

Double Jeopardy

Can an employer discipline a worker twice for the same alleged incident of wrongdoing? Logic says no, of course — but, truth is, seemingly straightforward issues can get complicated. And that’s why we have stewards, to help unravel things and make sure no one is unfairly punished.

Management’s response in a discipline situation like this is called holding someone in “double jeopardy.” That’s a legal principle that states one cannot be punished twice for the same offense, and it’s a principle that has long been used by arbitrators as well as judges. Following are some cases that show how double jeopardy has surfaced in workplace settings, and how arbitrators have responded to union grievances revolving around the act.

Tried twice for same crime

An employee was accused of assaulting another employee and then committing an act of sabotage on his way out of the department after the incident. The case was brought before a labor-management committee, which ruled against the company in what was the third step of the grievance procedure. The company took the case to the fourth step, arbitration, but this time concentrated on the sabotage aspect of the two offenses, claiming their more careful examination of the facts revealed some aspects that had been overlooked in their presentation before the committee. The arbitrator ruled against the company, saying the new “facts” were merely a rehash of what had been presented at the first hearing. The grievant was reinstated, but without back pay, because he had exhibited a “combative, inflexible, and uncompromising attitude toward all company representatives and others at the hearing.”

Just following the contract!

A woman was suspended for smoking in a

non-designated area and then fired after the investigation took place. Her union screamed double jeopardy, saying the suspension and the firing were two separate disciplines for the same infraction! The arbitrator upheld the company’s action, citing contract language declaring that no one shall be discharged without first being suspended from work pending an investigation. She stayed fired.

Absenteeism policies

An employee was suspended for accumulating his seventh point under a company-implemented absenteeism policy.

Twelve days later he was discharged for accumulating his eighth point. The union grieved, saying they had never agreed to the policy in the first place, and the discharge constituted double jeopardy.

The arbitrator ruled that the company had the right to establish reasonable work rules and that the discharge was for a separate offense, and therefore not double jeopardy.

A Wisconsin company invoked a no-fault absenteeism policy to fire a janitor after a long string of absences, mostly time taken off to care for her retarded son. The union complained the employee was exposed to double jeopardy because of the existence of two separate absenteeism policies at the same time. The arbitrator ruled that the company could apply a fault-based absenteeism policy along with a no-fault policy because the nature of the business made it necessary to ensure that an adequate workforce is in attendance to perform required tasks. The story has a happy ending, however. He reinstated the grievant to her job, with back pay, on grounds that the state’s Family and Medical Leave Act allowed her to take time off work to care for her son. He also said that she could take vacation time to care for her son under the same law.

A worker cannot be punished twice for the same offense

Positive drug tests

A nuclear power plant operator removed a worker from duty because of a positive drug test, but went on to conclude he was “trustworthy and reliable,” and issued a reprimand with an eight-day retroactive suspension. Then, three months later, he was again suspended because of a grand jury indictment for felony possession of marijuana flowing from the same incident. The arbitrator reversed the second suspension, saying that punishment represented double jeopardy.

In another case, an employee was denied a promotion after failing a drug test. He had previously been fired for failing the test, but the union got his job back. The arbitrator said that it wasn’t double jeopardy because being bypassed for promotion was not a form of punishment, and he upheld the company’s action.

Sexual harassment

An employee was discharged for sexual harassment involving no less than seven separate incidents. The union protested, noting that the employee had first received a letter stating that his conduct violated sexual harassment policy and the letter served as written notice that further violations would lead to dismissal. The arbitrator upheld the union, saying that he was fired for the same set of incidents for which he had already been reprimanded in the letter.

When investigating double jeopardy situations, here are some principles and tactics to keep in mind:

- n Clearly establish that the same incident was the basis for both penalties.
- n Check the agreement to determine procedures to be followed prior to discharge.
- n Don’t claim double jeopardy unless you’re sure that the employee has already been punished once for the violation.
- n Remember it is necessary to conduct a proper investigation of the entire proceedings. These cases can get very complicated.

— George Hagglund. The writer is Professor Emeritus at the School for Workers, University of Wisconsin at Madison.

Stewards know that justice on the job can be an elusive thing. While you'd think having the facts and common sense on your side would be enough to win in a dispute with management, you sometimes need a lot more to protect your co-workers. So, in this article we're offering some suggestions on how to increase pressure on management to do the right thing, without having to plod through every step in what frequently is a long and potentially expensive grievance procedure.

Keep in mind that your primary goal in dealing with any management-instigated injustice is to make things right for the affected worker or workers. A good steward has other goals, as well — building the union being a major one — but getting the issue resolved in a satisfactory way is primary. A common trap for many stewards working under contracts in which arbitration is the final step in a grievance procedure is to use that as a crutch. That is, they lay back and allow a grievance to move through the steps, believing that the union's case is so strong that an arbitrator will surely rule in your favor in the end.

Be careful. Maybe your union's leadership won't have as much faith in your case as you do, or think it less important than you do, and decide against taking it to arbitration. Maybe a union won't have the money to *take* it to arbitration. Maybe it'll go to arbitration—and you lose (setting a terrible precedent for future, similar cases at the same time.) Maybe you go to arbitration and the arbitrator decides to be nice to both labor and management by “splitting it down the middle.” Which means that instead of the member suffering an injustice, he or she suffers just “half” an injustice — a two-week suspension instead of a month, for example. The worker won't see that as a victory, nor will your co-workers.

Besides, it can take months to even *get* to arbitration, and justice delayed is justice denied.

So the smart steward looks for ways to win his or her battles quickly and without having to use the traditional grievance system. And the *really* smart steward looks

Pressure Points

for ways to build the union at the same time, understanding that the stronger the union, the less likely management is to pull stupid stunts down the road.

So, you want to win your grievances early, by bringing pressure on management to settle. There are many ways to do that, and to build union participation at the same time. A few ideas follow, ranging from subtle to confrontational.

Talk It Up

In groups of two or three or four, have workers talk about the case within earshot of a supervisor. Be sure the supervisor hears what you're saying. Be careful you're doing it at a time and place where you can't be charged with goofing off.

Be Quiet

On the other hand, don't talk at all! Give supervisors the silent treatment. Respond when you have to, so you don't get into trouble, but, otherwise, just give them the silent treatment.

Educate

Hold lunchtime or breaktime meetings about the issue. Distribute flyers so that workers know about the meetings, and leave a few where management will find them. You can be sure a copy will get back to upper management.

Publicize

Put items in the union newsletter, or even create a short-term special newsletter about the issue. Do a special flyer. Post items on the union bulletin board. Management probably reads the union bulletin board a lot more than union members, anyway.

Sign Up

Have workers from other departments show support by signing a group grievance.

Not only does this show management that the grievance isn't just the concern of one “malcontent” worker or that “aggressive” union steward, it has the effect of getting other workers more seriously committed to the fight, and the union's work. Or have everyone sign a petition to the employer expressing their outrage at the injustice being done to the grievant. You could make the petition poster-size, for more impact.

Have Fun

Find and exploit contract loopholes. If there's a rule that all male employees wear ties, for example, every man could come in one day with the ugliest tie they could find. Have everyone come in one day wearing totally red clothing. Or different departments could compete in a biggest belt buckle competition, or most beat up shoes. Or everyone could wear a black armband. Or, more to the point, a special button that makes the point that everyone knows about the issue of concern and wants it settled fairly.

All the tactics outlined above are pretty tame. There are a lot more weapons in the arsenal: for example, hold a candlelight vigil outside a boss's home; gather as many workers as possible outside a supervisor's office during lunch or break and demand a meeting to discuss the issue; do lunchtime informational picketing and leafleting; “work to rule.” These, especially, are approaches you'll want to discuss with your leadership before calling them into play. Because you're representing the union when you exercise your power, you want to be sure the full union is behind you.

Ultimately, you've got to keep in mind that a union is nothing more nor less than the power of its membership. By drawing as many people as possible into your steward's duties you not only help create conditions that lead to victories in labor-management confrontations, you build the strength of the union for fights to follow.

— David Prosten. *The writer is editor of Steward Update. With thanks to Ken Margolies and Pat Thomas.*

Settling Conflicts Between Members

n Co-workers Jack Valeri and Tony Kellerman are at it again — the harsh words, the blaming and then the uncomfortable silence. The whole unit goes through this once or twice a week and everyone's sick of it. They want the union to do something about it.

n Kathy East and Jessica North both bid on the same job. Kathy got the job because she was qualified and had more seniority, just as outlined in the union contract. Jessica believes she was better qualified and she's giving Kathy the cold shoulder, making it difficult for Kathy to do her new job. "This is all the union's doing," fumes Jessica.

n "Those young punks get all the perks around here and us old guys are just chopped liver," complains Juan about the younger workers in his shop who he claims get the better schedules. "I'm not giving them an ounce of advice — let them screw up on their own!"

These three examples of conflict between members are three potential headaches for the union steward. But before you reach for the aspirin, consider:

What's the Source of Conflict?

Figuring out the source of conflict can help guide you to the best approach.

n **Sometimes people just don't like each other**, as in Jack and Tony's case. The dislike may be rooted in something that happened between them, or it may be completely irrational — "I don't like his looks."

Since there's nothing in the union contract that says you must like your co-workers, point out to Jack and Tony the consequences of their battle. First, they are going to attract the wrath of management because their spats are disrupting work, giving management a clear shot at disciplining them. Second, they are making things tough for everyone around them — and that's just no good.

Not only should you talk to the two, you also should organize others to deliver the same message to them. Once you've delivered it, other co-workers will be more willing to speak up to them. If Jack

and Tony hear the message from enough co-workers, it just may sink in — hopefully before they get disciplined.

n **A union issue forces the conflict**, as in the case with Kathy and Jessica. The union attempts to negotiate the fairest contract possible and enforce that contract fairly, but it doesn't mean that everyone will get what they want. It's a union contract based on what's best for the group as a whole — not a contract for each individual member's happiness.

Sit down with Jessica and acknowledge her disappointment. Go over what the bidding and promotion system would be like *without* a contract — the rampant inequity, the favoritism, the whims of management. Get her to put herself in Kathy's shoes — Kathy has worked long and hard and is looking for a way up like any good worker would. Kathy doesn't deserve wrath for that.

Jessica may not initially buy it, but it's important time spent to set the record straight.

A lot of other union issues can force conflict between members, as well — a close vote on ratifying a contract, for example. Keeping members informed every step of the way is the best way to lessen the conflict people feel towards

each other. It will also help to look for and focus on the things on which people agree, not disagree.

n **Management stirs up discord within the unit** and members like Juan direct their anger at other workers, rather than at management. It's the age-old "divide and conquer" strategy and management can target it across many different lines. Some of the most common include: younger workers against older workers; male workers against female workers; day shift workers against night shift workers; whites against people of color.

Investigate the practices management is using and blow the whistle on them in a public way. Rally the unit around fighting the real culprit — not each other, but management. That may mean talking to the different groups involved and pointing out the inequity. Even if some group is benefitting from the inequity — say in Juan's case, the younger workers get a better schedule — point out that such a "benefit" will be short-lived. A management that uses favoritism really has only one favorite — management. They will never allow any group of workers to get too much. More importantly, the union won't tolerate management favoritism.

You can expect one group or the other might still continue their complaining about the other for awhile, but it's important for the union to take a stand on fairness in enforcing the contract.

If these approaches to member versus member conflict don't yield results — go ahead, reach for that aspirin.

Seriously, your efforts won't resolve every conflict, but they will gain the respect of the many other union members who are not in conflict.

— Pat Thomas. The author is on the staff of the Service Employees International Union, AFL-CIO.

Mid-Contract Bargaining

It should need no repeating that the most important function for an individual steward, or for a steward system as a whole, is building the union, and not just shuffling grievances forms around.

Contract negotiations have always been a great opportunity to carry out this union-building, because the interest of the membership in the affairs of the union is never higher than at the time a new contract is being decided. The interests of every member are affected by these negotiations over wages, benefits, and control of the workplace. Compare that level of interest in the union's work to the amount of interest displayed during periods of routine grievance handling. Then, members often feel that only individual cases are under discussion — things like discipline and discharge, or individual rate adjustments. Mentally they regard the situation as “someone else's problem,” and pretty much just don't care about what the union is doing.

A growing trend toward longer union contracts (frequently seven years, even ten) has made it all the more important that stewards not wait for the next round of negotiations before trying to correct a problem in their workplace or in the economy as a whole. Instead, stewards should seize the moment and work on the problems right away — both to bring justice to the workplace and to build the union.

What can stewards do to create the same excitement in the union during these long periods between contract talks? In many cases, unions have two different styles: one for “normal” times and one for negotiations. Realizing that membership interest is highest during negotiations, a steward should try to duplicate activities from negotiations and use them mid-contract.

Here are some important considerations and tactics to keep in mind:

n Every steward's efforts should be directed to building their union — every shift, every day, and not just during negotiations.

n To accomplish this task, a steward needs to be proactive. That means, staying alert to the possibilities of filing grievances that affect the largest number of members. If a situation could involve more than an individual worker, file a group grievance, and get each member to sign on. This broadens the interest in the issue and duplicates, at least on a small scale, the involvement that accompanies contract negotiations.

n Be visible in supporting these grievances. During contract talks, it's very common for members to show their support by wearing buttons, T-shirts, or stickers. Use the same tactics to support a major grievance — if for no other reason than to stay sharp for the next negotiations.

n Be aware that the recognition clause of the union contract provides for the union to negotiate over all terms of employment. This means that any change in the workplace can be negotiated, even in mid-contract. For example, if an employer introduces a new machine, or changes the work process, you have the right to demand to bargain for a higher pay grade for all of the affected workers.

n Know the law that covers your workplace. A steward in a private sector union, covered by the National Labor Relations Act, must understand that the union has a long list of “mandatory subjects of bargaining” — areas in, around and related to the workplace that a private employer is required to bargain about. If you are a member of a public sector union, look at the state or provincial legislation and see on which subjects you have the right to negotiate.

Use the interest usually found during contract bargaining to build the union during “normal” times

n If you're in an open shop situation, use these mid-contract grievances as a means to sign up some of your free riders and to demonstrate to the anti-union workers that belonging to a union “pays” more than the dues money “costs.”

n You can also use these mid-contract negotiations as a new organizing opportunity. If your workplace has some non-union departments, and your boss wants to dramatically reduce health insurance coverage, for example, use the demand for bargaining by the union as an opportunity to recruit these non-union workers and bring them under your contract.

n Expand the normal communications method within your union. Does your union have special workplace meetings to report on negotiations? Special leaflets or website bulletins? Use the same structure to support grievances.

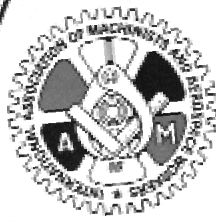
n Have an attitude! A minor change in a work requirement, like the ability to use a computer, may seem like “no big deal,” but an alert steward can use the change as an opportunity to demand bargaining for a higher pay rate, based on additional responsibilities. Even if you are not successful, the act of bargaining builds the morale of your members.

n The union needs to fight in negotiations against any expansion of the so-called “management rights clause,” which could narrow the rights of the union to negotiate over changes in the workplace.

In larger local unions, especially, union officers can be less in touch with every worker and every workplace than they'd want, and may not be aware of changes — new shifts, changed job assignments or requirements — so it's up to every steward to look for every opportunity to bargain and to build the union.

— Bill Barry. The writer is director of labor studies for the Community College of Baltimore County, Maryland.

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OFFICE OF THE INTERNATIONAL PRESIDENT

Dear IAM Representative:

The IAM's public profile is the sum of many great achievements during 116 years of struggle and service. While we can and should be measured by such events, IAM Shop Stewards know the union's reputation among local members is more often a matter of "what have you done for me lately?"

The answer to that question has the potential to be the foundation of your local's next organizing drive. The importance of communicating our victories to members of the community should never be overlooked or underestimated. A steward with a fresh victory under his or her belt should not hesitate to share the tale (if not the details) with friends and family outside work.

The steward's role as union ambassador may seem less important than the day-to-day responsibilities of making sure the contract is observed and the workplace is safe for our members. But the opportunity to grow the union should never be overlooked.

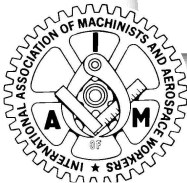
Now more than ever, we must look for every opportunity to organize new members. During the last four years, more than 100,000 IAM members saw their jobs disappear as entire industries were harvested, packaged and shipped overseas. The outlook for the next four years is no less serious.

In the days and months ahead, the labor movement will come together to confront historic challenges to social security, pensions and health care. We will use our power to protect what is ours and to demand limits on the incessant appetite of global corporations. Every IAM officer, steward and representative will be expected to do his or her part.

There are more than 20,000 IAM Shop Stewards on the job today in nearly 5,000 workplaces. Despite the traumas we have endured and the challenges ahead, we remain a potent force to be reckoned with at both the national and local level. I am confident we will measure up to the proud tradition of IAM representatives who went before us.

In solidarity,

R. Thomas Buffenberger
International President





*He owes
me an
apology!*

Settling Conflicts Between Members