

ARBITRAL ISSUES AND STANDARDS IN THEFT AND DISHONESTY CASES

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ABSTRACT

Employee theft and dishonesty pose major problems for employers. While employers are, of course, aware of the cost implications for them of such misbehavior, employees are properly concerned with being designated a thief. Obviously, obtaining future employment is almost an impossibility if an employee is terminated for that reason. This article reviews 108 arbitration awards covering over ten years, in order to develop a framework for understanding employee/employer issues in theft and dishonesty cases.

Crime against business totals an estimated \$90 billion a year, most of which is due to employee theft and other forms of misconduct [1]. In some cases, employers have responded by installing expensive video or other surveillance equipment, hiring security guards, and/or developed elaborate paperwork devices to forestall thievery. Despite such measures, thievery continues. It is small wonder, then, that employers respond harshly when employees are suspected of theft.

Theft may be defined as:

The taking and carrying away of personal goods of another of any value from any place, and with an intent to steal same. Such goods must be taken without the consent of the other and there must be some asportation [i.e., the removal of goods from one place to another] with an intent to steal them [*animus furandi*] [2, at 6467; 3 at 4427].

This article reviews all published arbitration awards dealing with theft or related dishonesty cases listed in the Bureau of National Affairs' [BNA] *Labor*

Arbitration Reports for the years 1985 to 1996, and the Commerce Clearing House's *Labor Arbitration Awards*, covering the years 1988 to 1997. In total, 108 awards were utilized in this study.

INTENT TO STEAL

As noted above, one portion of the definition of theft involves an intent to steal. Indeed, some arbitrators have stated that an employee cannot be guilty of theft unless an intent to steal has been established [4, 5]. Such intent may be proven through an admission of guilt by the grievant, or by inference derived from a consideration of the totality of all the circumstances [6, at 4020; 7, at 4026]. Occasionally, an employee may admit a theft [8], but more often than not, the employer's case will be built upon circumstantial evidence or eye witness testimony. Some arbitrators have considered the following as indicators of an employee's intent to steal:

1. whether or not the employee acts furtively or suspiciously after taking an item [9];
2. whether or not the employee attempts to hide the alleged stolen property or carries it openly [10];
3. whether or not the employee tells someone else that s/he has the property and/or leaves the property in another's care [4]; and
4. whether or not the employee indicates an intent to return the item only when confronted with knowledge of its possession by the employee [7].

Arbitrators have generally found a lack of motive [intent] to steal to exist when an employee removes the property of his/her employer from what is believed to be the rubbish or discard pile, or when s/he believes such property has been abandoned. For example, there was no just cause to discharge two employees who took some aluminum from a scrap pile [3]. They had previously taken things from that pile with permission and the arbitrator noted it was ". . . reasonable for the grievants to assume that matter placed in the trash pile was not worth anything and therefore could be taken home" [3, at 4427]. Similarly, a housekeeper's dismissal was reduced to a suspension after she took some flower arrangements from a patient's room in a hospital [11]. The housekeeper mistakenly assumed that the patient has been discharged or transferred [12]. Moreover, she told the ward secretary that flowers had been left in the room and took them in plain view [13, 14]. Nevertheless, it is probably a wiser choice for employees to seek permission to take home even apparent scrap, prior to removal from the employer's premises [15, 16].

Lack of intent to steal was also apparent in a case involving a twelve-year machine repairman who was also a skilled lockpick [17]. He unlocked his supervisor's tool cabinet without authority, to secure batteries and a bulb for his flashlight. The latter were needed to perform his repair work. A coworker observed

him opening the tool cabinet. It was clear that the employee was not taking the materials for his own use, but rather for work-related purposes. Therefore, the employee received full back pay less a one-week suspension and was admonished by the arbitrator not to open locks without permission. Similarly, a union steward was improperly discharged for the theft of fourteen legal pads he had obtained from the company supply room without authorization [18]. He had intended to use them during an official company-union conference. Arbitrator Wright pointed out there was no intent to steal the pads for his personal use and the company had condoned the taking and use of office supplies from the store-room by union stewards.

In an interesting case, a pipefitter was issued a disciplinary letter for “hoarding” tools in his locker [19]. There was no proof he had stolen the tools or converted them to his own use. As there were no established norms to indicate what inventory of tools a pipefitter should possess, there was no evidence of hoarding. Moreover, he was a twenty-year employee with an excellent work history. Nevertheless, in *American Steel Foundries (Indiana Harbor Works)*, termination was found to be appropriate for an employee who removed certain janitorial supplies and other items and stored them in his locker [20]. When confronted, his only excuse was that he “forgot” they were in his locker. The arbitrator found this explanation to be incredible based on the massive amount of supplies stored there. Moreover, some of the material was not consistent with a janitor’s duties [20].

However, not all arbitrators require an employer to establish proof of an employee’s intent to steal. Arbitrator Kelly explained the reasoning:

Theft is a covert activity and it is difficult or impossible for an employer to prove that an employee actually ‘intended’ to steal without searching an employee’s home—something no one advocates. It is enough for the Company to show that an employee had Company property in his or her possession without authorization, especially when locked in his or her personal vehicle just before going home. Even in criminal law, an individual is presumed to intend the reasonable consequence of his or her actions. Once the property is found in the employee’s unauthorized possession, it is up to the employee to adequately explain the circumstances [21, at 3383].

In arbitrator Kelly’s case, when the employee could not explain the presence of company property in his pickup truck, it was enough to establish guilt of possession with the intent to deprive the company of its property. Twenty-seven years of service was insufficient to modify the discharge [21].

An interesting case of intent to steal, or lack thereof, involved an employee with kleptomania [22]. Over a fifteen- to eighteen-year period, he stole large amounts of company property. Although acquitted by a court based on his

kleptomania and the fact that the employee, therefore, lacked knowledge and intent to be culpable [23], he was found to have been properly discharged by the arbitrator [22]. Arbitrator Goldberg stated:

Grievant's motive, or lack thereof, in taking the property has little to do with the manner in which the contract permits the Employer to respond to misconduct of this scope [22, at 614; 24].

Thus, in grievance arbitration, the contract may take precedence, even over the criminal law and its principles.

ASPORTATION OF GOODS

Another portion of arbitrator Marino's definition of theft [2] involved the asportation (or removal) of property from one place to another. The appropriation of goods and subsequent replacement of these goods, raises the question as to whether the employee's failure to remove the allegedly stolen items from company premises eliminates the possibility that the employee's action constitutes theft. For example, in one case a truck driver was observed shoplifting a pair of reading glasses while waiting to unload his truck at a customer's grocery store [2]. He was seen taking them from the display, cutting off the price tag, and placing them in his pocket, after he had put them in his own glass-carrying case. While he never left the store with the glasses, theft was established. It was noted that:

Arbitrator's have not required removal of the object of the theft from the employer's property in order to find that theft has occurred, so long as the employee has placed the property within his control. Such control may be manifested by placing the object in a lunchbox, a locker, or a toolbox, or through concealment of the property on the employee's person or in other space personal to the employee[,] has been held sufficient to satisfy the control requirement, particularly if accompanied by wrapping or other disguise or concealment [2, at 6467].

In this case, as previously noted, the truck driver placed the reading glasses in his own glass-carrying case [2].

An employee attempted to leave his work area with three rolls of tape of a kind in the employer's inventory [25]. That the property was not removed from the premises was, in the words of the arbitrator, an "attempt to steal," rather than theft. However, arbitrator Veglahn also observed: "An offense of attempted theft is equivalent to theft" [25, at 5296; 26]. Similarly, arbitrator Vonhof stated that: ". . . the essence of stealing is transferring property from the control of the owner to the control of the taker" [20, at 3979; 27]. Thus, it is not always necessary that

property leave the employer's premises for the act of theft to be established, only that the employee effectively remove the property from the employer's control to his or her control [28-32].

The above comments notwithstanding, there may be circumstances when the employee's failure to remove employer property from the premises warrants a conclusion that no theft was intended and/or committed. For example, in *Alcan Aluminum* and electrician was inappropriately discharged for the theft of tools belonging to a security guard [33]. When the electrician learned the guard had reported the tools as missing, the former returned them to the guard. Arbitrator Jones claimed that while the employee may have been guilty of "wrongful possession and unauthorized removal of property," that act did not become theft until he had complete control of that property outside the plant premises [33, at 1002]. He explained:

. . . the difficulty with the Company's case is the fact that the grievant did not have an opportunity to complete the intended theft. He changed his mind and returned the goods in question. He did not carry the Company's property out of the Company's premises and did not attempt to carry it through the gates. It is not intent, but the act itself which is punishable [33, at 1002; 34].

In *Seven-Up Bottling Company of Youngstown (Ohio)*, discharge was reduced to a suspension for a part-time route driver who took a can of tea without first paying for it [36]. However, a customer must pay when that customer reaches the check-out counter. Arbitrator Miller stated:

Until the customer passes beyond the register, he or she has not manifested any intention not to pay the retailer, merchandise the possession of which it agreed to transfer within the store to the customer [36, at 667; 37].

VALUE OF GOODS STOLEN

Arbitrator Marino's definition of theft referred to the ". . . carrying away of personal goods of another of any value . . ." [emphasis supplied]. There is some controversy among arbitrators as to the significance of the value of an item taken. Some claim that the value of the item is irrelevant. Others take a stolen item's worth into account for possible mitigation of the penalty imposed by the employer.

The first school of arbitral thought regarding the value of an item stolen, is illustrated in the *Tyson Foods, Inc.* case [42; see also 29, 43, 44]. A chief union steward placed electrical ballast worth less than a dollar in his car without permission. Brushing aside the argument that the theft involved a *de minimis* amount, arbitrator Moore stated:

Theft is theft. How much and how big does not and should not be a factor [42, at 1125].

Similarly, a discharge was upheld by one arbitrator when five potatoes were discovered in an employee's lunch box that were not his property [31]. This action resulted despite twenty years of service by the employee. Arbitrator Eisele noted: "Employers are not required to continue the employment of employees who engage in dishonest acts [31, at 4934; 45; 46]. The theory underlying discharges without regard to an item's worth is that once a theft is committed, normally an employee will likely continue in this type of behavior [47], and that employers are not required to continue such an employment relationship. In this regard, arbitrator Dworkin noted:

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 [28, at 252].

The value of a stolen item may also not be a serious consideration to some arbitrators because a dismissal for theft can be a deterrent to other employees to steal [48].

Nevertheless, when an employer's rule provides for a range of possible penalties for theft, the value of the item taken and/or other circumstances may be taken into account for mitigation of the imposed penalty by the employer. For example, the discharge of an employee for the admitted theft of two candy bars was reduced to a suspension where the company rules permitted a penalty less than discharge and the candy bars had been removed from an already opened carton [49]. The employee also had had a good work record for fifteen years. Arbitrator Smith explained his decision this way:

While there is no doubt that dishonesty is dishonesty, regardless of the nature of the act, it can be argued that some acts of dishonesty are more serious than others. Is the theft of one dollar (\$1.00) as serious as the theft of one-thousand dollars (\$1,000)? Is the theft of two (2) candy bars as serious as the initial breaking of the package, or the theft of product having greater value? Can it be argued that there is such a thing as gross dishonesty which is more serious than just dishonesty? [49, at 579; 50; 51].

Some arbitrators take the position that unless the employer's rule explicitly provides for discharge for theft of any item, whatsoever the value, arbitrators may have leeway to mitigate the penalty [25, at 5297]. Arbitrator Sass stated in this regard:

A company may impose the ultimate penalty of discharge for thefts involving items of even relative normal value, *provided* that employees have been put on notice that such thefts will result in discharge and such a rule is reasonably necessary in light of the type of business being conducted. Even then, however, all of the circumstances must be taken into consideration and such consideration may result in a finding that discharge is not justified. For example, if the value of the item taken is not just nominal, but truly negligible, and/or other employees have taken similar items without being disciplined or discharged, then there may be no just cause to discharge no matter what the Company's rules or posted notices say [52, at 3013].

In arbitrator Sass' case, discharge was found to be too severe when an employee stole a package of frozen breakfast. He [Sass] claimed that absent a clear notice that no theft of any kind would be tolerated, an employee could reasonably expect a correlation between the penalty imposed and the value of the item taken. No employee had ever been fired for the theft of nominal value at that company [53].

In another case, a discharge was reduced to a suspension for a senior store-room employee, even though he admitted taking hospital property. The items taken were small ones (razor blades, hand lotion, and toothpaste) ordinarily distributed free to patients. Such pilferage was commonplace, he did not engage in it excessively, and was not warned that pilferage could lead to discharge [54].

BURDEN OF PROOF AND QUANTUM OF PROOF ISSUES IN THEFT CASES

While there is little doubt that employers bear the initial burden to prove just cause, arbitrators have suggested a kind of shifting burden of proof may exist, once evidence has been established to show that an employee committed the theft. Arbitrator Veglahn explained:

Once the employer has conducted a competent investigation and reach [sic] a conclusion of probable guilt, the employee should make efforts to overcome this conclusion [25, at 5296].

Arbitrator Hooper has these interesting words regarding the appropriate quantum of proof:

While there is an analogy between termination from one's job and capital punishment, the two are only *analogous*. By no stretch of the imagination are they *equivalent*. There is a vast difference between losing one's life and losing one's job. Writings on the subject of quantum of proof tend to be more esoteric and academic than helpful. In the end, the most useful question to ask is simply whether the evidence is convincing that the Company did or did not

have just cause to discharge the grievant for the alleged act of theft [55, at 3079].

Some arbitrators take the position that if the parties' collective bargaining agreement does not specify a quantum of proof to be applied, the arbitrator is free to apply whatever quantum s/he deems appropriate [7 at 4026; 43, at 5783]. Three common quantum of proof are normally required by arbitrators in order that employers meet their burden of persuasion. The most stringent of these is that standard "beyond a reasonable doubt." Unions, of course, endorse this latter quantum of proof in theft cases. It is a standard used in criminal cases, and arbitrators have attempted to justify its use in theft cases because they involve questions of moral turpitude [45, at 1141], and of course, result in a stigma that makes it difficult for the employee to secure another job if the discharge is upheld [56]. Arbitrator Maniscalco, arguing the appropriateness of this quantum of proof, stated:

Since upholding disciplinary penalties for these or similar acts [theft] permanently brands an employee just as surely as a criminal conviction would, the arbitrator will generally insist in such cases that the employer prove his charges beyond a reasonable doubt [56, at 4455].

Not all arbitrators endorse this quantum in any arbitration case, including those involving criminal-type behavior and/or moral turpitude [57]. Arbitrator Daniel argued that if the parties had intended various degrees of proof to be applied in the arbitration process, depending on the particular offense involved, they would have stated their choices in the collective bargaining agreement [57, at 422]. He also noted:

. . . the better standard of proof is that the evidence in disciplinary cases be clear and convincing as the contention urged by the employer. To many this may appear to be a distinction with a difference for if the arbitrator is clearly and convincingly persuaded by the proofs it would be unlikely that he would harbor any reasonable doubt [57, at 422-423].

Other arbitrators have argued that a quantum of proof used in criminal cases (beyond a reasonable doubt) has no place in arbitration, as an employee's right to maintain his/her job is a matter of civil contractual obligations [47, at 607]. Arbitrator Kelly also argued against the applicability of the "beyond a reasonable doubt" standard in arbitration cases [21]. He claimed that if proof beyond a reasonable doubt were applied in serious offenses while preponderance of the evidence were the standard for lesser offenses, the result would be that those charged with less serious offenses would be more readily dismissed, while those charged with offenses involving moral turpitude would be more difficult to dismiss" . . . because of the more onerous standard of proof [21, at 3384].

Not all sample arbitration awards indicated the quantum of proof applied in that decision. Of the total of 108 cases surveyed, only twenty six mentioned the quantum of proof utilized. In ten of the twenty-six awards (38 percent), proof beyond a reasonable doubt was the preferred standard [3, 45, 58-64].

Seven of twenty-six sample awards (27 percent) showed the use of clear and convincing evidence as a quantum of proof [21, 27, 43, 57, 65-67]. Clear and convincing evidence is more than a preponderance of the evidence, but less rigorous than proof beyond a reasonable doubt.

Some arbitrators justify the use of the standard, “preponderance of the evidence,” on the basis that arbitration cases are civil matters involving contract interpretation, and preponderance of the evidence is the proper quantum to be applied. Because all arbitration cases stem from the interpretation of a contract (collective bargaining agreement), there is no requirement to apply a higher standard than preponderance of the evidence, regardless of the contract issue involved, absent a contrary requirement in the parties’ collective agreement. Preponderance of the evidence means that more likely than not, something is true. Five of twenty-six sample cases or 19 percent of the arbitrators indicated that quantum of proof was applied in their theft case [18, 25, 33, 68, 69].

Finally, five arbitrators indicated standards of proof different from the three commonly used ones, just discussed. These included: “a sufficient degree of certainty in order to warrant discharge” [70]; “preponderance of the clear and convincing evidence” [71]; “clear, persuasive, convincing and unrefuted [evidence]” [72]; whether employer used “reasonable judgment in determining just cause” [73, at 5375]; and “convincing the arbitrator as to which evidence is more worthy of belief” [47, at 607].

EVIDENCE OF THEFT OBTAINED BY SEARCHES

The method by which an employer gains its evidence of theft can become an issue of arbitration. One such issue is whether an employer is entitled to use “the fruit of the poisoned tree,” i.e., evidence that appears to have been gained illegally. For example, in one case, while sheriff’s deputies were searching an employee’s home for illegal drugs, they found material belonging to the employer [74]. The search was conducted without a search warrant. After the employer had been notified, the employee was discharged for theft. At the arbitration hearing, the arbitrator refused to apply the Fourth Amendment’s exclusionary rule for the evidence, urged by the union [74]. Instead, the arbitrator noted:

The majority of arbitrators appear not to apply the exclusionary rule in the context of disciplinary proceedings under a collective bargaining agreement [74, at 1749].

Amplifying on this conclusion, arbitrator McKay further explained:

However, the majority of cases tend to indicate that the exclusionary rule is not appropriate in cases of private employees unless the employer's conduct in some way is unfair or violates fundamental concepts of due process or fair play [74, at 1150].

In McKay's case, there was no evidence the employer had directed the sheriff to search the employee's premises. The employer was simply the gratuitous recipient of stolen property.

In another private sector case, the union claimed stolen property recovered from the employee's home should be excluded from arbitral consideration [67]. However, while the employee still owned the home, he did not live there. His ex-wife lived in the home, and the company was given permission by her to visit the home and retake possession of the stolen property. Discharge was upheld, and the accused employee did not testify in his own defense.

However, when the employer is a public sector one, the evidence from a warrantless search cannot be used [75].

As a general rule, employers have the right to conduct reasonable searches of employees and their belongings in an effort to uncover stolen items and/or illegal drugs, especially when "reasonable cause" suspicion is present [76]. For example, a twenty three-year employee who was attempting to steal four cartons of masking tape, worth \$127, had his discharge upheld [51]. The union contended the employee's due process rights had been violated after plant security guards had searched his car without union representation [77]. However, the employee opened the trunk of his car at the security guard's request and also admitted the theft [51].

As previously noted, arbitrators will often require that "reasonable cause" must exist before a search is proper. For example, in *American Welding and Manufacturing Company*, the union claimed an unauthorized search had been made when the employee attempted to remove bearings from the plant in the employee's lunchbox [28]. However, the supervisor's search was found to be reasonably motivated, based on his previous observation of the grievant in a limited-access storeroom with the bearings in question in his hands [28, 78].

However, when a company rule limited searches of vehicles in the parking lot only to "when warranted," an employer failed to show it had reasonable grounds to believe an investigator's report that the grievant was a "drug pusher" [79]. Not one employee could be linked by the investigator to the grievant.

NEED FOR A RULE PROHIBITING THEFT

Because theft (and other forms of dishonesty) represents a destruction of trust in the employment relationship and is so obviously wrong, no employer rule is deemed necessary to prohibit theft [31, at 4933]. For example, in *Walt Disney World Company* no rule was posted regarding theft, yet discharge was upheld for

an employee who stole a package of candy [48]. Arbitrator Abrams reasoned that employee's were aware they should not steal from the company, regardless of whether a rule existed or not [48]. Similarly, in another case, just cause existed to terminate a coin collector observed on videotape stealing money from pay-telephone boxes [44]. Arbitrator Winograd observed:

No advance warning should be needed for an employee to know that theft is improper and that dismissal is the penalty [44, at 5421].

Nevertheless, there are some arbitrators who take the position that unless a rule specifically indicates discharge for any theft, regardless of the value of the items stolen, a lesser penalty than discharge may be imposed by the arbitrator.

POLYGRAPH EVIDENCE

Issues in arbitration regarding the use of polygraph evidence still arise in cases involving theft. The Employee Polygraph Protection Act of 1988 regulates the use of such evidence [80]. It provides, among other things, for certain qualifications and requirements of examiners [80]. It also allows employers to require employees to submit to a polygraph test if the test is "administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as theft . . ." [81]. However, requiring employees to submit to polygraph testing, and arbitral weight of test results, are two different issues.

Arbitrators have been uniformly reluctant to countenance polygraph evidence; are skeptical of its results, and generally will not support the discharge of an employee who refuses to take a polygraph test, at least on that basis alone. At most, arbitrators tend to treat polygraph results as corroboration of other explicit evidence of guilt. Arbitrator Alsher noted in this regard:

Arbitrators have placed weight on results of lie detector tests when the test are designed to corroborate a person's account of an incident or the testimony of others. They are given little or no weight by Courts and by arbitrators when an employer relies solely on the lie detector results [cites omitted] [59, at 440].

In one case, an employer discharged an employee whom it had previously suspended, pending investigation of theft of company property [82]. Its stated decision for the employee's dismissal was "willful misconduct." However, the arbitrator found that the real reason for the discharge was the employee's refusal to take a polygraph examination [82]. Arbitrator DiLauro stated:

Refusal to take a lie detector test cannot support the grievant's discharge. Aside from the fact that 18 PS 7321 makes it illegal to require an employee to

take such a test as a condition for or continuation of employment, arbitral authority recognizes employees are not to be penalized for refusing to take lie detector tests [82, at 1136; 83].

While employers cannot terminate employees for refusals to take a polygraph tests, neither can employees mandate that they be given such a test to clear themselves of suspicion of wrongdoing. In *Abbott-Northwestern Hospital*, an employee was discharged for the theft of an answering machine and a pager [84]. The union insisted that the grievant be given a polygraph examination [84]. Arbitrator Berquist declined to do so, stating:

... the arbitrator holds that a polygraph test was not required in this instance at the request of the grievant because in any event it would not have been either way admissible in these proceedings because as I have held, it is not reliable and usurps the function of the arbitrator in the finding of fact and conclusions of law and his opinion [84, at 628].

It was enough proof for arbitrator Berquist that the grievant had brought the machine to a coworker's home to sell it for him [84].

RES JUDICATA

A recurring theme in theft cases is whether or not a court's finding of guilt should determine [i.e., *res judicata*] whether the employer had just cause to discharge an employee accused of theft. Sometimes the parties agree prior to a trial that the outcome in the court will decide the merits of the grievance. However, more often than not, when a criminal court trial results in a not-guilty verdict, the employer argues that it still has the right to discharge the acquitted employee.

In one such case, an employer was found to have just cause to discharge a checker for shoplifting and for threatening management representatives at a store in which she normally shopped, but did not work [85]. She had been observed taking beer, pop, snacks, and crayons around the scanner at the check-out counter. The items in her cart were checked against the register tape, and it was determined that some had not been paid. She claimed she had previously paid for the beer but had forgotten to take it with her and that her child had been playing with the crayons. No explanation for the unpaid pop or snacks was offered by the grievant. Criminal charges were lodged against her. She did not plead guilty and was not found to be guilty. Nevertheless, she was discharged by her employer [85].

While arbitrator Hart acknowledged that *res judicata* protects individuals from multiple claims, proceedings, and lawsuits, he also found it was:

. . . quite legitimate for the employer to take disciplinary action against an employee even though that employee has been previously dealt with by the courts. . . [85, at 311].

The major reasons why court decisions are not binding on arbitrators are that the two forums are, of course, different (arbitration is relatively informal, while strict formality is the norm in criminal court cases); arbitration also has relaxed rules of evidence while courts maintain strict rules of evidence; and the standards of proof are different (proof beyond a reasonable doubt in criminal courts versus preponderance of the evidence or clear and convincing evidence in arbitration) [8, at 927]. Indeed, an arbitrator has no obligation to respect a court's suggestion that an employee be given a second chance [8, 86]. Moreover, arbitrators reject the notion of *res judicata* because they claim the right to review and evaluate the evidence, and to decide the case only on the record before them [8]. Arbitrator Suardi has observed in this regard:

. . . the consensual nature of the parties' relationship make his [arbitrator's] strict adherence to the criminal process inappropriate. To hold otherwise would denigrate the flexibility normally associated with the arbitration process [75, at 4025; 87].

OFF-DUTY, OFF-PREMISES THEFT

Occasionally, employees will be terminated for thefts committed off-premises and while they are off-duty. Arbitrators normally require that a nexus exist between the off-duty misconduct and the employee's job before just cause exists for termination. For example, a hotel employee was arrested and subsequently convicted of theft of tires from a service station [88]. He was sentenced to five days in jail and fined. The details of the theft were not reported in the media, and there was no mention of the employer's name. As the employee worked for a hotel and had unobserved access to the rooms of the guests, a nexus was established between his off-duty misconduct and his hotel employment. Accordingly, the arbitrator sustained his discharge [88, 89].

On the other hand, when off-duty misconduct is not closely related to an employee's job, and there is little publicity regarding the misconduct, discharge may be reduced or even set aside. In *Fairmont General Hospital* a licensed practical nurse pled guilty to a shoplifting charge [90]. A local newspaper did not identify the grievant as an employee of the hospital, and the misconduct and the nexus to the job was slight, the arbitrator found [90, 91].

MITIGATION

While arbitrators have no power to grant clemency to a grievant when just cause has been established, they will consider reasons to mitigate a penalty imposed by an employer. Because theft is such a serious offense, even long service with the company will not necessarily overcome a proven theft. For example, arbitrator Eisele noted:

If an employee is guilty of intentional theft of company property, a long work record by itself is just not a sufficient mitigating circumstance to overturn the discharge, and especially, as in this case when the work record is not unblemished [31, at 4934].

On the other hand, even in theft cases, when an employer treats employees differently when they commit the same offense (disparate treatment), it will usually be enough to set aside the discharge. For example, in *Marion General Hospital*, an employee was discharged after he had duplicated a master key and then returned it [92]. His dismissal was reduced to a twenty-day suspension after there was evidence that the employer had merely suspended other employees for a similar offense [92]. However, no disparate treatment was found in a case when an employer discharged a black employee with sixteen years of services for stealing \$7 worth of cleaning supplies, even though it had not discharged a white, salaried employee, who had admitted to falsely billing the company for \$50 in expenses for a business trip [93]. The company had no clear evidence of the salaried employee's dishonesty before confronting him, and it allowed him to confess as part of a plea bargain for probation. However, the black employee was leaving the plant with the cleaning supplies in his bag, when security asked to search it [93]. Arbitrator Hooper cited a decision by the Eleventh Circuit court in reaching his conclusion [94]. In that case, because the plaintiff [Chaney] was a nonunion employee, the company was extended "greater discretion" by the court in dealing with him. This prompted arbitrator Hooper to remark:

I take "greater discretion" to mean a little more freedom to make distinctions, but something short of license to discriminate. There is a difference between "discretion" and "discrimination." The former means freedom to make distinctions; the latter incorporates the concept of distinctions based on partiality or prejudice [93, at 500].

Mitigation may also be extended when an employer engages in double jeopardy in issuing its penalty. Double jeopardy occurs when an employer gives an employee a penalty and the penalty is agreed to by the employee, but the employer later decides to raise the severity of the penalty. For example, a transportation company offered to reinstate a bus driver it had discharged when he was arrested for pocketing a one-dollar fare [95]. The driver had admitted from

the outset that he had kept the dollar after unsuccessfully attempting to insert it in the fare box. However, when the driver changed his plea in court from not guilty to guilty and was convicted of theft, the company decided to terminate him. The arbitrator considered this action to constitute “double jeopardy,” and he reinstated the driver with a suspension [95].

Improper investigation of the circumstances surrounding the theft may also be grounds for mitigation of the offense by an arbitrator. An employee of the city library was dismissed for allegedly stealing a \$15 fine after a person had returned three overdue books [96]. Arbitrator Pool overturned the discharge on the basis that the city had failed to conduct an adequate investigation and did not produce sufficient proof that the employee stole the money. The investigation was held to be inadequate because:

- a) the employee was not confronted until two days after the incident in question;
- b) he did not have a chance to tell his side of the story at a time that it was fresh in his mind;
- c) the grievant recorded the books’ return, and that he received \$15 (not the actions of a person intent on stealing); and
- d) no search was conducted by the library for the money [96].

However, while an improper investigation may mitigate a discharge [97], an employee may be discharged or otherwise disciplined based on the employee’s failure to cooperate in an investigation. In an interesting case, an employee refused to answer questions regarding his stealing gas services, on the advice of his attorney who was handling his criminal proceedings [98]. Arbitrator Penfield observed:

As a general rule in the area of labor relations, an employee cannot refuse to meet with an employer or to cooperate with the employer regarding legitimate work-related conduct. To do so is an act of insubordination, subject to disciplinary action up to and including discharge [cites omitted] [98, at 590].

Penfield also indicated that while the constitution protects an individual in a criminal proceeding, invoking the Fifth Amendment during an investigation in the private sector will not insulate an employee from disciplinary action [98, 99].

A final mitigating factor considered here is one that is controversial. Arbitrators appear to be divided over the issue of whether employees have the obligation to inform management regarding their observations of a coworker who steals from the employer. In one case, employees were arrested for possession of marijuana [100]. When they were arrested, company-owned communication equipment was discovered. The dwelling in which the employees resided was shared by workers of other employers in the communication industry.

According to arbitrator Collins, the failure by the company's employees to notify it of the theft did not justify discipline [100].

However, in another case, a nineteen-year supervisory technician was properly discharged after he had learned that his son had stolen some gold slag from the employer [101]. He told his son to "get rid of it." The company handbook permitted immediate discharge of any employee who allowed household members to steal company property. However, arbitrator White mitigated the discharge to a two-month suspension and forced the employee to retire with twenty years of service. White noted:

It is reasonable to expect that an employee would protect the property of the employer and report a theft [101, 102].

RESTITUTION

Arbitrators have disagreed regarding the significance of an employee's offer to restore money/property that has been stolen. Arbitrator Rybolt reported both sides of the issue:

The law is very clear that a "theft" does not cease to be a theft when the money [property is returned] is paid back (regardless of whether it is paid to the State or to the employer). The theft occurs when the money [property] is taken [103, at 5949].

On the other hand, Rybolt noted:

Restitution, however, is a factor which can properly be considered in determining the severity of the penalty [103, at 5949].

In one case, a package delivery driver was obliged to reimburse his employer for the cost of a package containing a \$12,000 diamond ring, which had been allegedly stolen from his vehicle [104]. The parties' collective bargaining agreement permitted the employer to seek reimbursement instead of disciplining the employee for negligence, based on the theory that there was no practical difference between the "loss" of a package and "theft" [104].

However, an arbitrator upheld the discharge of an employee who cashed several unauthorized paychecks totaling over \$25,000 that had been mistakenly issued to him [55]. The arbitrator argued that the grievant was not in ignorance because the checks were sent to his home instead of directly deposited, they were "outlandishly" large, and he cashed and immediately spent them. Under the circumstances, restitution did not alter the theft of company money [55]. Arbitrator Hooper stated:

Countless embezzlers and shoplifters have made the same offer *after* being discovered. Restitution is to be desired, but it does not erase the act of theft [55, at 3080].

WEINGARTEN OBLIGATIONS

The United States Supreme Court in *N.L.R.B. v. Jay Weingarten*, ruled that an employee can request union representation in an interview in which s/he reasonably believes will result in disciplinary action being taken [105]. If such representation is requested by the employee, the employer has an obligation to provide it. On the other hand, if the employee does not request representation, there is no requirement that the employer either suggest representation be present, or to provide same [105].

Presently, some employers have adopted the practice of providing union representation in disciplinary situations, whether requested or not. Also, some arbitrators impose a similar requirement. Arbitrator Weisbrod explained:

I concur with many arbitrators who hold employers to a higher standard than the strict requirements of *Weingarten* and who require that Union representatives be present whenever an employer seeks to interrogate an employee on a matter that could lead to discipline, whether or not the employee himself [sic] has the knowledge to demand representation [62, at 34].

However, if an employee signs a statement that s/he has been offered union representation and declines it, that employee may not later claim that his or her due process rights have been violated [48].

In another case, the union's reliance on an alleged breach of an employee's *Weingarten* rights were held to be misplaced when a plant security guard searched his car without union representation [51]. The arbitrator ruled there was no evidence that the guards abused their authority as they had no authority to discipline, and the search was not an investigatory interview. Therefore, the grievant's *Weingarten* rights were not abused. Moreover, the employee failed to ask for representation.

OVERPAYMENTS

There were several reported cases when employees received checks by mistake, cashed them, and then refused to pay the money back to the employer. Arbitrators have equated such employee behavior to "theft" and have often upheld discharge penalties for such misbehavior. For example, one arbitrator noted:

<M%-1>. . . when an employee has possession of stolen Company property, a presumption develops that the employee was involved with the theft and that if the employee failed to advise the management of the property in the employee's possession, the presumption is essentially irrefutable [55, at 3079; 106].

A union steward was also properly discharged when he failed to notify the company that he had received an overpayment of \$230 on his paycheck due to a bookkeeping error [73]. When confronted, he lied to management, used profanity, and made threats [73]. In a similar case, there was found to be just cause to discharge a grievant for an overpayment that resulted from a falsified time card, even though the falsification was not proven [107]. The grievant claimed she had failed to report the overpayment because she was upset by her grandfather's death. However, her excuses were later found to be incredible. The union argued in her behalf that she had not committed theft because theft is "taking property with the intent to deprive the owner of the value of the same" [107, at 405]. Arbitrator Cippola, however, found her failure to report the overpayment was indicative of her intent to keep the money [107]. He stated:

It is my opinion, that the Company is not bound to prove every element of a crime that also happens to be the subject of a work rule or policy. Otherwise, every personnel manager or industrial relations manager would have to be well versed in criminal law. "Theft" in the context of a work policy encompasses not only the "taking" but a "possession" of the property of another, either the company['s] or another employee['s] [107, at 405].

Discharge was also upheld when a grievant exaggerated the extent of a hand injury following an on-the-job accident [108, 109]. He continued to receive payments a year after a surveillance film showed he could have resumed his regular duties. Arbitrator Henle considered the employee's dishonesty to be equivalent to theft because he was taking money from the company's self-insurance system for workers' compensation [108].

DISCUSSION

Employers who seek to curb thievery, although not obliged to have a rule forbidding theft, are well-advised to develop and promulgate one. The sample cases suggest this rule should state that discharge is the penalty for proven theft, *regardless of the value of the item stolen*. Moreover, an employer is expected to consistently enforce its theft rule.

While some arbitrators require that an employer must prove an employee's intent to steal, others merely state that possession of unauthorized material is *prima facie* evidence that an employee intended theft of property. Intent, when required, may be established by showing the employee acted suspiciously after

taking an item, attempted to hide it, or offered to return the property only after being confronted by management. Cases when employees removed property from the employer's trash heap often result in discharge being set aside, as there was no intent to steal. They believe they are simply removing merchandise no longer wanted by the employer.

Whether property must be removed from the employer's premises to be considered theft depends upon the circumstances. To some arbitrators, theft is established if the item comes under the control of the employee instead of the employer. However, other arbitrators hold that theft occurs only when the employee has control of the property beyond the "company gate."

Only 24 percent of sample arbitration awards indicated the quantum of proof that was utilized. Of the twenty-six cases that made such a designation, 38 percent noted proof beyond a reasonable doubt, 27 percent used clear and convincing evidence, 19 percent utilized preponderance of the evidence, and 16 percent used nontraditional standards.

Polygraph evidence will generally not be accepted by arbitrators to establish proof of theft because they are distrustful of test results and their validity. At most, such evidence may be used to corroborate other, more convincing, evidence of an employee's guilt. Moreover, employees may not be discharged for refusing to take a lie detector test. On the other hand, an employee cannot demand that an employer provide a polygraph test as a means of clearing him/her of theft charges.

Length of an employee's service does not have the mitigating force that it does in other, less serious, forms of misconduct. However, when an employer gives inconsistent penalties in theft cases, or when it issues a penalty that is accepted and then raises it, mitigation or elimination of the penalty will almost always follow. An improper investigation of the facts surrounding a discharge may also serve to mitigate a dismissal for theft. Most arbitrators agree that restitution of money or property stolen will not diminish discipline for theft. However, an employer's failure to respect an employee's *Weingarten* rights will result in the discipline or discharge being overturned. However, it is an employee's responsibility to request union representation.

Finally, arbitrators have equated dishonesty in the form of failing to return obvious overpayments to be the same as theft. Discharge will almost always result in such situations.

* * *

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2. Supervalu Holding, Inc. Company, 96-1 Arb. ¶ 6093 (Marino, arb.) (1995).
3. See also *City of Youngstown, Ohio*, 91-1 Arb. ¶ 8287 (Gibson, arb.) (1990).
4. *Grant Hospital of Chicago*, 88 LA 587, 590 (Wolff, arb.) (1986).
5. *Cincinnati Gas and Electric Co.*, 90 LA 841, 843 (Roos, arb.) (1988).
6. *Georgia-Pacific Corporation*, 95-2 Arb. ¶ 5202 (Poole, arb.) (1995).
7. *Sahara Coal Company, Inc.*, 89-1 Arb. ¶ 8207 (Suardi, arb.) (1989).
8. *Monsanto Company, William A. Krummrich Plant*, 105 LA 923 (O'Grady, arb.) (1996).
9. *Coca-Cola Bottling Midwest, Inc.*, 97 LA 166, 168 (Daly, arb.) (1991).
10. *Durkee-French Foods*, 96 LA 176 (Murphy, arb.) (1990).
11. The housekeeper received a suspension for lying to Hospital officials, at least initially [4].
12. When an evening shift housekeeper changed a bed, it was normally because a patient had been discharged or transferred. Patients often left flowers in their rooms.
13. She also left the two flower arrangements with a guard to be picked up later.
14. See also *Consolidation Coal Company*, 92 LA 813 (Seidman, arb.) (1989), when an employer improperly discharged an employee who took two copper cables from a scrap pile. In another case, a 32-year employee was found to be improperly discharged for the theft of eleven pouches of gravy mix that were allegedly thrown in the trash (see *Durkee-French Foods* [10]).
15. *Laura Scudder's Inc.*, 87 LA 403 (Darrow, arb.) (1986).
16. *Georgia-Pacific Corp., Crossett [Ark.] Plywood Plant*, 94 LA 667 (Shearer, arb.) (1990).
17. *Copaz Packing Corp.*, 98 LA 982 (Seinsheimer, arb.) (1992).
18. *Carnation Company*, 84 LA 80 (Wright, arb.) (1985).
19. *Goodyear Tire and Rubber Company*, 98 LA 941 (Nicholas, arb.) (1992).
20. *American Steel Foundries (Indiana Harbor Works)*, 94-1 Arb. ¶ 4198 (Vonhof, arb.) (1993).
21. *Trans World Airlines Inc.*, 91-1 Arb. ¶ 8078 (Kelly, arb.) (1990).
22. *Kaiser Aluminum & Chemical Corp.*, 99 LA 609 (Goldberg, arb.) (1992).
23. See section entitled *Res Judicata* below.
24. Arbitrator Goldberg also noted there was no need to accommodate the grievant under the Americans with Disabilities Act (ADA).
25. *Defense General Supply Center*, 89-2 Arb. ¶ 8473 (Veglahn, arb.) (1989).
26. Discharge was held to be too severe in this case as the company had not established a practice of discharge for theft.
27. *Mrs. Alison's Cookie Company* 94-2 Arb. ¶ 4419 (Cippola, arb.) (1994), when the arbitrator stated: ". . . attempted theft (the lesser included offense of theft in common law) should not be considered a less serious offense [than theft]" [at 5119].
28. *American Welding and Manufacturing Company*, 89 LA 247 (Dworkin, arb.) (1987).
29. *Shell Oil Company, Norco Refinery*, 88-1 Arb. ¶ 8125 (Massey, arb.) (1988).
30. *Mason & Hanger-Silas Mason Co., Inc.*, 90-1 Arb. ¶ 8232 (Stephens, arb.) (1990).
31. *J. R. Simplot Company*, 92-2 Arb. ¶ 8410 at 4933-34 (Eisele, arb.) (1992).

32. Property was not removed from Company premises, but discharge for theft was upheld [6].
33. *Alcan Aluminum* 85 LA 1001 (Jones arb.) (1985).
34. Nevertheless, see [35].
35. *Pennzoil Product Co.*, 86 LA 877 (Stoltenberg, arb.) (1986), when a driver was properly discharged after he made a preplanned trip to an unauthorized location to meet his son and son-in-law. The purpose of this meeting was to siphon diesel fuel from the truck to their personal cars. He [grievant] had an attack of conscience and no fuel was taken. A company rule prohibited the unauthorized use of vehicles. Interestingly however, the arbitrator noted that had the attack of conscience occurred prior to his planned arrival at the designated location “. . . he would not have become a thief” [35, at 880].
36. *Seven-Up Bottling Company of Youngstown (Ohio)*, 98 LA 664 (Miller, arb.) (1992).
37. See also [38]
38. *Canteen Corporation*, 89 LA 815 (Keefe, arb.) (1987), when a worker was inappropriately discharged despite being “caught stealing food.” She did attempt to take food out of the plant, but it was lunch to which she was entitled and had no time to eat.
39. *Industrial Steel Treating Co.*, 98 LA 301 (House, arb.) (1991), discharge was reduced to a disciplinary layoff when a coworker observed the grievant placing a saw in a paper bag and leaving the plant with it. The saw could not be found for more than twenty six hours. The grievant claimed he had merely moved it to another location and voluntarily returned the saw.
40. Moreover, in *Cummings Inc.*, 104 LA 1012 (Hart, arb.) (1995), an employee was observed taking an air freshener from the storage area while attempting to conceal it. He was reinstated without back pay as there was no evidence that the air freshener dispenser was removed from the plant or used at his work station.
41. *Hackley Hospital*, 88-1 Arb. ¶ 8164 (Frost, arb.) (1987).
42. *Tyson Foods, Inc.*, 105 LA 1119 (Moore, arb.) See also [29].
43. *Metropolitan Transit Commission*, 92-2 Arb. ¶8599 (Pribble, arb.) (1991).
44. *Pacific Bell*, 93-2 Arb. ¶ 3482 at 5421 (Winograd, arb.) (1993).
45. *Greyhound Food Management, Inc.*, 89 LA 1138 (Grinstead, arb.) (1987), when discharge was upheld for the theft of a 58 cent can of orange juice.
46. *Westvaco Corporation*, 105 LA 180 (Nolan, arb.) (1995), when arbitrator Nolan referred to theft as one of the “mortal sins” of the workplace and therefore, no employer is required to give a thief a second chance [at 185-186].
47. *Gilbarco Inc.*, 93 LA 605, 608 (Flannagan, arb.) (1989).
48. *Walt Disney World Company*, 92-1 Arb. ¶ 8018 (Abrams, arb.) (1991). In that case, discharge was appropriate for an employee when she stole a package of candy, even though the value was minimum and she had a clear seventeen year employment record.
49. *PYA/Monarch Foodservice Inc.*, 94 LA 575 (Smith, arb.) (1990).
50. Arbitrator Stutz has observed that employers “. . . apply a rule of reason when the item involved is of small consequence and the act is casual or unremarkable.
51. *General Electric Co.*, 98 LA 355, 356 (Stutz, arb.) (1991). No citations were provided by arbitrator Stutz as support for this “rule of reason” [51].

52. *FMC Corporation Coke Plant*, 90-1 Arb. 8002 (Sass, arb.) (1989).
53. *Iowa-Illinois Gas & Electric Co.*, 84 LA 868 (Keefe, arb.) (1985), when the arbitrator noted that the only time that a theft will result in discharge, regardless of value, “. . . is when the rule applying its stringent measure has been publicized and enforced as written, from the word go” [at 869].
54. *Kaiser Foundation Hospitals*, 94 LA 725 (Kaufman, arb.) (1990).
55. *Lockheed Aeronautical Systems Company*, 94-1 Arb. ¶ 4016 (Hooper, arb.) (1993).
56. *John F. Queeny Plant, Monsanto Chemical Company*, 88-1 Arb. 8287 (Maniscalco, arb.) (1988).
57. *Frito-Lay, Inc.* 86 LA 420, 422 (Daniel, arb.) (1985).
58. *Houston Post Company*, 84 LA 620, 622 (Stephen, arb.) (1985).
59. *Avis Rent A Car Systems, Inc.*, 85 LA 435, 439 (Alsher, arb.) (1983).
60. *Bridgford Frozen-Rite Foods*, 91 LA 681 (McKee, arb.) (1988).
61. *The Peoples Gas Light and Coke Company*, 89-2 Arb. ¶ 8439 (Killingsworth, arb.) (1989).
62. *Arkansas Power & Light Company*, 92 LA 144, 147 (Weisbrod, arb.) (1989).
63. *University of Michigan*, 94-2 Arb. ¶ 4429 at 5172 (House, arb.) (1993).
64. *Yellow Freight System Inc.*, 103 LA 731 (Stix, arb.) (1994).
65. *Dierbergs Markets Inc.*, 93 LA 1113 (Yarowsky, arb.) (1989).
66. *American Steel Foundries*, 94 LA 745 (Seidman, arb.) (1990).
67. *Exxon Company, U.S.A.*, 101 LA 777 (Baroni, arb.) (1993).
68. *Air Micronesia, Inc.*, 89-1 Arb. ¶ 8133 (Darrow, arb.) (1988).
69. *Dayton Newspapers, Inc.*, 103 LA 641 (Keenan, arb.) (1994).
70. *Iowa-Illinois Gas & Electric Co.*, 86 LA 270 (Berger, arb.) (1986).
71. *Big Bear Stores, Inc.*, 103 LA 1149, 1156 (Bell, arb.) (1995).
72. *Sanyo Manufacturing Corporation*, 91-1 Arb. ¶ 8059 (Taylor, arb.) (1990).
73. *La Victoria Foods, Inc.*, 89-2 Arb. ¶ 8487 (Prayzich, arb.) (1989).
74. *Union Oil Company of California*, 99 LA 1137 (McKay, arb.) (1992).
75. *United States Government Printing Office*, 82 LA 57 (Feldesman, arb.) (1983). In that case, stolen photographic equipment was found on the floor of the employee’s living room, during a search of his home without a search warrant.
76. *Square D Company*, 96 LA 541, 545 (Allen, arb.) (1991).
77. There was no requirement in the parties’ collective bargaining agreement that a search must be conducted in the presence of the employee and/or union steward. If there were such a contract provision, however, demanding employee/union participation, the employer must comply; see e.g., *Goodyear Tire & Rubber Company* [19].
78. See also *Air Micronesia* [68] when the employer obtained a warrant to search lockers after reports had been made by passengers that an employee was hiding company property.
79. *Kerr-McGee Chemical Corp.*, 90 LA 55 (Levin, arb.) (1987).
80. Employee Polygraph Protection Act, 29 USC 2001; PL 100-347 (1988).
81. 29 USC 2006 § 7 (d) (1).
82. *Bake Rite Rolls*, 90 LA 1133 (DiLauro, arb.) (1988).
83. *Mississippi Power Company*, 90 LA 220 (Jewett, arb.) (1987).

84. *Abbott-Northwestern Hospital*, 94 LA 621 (Berquist, arb.) (1990).
85. *Bruno's Food Fair, Inc.*, 104 LA 306 (Hart, arb.) (1995).
86. In this case the employee had been arrested, prosecuted and he pled guilty [8].
87. *Ohio Department of Youth Services*, 96-2 Arb. ¶ 6234 (Smith, arb.) (1995), when an employee was found not guilty on twelve counts of forgery, but was later held to have been properly discharged by the employer.
88. *CSX Hotels, Inc., dba The Greenbrier*, 90-1 Arb. ¶ 8135 (Zobrak, arb.) (1989).
89. See also *Leestown Company, Inc.*, 102 LA 979 (Sergent, arb.) (1994).
90. *Fairmont General Hospital*, 91 LA 930 (Hunter, arb.) (1988).
91. *City Utilities of Springfield*, 92 LA 515 (Erbs, arb.) (1989).
92. *Marion General Hospital*, 90 LA 735 (Curry, arb.) (1988).
93. *Henkel Corporation*, 104 LA 494 (Hooper, arb.) (1995).
94. *Chaney v. Southern Railway Company*, 847 F.2d 718 (11th Cir. 1988).
95. *Transit Mgt. of Southeast Louisiana Inc.*, 95 LA 74 (Allen, arb.) (1990).
96. *City of Berkeley [Calif.]*, 96-2 Arb. ¶ 6349 (Pool, arb.) (1996).
97. Nevertheless, an improper investigation does not automatically invalidate a discharge for theft. See *Beatrice/Hunt-Wesson, Inc.*, 89 LA 710 (Bickner, arb.) (1987).
98. *Illinois Power Company*, 84 LA 586 (Penfield, arb.) (1985).
99. The reason for this result is that constitutional amendments protect private citizens from the actions of government. Such protections do not reach, normally, to the private sector as it is the employer acting, not the government. See also *Square D Company*, when the arbitrator noted that the employee could have been discharged on the grounds of his refusal to participate in an investigation, had the company elected to use this reason [76].
100. *General Telephone Company of California*, 87 LA 441 (Collins, arb.) (1986).
101. *Cyrus Bagdad Copper Corp.*, 99 LA 841 (White, arb.) (1992).
102. See also the discussion appearing below regarding "overpayments" for another perspective regarding an employee's duty to notify his/her employer regarding payments that may not have been due him/her.
103. *Morse Controls INCOM*, 88-2 Arb. ¶ 8578 (Rybolt, arb.) (1988).
104. *United Parcel Service, Inc.*, 105 LA 637 (Nicholas, arb.) (1995). Few collective bargaining agreements allow the election of disciplinary action or recompense for monetary loss. However, such a provision acts as a deterrent to negligent handling of packages.
105. *NLRB v. Jay Weingarten*, 420 U.S. 251 (1975).
106. *General Refractories Co.*, 99 LA 311 (Richard, arb.) (1992), when there was just cause to discharge an employee who received more than \$20,000 in disability benefits over a three-year period to which he was not entitled.
107. *Northview Village*, 95 LA 401 (Cipolla, arb.) (1990).
108. *Bethlehem Steel Corp.*, 94 LA 1309 (Henle, arb.) (1990).
109. However, see *Merico Inc., Earth Grains Division*, 98 LA 122 (Silver, arb.) (1992) for a case when an employee was discharged for receiving sick-pay benefits for three days after he was able to work. The employee had told the company he was ready for work without restriction on April 9th, and the company failed to create, or offer, the grievant light duty. The discharge was, therefore, set aside.

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