then, does not signify a change in hierarchical work place relations. Indeed, the existence of a grievance provision in a collective agreement under this view signifies labor's acquiescence in a junior role.

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12. See *Walker v. Birmingham*, 388 U.S. 307 (1967).

13. Courts, of course, generally hear evidence prior to granting an injunction and may decline to act.

14. See Atleson, *supra* note 9. See also *Ford Motor Co.*, 3 Lab. Arb. (BNA) 779 (1941) (Shulman, Arb.).

15. *Ford*, 3 Lab. Arb. (BNA), at 781 (cited in *Nathan Mfg. Co.*, 7 Lab. Arb. (BNA) 3, 5-6 (1947) (Scheiber, Arb.)). I believe the World War II context is highly relevant to decisions such as Shulman's. See, e.g., Robert Rabin's comment in this issue.

16. *Ford*, 3 Lab. Arb. (BNA), at 781.

17. Without doubt, such an approach is highly efficient in terms of productive efficacy. Aside from questions of workers participation, addressed in collective bargaining or "quality of work life" arrangements, someone will have to give orders no matter what the structure of the workplace. The normally addressed issues include the zone of discretion in granting orders and the extent to which employees participate in determining those boundaries.

I have chosen another area to illustrate a similar yet somewhat different set of assumptions which underlie arbitration awards. The general category involves discipline for insubordination to supervisors, a notion which carries certain values and assumptions of its own. These decisions would generally not be surprising if we were looking at different settings: prisoners incarcerated in jails, students in school, or members of the armed forces. These cases, however, involve employees in workplaces represented by labor unions and operating under collective bargaining agreements. It is generally assumed that employers can make rules for the workplace to govern the discipline of employees. The assumption of such a power is a historical carryover from notions found in master-servant law.<sup>18</sup> Such rules often cover a variety of kinds of behavior, and the employers' power to make rules is generally not contested, even in union organized workplaces. Occasionally arbitration proceedings test the rationality of these rules or whether the violation of these rules amounts to "just cause" under the collective bargaining agreement. But the *power* of the employer to stipulate norms of behavior or conduct at the workplace is generally not contested.<sup>19</sup>

I have narrowed the focus in this area to discipline meted out to employees for uttering obscenities toward their employer's representative. The cases arise when an employee who has been disciplined for profanity files a grievance against the employer or supervisor. The grievance is then disposed of by an arbitrator at an arbitration proceeding. Since these are cases where employees generally do not refuse to work, production is not immediately implicated. Instead, any impact upon production or efficiency is indirect at most. These cases raise questions about the symbolic importance of management and the status relationships that exist between employees and employers. This is perhaps a strange area for a non-swearer to enter, something like a teetotaler investigating drinking patterns at local pubs. Nevertheless, these cases involve assumptions of deference and respect and are extremely important in revealing arbitrators' assumptions concerning the needs of the workplace. I understand that arbitrators and managers

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18. See J. ATLESON, *supra* note 5, at 19-34.

19. See, e.g., the rules of the Matteawan Company in 1846, in A. WALLACE, ROCKDALE: THE GROWTH OF AN AMERICAN VILLAGE IN THE EARLY INDUSTRIAL REVOLUTION 330-31 (1978).

would argue that efficiency, not status considerations, explain these situations. To some extent this is correct, but I believe that the decisions speak for themselves.

### I. THE STUDY

One would expect language to be rather harsh and earthy in many workplaces. In fact, most arbitrators assume that to be the case. It may be true that language is rougher where work is demanding, demeaning or dirty, although this assumption may contain its own status assumptions. It is, one should note, quite different than the world from which arbitrators tend to come and in which they spend most of their time. Many arbitrators are lawyers or teachers. Academia, at least today, can surely not be said to be free of foul language, either from its professoriate or students, but it may well be more free than most work places. It is possible to view these decisions as merely remnants of a more pristine past when language was thought to be more clear and pure and when obscenities were less tolerated. I think not, however, although some of these opinions now strike us as quite funny and archaic. For instance, one arbitrator stated:

The arbitrator has spent many years in a wide variety of shops and agrees that the language testified to is frequently used. It is not, however, commonly used in the presence of women and it is certainly not commonly used in a loud manner in lunch areas inhabited by female employees from both office and shop.<sup>20</sup>

Rather than investigate all or most of the published cases dealing with this question, I initially sought about fifteen cases which dealt with alleged obscene remarks made to supervisors. My assumption was that such cases would provide a kind of random sample, although not necessarily the kind of sample that social scientists would prefer. Unfortunately, a perfectly representative sample is impossible to obtain, primarily because few arbitration decisions are published. Those that are published represent an undetermined and probably small percentage of all cases decided each year. Moreover, they represent those decisions thought interesting or important by the publishers of the various services. Therefore, there are at least two levels of uncertainty in using

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20. Fairchild Indus., 75 Lab. Arb. (BNA) 288, 289 (1980) (Groshong, Arb.).

published cases as a source of ideas about what arbitrators do.<sup>21</sup>

There is also a problem with using recent cases because they may represent a fixed snapshot of a developing area. There are ways of testing this proposition, however, and a review of some older cases and the arbitration treatises demonstrates that little change seems to have occurred in the approach of arbitrators. Indeed, there is strong support for the argument that the cases studied represent a fair sample of at least the published cases.

It should also be noted that all reported arbitration cases reflect precedent in a sense. It is not only that prior cases are often followed unless there are distinguishing facts, but the views and values of prior arbitrators become part of the atmosphere in which arbitrators and negotiators work. This happens in a number of senses. First, the writings of arbitrators such as Harry Shulman, who gained influence during or after World War II when arbitration became widespread and established, are highly significant. Their words are often cited, and arbitrators, acting in a somewhat competitive world, generally do not attempt to overtly distinguish themselves from the big names in the field. Many of these early and influential arbitrators were in government service during World War II in places like the War Labor Board and the Office of Price Control. It would be fascinating to inquire whether their views on arbitration were affected by the wartime need to maintain production and avoid strikes.

Moreover, in a realistic sense, the notions of past arbitrators, carried down through the years in arbitration awards, can rationally be considered to be a part of the atmosphere in which collective bargaining agreements are negotiated. If language has had a certain meaning according to arbitrators for many years, then one can reasonably assume that the same language may have that same meaning in current agreements.

The study analyzes thirteen arbitration cases.<sup>22</sup> A wider number were examined but some were excluded because they involved multiple offenses, often with insubordination as only a subsidiary ingredient. Most of these cases are fairly recent. Desiring more cases, however, a few older cases were read which were cited in

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21. See Cole, *How Representative are Published Decisions*, in 37 NAT'L ACAD. OF ARB. PROC. 170 (1985).

22. Citations to cases used in the study may be found in the *Appendix*.



the most widely known and used treatise in the field, Elkouri & Elkouri, *How Arbitration Works*.<sup>23</sup> Thus the sample allows one to compare the assumptions underlying older arbitration cases as well as those decided recently. Moreover, the cases cited by Elkouri & Elkouri are often relied upon by advocates in arbitration proceedings, and considered by arbitrators themselves, because the work is generally considered the "bible" by many in the field. These cases, then, may be presumed to be as influential as any in the particular area of inquiry.

## II. GENERAL ANALYSIS OF THE CASES: A DUTY OF RESPECT

### A. *Profanity, Discipline and Productivity*

This study reveals that arbitrators believe employees are obliged to show respect to members of supervision even though such respect is not expressly required by collective agreements. Often this is said to be required because production would otherwise be affected, although there is rarely any evidence that production was interfered with or would likely be affected.

In five of the thirteen cases studied, the employees disciplined were union officials. The grievance was upheld in only one of these five cases. In two cases the disciplinary penalty was allowed to stand. In the other two cases, where the discipline imposed was discharge, the discipline was reduced to a five-month suspension in one case and a seven-month and twenty-five day suspension in the other. The opinions are devoid of any evidence demonstrating that the language thought offensive had an adverse effect on the production process. This leads to the possibility that production is not implicated at all, or at least not directly, and that the real ground for the decision is that the proper functioning of the enterprise requires a certain level of obedience and deference on the part of employees. These values expressed by arbitrators are particularly significant because, when organized employees are involved, the NLRB will generally defer to the arbitration process and uphold arbitral awards.<sup>24</sup>

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23. F. ELKOURI & E. ELKOURI, *supra* note 5. For critical evaluations of this book, see Alexander, Book Review, 41 ARB. J. 84 (1986); Bomstein, Book Review, *id.* at 87; Gold, Book Review, *id.* at 85; Ornati, Book Review, *id.* at 82.

24. See United Technologies Corp., 268 N.L.R.B. 83 (1984); Atlantic Steel Co., 245 N.L.R.B. 814 (1979).

Indeed, this assumption that obedience and deference are owed to supervisors is often clearly expressed. In this sense, the cases clearly apply master-servant notions to the employee-supervisor relationship.<sup>25</sup> Thus, the arbitrator in *Spartan Mills* stated that "a person may use crude, or even obscene language in reference to persons, things, or situations, and this is not regarded as insubordinate so long as it does not tend to break down plant discipline."<sup>26</sup> Yet, there was no evidence in *Spartan Mills* that the obscenity tended to "break down plant discipline." The shop supervisor had accused the grievant of wasting time and said that disciplinary action would be taken. The company contended that the grievant responded by saying "You are a God Damned liar" and "You can take this Warning and stick it up your ass."<sup>27</sup> The arbitrator found that the grievant in fact said this and upheld a five day suspension from work without pay.<sup>28</sup>

Most of the discussion in *Spartan Mills* deals with the credibility determinations the arbitrator must make. There was little discussion, however, as to why the language, if it was to be attributed to the grievant, should be subject to a five day suspension. The arbitrator's explanation as to why the grievant's remarks tended to break down plant discipline was as follows:

In the present case the supervisor was in the process of initiating discipline by his presenting a document to the grievant. Hence the grievant's remark has to be viewed as a challenge to the supervisor's authority and a direct attack on the right to manage the plant efficiently. This cannot be tolerated. Nor can it be viewed in the same light as shop talk. In effect the supervisor had no choice but to act decisively in defense of his position and he did so in a manner which is both contractually proper and moderate.<sup>29</sup>

The grievant's offensive remark was viewed as a "challenge to the supervisor's authority"<sup>30</sup> and also a "direct attack on the right to manage the plant efficiently."<sup>31</sup> Even if productivity and supervisory authority must be maintained at all costs, it is certainly not clear from the facts set out that an employee who objects upon receiving a warning somehow interferes with the production pro-

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25. See J. ATLESON, *supra* note 5.

26. *Spartan Mills*, 68 Lab. Arb. (BNA) 1279, 1282 (1977) (Sherman, Arb.).

27. *Id.* at 1280.

28. *Id.* at 1282.

29. *Id.*

30. *Id.*

31. *Id.*

cess. Presumably the employee is not required to politely state "thank you," or meekly bow his head, twist his cap and grind his feet on the floor. And it seems that employees may certainly protest the propriety of discipline. Thus, the case probably turns on the language the employee used in protesting the discipline imposed. It is not clear from the opinion whether calling the supervisor a liar or telling the supervisor where he could place the warning was the critical language; perhaps the combination of the two led to the decision. What is clear, however, is that the arbitrator assumed that this protest was a "direct attack on the right to manage the plant efficiently" and no further discussion of the matter was required. In at least four of the other thirteen cases arbitrators felt no need to explain why obscenity in general, or in particular, should merit discipline of any kind.

#### B. *The Special Status of Supervisors and Union Officials*

Arbitrators tend to permit profanity when it is used as emphasis in speech, but often draw the line at speech which is derogatory of supervision. Thus,

[p]rofanity is frequently used for emphasis in speech and as such is correctly characterized as "shop talk." But this Arbitrator does not believe it embraces directing profane and demeaning language at individuals be they management representatives or members of the bargaining unit. . . . This type of behavior has no place in industrial society and Management cannot be expected to tolerate it.<sup>32</sup>

In *Hobart*, as in most cases, the testimony of management witnesses and the grievant and fellow co-workers differs markedly. Management witnesses testified that the grievant (the "Russell" of the opening quotation) entered the office of the first shift foreman and stated that he would like to see an employee in the foreman's department. When the foreman asked what this concerned, the grievant is alleged to have responded in an ill-advised fashion: "I am tired of your fucking shit, what you need is your fucking ass kicked." The foreman told the grievant, who was also the union steward, that he did not use that kind of abusive language himself and that he would not tolerate it. The matter was reported to the plant superintendent and to the industrial relations manager. The grievant denied that the colloquy occurred immediately thereafter

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32. *Hobart*, 75 Lab. Arb. (BNA) at 909.

in a meeting with the industrial relations manager. The manager, believing the version of events as presented by the foreman, told the employee that "this is not the type of language which we use in civilized society." The grievant is alleged then to have stood within a few inches of the personnel manager's face and responded: "Are you calling me uncivilized?" "No, I do not," responded the manager. "Your choice of language is uncivilized and has no place in this environment." The grievant then responded by saying, "you can kiss my ass."

The grievant's testimony was quite different, although he explained why he was indeed angry at each of the occasions. In the first situation, he said he responded to the foreman by saying "you know damn well what the problem is—why is it every time we come up here about a problem you never know what it is relating to." He conceded that he said he was "tired of his shit" and he referred to the foreman as a "liar" and as a "well known liar." The remarks, as found by the arbitrator, resulted in a three day suspension. The case is also noteworthy because the employee involved was the union's chief steward who was working on union business at the time.

Some arbitrators feel that union representatives must be given greater latitude—that is, in a sense they have higher status—than regular employees.<sup>33</sup> "If the actions of the grievant were as an employee *acting only as an employee* there would be little question that the discharge should be sustained."<sup>34</sup> Otherwise, for instance, stewards might be timid in carrying out their role in administering the collective bargaining agreement. In these cases, status assumptions clearly come to the foreground for a union official is viewed, often expressly, as the approximate equal of a foreman and, as such, is "not required to show the same amount of deference and respect to his supervisor in discussing union business."<sup>35</sup> A steward must be free "to deal with the foreman as an equal, on a man to man basis rather than employee to boss . . . ."<sup>36</sup> Even more revealing is the statement that a steward is "not required to show the same deference or respect to a supervisor or company official as would be required in the normal employer-

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33. See Jennings, *supra* note 2, at 266.

34. Sherwin-Williams Co., 56 Lab. Arb. (BNA) 101, 106 (1971) (Sullivan, Arb.).

35. Jennings, *supra* note 2, at 266.

36. Wyandotte Chem. Corp., 39 Lab. Arb. (BNA) 277, 280 (1962) (Kadish, Arb.).

employee relationship, because that relationship is temporarily suspended."<sup>37</sup> Thus, the notion is that the employer-employee relationship must necessarily involve an unequal relationship, something less than a "man to man" relationship. A steward has a wider range of freedom since the inferior position is "temporarily suspended" when the steward acts in his or her official capacity.

On the other hand, a contrary strain is sometimes found in the cases, and some arbitrators argue that union representatives should be *more* attuned to the proper norms of behavior in the enterprise.<sup>38</sup> In *Hobart*, for instance, the arbitrator stated that "Management cannot function properly if employees who are also Union Stewards can with impunity verbally insult and abuse members of Management with whom they come into contact as Stewards."<sup>39</sup> The language in the case went beyond excusable "shop talk" because it was "abusive and threatening in nature."<sup>40</sup> Yet, the arbitrator noted that the steward must "be allowed to operate without fear of retaliation in the performance of that role, and that mere militancy or zealotry on his part will not justify punishment, nor can a Steward be limited to the language of polite society in fulfilling his role."<sup>41</sup> Thus, the steward is permitted to be militant and zealous so long as his language is not deemed by an arbitrator to verbally insult members of management. The notion of status is clearly imbedded in these decisions. Union representatives are accorded a wide range of verbal expression, but even they may not "assume powers far beyond [their] province."<sup>42</sup> This may indeed be a difficult line to hew in the heat of the moment, and the risk of overreaction is on the employee.

### C. *Supervisors and Profanity as a Weapon of the Powerless*

In only two of the thirteen cases is any reference made to controls on supervisors who verbally abuse employees. In one case

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37. Ormet Corp., 54 Lab. Arb. (BNA) 363, 364-65 (1970) (Williams, Arb.).

38. *But cf.* Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) (holding that it is an unfair labor practice for an employer to discipline union officials more severely than other workers for their participation in an unlawful work stoppage where the collective bargaining agreement did not explicitly impose on them a duty to uphold it).

39. *Hobart*, 75 Lab. Arb. (BNA) at 909.

40. *Id.*

41. *Id.*

42. Butler Stamping Co., 63 Lab. Arb. (BNA) 765, 766 (1974) (Pollack, Arb.).

discipline was overturned, a result supported by the arbitrator's statement that the union had no means to sanction supervisors who verbally abuse employees. Of course, this is the kind of exception which would swallow up the rule, for this is the case in nearly every situation. In another case, the arbitrator mentioned that a supervisor had been admonished by management for verbally abusing an employee.<sup>43</sup> This was cited to uphold discipline—in this case *discharge*—against an employee. Of course even if some kind of equality was ever possible in this kind of situation, obscenities are often a device of the powerless, not the powerful. Supervisors often possess sufficient power and weapons so that they do not need to use obscenities toward employees.<sup>44</sup> In a cultural sense, supervisors who often are cleanly and neatly dressed, often wearing a white shirt and tie, are induced to believe in middle class ways, perhaps explaining why they object so strongly to obscenities. As in the cases studied, obscenities are simply followed by warnings of discipline initiated by supervisors. Employees, as must be clear, have little power to respond in similar ways to abusive remarks or provocations of supervisors. Certainly they have no power to admonish or begin disciplinary steps against the supervisor.

It is the fear of being discharged which above all else renders the great majority of employees vulnerable to employer coercion.<sup>45</sup>

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We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for *all* of their income is something new in the world. *For our generation, the substance of life is in another man's hands.*<sup>46</sup>

“Russell, this is not the type of language we use in a civilized society.”<sup>47</sup> It is not clear that workers tend to see the workplace as

43. Fairchild Indus., 75 Lab. Arb. (BNA) 289 (1980) (Groshong, Arb.).

44. In addition, at least since the mid-1940s, employers have attempted to convince supervisors that they are members of a different class. See Seitz, *Legal, Legislative and Managerial Responses to the Organization of Supervisory Employees in the 1940s*, 28 AM. J. LEGAL HIST. 199 (1984).

45. Blades, *Employment at Will vs. Individual Freedom: on Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1406 (1967).

46. F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951) (emphasis in original).

47. *Hobart*, 75 Lab. Arb. (BNA) at 908.

much less civilized than this quote assumes. Arbitrators deal with collective agreements which are attempts to civilize the relation in some sense, but the results seem to permit management to enforce the same kind of norms of deference that would exist without an agreement. The language of the workplace may not approximate the arbitrator's view of the needs of civilized society. As the employee responded in *Hobart*, "Are you calling me uncivilized, if I am uncivilized then you kiss my ass." Arbitrators apparently believe they possess a sense of the kind of language and respect which should occur in the workplace. Sometimes these notions are tied to unproved and unverified assumptions about the impact upon the production process. Often, however, arbitrators simply use notions of what they believe is required in a "civilized society." That makes it necessary to distinguish the kind of language normally used in the workplace, which could be deemed "shop talk," and the kind of language which is not consistent with the arbitrator's view of a civilized society.

D. "*Shop Talk*": *Distinguishing Between Fair and Foul Expression*

Unions often argue that the offending language was merely "shop talk," a category of speech which, it is assumed, is justifiable and, thus, less offensive. This may mean that the words uttered simply reflect the level of discourse in the workplace, and words should be understood, interpreted and evaluated in light of the atmosphere in which they arise. Some arbitrators do use this notion of "shop talk": "The employee's words were something less than Chesterfieldian and something more than the usually purple prose of any men but not necessarily beyond the usual language of the shop."<sup>48</sup>

Such arbitral sentiments are referred to by Stessin as representing a "more indulgent view of 'shop talk'. . . ."<sup>49</sup> Preceding such views, Stessin<sup>50</sup> gives considerably *more* attention to what he obviously believes is a *less* indulgent view. Presumably, the order and amount of attention may reflect Stessin's own notions. Stes-

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48. *Singer Mfg. Co.*, 19 Lab. Arb. (BNA) 455 (1952). *See also* *Darnell Wood Products Co.*, 8 Lab. Arb. (BNA) 562 (1947) (Dwyer, Arb.); *Terminal Cab Co.*, 7 Lab. Arb. (BNA) 780 (1947) (Minton, Arb.).

49. L. STESSIN, *supra* note 1, at 61 n.34 (Stessin erroneously attributes the quote to *Singer*).

50. L. STESSIN, *supra* note 1, at 61.

sin's section on shop talk states that this defense is raised by unions not to show the normal level of discourse, but, rather, to indicate that the "speech intended no hostility, anger or provocation toward management. . . ." <sup>51</sup> This is a considerably different view of shop talk, focusing more on the speaker's presumed *intent* or, ultimately, upon the harm to managerial status. Thus, Stessin quotes Ralph Seward who upheld discipline against a verbally abusive employee who had accused the supervisor of spying on him: "Though the phrases used by Mr. L. may frequently be used in jest, banter or even casual argument in the plant, they were of the sort which no self-respecting man should be expected to tolerate when applied to him in anger." <sup>52</sup> This means either (1) that although the phrases were in common usage, they cannot be permitted when used in anger; or (2) despite common usage, they cannot be directed to foremen. Apparently, speech among employees is not a good guide to proper speech between employees and management.

Only one comprehensive study of verbal and physical abuse cases could be found. <sup>53</sup> Ken Jennings studied seventy cases published between 1967 and 1973. Although arbitrators generally assumed the need to defend the authority of supervisors, mitigating circumstances were found in fifty-five percent of the awards canvassed. <sup>54</sup> The grounds for mitigation, some of which have already been referred to, are not unlike the grounds used in all disciplinary cases. The present study is more concerned with the nature of the presumed offense, for there is no evidence that mitigating circumstances are found with any greater or lesser degree in verbal abuse cases.

Jennings' view of shop talk, based on his study, is quite different from the view expressed by a number of sources. For Jennings, shop talk means that an employee cannot be disciplined "if his language is not materially different than that uttered by other employees, even if the grievant directs the words to a member of

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51. *Id.*

52. *Id.* (quoting International Harvester Co., 13 Lab. Arb. (BNA) 986, 988 (1949) (Seward, Arb.)).

53. Jennings, *supra* note 2.

54. *But cf.* Ross, *The Arbitration of Discharge Cases*, in 10 NAT'L ACAD. OF ARB. PROC. 21 (1957) (workers reinstated by an arbitrator are often likely not to accept reinstatement, to quit their jobs soon after reinstatement, or to be discharged again).



supervision.”<sup>55</sup> Such an approach focuses on normal work place intercourse and not upon whether the speech is used in “anger” or otherwise reflects disrespect to the supervisor.

Nevertheless, by beginning with even this broader view of shop talk, the notion is still conveyed that respect to supervisors must be shown even though the appropriate level of respect is relative to the normal inter-personal relationships at the work place. Indeed, Jennings refers to cases in which arbitrators distinguish between “obscene and abusive generalities” such as “God Damn it,” and personal epithets directed to the supervisor such as “God Damn you.” Such personal remarks are said to detract from the authority of supervision particularly if the remarks are personally insulting and made in the presence of other employees.<sup>56</sup> Thus, Jennings cites a case where a three day suspension was earned for saying, “get your ass out of here or I’ll file a grievance,” or for calling the foreman a “damn liar.”<sup>57</sup> In one case, an employee interrupted the supervisor’s conversation with the remark, “that’s bullshit.” The remark, said the arbitrator, was not a personal epithet but merely an emphatic way of expressing disagreement since “it carries no suggestion that the sentiment is a deliberate lie, but expresses only the speaker’s belief that the statement is utterly without merit or substance.”<sup>58</sup> It is unclear whether the arbitrator was actually uncomfortable with the view of many other arbitrators or was trying to distinguish between “bullshit” and “that’s a lie.” The line seems metaphysical at best, although this perception is soothing to college professors who tend to be in the receiving end of the former more than the latter.

One possible distinction seems to be obscenities which merely make speech more emphatic, and perhaps vigorous, as opposed to obscenities which demean or challenge the integrity of the supervisor. (I am not dealing here with language, whether or not obscene, threatening physical retaliation). One attempt to distinguish between proper and improper language follows:

Arbitrators have generally taken the position that in order for an employee

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55. Jennings, *supra* note 2, at 260.

56. Jennings, *supra* note 2, at 260-61. See, e.g., Ohmstede Machine Works, Inc., 60 Lab. Arb. (BNA) 522 (1973) (Marlatt, Arb.); Paul W. Wills, Inc., 50 Lab. Arb. (BNA) 95 (1968) (Nichols, Arb.); Permatex Co., 54 Lab. Arb. (BNA) 546 (1970) (Goetz, Arb.).

57. Jennings, *supra* note 2, at 261.

58. Ohmstede, 60 Lab. Arb. (BNA) at 525.

to be charged with the use of abusive or profane language, the language must in fact be profane, it must be directed toward the supervisor challenging the supervisor's authority and must usually be made in the presence of other employees, on the theory that such language is a direct challenge to the authority of the supervisor to manage. . . .

The issue does center around whether the language used was profane. Generally, if D— had said, "God damn it, leave me alone, don't bother me, God damn it," or "damn it, leave me alone," this gets very near to or is a form of shop talk. . . . But when an employee begins using the words "go fuck yourself," arbitrators have recognized that this is profane, rather than a mere adjective or descriptive manner of speech.<sup>59</sup>

To some extent this is a variation of the distinction sometimes made between obscenity used as mere emphasis and that used to demean the supervisor. A cynic might say that the arbitrator permits language which violates one of the ten commandments but not language which demeans the integrity of the supervisor. Yet, this distinction is commonly made and the arbitrator cited many arbitral decisions. Thus, "there is a vast difference between the use of such terms in an ordinary manner and a manner in which it was intended to be insulting."<sup>60</sup> Moreover, "[t]he parties are well aware of the fact that profanity may be used in general conversation, in jest, or for emphasis in normal discussions among employees. . . ."<sup>61</sup>

These quotations indicate that a dichotomy is often created between two quite different matters: the arbitrators are not distinguishing between obscenities and nonobscenities or between common or uncommon obscenities. Instead, they seem to separate "ordinary" obscenity from obscenity which is *intended* to be demeaning. The assumption is that ordinary obscenity is not meant to be insulting, even though it obviously might be so perceived by the target. The operative factor, then, seems to be the *intent* with which the words are used. The opinions, however, rarely reveal a search for intent. I conclude, then, that these arbitrators *assume* that certain kinds of obscenity inherently involve an intent to demean. Despite the language used by arbitrators then, the decisions really reveal an implicit distinction between kinds of rough language.

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59. Thoreson-McCosh, Inc., 75 Lab. Arb. (BNA) 858, 860 (1980) (Roumell, Arb.).

60. Paragon Brick and Steel Co., 43 Lab. Arb. (BNA) 864, 868 (1964) (Bradley, Arb.).

61. Mississippi Valley Structural Steel Co., 35 Lab. Arb. (BNA) 506, 507 (1960) (Luskin, Arb.).

In *Thoreson-McCosh*,<sup>62</sup> for example, the employee was apparently away from his work area and did in fact give the foreman some static about returning to his assigned work area. The discipline, however, was apparently imposed because at some point in the discussion the employee said, "go away, go fuck off, get off my back." Such language has been viewed by a number of arbitrators as more than a "mere adjective or descriptive manner of speech."<sup>63</sup> In *Thoreson-McCosh* the arbitrator stated that there was no question that "the language used was profane and abusive; was made in front of other employees in the work area (although, as pointed out in the analysis of the facts, not heard by the employees); [and] was obviously designed to undermine [the supervisor's] status, prestige and authority as a supervisor."<sup>64</sup>

As in other cases the fact that there are employees in the general area seems to be highly important to arbitrators. Some arbitrators concede that in a "private discussion" employees are permitted to go "further."<sup>65</sup> In *Thoreson-McCosh* it was important that other employees were present even though they did not hear the statements attributed to the grievant.<sup>66</sup> The concern that other employees might hear the remarks, making the impact more severe and thus more offensive, is perhaps the most interesting find-

62. 75 Lab. Arb. (BNA) at 858.

63. See, e.g., Arkansas-Louisiana Chemical Corp., 35 Lab. Arb. (BNA) 887 (1962) (Wollett, Arb.); Bacyrus-Erie Co., 44 Lab. Arb. (BNA) 858 (1965) (McGary, Arb.); Canteen Corp., 52 Lab. Arb. (BNA) 781 (1969) (Keefe, Arb.); Circus Circus, Inc., 52 Lab. Arb. (BNA) 1071 (1969) (Kotin, Arb.); Demster Bros. Inc., 57 Lab. Arb. (BNA) 1275 (1971) (Hemmel, Arb.); Eaton, Yale & Towne, Inc., 56 Lab. Arb. (BNA) 1037 (1971) (Kates, Arb.); G. Heileman Brewing Co., 54 Lab. Arb. (BNA) 1 (1969) (Solomon, Arb.); Minneapolis-Moline Co., 18 Lab. Arb. (BNA) 235 (1952) (Updegraff, Arb.); Michigan Steel Casting Co., 6 Lab. Arb. (BNA) 678 (1947) (Platt, Arb.); Paragon Bridge & Steel Co., 43 Lab. Arb. (BNA) 864 (1964) (Bradley, Arb.); Yale & Towne Mfg., 4 Lab. Arb. (BNA) 1100 (1963) (Wallen, Arb.).

64. *Thoreson-McCosh*, 75 Lab. Arb. (BNA) at 861.

65. *Id.* at 861; Arkansas-Louisiana Chem. Corp., 35 Lab. Arb. (BNA) 887 (1960) (Wollett, Arb.).

66. The language resulted in a five-day suspension and the granting of 10 disciplinary points. The company utilizes a progressive disciplinary procedure which provides for automatic discharge upon the accumulation of 21 points. The arbitrator acknowledged that the 10 disciplinary points was a severe penalty considering the fact that the grievant had already acquired nine points. The arbitrator cautioned the company "to be loathe to discharge because of a mechanical application of the 21 points." Yet, he upheld the discipline, while noting that the language was not severe or repeated and that the offense was the "most minimal type of offensive which would justify a five-day suspension." *Thoreson-McCosh*, 75 Lab. Arb. (BNA) at 862.

ing. If a lack of respect leads, or could lead, to reduced production then the concern would be sensible. As noted, however, evidence of an impact upon production, is not crucial to upholding discipline. Thus, either arbitrators merely *assume* an adverse impact upon production or other factors explain the concern for the "listening audience." I cannot, of course, draw any firm conclusion. But whether productivity is or is not the ultimate interest, the *immediate* concern is always the avoidance of overt signs of militancy, expressions of equality, or a rejection of hierarchy.

Perhaps one more example will suffice to show that profanity when directed at management is subject to discipline because it exemplifies a lack of respect. Apparently, the need for a respect is an implied part of the employment relationship.<sup>67</sup> In *American Shipbuilding Company*,<sup>67</sup> the employee said to the foreman: "you're a god damn liar and always was and always will be one."<sup>68</sup> The employee was penalized with a five-day suspension when he refused to apologize to the foreman. The arbitrator explained:

Although cussing and a certain amount of profanity may not be unusual in a shipyard anymore than in a foundry or other plants where hard work is the rule and tough men are engaged in communication under trying conditions, some limit must be recognized even here . . . . Calling a man a liar in this manner is far different from using a pet cuss word, foul language, or ordinary profanity. The profanity used in this instance merely served to emphasize the seriousness of the public accusation . . . . [T]he grievant's failure to even apologize punctuates his apparent misguided notion of his own responsibility toward all management personnel.<sup>69</sup>

Underlying all these cases is the apparent belief that chaos will arise if employees can use this kind of language without being punished. The NLRB faces similar questions in cases where discipline for insubordination is said to violate section 8(a)(1) or (3).<sup>70</sup> Unlike the issues arbitrators face, however, the simple issue of justification or good faith is not technically relevant. The issue is, rather, whether the employee's actions were protected by section 7 and the burden is on the employee. The Board generally does hold that obscenity directed to supervisory personnel is not pro-

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67. 44 Lab. Arb. (BNA) 254 (1964) (Teple, Alexander & Cavano, Arbs.).

68. *Id.* at 255.

69. *Id.* at 255-56.

70. National Labor Relations Act, §8, ch. 372, 49 Stat. 452-53 (1935) (codified as amended at 29 U.S.C. § 158 (1982)).

tected; thus, discipline for such speech cannot violate the act.<sup>71</sup> Often, however, the language is ignored as "shop talk," but simultaneous threats are viewed much more seriously.<sup>72</sup> Similarly, as in the arbitral situation, a somewhat wider latitude is given to stewards who are taking part in the grievance process.<sup>73</sup> As in all unfair labor practice situations, the discipline will not be upheld if a charge of insubordination was a pretext for discriminatory action.<sup>74</sup> In deciding these issues, the prior disciplinary practices of the employer and the common modes of discourse in the workplace are relevant factors.<sup>75</sup> Similarly, these cases are affected by the *Wright Line* standard. In one case the Board held that the employer would have discharged the employee even in the absence of protected conduct because his "intemperate cursing" of the supervisor was by itself sufficient for discharge.<sup>76</sup> The problems with *Wright Line*, and the Board's possible view of cursing, can be seen in the Board's decision that no violation occurred even though similar statements were not penalized because those situations involved "less serious, spontaneous exchanges." Similarly, although it seems irrelevant to the issue of protected conduct, the Board sometimes upholds discipline upon the ground that swearing occurred "within the hearing of other employees."<sup>77</sup> It is possible, however, that the work relationship is already deemed chaotic and unordered by employees, leading them to use just this kind of language.

Many of these cases, whether before the NLRB or an arbitrator, turn on credibility determinations. Generally, under a variety

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71. See *Leshner Corp.*, 260 N.L.R.B. 157 (1982); *St. Rita's Medical Center*, 261 N.L.R.B. 357 (1982).

72. See, e.g., *Detroit Edison Co.*, 241 N.L.R.B. 1086 (1979).

73. See, e.g., *Crown Cent. Petroleum Corp.*, 177 N.L.R.B. 322 (1969).

74. See, e.g., *Champion Parts Rebuilders, Inc.*, 260 N.L.R.B. 454 (1982); *Downtowner Motor Inn*, 262 N.L.R.B. 1058 (1982); *Haco Eng'g Co.*, 265 N.L.R.B. 27 (1982); *Richmond Tank Car Co.*, 264 N.L.R.B. 174 (1982), *rev'd on other grounds*, 721 F.2d 499 (5th Cir. 1983).

75. See *Federal Management, Co.*, 264 N.L.R.B. 107 (1984); *Traverse City Osteopathic Hosp.*, 260 N.L.R.B. 1061 (1982), *enforced*, 114 L.R.R.M. (BNA) 2376 (1983); *Kenco Plastics Co.*, 260 N.L.R.B. 1420 (1982); *Tessler Lutheran Home for Children*, 263 N.L.R.B. 651 (1982).

76. *Host Serv. Inc.*, 263 N.L.R.B. 672 (1982).

77. *Leshner*, 260 N.L.R.B. at 159 n.10. *But see* *Consolidated Freightways, Corp.*, 257 N.L.R.B. 1281 n.1 (1981) ("we do not rely on her [ALJ] observation that it was significant that Reiber's 'obscene outburst' took place on the dock in the presence of other employees rather than as part of the *res gestae* of a grievance hearing").

of tests and personal instinct, arbitrators seem to tend to uphold the recollections of the management witnesses. One arbitrator rejected any view that either the supervisor's or the employee's testimony should always be believed, an easy determination since no real life arbitrator believes either view. Nevertheless, in answering the credibility issue, the arbitrator gave much weight to his determination that "the grievant had a motive to deny that he used abusive language, especially when he was informed that such language would be a basis for a disciplinary suspension."<sup>78</sup> Thus, he relied to some extent on the assumption that the grievant had more reason to distort the evidence than did the supervisor. The grievant's testimony was further discredited in this case on other dubious grounds. The arbitrator asked which story was most consistent with the facts, and credited the supervisor's view because the supervisor seemed to be merely a person carrying out his assigned task and seemed to have borne no grudge against the grievant. The employee, however, was viewed as "being very outspoken, especially when he believes he has been unjustly accused of wrongdoing."<sup>79</sup> Thus, sometime after the suspension, the employee received an order to leave the department on an errand. The employee responded, "You won't lie about me again, will you?"<sup>80</sup> A similar remark was made in response to an alleged "peace offer" at another time. In effect, the grievant was alleged to have said "you know what you can do with it." These two instances, both of which suggest anger or irritation or a feeling of unfair treatment in relation to the prior discipline, are viewed as "close to being insubordination" themselves.<sup>81</sup> Moreover, they "tend to discredit the grievant's testimony that he did not and would not make such a disrespectful remark to a supervisor."<sup>82</sup>

Although arbitrators may mitigate penalties or absolve employees when their obscene remarks are provoked, the arbitrators view of what is provocation may be quite different from that of employees. Moreover, provocation may not be revealed in any one incident and therefore proof of adequate provocation may be difficult or impossible to acquire. It is difficult to believe that respect

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78. *Spartan Mills*, 68 Lab. Arb. (BNA) 1279, 1281 (1977) (Sherman, Arb.).

79. *Id.* at 1282.

80. *Id.*

81. *Id.*

82. *Id.*

is engendered by punishing what is thought to be disrespect, yet this assumption tends to underlie these cases. The assumptions in these cases, as noted at the outset, would not seem strange if found in school or prison disciplinary cases or perhaps even in military discipline cases. More importantly, the language involved in these cases can be said to be disrespectful, especially to the hierarchical structure of modern enterprise. It is this disrespect which is punished.

### III. CONCLUSION: THE DUTY OF RESPECT

Since we are not dealing with the refusal to follow explicit work orders, the underlying notion is that the expression of disrespect for "authority" is undesirable and also punishable. In addition, arbitrators may believe that the demonstration of respect, aside from the worker's actual state of mind, has institutional value. If the expression of disrespect is seen as poisoning the atmosphere, with some ultimate effect upon productivity, then arbitrators may feel no need to rely upon actual proof of inefficiency.<sup>83</sup>

In addition, striving for a world in which a modest level of decorum and mutual respect exists has value irrespective of production effects. Workers as well as foremen would no doubt approve of some standards of harmony in the workplace, although the standard is normally established by management and enforced by arbitrators only against employees. Employees, moreover, may see the workplace as quite chaotic and penalties may not deter expressions of disrespect or, of course, provide the foundation for genuine, mutual respect. Finally, obscenities might be seen as angry expressions of the weak since foremen, even if held to similar standards, have other weapons at their disposal.

This area provides a seemingly rich lode for sociological investigation. For instance, to what extent is the language actually used in the workplace related to the kind of work performed? Is the work dirty, dangerous or unpleasant? To what extent does it relate to the existing style and substance of management? Second, is it conceivable to view arbitrators' and foremen's views about obscenity as being based upon a quite different class or socio-economic background? Third, arbitrators may overlook the personal

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83. I am indebted to Clyde Summers for these thoughts.

and status needs of foremen as motivational factors in imposing discipline quite apart from productive efficiency. As persons "higher" than workers, there may be a felt need to be shown respect totally apart from institutional concerns.

Arbitrary concern for the appropriate level of respect to be shown supervisors is historically interesting for two reasons. First, "[b]efore 1900 and in most factories before 1920 the foreman was the undisputed ruler of his department, gang, crew, or shop."<sup>84</sup> The foreman's primary responsibility was "getting the work out," a task designated as the "driving" method, "a combination of authoritarian rule and physical compulsion."<sup>85</sup> As John Fitch, author of a study of labor conditions in the steel industry, explained to a congressional committee, driving or "pushing" was done in a variety of ways, "through motions and profanity." The use of profanity was a common mode of "driving" workers.<sup>86</sup>

Second, the status of supervisors is of recent vintage. After 1920, much of the foreman's power to discipline or determine productive flow was removed and placed in specialized departments. As a response to the organization of foremen in unions in World War II, many companies began educational programs to convince foremen that they were indeed part of management. Psychology was not ignored: "foremen [at Ford] received special lunch rooms, identification badges and parking lots."<sup>87</sup>

The foreman's role, therefore, has been continually altered by the interests of management, the growth of personnel departments, the organization of employees and, most importantly, management's perception that foremen are its front line in the battle for control at the point of production. The assumption many arbitrators take as inherent is historically contingent and, moreover, is only one version of a long, historical conflict over the control of the workplace.

The purpose of this endeavor was to illustrate the approach of arbitrators to certain types of insubordination claims, not to suggest an alternative vision. It is clear that notions of efficiency and productivity strike sympathetic chords in arbitrators, and it is perfectly understandable why this should be so. Much less under-

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84. D. NELSON, *MANAGERS AND WORKERS* 42 (1975).

85. *Id.* at 43.

86. *Id.* at 43-44.

87. Seitz, *supra* note 44, at 236.



standable is the reluctance to focus upon the actual nature of an employee's work life and, instead, uncritically accept hierarchial notions of order and control in what is traditionally championed as a joint, and contractual, endeavor.

#### IV. POSTSCRIPT: A LOOK AT TREATISES

Arbitrators and representatives often rely upon published treatises and handbooks to guide them in arbitration proceedings and in the preparation of arbitral briefs and awards. Thus, the selection of cases by a text writer is exceedingly important. For this reason, some of the individual cases studied here were taken from the Elkouri & Elkouri book, clearly the most widely known and used treatise. The Elkouri volume, however, does not discuss discharge and discipline cases; instead it merely cites awards in various categories of cases.<sup>88</sup> Clarence Updegraff, the author of perhaps the second most widely used treatise, also does not deal in depth with disciplinary cases and does not refer at all to specific kinds of disciplinary cases.<sup>89</sup> A look at other writings in the area, however, is highly revealing.

Initially, the writings to be discussed cannot be seen as especially thoughtful or unbiased. One volume in the Practicing Law Institute's series does barely more than quote from one decision.<sup>90</sup> The quotation is followed by a paragraph of text which suggests that other arbitrators may take a different view. The entire section, however, reflects little understanding of the social situation out of which these cases arise and, in general, assumes that obscene language impairs discipline or derogates the authority of, or respect due, a supervisor and, for this reason, should result in discipline. The section in its entirety follows:

##### PROFANITY AND OBSCENITY

As concerns obscene language, the following remarks made by an arbitrator are enlightening:

*Next it was contended that, as the use of obscene profane language was customary on the part of employees and supervisors, it was discriminatory to single out one employee for discharge for the use of such language. The evidence clearly established that the employees and foremen did use such terms but in an ordi-*

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88. F. ELKOURI & E. ELKOURI, *supra* note 5, at 697.

89. C. UPDEGRAFF, *ARBITRATION AND LABOR RELATIONS* 305-07 (3d ed. 1970).

90. *ARBITRATING LABOR CASES* 87 (N. Levin, ed. 1974) (Corporate Law and Practice Sourcebook No. 6).

nary and conversational manner. They were spoken to convey directions and acknowledge instructions. But there is a vast difference between the use of such terms in an ordinary manner and in the manner which is intended to be insulting. There was abundant testimony of the use of these terms by many employees but little of instances where these words were spoken in anger. When the speaker is mad and uses such terms he intends them to be degrading and it is an insult to the recipient. While it was customary in the plant to use such terms in ordinary conversation, it was not customary to use them in anger and with the intent (to insult) as was done in the instant case. The Grievant was not the first employee to be discharged for insubordination arising out of the use of profanity. Previously another employee had been discharged for this reason. A grievance was filed but was withdrawn by the employee before being submitted to arbitration. Presumably the employees knew that the use of obscene profane language in a hostile manner could result in discharge.

The arbitrator concluded that the employer had just cause for discharging the grievant. Other arbitrators, however, may be more tolerant, and some tend to forgive the use of four letter words even spoken in anger. Many will differentiate between an insult to a supervisor, which impairs company discipline and involves insubordination and disrespect, and the lesser offense of such language towards a co-worker of equal rank.<sup>91</sup>

BNA's *Grievance Guide* provides citations on categories of employee offenses. Revealingly, the section on "abusive language" immediately follows a section on "assaults on supervisors." The latter section begins: "Generally, arbitrators do not require companies to put up with verbal abuse of their foreman by employees."<sup>92</sup> "[I]f such language is used to embarrass, ridicule, or degrade a supervisor, it would be considered an insubordinate act, especially if other employees were present to hear it."<sup>93</sup> Special attention is given to *Paragon Bridge & Steel*, the exclusive source in the PLI volume and the source of the preceding quotation.<sup>94</sup>

The cases cited in the *BNA Guide* suggest that little debate exists. Indeed, the decisions cited seem to go quite far. Thus, in addition to summarizing *Paragon*, the *Guide* also refers to "name-calling" as worthy of discipline and cites an arbitrator who it says would consider just cause to exist if an employee "calls his supervisor a name in front of other employees." This is treated as

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91. *Id.* at 86-87, quoting *Paragon Bridge & Steel Co.*, 43 Lab. Arb. (BNA) 864 (1964) (Bradley, Arb.) (footnote omitted).

92. BUREAU OF NATIONAL AFFAIRS, *GRIEVANCE GUIDE* 34 (5th ed. 1978) [hereinafter cited as *GUIDE*].

93. *Id.*

94. See F. ELKOURI & E. ELKOURI, *supra* note 5, at 656.

"cause" for discipline even though the "name" is not said to the supervisor!<sup>95</sup>

Moreover, the *Guide* cites the opinion in *Pacific Mills* to support the statement that "calling a supervisor a 'liar' is usually regarded as a major offense that may warrant the discharge penalty."<sup>96</sup> In this decision, an employee's "erroneous impression" led him to believe that the supervisor had lied. Nevertheless, the *discharge* was upheld. In many of its textual references and citations the presence of other employees is cited as important, and the *absence* of other employees as a ground for easing the penalty.<sup>97</sup>

In the preceding section on assaults, the *Guide* states that "most arbitrators agree that management's right to control operations in an efficient manner rests upon the assumption that employees will exhibit respect for their supervisors."<sup>98</sup> The *Guide* recognizes that supervisors may provoke undesirable conduct, but notes that although provocation may be a mitigating factor, it is "rarely held to justify letting the employee go scot free." Indeed, "only extreme provocation would excuse an assault on a management representative."<sup>99</sup>

Arbitrators hold, we are told without citations, that it is irrelevant that employees can be punished while management takes no action against the provoking supervisor. Thus, we read that "a union has no right to question an employer's relations with his supervisors."<sup>100</sup> As noted earlier, decisions to the contrary can easily be discovered. Moreover, although arbitrators recognize that people often act differently when provoked than they might in the absence of such provocation, the *Guide* confidently informs us that some arbitrators do not find provocation to be a complete defense. In *Singer Manufacturing Co.*,<sup>101</sup> for instance, there was evi-

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95. See *GUIDE*, *supra* note 92, at 35 (discussing Arkansas-Louisiana Chemical Corp., 35 Lab. Arb. (BNA) 887 (1962) (Wollett, Arb.) (not cited by Elkouri)).

96. *Pacific Mills*, 3 Lab. Arb. (BNA) 141 (1946) (McCoy, Arb.); *but cf.* *Higgins Indus. Inc.*, 25 Lab. Arb. (BNA) 439 (1955) (Herbert, Arb.). These two cases are emphasized in L. STESSIN, *supra* note 1, at 59-60.

97. See *Higgins*, 25 Lab. Arb. (BNA) at 439. See also *Marion Mfg. Corp.*, 13 Lab. Arb. (BNA) 616, 619 (1949) (Shawe, Arb.), *cited in* L. STESSIN, *supra* note 1, at 60.

98. *GUIDE*, *supra* note 92, at 32.

99. *Id.* at 34. See also A. ZACK & R. BLOCH, *THE ARBITRATION OF DISCIPLINE CASES* 42-45 (1979).

100. *GUIDE*, *supra* note 65, at 34.

101. 19 Lab. Arb. (BNA) 455 (1952) (Bailer, Arb.).

dence that the foreman had first used the kind of foul language for which the employee was disciplined. The discharge was reduced to a one week layoff.<sup>102</sup> Jennings' study of seventy cases found that arbitrators were more sensitive to provocations from management personnel.<sup>103</sup> If Jennings' cases are representative, the sources discussed above do not accurately reflect arbitral thinking on issues of provocation.

The conclusion parallels the warning professors routinely give their students: Treatises must be used with great care for they often mislead as much as they enlighten.

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102. See also *Higgins*, 25 Lab. Arb. (BNA) at 439 (provocation was used to reinstate an employee, but without back pay). See also *Reynolds Metal Co.*, 17 Lab. Arb. (BNA) 710 (1951) (Granoff, Arb.); Jennings, *supra* note 2, at 267-68.

103. Jennings, *supra* note 2, at 267-69.

## APPENDIX

*Cases reviewed for this study:*

*American Shipbuilding Co.*, 44 Lab. Arb. (BNA) 254 (1964) (Teple, Alexander, Cavano, Arb.) (discipline justified for employee who called foreman "a goddamned liar" in presence of other employees).

*Bethlehem Steel Corp.*, 76 Lab. Arb. (BNA) 480 (1981) (Sharnoff, Strongin, Arb.) (discharge proper for employee charged with intentionally bumping and threatening foreman).

*Bacyrus-Erie Co.*, 44 Lab. Arb. (BNA) 858 (1965) (McGury, Arb.) (discipline not warranted for union committeeman who made insulting remarks to supervisor over a grievance dispute where mitigating circumstances were present).

*Darnell Wood Products Co.*, 8 Lab. Arb. (BNA) 562 (1947) (Dwyer, Arb.) (discharge too severe for employee who used "pretty strong language" during dispute with supervisor over operation of his machine where mitigating circumstances existed).

*Dempster Bros. Inc.*, 57 Lab. Arb. (BNA) 1279 (1971) (Haemmel, Arb.) (use of vile and abusive language toward supervisor warranted a one week lay-off).

*Eaton, Yale & Towne, Inc.*, 56 Lab. Arb. (BNA) 1037 (1971) (Kates, Arb.) (discharge too severe for steward who addressed profane language at foreman after foreman would not authorize a leave from work for union business).

*Fairchild Indus.*, 75 Lab. Arb. (BNA) 289 (1980) (Groshong, Arb.) (discharge termed proper for employee continually violating plant rule against "immoral conduct" by using vulgar language).

*Higgins Indus., Inc.*, 25 Lab. Arb. (BNA) 439 (1955) (Herbert, Arb.) (discharge was called too severe a penalty for employee who called foreman a "damned liar" after foreman accused him of taking excessive rest time).

*Hobart Corp.*, 75 Lab. Arb. (BNA) 907 (1980) (Curry, Arb.) (suspension proper for union steward who told foreman that he was tired of his "fucking shit").

*International Harvester Co.*, 13 Lab. Arb. (BNA) 986 (1949) (Seward, Arb.) (employee who directed his tirade of abusive and obscene language at supervisor without provocation was properly discharged).

*Iowa Power & Light*, 76 Lab. Arb. (BNA) 482 (1981) (Gradwohl, Watts, Yarley, Arb.) (suspension improper for employee who di-

rected abusive language at supervisor).

*Lockhead Shipbuilding & Construction Co.*, 73 Lab. Arb. (BNA) 711 (1979) (Lovell, Arb.) (discharge termed too severe for employee who made threats and racist remarks to supervisor when mitigating circumstances were present).

*Mead Packaging Co.*, 74 Lab. Arb. (BNA) 881 (1980) (Ziskind, Arb.) (discharge was improper for employee using profane language toward supervisor when mitigating circumstances were present).

*Mississippi Valley Structural Steel Co.*, 35 Lab. Arb. (BNA) 506, 507 (1960) (Luskin, Arb.) (employer was justified in discharging employee who used profane and abusive language to supervisor, despite the fact that similar conduct in the past had not led to discharge).

*Nathan Mfg. Co.*, 7 Lab. Arb. (BNA) 3, 6 (1947) (Scheiber, Arb.) (shop steward reinstated after being discharged for flouting foreman's orders not to instruct employees to disobey orders even if he believes such orders to be in violation of the contract).

*New York Air Brake Co.*, 74 Lab. Arb. (BNA) 875 (1980) (McDonnell, Arb.) (employer not justified in discharging one employee and suspending another on charges of foul language; arbitrator doubts charge of foul language given standards of 1980 community).

*Ohmstede Works, Inc.*, 60 Lab. Arb. (BNA) 522 (1973) (Marlatt, Arb.) (disciplinary layoff was not justified for use of abusive language with mitigating circumstances present).

*Pacific Mills*, 3 Lab. Arb. (BNA) 141 (1946) (McCoy, Arb.) (discharge of employee for repeatedly using profane and abusive language to his supervisor is upheld, despite fact that there was considerable justification for the abusive language that precipitated his discharge).

*Paragon Brick & Steel Co.*, 43 Lab. Arb. (BNA) 864, 868 (1964) (Bradley, Arb.) (employer was justified in discharging employee who used profane language against supervisor, even though profanity is common in the plant, as employer cannot condone repeated insubordination without losing respect of both employees and supervisors).

*Permatex Co.*, 54 Lab. Arb. (BNA) 546 (1970) (Goetz, Arb.) (employer not justified in summarily dismissing an employee for loud and abusive language directed at production manager as charge of

abusiveness and obscenity exaggerated).

*PPG Indus. Inc.*, 57 Lab. Arb. (BNA) 866 (1971) (Coburn, Arb.) (employer was justified in imposing two and one half day suspension on union president because union president berated supervisor in presence of other employees).

*Reynolds Metal Co.*, 17 Lab. Arb. (BNA) 710 (1951) (Granoff, Arb.) (employer must reinstate employee discharged for disobedience, abusive language and assault, because employee outburst was culmination of months of "riding" by foreman).

*Seattle Dep't Stores*, 75 Lab. Arb. (BNA) 6 (1980) (Beck, Arb.) (restaurant employer improperly suspended a mixologist for insubordination as she apologized shortly afterwards and told manager he would have no more trouble from her).

*Sherwin-Williams Co.*, 56 Lab. Arb. (BNA) 101 (1971) (Sullivan, Arb.) (employee was improperly dismissed for fight with foreman when foreman stuck his finger in employee's face and employee slapped his hand away, thus initiating the incident).

*Singer Mfg. Co.*, 19 Lab. Arb. (BNA) 455 (1952) (Bailer, Arb.) (suspension of employee for calling group leader obscene names was shortened because supervisors used similar language against employees and it was clear that threats of bodily injury were not meant to be carried out).

*Spartan Mills*, 68 Lab. Arb. (BNA) 1279, 1282 (1977) (Sherman, Arb.) (employer had just cause to suspend employee for calling supervisor a "God damned liar" because the remark is a challenge to supervisor's authority, undermined respectful employer-employee relationship and would invite further hostility if condoned).

*Terminal Cab Co.*, 7 Lab. Arb. (BNA) 780 (1947) (Minton, Arb.) (employer not entitled to discharge employee for threatening supervisory employee when threat took place off duty and off company property; another employee discharged for abusive language on duty should be reinstated because use of such language was common in the industry).

*Thorenson-McCosh, Inc.*, 75 Lab. Arb. (BNA) 858 (1980) (Roumell, Arb.) (employer properly imposed five day suspension on employee who told supervisor to "fuck off" because language was profane, abusive and spoken in front of other employees).

*Whirlpool Corp.*, 54 Lab. Arb. (BNA) 576 (1970) (Williams, Arb.) (discharge too severe a penalty for union steward who used ob-

scene language in refusing to obey supervisor's order to return to work).

*Paul W. Wills, Inc.*, 50 Lab. Arb. (BNA) 95 (1968) (Nichols, Arb.) (penalty of discharge too severe for an employee who used profane language against supervisor and refused to follow work directive, since supervisor's directive required employee to perform task that would aggravate his known back injury).



