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Arbitral Value Judgments in Health and Safety Disputes: Management Rights Over Workers’ Rights

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INTRODUCTION

The influence of personal beliefs and values on the judgments of judicial and quasi-judicial decision-makers, such as labor arbitrators, continues to be ignored almost totally in the literature of labor law and labor arbitration.¹ The research that has been done on this subject, however, demonstrates that prevailing ideas about ethics, humanity, law, private property, economics and the nature of the employer-worker relationship not only condition the thinking of these decision-makers, but also provide them with the ultimate standards for judgment. These value judgments pre-position a decision-maker’s approach to particular case situations, thereby exercising a powerful influence on the outcomes of those cases.

A study of arbitral decisions in cases involving subcontracting and out-of-unit transfers of work,² for example, identified a domi-

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2. Gross, supra note 1, at 55-72.

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nent value theme: management rights are necessary for the continued existence of the free enterprise system, and the pursuit of efficiency is one of the most important and fundamental rights of management. The decisions studied demonstrated arbitral acceptance of efficiency as the greatest good and the resultant presumption that the right to subcontract is essential to the competitive survival of the firm.\(^3\)

That study focused on subcontracting because those decisions were very likely to contain value expressions and orientations given the clash between the goals of maximum efficiency and employee job security. This study focuses on health and safety disputes because the even more fundamental clash between management's rights to operate the enterprise and workers' rights to a safe and healthy workplace is most likely to evoke arbitral value judgments.

The research sources for published decisions were the Bureau of National Affairs *Labor-Arbitration Reports* and Commerce Clearinghouse *Labor Arbitration Awards*: a total of 584 reported arbitration decisions involving health and safety disputes from 1945 to 1984.\(^4\) Despite the large number of cases used, no justifiable claim can be made that these cases constitute a representative sample of arbitral opinions in this subject area since only a relatively small percentage of arbitration decisions are published and those were chosen by subjective editorial judgment. The reporting services also make no systematic effort to publish "old pros" rather than lesser known arbitrators. Having said that, however, we should add that there is no evidence that arbitrators have been deciding these cases in private any differently than they have been deciding them in public—but only a thorough analysis of unpublished decisions will answer that question.\(^5\)

For purposes of analysis, these safety and health cases were divided into four major categories: Refusals to work for reasons of

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3. *Id.*

4. A total of 743 cases were examined for this study, of which 159 cases involving miscellaneous subjects were excluded. Those miscellaneous subjects included employer failure to pay hazard premiums, employer failure to pay for lost time due to shutdowns caused by safety problems, employer refusal to provide safety equipment, employee failure to properly operate safety equipment, and cases involving OSHA "walk around" pay.

5. For a study examining the representative nature of published arbitration decisions, see Stieber, Block & Corbitt, in Cole, *How Representative are Published Decisions*, in 37 Nat'l Acad. of Arb. Proc. 170 (1985).
safety or health; the formulation and implementation of safety rules; crew size determinations which raise safety issues; and disease and disability cases where safety is an important consideration.

For those interested in aggregate numbers, we have included in an Appendix tables providing numerical breakdowns of case types and outcomes in each category, as well as the standards of proof and outcomes in cases involving refusals to work for reasons of health and safety. We have also tabulated the standards of proof in these refusal to work cases over time.

Clearly, however, this is not a quantitative study. A reader focusing on win-loss rates, even though base rates across types of cases support our analysis, will miss the main point of this Article. Workers can win these cases despite heavy burdens and stringent standards of proof. Some outcomes may also reflect numerous criteria not germane to either the insubordination or the health and safety issue which we have recorded but not tabulated for the purpose of this Article.6

Whatever the win-loss rate, the thrust of our Article remains the same: That arbitral value judgments establish the standards of proof and presumptions that shape arbitrators' conceptions of health and safety cases by focusing on management rights rather than workers' rights. These value judgments constitute the current arbitral common law in this area.

I. CONTROLLING ARBITRAL VALUE JUDGMENTS

A. Refusal to work cases

Almost forty years ago, distinguished arbitrator Harry Shulman set forth in *Ford Motor Company*7 the principle of "work first, grieve later." In that case, a union representative countermanded a management order temporarily assigning employees to work in higher job classifications because that order was allegedly in violation of a long-standing practice of temporary assignments to lower but not higher classifications. Shulman ruled that "normally" an employee must obey a legitimate work order even if the employee is convinced the order is improper. According to Shulman, the

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6. See infra criteria cited at note 17.
employees should have worked in the higher classification and then protested by filing a grievance since "the grievance procedure would have provided them adequate recompense for the wrong." Otherwise, Shulman said, individual action would be substituted for collective action and the grievance procedure would be replaced with extra-contractual methods so that no enterprise could operate:

[A]n industrial plant is not a debating society. Its objective is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And someone must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. It must be vested here because the responsibility for production is also vested here; and responsibility must be accompanied by authority. It is fairly vested here because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision.

Shulman allowed for exceptions to his rule: when obedience to a management order would require commission of a criminal or otherwise unlawful act or create an "unusual health hazard or other serious sacrifice." Shulman's "work first, grieve later" rule, reflecting the underlying value judgment that management has the right to direct and control the workforce, has become an axiom of labor relations as has his "threat to health or safety" exception to the rule.

Arbitrators, however, do not literally except health and safety from the "work first, grieve later" rule. Arbitral application of the rule in cases where employees refuse to obey management orders because of perceived or actual threats to health and safety reflects an insubordination mode of analysis. Management's right to direct and control the workplace becomes the analytic starting point, and the challenge to that right, i.e., a refusal to work, is insubordination. This approach relegates the safety and health claim to an affirmative defense to the insubordination charge.

In this insubordination mode of analysis, the employer meets its burden of proof by establishing only the usual elements constituting insubordination—that a direct order was given to the employees by a legitimate management authority, that the employees

8. Id. at 782.
10. Id.
were warned of the consequences of refusal, and that the employees refused to obey the order. As far as the employer is concerned, therefore, there is nothing that distinguishes a refusal to work for reasons of health or safety from any other type of refusal to work case.\textsuperscript{11} Certainly, the employer is not obliged to prove that the work assignment did not endanger an employee's health or safety.\textsuperscript{12}

It is the employee who must carry the burden of ultimate persuasion by establishing the sufficiency of his or her reason for refusing the work assignment, thus proving to an arbitrator's satisfaction that a health or safety hazard justified disobedience.\textsuperscript{13} In only one out of the 154 refusal to work cases did the arbitrator also put a burden of ultimate persuasion on the employer to prove the existence of a safe and healthful workplace.\textsuperscript{14} In that case, the arbitrator stated: "If the warning device was defective, I think that in view of the accompanying circumstances, that it is not too much of a burden to place on the Company to ask it to demonstrate not only was the machine defective but also the odors present did not present a danger."\textsuperscript{15} Even this case is not without ambiguity concerning the burden of proof, however, since the arbitrator had asserted earlier in the opinion that "the grievants must establish first that they had the right to refuse to work . . . ."\textsuperscript{16} In one other case, the arbitrator was obliged by a specific contractual provision involving health and safety to put the burden of ultimate persuasion on the employer.\textsuperscript{17} In only two other

\begin{itemize}
\item \textsuperscript{12} As one arbitrator put it:
\begin{quote}
The burden of establishing by the preponderance of the evidence that a prima facie ground for suspension or discharge existed rests on the Company. . . .
\end{quote}
Here the Company sustained that burden of proof merely by proving the refusal to accept a work assignment within the scope of [the Grievant's] job as a Maintenance Machinist.
\item \textsuperscript{13} LaClede Steel Co., 71-1 Lab. Arb. Awards (CCH) ¶ 8182 (1971) (Volz, Arb.).
\item \textsuperscript{14} Miller Printing Mach. Co., 70-1 Lab. Arb. Awards (CCH) ¶ 8438 (1969) (Krimsly, Arb.).
\item \textsuperscript{15} \textit{Id.} at 4443.
\item \textsuperscript{16} \textit{Id.} at 4442.
\item \textsuperscript{17} Savannah Elec. & Power Co., 77-1 Lab. Arb. Awards (CCH) ¶ 8056 (1977) (Rimer, Arb.).
\end{itemize}
refusal to work cases did a contractual provision arguably affect the burden or the outcome of the case.18

The point that must be underscored, therefore, is that most arbitrators in allocating the burden of proof in these refusal cases, rely upon value judgments concerning reserved management rights, not upon specific contractual provisions. Similarly, contractual health and safety language, usually general, seldom specific, did appear in a certain number of cases examined. Arbitrators usually noted and then rarely relied upon such provisions in their opinions. Thus, as with management rights, comments about health and safety in arbitrators' opinions primarily reflect the arbitrator's value judgments concerning health and safety, not specific contractual provisions.

Consequently, the whole orientation to this type of refusal to work case takes a health and safety dispute and makes it a matter of insubordination with health and safety merely a mitigating factor. Although technically the employer carries the burden of proof in all discipline cases, the practical effect of this orientation in refusal to work for reasons of health and safety cases is to shift the burden of proof concerning the decisive issue to the discharged or otherwise disciplined employee. Arbitrators sustained some penalty against employees in two of every three of the 154 cases in which an employee refused to work for reasons of health or safety.19

The effect of this mode of analysis on the outcome of these cases is even more severe for employees because arbitrators routinely place upon them the heaviest possible standards of proof. Standards of proof in these cases come in three weights: objective proof, reasonable belief, and good faith belief.20 In forty-two percent of the 120 refusal to work cases where the standard of proof could be identified, arbitrators required the employee (or the em-

19. See infra Appendix (Table No. 1).
In at least 18 of the cases, the employer-imposed penalty was mitigated or vacated for reasons unrelated to the actual existence of a safety hazard or an actual occurrence of insubordination, such as long service, good work or disciplinary records, or respectful attitudes. When these decisions are excluded from our tabulations, arbitrators sustained some penalty against employees in three out of every four of the 154 cases in which an employee refused to work for health or safety reasons.
20. See infra Appendix (Tables Nos. 2 & 3).
ployee's union) to produce objective proof that a health or safety hazard existed—proof which is defined as objective evidence of abnormally dangerous conditions:21 "demonstrative, objective, or factual evidence,"22 such as "scientific evidence,"23 that there was "in fact an extremely hazardous situation,"24 beyond the "normal hazards" involved in the disputed work.25 Examples ranged from proof that there was in fact ice on the ceiling and a water line freeze-up,26 an oil spill in the work area,27 to proof that there was hot, flying scale in the forge shop.28

Arbitral determinations of objective proof are commonly based on independent measurements of various sorts (tests of airborne concentrations of asbestos,29 the results of federal or state agency inspections,30 geiger counter readings of radiation levels,31 and photographs32), personal observations of the workplace (work area adequate and work could be performed without hindrance,33 working welders observed at length without any fogging of their safety glasses,34 and "nothing to suggest an unsafe neighborhood" for telephone work where the arbitrator saw "an elementary school, a church, a large wood products plant . . . and single family houses which were generally well kept . . . [in] a quiet neigh-

21. See id. (Table No. 2).
23. Morgan Eng'g Co., 77-1 Lab. Arb. Awards (CCH) ¶ 8021, at 3096 (1976) (Gibson, Arb.).
27. FMC Corp., 70 Lab. Arb. (BNA) 574 (1978) (Nigro, Arb.).
34. United States Steel Corp., 69-1 Lab. Arb. Awards (CCH) ¶ 8300 (1968) (Garrett, Arb.).
and direct participation in the incident (an extended drive through the plant grounds revealed that an A-frame in the front of a truck did not obstruct the driver's vision, an arbitrator "suffered no real discomfort while in an area where sulfuric acid fumes were present, and an arbitrator detected no fumes or odors when he put his head into a tank containing a copper plating solution "further than necessary to perform the operation").

The "reasonable person" or "reasonable belief" standard requires an employee to demonstrate a reasonable basis for believing that an abnormal and imminent danger existed: "the employee has the duty, not only of stating that he believes there is a risk to his safety or health, and the reason for believing so, but he also has the burden . . . of showing by appropriate evidence that he had a reasonable basis for his belief." That reasonable basis must be "more than a mere presumption" of a "remote, statistical possibility" or a "frivolous, unsound, or illogical feeling." The employee must establish "some colorable basis in the facts of the work situation confronting him" that justifies a belief that it would be unsafe "beyond the normal hazard inherent in the operation" to perform that assignment. Under this approach, arbitrators determine whether "the facts and circumstances known to the employee at the time of the incident would have caused a 'reasonable man' to fear for his safety or health."

Although by definition "reasonable belief" would seem to re-

35. Southwestern Bell Tel., 80-1 Lab. Arb. Awards (CCH) ¶ 8309, at 4381 (1980) (Bothwell, Arb.).
44. LaClede Steel Co., 71-1 Lab. Arb. Awards (CCH) ¶ 8182, at 3599 (1971) (Volz, Arb.); see also Western Airlines, Inc., 67 Lab. Arb. (BNA) 486 (1976) (Christopher, Arb.). If this burden is met, it will not matter if it is subsequently established that no hazard had in fact existed. It is also unnecessary to prove that an injury would have occurred if the work order had been obeyed. Tremco Mfg. Co., 72-1 Lab. Arb. Awards (CCH) ¶ 8292 (1972) (Teple, Arb.).
quire a lighter burden of proof, most often there is only a slight difference, if any, between what arbitrators require of employees under the objective proof and reasonable belief standards. Arbitrators emphasize the factual basis, if any, for the perceived danger under both standards and the facts required to substantiate a reasonable belief are often identical to those needed to demonstrate objective proof. In other words, some arbitrators find a grievant’s belief reasonable only when it is supported by objective proof of a health or safety hazard. Thus, in twenty-four percent of the cases with identifiable standards of proof, arbitrators applying “reasonable belief standards” required factual bases essentially indistinguishable from those required under the standard of objective proof. In effect, therefore, in sixty-six percent of these cases objective proof was required.\footnote{Arbitrators found, for example, that employees had reasonable grounds to believe conditions were “abnormally and immediately dangerous” to health or safety in situations where: welding was being done outdoors in rain, thunder and lightning;\footnote{Southern Iron & Metal Co., 83-1 Lab. Arb. Awards (CCH) ¶ 8043 (1982) (Nicholas, Arb.).} unannounced blasting shook an underground lunch room and the miners required to eat there, tumbling lunch and helmets to the floor;\footnote{Zeni-McKinney-Williams Corp., 76-2 Lab. Arb. Awards (CCH) ¶ 8421 (1976) (Sherman, Arb.).} “strange smelling” smoke was escaping from a compressed air line in a factory and employees, who knew the fire department had been called, overheard a supervisor instructing certain workers not to strike a match or light a cigarette;\footnote{American Radiator & Standard Sanitary Corp., 41 Lab. Arb. (BNA) 755 (1963) (Stouffer, Arb.).} ground meat scraps gave off an offensive odor, and the affected employee became ill, had a nosebleed and vomited;\footnote{Packers By-Products Co., 8 Lab. Arb. (BNA) 248 (1947) (Wardlaw, Arb.).} and where an employee refused to work on occasionally malfunctioning punch press machines (which required him to place his hands within the point of operation) after he saw that blood was still on the floor where a fellow-worker had lost an arm the previous day because of a machine malfunction.\footnote{Checker Motors Corp., 61 Lab. Arb. (BNA) 33 (1973) (Daniel, Arb.).} In approximately twenty-five percent of these refusal to work cases, arbitrators did apply a rea-
sonable belief standard that required something less than objective proof to justify a refusal.\(^{51}\)

By far both the lightest and least applied standard of proof is that of "good faith," belief defined by arbitrators as a fear that is "genuine,"\(^{52}\) "sincere,"\(^{53}\) "honest and not a subterfuge"\(^{54}\) — "an honest and sincere personal conviction that his life would be in danger"\(^{55}\) regardless of whether an unsafe or unhealthful condition actually existed. This honest conviction must pertain to a perceived hazard beyond "the normal hazard attendant upon the regular duties of the job."\(^{56}\) Arbitrators made reference to this standard of proof in approximately nine percent of the cases.\(^{57}\)

The actual use of this standard by arbitrators is so rare, however, that there was only one reported case where an employee's good faith belief was the sole, or even the primary, basis for barring a finding of insubordination for refusing to obey a work order for reasons of health or safety.\(^{58}\) A good faith belief is more often used as a basis for mitigating the penalty imposed for such an insubordination.\(^{59}\)

The insubordination mode of analysis used in the refusal to work cases, with its associated heavy burden of proof on employees, is the consequence of arbitrators' almost universal acceptance of the value judgment that management's freedom to operate the enterprise and direct the workforce is superior to all other rights.

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51. Not surprisingly, where the standard of proof was "Objective Proof" or "Objective Proof Termed Reasonable Belief," refusals to work went unpunished in only 26 out of 80 cases (32.5%). When a less stringent version of the reasonable belief standard was applied, refusals went unpunished in 16 out of 29 cases (55.2%). See infra Appendix (Tables Nos. 2 & 3).

52. Lone Star Steel Co., 48 Lab. Arb. (BNA) 1094, 1097 (1967) (Jenkins, Arb.).


56. Id. at 1046.

57. See infra Appendix (Tables Nos. 2 & 3).


including workers' rights to a safe and healthful workplace. This value judgment is rooted in conceptions of the rights of private property, defined during an era dominated by a philosophy of free market economics, by courts that desired to encourage industrial undertakings by making the burdens on entrepreneurs as light as possible.60

Arbitrators see refusals to work, even for reasons of health and safety, as dangerous threats to the management authority they consider essential to the operation of an enterprise for profit. For example, in upholding the discipline imposed on miners who refused to throw a breaker switch on a shuttlecar after one miner who touched the car received a mild electrical shock, an arbitrator warned that "utter chaos" would be the "logical end product of each crew member making the decision as to what is or is not unsafe" since "no production would ever take place and the mines would be shut down without employment."61 Another arbitrator foresaw "anarchy" at the workplace unless he enforced management's right to require obedience to its orders in the face of employees' refusal to work because of smoke and dust at their work areas.62

Another arbitrator, in denying the grievance of an employee who was discharged for refusing to work in an area that required him to wade into water backed up around a 440 volt electricity line, presented a somewhat different version of the management rights value judgment: "In order for the Company to keep its business enterprise operating in a viable manner, its employees must be engaged in performing work . . . not . . . in creating confrontations."63 This point was made even more succinctly in the Farmers Chemical Company decision, echoing Harry Shulman, "[a]n industrial plant is not a debating society. Its object is production."64

Revealing analogies are used in some decisions to affirm management's paramount authority. In Richards Tank Corporation, af-

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ter asserting that there could be no business and that no company could produce anything without the right to tell a man what to do and when to do it, the arbitrator said that if it were otherwise, it would "be as if an army should desert its General on the field of Battle." The state, rather than the military, was the point of comparison in another decision holding that "a member of the industrial society" may not choose what rules to obey or disobey "just as a citizen of the civil society may not choose what laws he will obey and what laws he will not obey because of his own personal beliefs or reasons."

The use of the insubordination mode of analysis, as well as the heavy quantum of proof placed on employees, maximizes an employer's control of employee discipline and, thereby, minimizes employee interference with management's freedom to operate the enterprise. This approach means that reasonable doubts about safety and health are resolved against the employees who raise that defense. The restraining effect on employee conduct is obvious, as one arbitrator observed: "[I]t should be clear to all employees that a justification for 'on the spot' refusal to accept a work assignment will be difficult to establish except in a very clear and meritorious case." For employees, therefore, the risk of failing to meet their heavy burden of proof is high and the consequences potentially disastrous since insubordination of this sort is generally considered just cause for discharge. In the rare cases in which arbitrators do find for employees, they routinely include in their opinions a caveat that such success is the exception and should not be interpreted as "encouragement" to refuse to obey a work order.

Other arbitral considerations also demonstrate the pre-eminence of the management control value judgment in arbitrators'

65. Richards Tank Corp., 47 Lab. Arb. (BNA) 83, 85 (1966) (Welch, Arb.). Military analogies are, however, inappropriate in health and safety cases since an employee cannot lawfully be compelled to give life or limb to his or her employer. See Hegeler Zinc Co., 8 Lab. Arb. (BNA) 826, 831 (1947) (Elson, Arb.).


thinking. They cite favorably, for example, the fact that an employee had always carried out management's orders "without question" and that the employee's objections to performing the work at issue were not presented in an "arrogant" or "combative" way or with "aggressive animosity" but in a "respectful manner...[that]...did not subject the foreman to ridicule or embarrassment." It is also important to arbitrators that the refusal not be a planned test of managerial authority. Arbitrators generally condemn any concerted refusal to obey management's orders even for reasons of health and safety whether or not that refusal is justified. The seriousness of individual threats to management authority is compounded when those individuals join together in protest.

Management control is also reinforced by arbitrators who approach safety and health cases with the presumption that employees, not employers, are responsible for accidents—assuming that the possibility of accidents would be minimized if employees would perform their job tasks according to company instructions and with due care. This presumption has its roots in negligence theory: "In fact, perhaps, in most instances where an accident does occur, the accident is caused by an employee doing something that the employee should not have done." This approach, of course, adds to the already heavy burden of proof placed upon employees in these cases, making it even less likely that a safety defense will be upheld.

Many arbitrators apply another presumption from the com-

70. Pittsburgh Plate Glass Co., 29 Lab. Arb. (BNA) 538 (1957) (Reid, Arb.).
73. See Pittsburgh Plate Glass Co., 29 Lab. Arb. (BNA) 538 (1957) (Reid, Arb.).
mon law of torts to refusals to work for reasons of health and safety—the assumption of risk. Under that theory, a worker who enters employment assumes all of the ordinary risks of such employment or any other obvious extraordinary dangers involved in that employment. Despite the fact that the states, through workers' compensation acts, and the federal government, through OSHA, have clearly rejected that theory, its continued use by arbitrators also augments employer control and adds to the employees' burden of proof. Moreover, the presumption is not only that an employee assumes the risk of danger in a job, but also that an employee is financially compensated for doing so.

The "assumption of risk" aspect of the management rights value judgment on the outcomes of cases involving refusals to work for reasons of health and safety was most pointedly expressed by the arbitrator in *Elliott Company*: "One is always free to quit a job and take one which doesn't require such hardship" but cannot refuse to perform work "if his job calls for it and then expect to escape severe disciplinary results."

The primacy of managerial authority in the decisional-thinking of labor arbitrators is also manifest in the arbitral use of penalties, not only as punishments for specific refusals to work but also as lessons designed to discourage other employees from challenging management's orders. Most obvious, of course, is the discharge penalty, often imposed:

because to do otherwise would be an announcement to all of the Company's employees that [they need not fear the loss of their jobs] on a first occasion of insubordination . . . . It is obvious that such a situation would be chaotic and would seriously damage, if not completely ruin, the Company's attempt to operate its business enterprise in a profitable manner.

Even when the arbitrator finds that an employee was justified in refusing to obey an order for reasons of health or safety, the company-imposed penalty is sometimes merely reduced, not abrogated, because "the imposition of some discipline was proper"

where "the record shows a refusal of an order of a foreman" which "cannot be condoned." In such decisions, the point is made that employees should not expect to refuse orders "with impunity," so some substantial penalty such as a suspension without pay "would certainly be sufficient to discourage these men or others from lightly disregarding the Company's desires in the future."

The management rights framework of analysis used by arbitrators in cases where employees have refused to work for reasons of safety and health has resulted in decisions that place property rights, and other factors such as profits, efficiency, cost-benefit analysis, technology, management authority, and economic progress, over human rights. In a case referred to previously (the employee who became ill, had nosebleeds, and vomited while working in the midst of offensive odors and fumes from packing house meat scraps), the arbitrator told the employee that the proper procedure was to get sick first and then grieve:

It appears that the proper procedure should have been for the Union committee to have insisted that the employee go onto the job assigned and for the employee to have done so, then if he became ill as a result thereof to have asked for assignment to some other job. . . . [T]he failure of the employee to do so does not justify reinstatement with back pay.

The discharge of another employee was upheld because she refused to return to a fiberglass cutting job where she had developed an allergic reaction to the dust and shavings from cutting baked fiberglass molds. As many as seventy-five percent of workers in that area had developed such allergies and many of them had quit or had been terminated. The arbitrator found that the grievant "suffered not only from irritation and itching sensations at the points of contact, but. . . also. . . severe secondary allergic reactions, such as a rash and hives on other parts of her


84. Packers By-Products Co., 8 Lab. Arb. (BNA) 248, 250 (1947) (Wardlaw, Arb.).

He also found that these allergic reactions had "spread even to the soles of her feet, sometimes making it difficult for her to walk or stand after a normal day's work." All of these symptoms disappeared when she was temporarily transferred to another job because of a shutdown in the fiberglass area.

The arbitrator ruled that compliance with management's order to return to the fiberglass work area would probably cause her to suffer the same allergic reactions to fiberglass dust, but "no worse than the reactions she had been willing to endure" while on that job which, although "[u]npleasant," did not constitute "a threat to her basic health, safety, or welfare." The arbitrator concluded that a lesser penalty would serve no purpose since the grievant "rest[ed] her entire case upon an absolute right to refuse to comply with the job assignment made."

In the case where an employee refused to operate an occasiona--

Yet, in a July 1973 decision, the arbitrator found that since this aspect of OSHA did not become effective until August 3, 1974, the company was "not obliged to provide alternate means by which there would be an elimination of the necessity of putting hands or fingers within the point of operation." The penalty imposed on the employee reveals the arbitrator's value priorities—he did not sustain the discharge because the employee's refusal to work was due to a reasonable fear with "some basis in fact" but instead placed the employee on an unpaid leave of absence, without accumulation of seniority or benefits, from December 8, 1972 (the date of the refusal to work), "until such time as

86. Id. at 4347.
87. Id.
88. Id. at 4349.
89. Id. at 4348-49.
91. Id.
92. Id. at 35-36.
the Company eliminates the need for the operator to place his hands or fingers within the point of operation" or, in any event, not later than August 31, 1974.93

Arbitrators find other ways to uphold management authority even in the face of contrary governmental directions. On August 29, 1974, a number of employees in the stripping room of a zinc plant refused to continue working in a higher than usual "acid mist" (a mixture of oxygen and hydrogen gases carrying microscopic droplets of sulfuric acid) that caused sore eyes, bleeding noses, facial burns, and difficult breathing. In January 1974, the work area was inspected by the Idaho Inspector of Mines who recommended that the acid mists be monitored periodically, that an approved respirator be worn, and that a plan be developed to ventilate and dissipate the acid mists. That report was supplemented by a memorandum from an industrial hygienist for the State of Idaho stating that air samples taken in January indicated that it was possible that some workers were being overexposed to sulfuric acid.94

The arbitrator upheld the company's suspension of these employees because their work was not "abnormally dangerous" (he said the contract made no reference to "abnormal conditions"), because the report of the Idaho Inspector of Mines did "not state definitely that there is a health hazard" and the state hygienist spoke only "of a possible overexposure to sulphuric acid."95

It should be noted that those employees who have followed the Shulman scheme, obeying first and protesting their allegedly unsafe and unhealthful working conditions later in the grievance procedure, have not lost their jobs but have been penalized in a substantial number of cases; arbitrators upheld the grievances of such employees in only twenty-five of ninety-nine reported cases.96

B. Safety Rule Cases

Safety and health are clearly not the primary concern of arbitrators in refusal to work cases. In cases involving management's unilateral formulation and implementation of safety rules, how-

93. Id. at 36.
95. Id. at 186 (emphasis in original).
96. See infra Appendix (Table No. 1).
ever, arbitrators seem to elevate safety and health concerns to a rank above all other matters: "Matters of safety, to prevent injuries and loss of life, must always be given a paramount position."97 "[S]afety is of the first importance in this industry."98 In phrases never used in refusal to work opinions, arbitrators represent safety as an "inherent obligation of the Company to protect its employees,"99 and an "inherent duty" and responsibility to employees to provide a safe place to work.100 In the words of one arbitrator:

One would certainly hope and trust that the paramount consideration of both the parties to this dispute is the ultimate safety of the employees in the plant. To say that, as an arbitrator, I should ignore this aspect of the case is like saying that I should ignore an elephant that walked into my living room. Because safety is of such great importance . . . .101

This apparent shift in emphasis to safety is not the result of reasoning from a different premise. The evidence shows that the basic management authority value orientation of arbitrators has not changed. The primacy of safety and health in these decisions is not inconsistent with its subordinate position in refusal to work cases because its ranking in the priorities of labor arbitrators depends upon one consistent, controlling factor: management rights. In the refusal to work cases, management's authority to override employee health and safety concerns is being challenged by employees. [I]n safety rule cases, however, management's authority to determine and implement safety and health rules is being asserted by management. As we discuss in our conclusion, we certainly support an approach in safety rule cases that resolves doubts in favor of safety or health when there is evidence of a threat to safety or health. It is disturbing, however, that for most arbitrators, safety and health become paramount only when management uses them as justification for management's exercise of authority in establishing and enforcing safety rules.

Some arbitrators assert flatly that "it is a basic management right to formulate reasonable safety rules." The "ultimate authority" for rule-making "does reside with the Employer" and even the existence of a joint union-management safety committee does not constitute a waiver of the employer's authority "to issue whatever rules are necessary to insure a safe operation." Others assert that "[s]afety is simply sound business as millions of Man-Days are lost each year due to industrial accidents," "a bad safety record would . . . adversely affect the Company's ability to attract and maintain new employees [who] would tend to avoid a plant with a bad safety record," the production services of a valuable employee are lost, "[t]he tremendous increase in the cost of workmen's compensation and group health insurance" make safety rules essential, and poor safety records "bring down upon the company the safety enforcement agencies of the State and Federal governments."

Influenced by the management rights value judgment, arbitrators place only the lightest burden on employers to show that their safety and health rules are reasonable. There is, in fact, an arbitral presumption that any rule designed to protect employees from injury is reasonable: "Almost every company in any line of manufacturing business attempts to make every rule and regulation that is possible which will be for the benefit of the employee and as a result accidents . . . have been reduced materially."

This presumption is so strong that it extends to situations where an employer has not demonstrated, with any substantial ev-

103. Alan Wood Steel Co., 38 Lab. Arb. (BNA) 418, 419 (1961) (Horvitz, Arb.). According to Horvitz, "The union cannot be given, nor should it desire, a veto power over . . . [safety rules]." Id. at 419. See also Glen-Gary Corp., 80 Lab. Arb. (BNA) 921 (1983) (Gates, Arb.).
idence, that a particular health or safety rule is necessary. One arbitrator upheld an airline's rule requiring its pilots to be beardless because of an alleged interference with the fit of a protective breathing mask, even though available research was inconclusive and the other available evidence was only "suggestive of risk." The arbitrator was satisfied, however, that this was enough to stir disturbing doubts whether one would want to be on board an aircraft with a bearded crew-member at the controls in a sudden onslaught of a life-threatening emergency experience which required swift and sure mask protection to surmount an oxygen crisis in the cockpit.

In the opinion of the arbitrator, the company did "not have to show more than that the data that do exist point to unsafety," particularly when the "legal implications" portend "devastating liability" to an unheedful employer.

In Olin Corporation, the arbitrator upheld the company's imposition of a rule which disqualified all female employees of child-bearing age (i.e., ages 18-50) from bidding on jobs where they would be exposed to lead. Although this rule was more restrictive than the OSHA regulations then in effect, the arbitrator ruled that it was "not . . . unreasonable" for the company to implement lead exposure standards more stringent than OSHA's despite "the medical difficulty of determining the precise level at which lead exposure becomes a health hazard to employees, let alone the resulting effects on pregnancies of such exposure." These doubts were resolved in favor of safety—"[i]f the Arbitrator were to judge the Company's medical evaluations and conclusions to be overly cautious and unnecessary, he could be jeopardizing [sic] the future health and safety of the Company's employees"—especially when "it is the Company, not OSHA, which bears the financial responsibility for occupational damage to employee health." Contrast that approach with the burden put on employees in refusal to work cases to establish with objective proof that working conditions were in fact unsafe or unhealthful.

111. Id. at 328.
112. Id. (emphasis added).
114. Id. at 295.
115. Id.
Arbitrators also facilitate the exercise of management's authority to formulate and implement safety rules by not requiring an employer to justify a rule with proof of prior injuries or previous health or safety problems: "the Company doesn’t have to wait until someone has suffered a head injury before it can require wearing ['bump'] hats;"[116] "[t]he Company need not confine its adoption of safety rules to correcting situations which have resulted in injury."[117] This approach also sharply contrasts with the way arbitrators treat the absence of incidents of injury or illness in refusal to work cases where the fact that no other employee who agreed to perform the disputed work was injured,[118] or the fact that over a longer period of time there were few or no accidents or apparent ill health effects, is usually considered persuasive evidence that the work is safe.[119] Given this arbitral approach and reasoning, employees won only twenty-three percent of the safety rule cases—44 of 191 reported decisions.[120]

C. Crew Size Reduction Cases

In these cases, adherence by arbitrators to the underlying value judgment of management's right to manage again appears clearly and forcibly, but without any ostensible ranking of safety first, in their opinions concerning employers' crew size determinations. In this line of cases, where a union claims that a reduction in the size of a work crew jeopardizes safety or that a work crew should be increased for safety reasons, the primacy of management authority is portrayed by arbitrators as essential to the pursuit of efficiency. Efficiency is viewed by arbitrators as one of the most important and fundamental rights of management: "It

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120. See infra Appendix (Table No. 1).
hardly needs to be added that the Company does have the inherent residual Management power and authority to operate the plant as efficiently as it can . . . ."121 Grievances were upheld in only eighteen percent of these cases—eleven of sixty-two cases.122

The power and influence of this value judgment is demonstrated not only by the number of times it is repeated in crew size opinions but also by the unusual interpretations it inspires. One arbitrator decided, for example, that since there was no contractual language concerning the "maintenance of crew size in the interest of safety" he would be improperly adding to the contract by "making a pronouncement on this subject."123 In *McGraw Edison Company*, where there was bilaterally negotiated contractual language requiring the company to make reasonable provisions for the in-plant safety and health of its employees, the arbitrator ruled that it was the company's right to decide unilaterally what "reasonable provisions" meant.124

Once again the burden of proof is placed on the employees and their union. In *Erie Mining Company*, for example, even after allowing that "it might be reasoned" that an employer had a specific duty to "provide (1) a safe place to work; (2) safe machinery tools, and equipment; (3) competent fellow employees; (4) instructions and . . . warnings as to the dangers involved; and (5) rules for the conduct of the work," the arbitrator placed the burden not on the party with the duty to provide the safe workplace, but on the union "to establish the violation by the company of the particular duty upon which it [the union] hinges its case."125

The union and employees must prove that a reduction in crew size will *in fact* result in an unsafe condition or that an additional crew member would substantially reduce risks. The union must show that management "created a hazardous condition"126 in its determination of crew size or, as one arbitrator put it in a gas furnace operation case, the union must be able "to produce . . . evidence of *actual* explosion or serious fire which would en-

122. *See infra* Appendix (Table No. 1).
123. Cynthetex Corp., 72-2 Lab. Arb. Awards (CCH) ¶ 8519 (1972) (Davis, Arb.).
124. McGraw-Edison Co., 79-1 Lab. Arb. Awards (CCH) ¶ 8262 (1979) (Seinsheimer, Arb.). The contract, it should be noted, actually read "responsible provisions."
danger operators who used reasonable caution and followed safety procedures."\(^{127}\) The union must also prove "abnormal" hazards beyond those "inherent in the normal operation" of the job.\(^{128}\)

The arbitrator's decision in that same furnace operation case demonstrates the effect of the interaction between the objective proof standard and arbitral reverence for efficiency: "it is not reasonable to ask a Company to increase their operating costs, and ultimately the price of their products to the public, in order to achieve a minimal hypothetical reduction in possible risk to a few employees."\(^{129}\) In *Illinois Department of Personnel*, the arbitrator acknowledged that the employees who administered public assistance were sincere in fearing for their safety but ruled that the employer was not obliged to reinstitute security guard protection for those employees. The union had not carried out its burden of proof because, after "scanning the occupational field," the arbitrator doubted that the public aid office was unique among "a great number of vocations [that] expose individuals to verbal abuse and occasionally to physical threats or attack."\(^{130}\) Furthermore, the remedy sought by the union offended his sense of efficiency: "The Arbitrator finds it a bit repulsive to visualize a security guard with nothing to do but make an appearance and be available as a third party intermediary on occasion."\(^{131}\)

In crew sizes cases, therefore, doubts about safety are subordinated to concerns about efficiency and technological change. Unlike arbitrators' pronouncements in safety rule cases about the pre-eminence of safety and health, their opinions in crew size cases routinely contain disclaimers about management's obligations. These statements reflect the underlying management rights value judgment: "The problem is not what is the safest possible method to be installed;"\(^{132}\) "[w]hile the company is obligated to

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131. *Id.* n.4.
exercise a high degree of responsibility with reference to the safety of its personnel, it is not an absolute insurer of the safety of its employees."\textsuperscript{133} The opinions present a more relaxed and less urgent attitude toward safety:

Every one of us takes a considerable number of risks every day, off the job as well as on the job. We risk injury and death when we drive an automobile, ride an airplane or train, cross a street as a pedestrian, or operate power tools. Yet we must take these risks if we are to function as normal people in a modern society.\textsuperscript{134}

Contrary to their approach to safety rule cases, arbitrators consider the absence of on-the-job accidents in crew size cases to be persuasive proof that there is no safety problem. That approach, of course, is also used in refusal to work cases, showing the underlying management rights value judgment at work.\textsuperscript{135}

Acceptance of efficiency as the paramount good also reflects the arbitral presumption that management’s motives in these cases are of the highest order ("[s]urely the Company is in a competitive business, but the Arbitrator does not believe that it would sacrifice the safety of its employees for the purpose of saving a few dollars")\textsuperscript{136} and an arbitral suspicion that a union’s safety claim is only a cover for some ulterior motive, such as attempting to retain a job, to get extra employees assigned, to recoup lost earnings for employees (crews on incentive plans, for example) or to challenge the wisdom of management’s action in some other way.\textsuperscript{137}

D. Disease and Disability Cases

In the words of one arbitrator, a company’s right to terminate the employment of a person who cannot perform assigned

\begin{itemize}
  \item \textsuperscript{133} \textit{Erie Mining Co.}, 36 Lab. Arb. (BNA) at 909.
  \item \textsuperscript{134} \textit{Lever Bros. Co.}, 64 Lab. Arb. (BNA) 503, 507 (1975) (Block, Arb.).
  \item \textsuperscript{136} \textit{Hooker Chem. Corp.}, 71-1 Lab. Arb. Awards (CCH) \S\ 8325, at 3783 (1971) (Oppenheinm, Arb.).
\end{itemize}
job duties because of a physical disability is "universally recognized." Arbitrators in these "disability and disease" cases, as in safety rule cases, express an overriding concern for safety and health and place responsibility on employers to protect the affected employee and that employee's coworkers from accidents, injuries, or illnesses. What comes through the words once again, however, is the primacy of the management rights value judgment; that is, arbitrators give paramount importance to safety and health considerations only when they are consistent with management's needs.138

Over the years, arbitrators have consistently considered a physical disability to be just cause for discharge when it constitutes a hazard to the employee or fellow employees—"harsh as such action may be."140 It is actually more than a mere cause for discharge since arbitrators agree that an employer has an obligation not to jeopardize the safety of other employees by retaining one afflicted with a disability.141

These cases comprise a catalogue of human pain and disorders: coronary problems, epilepsy, Parkinson's disease, silicosis, allergies, back pain, vision deficiencies, fainting, leg amputations, polio, asthma, scabies, mental problems, Paget's disease, emphysema, diabetes, and Viet Nam induced "delayed stress syndrome." Arbitrators express remorse at being compelled to decide against


139. Prominent among these needs are financial considerations, such as increases in the cost of workmen's compensation and other insurance liabilities borne by employers. One arbitrator explained:

The temptation for an employer to divest himself of a clearly physically disabled employee is, to be candid about it, a real one considering the money costs involved or that may be involved in the future. . . . [But] an employer is not the guarantor of a job for life for an employee unfortunately suffering with a work connected disability.


grievants experiencing these dysfunctions, but that remorse gives way to their sense of personal responsibility for the safety and health of these grievants: "[I]f the [work] restriction were lifted and the grievant as a result suffered another attack or this condition became aggravated, I would blame only myself." This sense of personal responsibility is undetectable in the refusal to work and the crew size cases.

In a typical case, *Arketex Ceramic Corporation*, the arbitrator sustained the discharge of an employee who had silicosis because it was the employer's contractual obligation to correct any condition that endangered an employee's health or safety and the worker's health would have been endangered if he returned to work "in the dust-filled air that is especially dangerous to him." The arbitrator also considered the matter of a threatened insurance premium increase:

One way of looking at this is that the Company has the right to run its operation in the most economical manner it can . . . . [T]his is a responsibility not only to the owners but to all the employees as well. There seems to be little question that returning this man to Yard work could cause an increase in the insurance rate or an increase in the cost of operation. I can see little difference in this than if it could have been said that this man could only work at half the level of the other men and, therefore, two men would be needed instead of one and, as a result, costs would have been increased. Under such a circumstance, there would be little question that the employee would be unsatisfactory and the Company, under this Contract, would not only have the right but the duty to protect itself and its employees by terminating this employee.

The arbitrator also indicated some annoyance with the victim of silicosis because of his refusal "to accept and understand the danger to his health has placed everyone concerned with this case in a most difficult and painful position":

If they agree with his demand to be put back into the Yard, they are . . . sentencing him to further impairment of his health, or even to shortening

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145. *Id.*
his life. And on the other hand, if they disagree with him, they are placed in
the position of desiring the end of his working life at Arketex. For my part,
I have no intention of ruling in a manner that would hasten his death or
further impair his health.\textsuperscript{146}

Safety and health first is the stated theme of these decisions:
"Just as an employer should not be expected to direct an em-
ployee to work under unsafe conditions, the employer should not
be expected to assign a person to duties which would be detrimen-
tal to his health, or hazardous to other persons."\textsuperscript{147} One arbitra-
tor put it most succinctly: "It is better, in my view, that manage-
ment err on the side of safety rather, than otherwise."\textsuperscript{148}

Arbitrators readily allow employers to "err on the side of safety"
in safety rule and disability and disease cases, but provide no such
benefit of the doubt to employees in refusal to work and crew size
cases.

In \textit{Arandell Corporation}, for example, the arbitrator stated
that, whereas a heavy burden of proof lies upon management in
disciplinary cases, no such heavy burden applies when the case is
nondisciplinary—"such as releases due to bad health."\textsuperscript{149} To say
merely that arbitrators place a lesser burden of proof on employ-
ers in health and safety cases involving employee disabilities than
they place on employees in refusal to work for reasons of health
or safety cases would be a seriously misleading understatement. In
\textit{Arandell}, the employer terminated the employment of a man who
had been under the care of a psychiatrist after his coworkers
signed what the arbitrator called a "worried message of warning
to management: 'We the employees of Arandell Corporation feel
for the best interest of C—that he be relieved of his duties in the
Press Department because of apparent health problems!'"\textsuperscript{150}
The arbitrator noted that the company "had no part in this document,
except to suggest the insertion of the word 'apparent.'" In the
opinion of the arbitrator, the observations of the worker’s fellow
employees "standing alone fully established a valid and forceful
reason for the employee’s removal" and the burden was then on

\textsuperscript{146} \textit{Id.} at 1176-77.
\textsuperscript{147} Cominco Am. Inc., 69-2 Lab. Arb. Awards (CCH) \textsuperscript{\$} 8728, at 5483 (1969)
(Belcher, Arb.).
\textsuperscript{148} Fram Corp., 82-1 Lab. Arb. Awards (CCH) \textsuperscript{\$} 8265, at 4203 (1982) (Kates, Arb.).
\textsuperscript{149} Arandell Corp., 56 Lab. Arb. (BNA) 832, 834 (1971) (Hazelwood, Arb.).
\textsuperscript{150} \textit{Id.} at 833.
the discharged employee to present "strong medical evidence" of his "normalcy." The arbitrator does not say why the company was not obliged to present "strong medical evidence" of the employee's abnormalcy before terminating his employment.\textsuperscript{153}

After the employee did give the company a report from his psychiatrist which "contradicted the non-professional suspicions of the co-workers," the employer reinstated the man but denied him seven months back pay. The arbitrator upheld the denial of back pay because the employer had "reasonable grounds . . . for suspicion" and "Management, in its role of protector of personnel and property, should not gamble with his retention when a worker carries on suspiciously and has a past history of mental difficulty."\textsuperscript{152}

The arbitrator in \textit{Caterpillar Tractor Company}\textsuperscript{153} sustained the demotion of an automotive serviceman, who had some residual handicap to his right arm and leg due to childhood polio, despite the fact that in his five months on that job he had caused no injury to himself or others. The arbitrator acknowledged that the company's conclusion that the grievant lacked the physical strength and dexterity to perform the job was based "primarily on opinion evidence" resulting from observations of the employee.\textsuperscript{154}

The company's observations were "limited in frequency and duration" and "standing alone," the arbitrator concluded, were "undoubtedly . . . too weak to justify the Company's action." These company observations were "fortified," however, by "two members of the Union's Safety Committee" neither of whom testified at the hearing of this case. Rather than requiring the company to produce these witnesses to provide testimony to substantiate the company's decision to demote, the arbitrator found that the Union's failure to call one of these safety committee members to testify raised "an inference that his testimony would have been unfavorable to [the] Grievant's cause and, therefore, lends support to the Company's evidence . . . ."\textsuperscript{155}

\textsuperscript{151.} \textit{Id.}
\textsuperscript{152.} \textit{Id.} at 834 (emphasis in original).
\textsuperscript{153.} \textit{Caterpillar Tractor Co.}, 78-2 Lab. Arb. Awards (CCH) ¶ 8409 (1978) (Roberts, Arb.).
\textsuperscript{154.} \textit{Id.} at 4920.
\textsuperscript{155.} \textit{Id.} at 4921.
In the opinion of the arbitrator, the company’s “evidence” was also buttressed by the complaints of two of the grievant’s fellow employees who also did not appear at the hearing to testify. The arbitrator admitted that this was hearsay evidence but added that there was “nothing in the record . . . contradictory to this fact [i.e., the complaints].” He concluded that since there was “an unreasonable risk of injury” the employer “should not wait until some irreparable harm has occurred prior to taking corrective and remedial action.”

In other cases, arbitrators, without any medical evidence to support a company’s position, find the “subjective conviction[s]” of grievants “insufficient to rebut the opinions of Company witnesses intimately familiar with the operations and the hazards thereof . . . ." In *Koppers Company, Inc.*, the arbitrator upheld the discharge of an employee suffering from epilepsy despite the fact that the grievant “was never given full diagnostic testing for epilepsy” by either a company doctor or his own physician. There was some evidence that the grievant had “passed out” while leaving a ball game four years before his discharge and that his doctor had prescribed medication “typically associated with treatment for epilepsy.” He had never experienced any such problems on the job.

According to the arbitrator, the company had no obligation “to seek further independent proof of the Grievant’s condition” because, if the diagnosis was “not well founded,” any loss suffered by the grievant was a matter between him and his doctor. This arbitrator’s concluding remarks confirm the speculative nature of the basis for termination, the fact that such doubts are resolved against employees, ignorance concerning the nature of epilepsy and the fact that it can be controlled, and the primacy of management rights:

It is true, of course, that the Grievant has not suffered any seizures in the period of his employment. The fact remains that if, indeed, he is epileptic,
such seizure may come at any time and without prior notice. Nor can my
decision in this case be affected by the assertion of the Union that other
employees in the plant who have had heart disease, diabetes, and high blood
pressure and have been required to take medication for such conditions
have not been discharged by the Company. No evidence was adduced, how-
ever, to show that such cases provided safety risks comparable to that in the
case of this Grievant.\(^{161}\)

Even when medical evidence is available to arbitrators it is
most often in the form of written reports rather than personal
testimony subject to cross examination. Moreover, it is frequently
conflicting—"add[ing] up to a difficult and sobering responsibility
for one without a medical background"\(^{162}\) which, unfortunately,
reduces arbitrators to reading medical dictionaries and other
books for confirmation of one report or another.\(^{163}\) Given the al-
ready established fact that doubts in these cases are going to be
resolved in favor of management, confusion concerning a griev-
ant's physical or mental condition can only be detrimental to em-
ployees and their unions—particularly when arbitrators, con-
fronted with conflicting expert medical testimony, commonly
uphold an employer's right to rely on its own medical advisors.\(^{164}\)
Arbitrators upheld employee grievances in only six of fifty-eight
reported cases involving disease and disability issues—slightly
more than ten percent.\(^{165}\)

II. IGNORING ALTERNATIVE VALUE JUDGMENTS: ARBITRATION AND
THE LAW

Value judgments underlie not only arbitration decisions but
also statutory policies and the decisions of judges interpreting and
applying those statutory policies. This Section is not intended to
be an in-depth legal analysis of statutory or judicial standards. Al-
though the issue of whether arbitrators should apply external law
in their decisions has been the subject of extensive debate,\(^{166}\) this

\(^{161}\) Id.

\(^{162}\) Reynolds Metals Co., 43 Lab. Arb. (BNA) 734, 737 (1964) (Boles, Arb.).

\(^{163}\) See Cominco Am. Inc., 69-2 Lab. Arb. Awards (CCH) ¶ 8728 (1969) (Belcher,

\(^{164}\) See Mobil Oil Corp., 81 Lab. Arb. (BNA) 1090 (1983) (Taylor, Arb.); Cominco
Co., 49 Lab. Arb. (BNA) 585 (1967) (Doyle, Arb.).

\(^{165}\) See infra Appendix (Table No. 1).

\(^{166}\) Many of the arguments framing the current debate about the role of external law
Section's purpose is not to urge the application of these statutory and judicial standards. This Section's primary purpose, rather, is to underscore the existence of public policy, in the form of alternative statutory and judicial value judgments and the varying approaches taken by courts that are sometimes compatible but often sharply contrast with those applied by labor arbitrators in health and safety cases.\textsuperscript{167}

The major statute dealing with on-the-job health and safety
is, of course, the Occupational Safety and Health Act (OSHA). The fundamental purpose of that law is stated in its preamble: "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." The legislative history of OSHA clearly affirms that the primary goal of the Act is worker safety and health, not management productivity or control: "We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies intact."

OSHA places the primary burden of creating safe and healthful working conditions on employers. An employer's obligation is two-fold: to provide a workplace free from recognized hazards causing or likely to cause worker death or serious physical harm; and, to comply with all OSHA standards. The employee's sole obligation is to comply with all applicable OSHA standards, rules, regulations, and orders. Commentators have noted that OSHA is "one of the most far-reaching pieces of remedial social legislation ever enacted by the United States Congress," for it is not merely a set of safety codes "but rather extensive legislation intended to alter employer and employee rights and obligations regarding broad health and safety issues."

Few arbitrators refer to OSHA in their opinions. Most of those arbitrators who do, use OSHA not to emphasize workers' rights but to strengthen the case for management's rights. Arbi-
trators mention OSHA most often in safety rule cases, emphasizing that management must be allowed wide latitude to promulgate safety rules because it is under pressure from OSHA, that OSHA is "looking over [the company's] shoulder," or that "the company may be subject to severe liability" if it does not comply with OSHA. 176

The arbitral management rights orientation is so strong that it has led to claims by some arbitrators that Congress must have been primarily concerned with management rights when it enacted OSHA:

[S]hould there be any doubt that the Company lacked such a right [to make safety rules] it can be completely removed when note is given to the obligations imposed on the Company by the Federal Government with the enactment of [OSHA]. In setting forth the standards to assure safe and healthful working conditions for working men and women, the Congress of the United States has placed limitations on Company employers subject to the act. The industrial concern of today must take proper steps to bring about a reduction of on the job accidents and the setting and causes for same. Certainly, it is only true to conclude that Congress fully recognized and affirmed managements' rights to make reasonable and proper rules for the welfare of the worker. 177

In these safety rule cases, arbitrators acknowledge some management obligation under OSHA to provide a safe and healthful workplace. There is virtually no discussion in refusal to work cases of any management obligation under OSHA. While arbitrators' stated standards of proof (i.e., good faith, reasonableness or objective proof) often bear resemblance to the standard of proof required in OSHA refusal cases, 178 arbitrators' reliance upon objec-


(1) the employee is ordered by his employer to work under conditions that the employee reasonably believes pose an imminent risk of death or serious bodily injury, and

(2) the employee has reason to believe that there is not sufficient time or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger.
tive proof, combined with the insubordination mode of analysis, puts a heavy burden of proof upon the employee, rather than emphasizing the obligations OSHA places upon management and the rights the law confers upon employees. As the Supreme Court has stated:

The Act does not wait for an employee to die or become injured. It authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring. It would seem anomalous to construe an act so directed and constructed as prohibiting an employee, with no other reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous.179

Cases decided under OSHA are also in clear contrast to another arbitral presumption: that it is the worker, not the employer, who is ultimately responsible for accidents. OSHA, contrary to the arbitral approach, requires an employer "to prevent and suppress hazardous conduct by employees, and this duty is not qualified by such common law doctrines as assumption of risk, contributory negligence, or comparative negligence."180 Under OSHA, an employer must:

[T]ake steps to prevent and suppress hazardous conduct by employees, including proper training and supervision of employees. An employer is not an insurer, and need not take steps to prevent hazards which are not generally foreseeable . . . but at the same time an employer must do all it feasibly can to prevent foreseeable hazards, including dangerous conduct by its employees . . . .181

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181. General Dynamics Corp. v. Occupational Safety & Health Rev. Comm'n, 599 F.2d 453, 458 (1st Cir. 1979); see also Usery v. Marquette Cement Mfg. Co., 568 F.2d 902,
As one commentator has noted, in OSHA refusal cases the courts presume the workers' good faith and "have been fairly liberal in construing the requirements of the regulation. They have avoided . . . strict requirements . . . while at the same time they have protected employers against frivolous refusals."  

Key cases decided under the National Labor Relations Act (NLRA) and the Labor-Management Relations Act (LMRA) regarding refusals to work for reasons of health and safety identify standards of proof to be used under those statutes. Section 7 of the NLRA gives employees the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection," including health and safety related activities. A concerted refusal to work due to unsafe working conditions is, therefore, protected under section 7. Such a refusal by unionized employees, however, may run afoul of a no-strike clause in a collective bargaining agreement, or, under the Steelworkers Trilogy principle, an implied no-strike agreement where grievance and binding arbitration are contractually agreed upon dispute resolution procedures. In such situations, a refusal to work due to unsafe working conditions may be protected by section 502 of the LMRA, which provides that the "quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment [shall not] be deemed a strike . . . ."  

The Supreme Court interprets section 7 as requiring that an employee need show only good faith in refusing to perform an allegedly unsafe task. According to the Supreme Court, the reasonableness of employees' decisions to engage in concerted activity is irrelevant because the central purpose of section 7 is the guarantee of concerted activity for mutual aid or protection. In NLRB v. Washington Aluminum Co., for example, where machine shop employees engaged in a concerted refusal to work in an unheated shop on a cold day, the Court ruled: "At the very most,  

910 (2d Cir. 1977).  
182. Note, supra note 167, at 567.  
that fact might tend to indicate that the conduct of men in leaving was unnecessary and unwise, and it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not."\textsuperscript{187} The Court's use of the good faith standard of proof, rarely used by arbitrators, places a light burden of proof upon employees, thus placing primary value on the protection of concerted activity.

In contrast to section 7's clear protection of concerted activity in the pursuit of a safe workplace, arbitrators view concerted activity as an even more dangerous threat to management authority than individual refusals to work. Concerted refusals imply an added dimension of "collusion to interrupt the flow of work and hence a deliberate challenge to [management's] authority to direct the working force."\textsuperscript{188} Refusals to work that might be acceptable if they involved only a single employee become unacceptable when carried out concertedly because they are "premeditated."\textsuperscript{189} The ironic result of this arbitral approach is that concerted activity may be less protected than individual refusal even when a no-strike clause is not in effect. One arbitrator, after examining other arbitration opinions concerning this issue, stated that he was not aware of any support in principle or precedent for the proposition that an individual employee . . . may rely on his personal belief that a job is unduly hazardous as a valid basis for preventing other employees from performing it. The protection afforded by Arbitration Decisions to individual refusals to work in a situation believed to be hazardous does not, as far as I know,

\textsuperscript{187} 370 U.S. at 16.

The findings of the Board . . . show a running dispute between the machine shop employees and the company over the heating of the shop on cold days—a dispute which culminated in the decision of the employees to act concertedly in an effort to force the company to improve that condition of their employment. The fact that the company was already making every effort to repair the furnace and bring heat into the shop that morning does not change the nature of the controversy that caused the walkout. At the very most, that fact might tend to indicate that the conduct of the men in leaving was unnecessary and unwise, and it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not.

\textit{Id.} at 15-16.

\textsuperscript{188} U.S. Plywood-Champion Papers, Inc., 50 Lab. Arb. (BNA) 115, 124 (1968) (Jenkins, Arb.) (emphasis added).

extend to collective action. 190

The Supreme Court's interpretation of section 502 of the
LMRA, however, establishes a much more stringent standard than
section 7. A union must present, as in most arbitrations, "ascert-
tainable, objective evidence supporting its conclusion that an
abnormally dangerous condition for work exists" in order to obtain
section 502's protection. 191 The Court bases its narrow interpreta-
tion of section 502, a provision devoid of legislative history, upon
an "unwilling[ness] to conclude that Congress intended the public
policy favoring arbitration and peaceful resolution of labor dis-
putes to be circumvented by so slender a thread as subjective
judgment, however honest it may be." 192 That policy leads to a
strict standard of objective proof which, as in the arbitration
cases, places a heavy burden of proof upon the worker.

Despite the similarity of the judicial interpretation of section
502 and the arbitral approach to standard of proof in refusal to
work cases, most arbitrators do not acknowledge workers' statu-
tory rights regardless of whether those rights emanate from sec-
tion 502 or section 7 of the LMRA or from OSHA. One arbitra-
tor, for example, responded to a worker's claim that he had a
statutory right to refuse unsafe work by telling the employee that
he

and his family misread and misunderstood the provisions of [section 502 of
the LMRA]. Nothing in section 502, or any other provision of the [LMRA]
egates or modifies in any way the right of management to assign its employ-
ees to a lawful and contractually obligated duty or immunizes employees
from discipline up to and including discharge for refusal to perform such
duties. 193

192. Id. at 386. J. Atleson, supra note 1, discussing 29 U.S.C. § 143 (1982) contends,
[a]s in many areas of the labor law, the function of a standard is to shift certain
risks. In this area, the issue is who should bear the risks of a good-faith walkout
that, it ultimately appears, was not in response to an objectively established "ab-
normally hazardous" condition. A Board trial examiner expressed the dilemma:
"[the objective evidence requirement] places a heavy burden on employees,
who must act without the benefit of medical advice and whose choice places
either their jobs or their health in jeopardy." The Court chose to place the
"risk" upon employees because of the value of continued, uninterrupted pro-
duction and the assumption that employees are unreliable and irresponsible
judges of workplace safety.

Id. at 100.

In the few cases where arbitrators do consider and give substantial weight to worker’s statutory right to refuse unsafe work, the insubordination mode of analysis can become secondary to or, at least, separate from, the safety question:

The issue to be decided is deceptively simple. The fact is that some of the grievants did go to extreme and the outer limits of reason in their protests and in their defiance of the employer. . . . But even this behavior has a counterpoint. This other side of the coin has to do with an honest belief that grievants, and other plant employees, had been made to work under unsafe and unhealthy working conditions. It is no secret that federal labor law protects employees by granting them the right to strike over unsafe working conditions.

* * * * *

It is important to note that the OSHA Act [sic] affords employees the same right to leave the workplace when they in good faith believe they are at risk to their own safety.

* * * * *

Although the arbitrator has determined that grievants resorted to completely unacceptable measures of protests, their conduct, individual and collective, was not indefensible. Their concern was sincere and the matter protested was of such great importance—not only to plant employees but to the employer as well.

* * * * *

These grievances have been resolved on the basis of the good faith perception of grievants that they were being required to perform work under plant conditions that were unhealthy and even dangerous. Their complaints of headaches were real and were not a pretext to evade their assigned tasks. Of course, they overreacted to the immediacy of the danger and should have referred the matter to their Union representative. But their conduct was not so outrageous as to lose the benefit of their contractual and statutory protection.

Differing value judgments of courts, as opposed to arbitrators, in refusal to work cases leads to contradictory results: one set reached by arbitrators concerned primarily with management rights, and a different set by courts who are interpreting statutes concerned primarily with workers’ rights to a safe and healthful workplace.

The same sort of contradictory approaches are evident in


195. Welch Mfg. Co., 80 Lab. Arb. (BNA) 273, 275-76 (1983) (Yarowski, Arb.) (citation omitted). For examples of arbitration decisions based at least in part on alternative approaches to health and safety dispute resolution, see supra notes 14-17 and accompanying text and infra note 204.
comparing disease and disability cases decided by arbitrators with

court cases involving handicapped individuals under the Rehabili-
tation Act of 1973. Section 504 of the Act provides that "[n]o
otherwise qualified handicapped individual . . . shall, solely by
reason of his handicap, be excluded from the participation in, be
denied the benefits of, or be subjected to discrimination under
any program or activity receiving Federal financial assistance . . . ."

As previously discussed, many arbitrators sustain manage-
ment's right to discharge based upon unsupported management
assertions that allegedly disabled employees are or will be health
or safety threats to themselves, or might cause the company eco-
nomic loss. Following the policy set by the Rehabilitation Act, the
courts take a distinctly different approach.

The importance of preserving job opportunities for the handicapped set a
high standard for the effectiveness of job qualifications that adversely affect
the handicapped. The regulation makes consistency with business necessity
an independent requirement, and the courts must be wary that business ne-
cessity is not confused with mere expediency. If a job qualification is to be
permitted to exclude handicapped individuals, it must be directly connected
with, and must substantially promote, "business necessity and safe perform-
ance." The [employer] had the burden of demonstrating that its job qualifi-
cations met this standard.\footnote{197}

The courts do not accept generalized management assertions
of current safety hazard, risk of future injury, or long-term health
problems. The courts require management to produce specific
proof, often in the form of expert testimony, to support such as-
sertions.\footnote{198} These evidentiary requirements, which put the burden
of proof upon management, would lead to a different result if ap-
plied in the arbitration case in which the arbitrator, eager to up-
hold management's right to "protect" the worker and thus keep
the workplace safe, removes the worker from the workplace based
upon little or no evidence of real danger. As one court noted:

It would be a rare case indeed in which a hostile discriminatory purpose or

\footnote{196. 29 U.S.C. § 794 (1982).}

\footnote{197. Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 621-22 (9th Cir.
1982).}

\footnote{198. E.g., Southwestern Community College v. Davis, 442 U.S. 397, 400-04 (1979);
Bentivegna v. United States Dep't of Labor, 694 F.2d 619, 621-23 (9th Cir. 1982); Pushkin
v. Regents of the Univ. of Colo., 658 F.2d 1372, 1382-83 (10th Cir. 1981); E.E. Black, Ltd.
subjective intent to discriminate solely on the basis of handicap could be shown. Discrimination on the basis of handicap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons.\textsuperscript{199}

CONCLUSION

The analysis of these published decisions does more than confirm the existence of value premises in the decisions of labor arbitrators. It reveals that the management rights value judgment is dominant and that this value judgment clearly controls the appearance and use of another value judgment: the notion that a worker has a right to a safe and healthful workplace. More specifically, most arbitrators make safety and health concerns paramount only when those claims support management rights. The four major categories of decisions read together constitute a classic illustration of how the acceptance of a certain value judgment determines a decision-maker's whole orientation when deciding an issue.\textsuperscript{200}

One fundamental question raised by these findings is what value judgment should control at the workplace when workers' health and safety are concerned. The long-standing dominance in United States industrial history of the proposition that management rights must take precedence over all else should not obscure a more humane value judgment, one more in keeping with current law and policy concerning worker health and safety—a value judgment that would make the workers' right to a safe and healthful workplace paramount. As our review of safety rule and disease and disability cases has illustrated, arbitrators do, in fact, recognize workers' health and safety value judgments as important and valid, even "paramount," but only where these value judgments coincide with management rights.\textsuperscript{201} Where, as in the refusal to work and crew size cases, a worker health and safety value j
HEALTH AND SAFETY ARBITRATION

ment comes into conflict with management rights concepts of profit, property, authority, efficiency, cost-benefit analysis, technology or "progress," worker health and safety is relegated, at most, to a range of secondary considerations.

The current weighing of priorities in refusal to work cases is in part the result of arbitrators' interpretations and applications of the Shulman "work first, grieve later" rule. As we have discussed, the result of the rule's application in refusal to work cases is that arbitrators treat health and safety as an affirmative defense to an insubordination charge. We propose that arbitrators instead make health and safety an exception to Shulman's rule in the dictionary sense of "exception": "[A] case to which a rule does not apply."202

Arbitral acceptance and application of the Shulman rule has made insubordination and, thus, management rights, the primary focus in cases involving a refusal to work for reasons of health and safety. If, instead, the health and safety aspect of the case was made primary, employers would carry the burden of proving that workplaces were in fact safe or healthful or that work assignments did not in fact endanger the health or safety of their employees. This approach would put the burden of proof on the party who is responsible for providing, and has the primary power and control in maintaining a safe and healthful place to work. It would also reflect a value judgment that such refusals to work are health and safety disputes, rather than primarily matters of insubordination.

More specifically, arbitrators would approach these cases in the following manner: The employer has the burden of proving that the aspect of the workplace or work assignment at issue was safe. If the employer fails to carry that burden, the grievance is sustained and that is the end of it. If the employer successfully carries this burden of proof, then the employee would be required to demonstrate a good faith or reasonable belief that the workplace or work assignment was a threat to health or safety. If the employee successfully carries this burden, the grievance is sustained. If not, the insubordination question could then be considered. This approach would ensure not only the primacy of health and safety concerns, but would also prevent workers from being confronted with the unfair dilemma now imposed upon them—to work and risk their health and safety or to refuse to work and risk

The Shulman rule, however, constitutes only a part of the issues raised in this Article. Arbitral use of the suggested changes, in both the Shulman rule and the usual arbitral approach in refusal cases, cannot by itself alter the predominant management rights value judgment that shapes most arbitrators' perspectives on cases involving worker health and safety. Only arbitral adoption of the value judgment that nothing is more important at the workplace than human life and health would change completely arbitrators' current orientation to all four categories of cases discussed in this paper.

Some maintain that the specific character of health and safety disputes distinguishes them from other disputes arising under a collective bargaining agreement, thereby justifying their removal from arbitration. The Third Circuit Court of Appeals in the *Gateway Coal* case, for example, upheld a union claim that work safety

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203. For a discussion of four cases that at least partly shift the burden to the employer—although only one of them shifts the burden in the absence of explicit contractual language—see supra notes 11-13 and accompanying text.

204. For examples of some of the few cases that illustrate an arbitral approach to health and safety disputes contrary to the more prevalent ("majority") approach described in this Article, see Illinois Bell Tel. Co., 79-1 Lab. Arb. Awards (CCH) ¶ 8001, at 3009 (1978) (Epstein, Arb.) (crew size: "We find that if there is any danger whatsoever of safety or health hazards, then all reasonable precautionary measures should be taken."); Carnation Co., 60 Lab. Arb. (BNA) 674, 676 (1973) (Hayes, Arb.) (disease and disability: "Where there is no basis or evidence to support management's judgment of fitness and where the employee has a long and excellent record of employment coupled with seniority rights and contractual benefits, it must be concluded that the Company acted unfairly and unreasonably."); Delman Co., 66-3 Lab. Arb. Awards (CCH) ¶ 8989, at 6445 (1966) (Jenkins, Arb.) (refusal case: "To justify their position that the area was unsafe, the grievants ought not to be expected to exhibit the symptoms of serious carbon monoxide poisoning."); Union Carbide & Carbon Corp., 16 Lab. Arb. (BNA) 707, 710 (1951) (Schedler, Arb.) (safety rule: "the Company has utterly failed to show that many of the employees in this grievance are completely unexposed to radioactive substances, and therefore do not need clothing for their health and safety"); Hegeler Zinc Co., 8 Lab. Arb. (BNA) 826 (1947) (Elsen, Arb.) (refusal case)

Resort to the grievance procedure is not an antidote to pneumonia nor can it be said that where there is an actual hazard to life and limb, it is the intent of the parties to the collective bargaining agreement that no matter what the circumstances, the order must be obeyed. The collective bargaining agreement is concerned with human beings. In the normal employment relationship, it is true there are emergencies which require prompt and disciplined obedience, but discipline essential in an army, that of an unqualified duty to obey, has no place in the ordinary industrial management relationship.

*Id.* at 831.
disputes were not subject to arbitration:

Considerations of economic peace that favor arbitration of ordinary
disputes have little weight here. Men are not wont to submit matters of life
or death to arbitration and no enlightened society encourages, much less
requires them to do so. If employees believe that correctable circumstances
are unnecessarily adding to the normal dangers of their hazardous employ-
ment, there is no sound reason for requiring them to subordinate their judg-
ment to that of an arbitrator, however impartial he may be. The arbitrator
is not staking his life on his impartial decision. It should not be the policy of
the law to force the employees to stake theirs on his judgment.205

That the Supreme Court overruled the third circuit in Gateway
Coal206 by deciding that health and safety cases are subject to arbi-
tration does not change the life and death nature of these cases.
Serious questions remain of the ability of arbitration to deal ade-
quately with these issues.207

First, arbitrators in the main make the decision to ignore ex-
ternal laws concerning health and safety, a choice that deprives
arbitrators of access, not only to alternative values and public pol-
icy guidelines, but also to important and relevant data (such as
OSHA standards) concerning occupational safety and health.
Safety and health disputes also routinely involve technical matters
beyond the expertise of most arbitrators; a situation requiring, at
least, the creation of special panels of arbitrators with demon-
strated qualifications in this area. Finally, the traditional arbitral
remedy power is often inadequate to deal not only with the broad
scope of certain health and safety problems that range far beyond
the situation of a single grievant, but also with the long-term ef-
fects of working with certain job-related materials and processes

205. Gateway Coal Co. v. UMW, 466 F.2d 1157, 1160 (3d Cir. 1972), rev'd, 414 U.S.
368 (1974).
207. Some of these questions have been raised by the Supreme Court in more recent
rulings on judicial deference to arbitration in cases dealing with workers' "nonwaivable
public law right[s]." Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 737

In Barrentine and Gardner-Denver, the Court found that arbitration awards dealing with
claims under the Fair Labor Standards Act, see 29 U.S.C. §§ 201-219 (1982), and Title VII
quent independent judicial review of the merits of a grievant's Fair Labor Standards Act or
Title VII claim. The treatment of worker health and safety claims, similarly covered by the
existence of a variety of federal statutes, see supra text accompanying notes 166-99, involve
concerns similar to those the Court expressed in Barrentine and Gardner-Denver. See gener-
ally Barrentine, 450 U.S. at 739-46; Gardner-Denver Co., 415 U.S. at 55-60.
such as toxic chemicals, radiation and asbestos.

It is possible that these defects can be wholly or partially eliminated. But this study has demonstrated that as a consequence of the adoption and implementation of a management rights value judgment, arbitration has become part of an industrial relations system that has as its aim the maintenance of managerial control over all aspects of an enterprise. Arbitrators give health and safety priority only insofar as the assertion of the health and safety value judgment supports this managerial control, as in the safety rule and disease and disability cases. When the health and safety of the worker conflicts with the goals of managerial control, as in the refusal to work and crew size cases, management rights reign supreme.

Given the structure and nature of the arbitration process, the pervasiveness of the management rights value judgment, and the absence of any direct or systematic way to bring about change in arbitral values, there appears to be little chance that labor arbitrators will place the safety and health of men and women at the workplace above all other considerations. As Justice Benjamin Cardozo noted, however, "if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined."208 We hope that by identifying the management rights value judgment and its dominance in health and safety matters arbitrators will recognize that change is needed.

208. B. Cardozo, The Nature of the Judicial Process 23 (1921) (quoting M. Smith, Jurisprudence 21 (1909)).
## Appendix

### Table 1

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Total Number of Cases*</th>
<th>Grievances Upheld</th>
<th>Grievances Denied/Upheld in Part**</th>
<th>Grievances Denied</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refusal to work for reasons of health and safety</td>
<td>158 (154)</td>
<td>55</td>
<td>32</td>
<td>67</td>
</tr>
<tr>
<td>Safety rule</td>
<td>196 (191)</td>
<td>44</td>
<td>30</td>
<td>117</td>
</tr>
<tr>
<td>Crew size reduction</td>
<td>65 (62)</td>
<td>11</td>
<td>4</td>
<td>47</td>
</tr>
<tr>
<td>Disease and Disability</td>
<td>61 (58)</td>
<td>6</td>
<td>13</td>
<td>39</td>
</tr>
<tr>
<td>Performed work but protested working conditions</td>
<td>104 (99)</td>
<td>25</td>
<td>14</td>
<td>60</td>
</tr>
<tr>
<td>Total Cases Examined</td>
<td>584 (564)</td>
<td>141</td>
<td>93</td>
<td>330</td>
</tr>
</tbody>
</table>

*The total of each outcome column is less than the total number of cases found in each category due to circumstances such as insufficient information in the published cases and retention of jurisdiction by an arbitrator which prevented a determination of outcome in a few cases in each category. The number in parentheses indicates the number of cases in which we could determine a specific outcome.

**For refusal to work cases, this column represents any modification of the original penalty. For the other types of cases, this column represents split decisions involving two or more grievants, outcomes to be based on future acts, special circumstances, or additional information to be provided to the arbitrator.
Table 2

Standard of Proof in Refusal to Work Cases

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Objective Proof</th>
<th>Objective Proof termed Reasonable Belief</th>
<th>Reasonable Belief</th>
<th>Good Faith Belief</th>
<th>Total*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refusal to work for reasons of health and safety</td>
<td>50</td>
<td>30</td>
<td>29</td>
<td>11</td>
<td>120</td>
</tr>
</tbody>
</table>

*In the remainder of the refusal to work cases, no standard of proof was discussed or could be determined with confidence.

Table 3

Standard of Proof and Outcome in Refusal to Work Cases

<table>
<thead>
<tr>
<th>Standard of proof</th>
<th>Grievances Upheld</th>
<th>Grievances Denied/ Upheld in Part</th>
<th>Grievances Denied</th>
<th>Total*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objective Proof</td>
<td>11</td>
<td>6</td>
<td>33</td>
<td>50</td>
</tr>
<tr>
<td>Objective proof termed reasonable belief</td>
<td>15</td>
<td>9</td>
<td>6</td>
<td>30</td>
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<tr>
<td>Reasonable belief</td>
<td>16</td>
<td>5</td>
<td>8</td>
<td>29</td>
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<tr>
<td>Good faith belief</td>
<td>4</td>
<td>5</td>
<td>2</td>
<td>11</td>
</tr>
<tr>
<td>Unknown</td>
<td>9</td>
<td>7</td>
<td>18</td>
<td>34</td>
</tr>
<tr>
<td>Total</td>
<td>55</td>
<td>32</td>
<td>67</td>
<td>154</td>
</tr>
</tbody>
</table>

*In the remainder of the refusal to work cases, no standard of proof was discussed or could be determined with confidence.
Table 4
Standards of Proof in Refusal to Work Cases
in Five Year Intervals

<table>
<thead>
<tr>
<th>Years</th>
<th>Total Number of Cases</th>
<th>Objective Proof</th>
<th>Reasonable Belief</th>
<th>Reasonable Belief</th>
<th>Good Faith Belief</th>
<th>No Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>1945-50</td>
<td>15</td>
<td>5</td>
<td>6</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>1951-55</td>
<td>13</td>
<td>5</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>1956-60</td>
<td>13</td>
<td>5</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>1961-65</td>
<td>19</td>
<td>4</td>
<td>4</td>
<td>5</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>1966-70</td>
<td>36</td>
<td>13</td>
<td>7</td>
<td>7</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>1971-75</td>
<td>24</td>
<td>7</td>
<td>4</td>
<td>5</td>
<td>2</td>
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<td>1976-80</td>
<td>28</td>
<td>10</td>
<td>5</td>
<td>4</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>1981-84</td>
<td>10</td>
<td>1</td>
<td>0</td>
<td>6</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Total of All Cases</td>
<td>158</td>
<td>50</td>
<td>30</td>
<td>29</td>
<td>11</td>
<td>38</td>
</tr>
</tbody>
</table>