

TAM

E D U C A T O R

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Canada

Horseplay on the Job

PRACTICAL JOKE

SUSPENSION

FIRE

GRIEVANCE

MISUNDERSTANDING



Horseplay on the Job

Daily life on the job can be boring. After all, once you've learned the work routine, there's frequently energy left that can be used for more interesting activities — like, maybe, practical jokes. These stunts are commonplace on the job, and form a means by which life can become more interesting, at least for a moment.

Practical jokes are one thing; their rowdy cousin, horseplay, can be quite another. In general terms, horseplay tends to involve a more physical kind of “joke,” one that the person on the receiving end — and the boss — may not view as funny, or may be taken wrong. Or even both.

The problem is that the target of the “joke” may be in a bad mood on a particular day, or the “joke” may focus on someone who is not in the mood for it. Or, the “joke” gets out of hand, leading to an altercation in which words or even fists may fly. The result: a discipline or discharge. What started out in the perpetrator's mind as a joke ends up in the steward's lap as a grievance.

Nearly all workplaces have rules that make horseplay an offense punishable by discipline or discharge, so any steward looking to avoid having to deal with a headache down the road might want to offer a little preventive advice to any known jokester in the vicinity. Bad things can happen if their humour goes bad. While it is not the union's job to maintain workplace discipline, common sense says that if you see something heading your way that can get a co-worker in trouble, you might want to think about doing what you can to make sure it doesn't get out of hand.

What do you look for? Well, here are a few recent examples of “jokes” that went bad, ending up in arbitration:

Peeing on the Floor

For some reason, a worker thought it would be funny to urinate on the men's break room floor. His workmates didn't think it was funny, nor did management: he was fired on the spot, and the arbitra-



tor agreed with the company. He said that employees eat and rest in the break room, and the worker's conduct violated a company rule stating that indecent conduct may result in discharge.

Topless Trouble

A female employee used the employer's photo equipment to take pictures of her bare breasts. She did not have permission to use the equipment, and the company discharged her. The arbitrator did not agree with the company, reducing the penalty to two months without pay. He said the discharge was “excessive” for horseplay, the pictures were not “obscene” under law, she did not commit sexual harassment, and suspension was more appropriate, sending a signal that the grievor's misconduct was not condoned.

Bodily Harm: Threats

A worker threatened another employee with bodily harm three times over a five-day period. Management fired him. The grievor claimed it was just horseplay, but the arbitrator upheld the company's action. He said the employee had been disciplined before for threatening another worker; he admitted to having used nearly all of the specific threatening language that had been alleged; another employee had been fired for similar threatening behaviour; and the grievor was not enti-

pled to “justice and dignity” after what he did to another employee.

Bodily Harm: Thrown Object

A worker threw a sledge hammer in the general direction of other employees; it bounced off a parts tub and injured someone. The culprit was fired. The arbitrator reinstated him without back pay, noting that the employer operated a plant where horseplay was excessive. It was the grievor's first offense; he had a clean work record and expressed remorse to the injured worker; the struck worker had not been targeted and would not have been hit were it not for the ricochet, and the act was horseplay, which under the work rules called for progressive discipline.

Bodily Harm: Wrestling

A worker picked up another employee and slammed him down on a table, then grabbed and wrestled to him to the ground, pinning him while another worker joined in the “horseplay.” The company fired him, but the arbitrator reduced the penalty to a last chance agreement, even though he was already working on a last chance agreement from an earlier incident. The arbitrator said that the previous four disciplines had already been reduced to level three under the company's discipline system, and the other employee received discipline one level higher than those previously imposed did.

Making jokes at other workers' expense is questionable at any time, but especially so when it gets into roughhousing or threatening behaviour. If you as a steward have to defend a worker who has committed horseplay or practical jokes, be aware of the employer's rules that deal with the offense. Best of all, avoid disciplines and discharge situations by warning employees who may have gone too far in their “jokes” before they get in trouble, especially those who have gotten into trouble before.

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

Using Information Requests Tactically

Your employer's legal obligation to furnish all kinds of information to the union relating to bargaining unit members' interests is quite broad in scope. But since — no surprise here — many employers initially resist handing over the documents or other information the union seeks, it's worth thinking about some tactics to use when making these requests.

- Always either initially submit your request in writing or confirm your oral request in writing. There's no need to give the employer an opening to raise a phony issue about what you really asked for. And having your request in writing protects you later on if the employer hasn't turned over everything that's responsive to your request.

- Make your request continuing in nature ("Please provide any new information that comes to light after your initial response to this request.") This way you are covered if any new information comes up in the meantime, information that you would want to have when you show up at the arbitration hearing, a bargaining session, or other meeting.

- It's best to make sure that your request is open-ended. Include with your request the words, "The union reserves the right to ask for additional information pertaining to this concern." This way the employer can't try to wriggle out from under a subsequent information request you might make relating to the same topic.

- Specify that the various items you ask for in your request are severable, that this isn't an all-or-nothing request. You could write, "Please provide information that is available as soon as it is practicable to do so; the union will accept a partial response to this request without prejudice to its position that it is entitled to all documents and information requested." This way the

employer can't stall, withholding all the information you're seeking until everything is located and assembled.

- You may want to anticipate and preempt certain employer defences in your initial request. For example, the law says that confidentiality may be grounds for nondisclosure, but that legitimate needs for confidentiality must be weighed against the union's need for the information. Therefore, you may want to clearly assert at the time you make your request why it is that the information sought is so important to the union. Or you can preempt an argument about confidentiality

by agreeing up front that the employer can black out names or other identifying information from the documents it turns over, or you can submit written privacy waivers from the individual employees along with your request.

- Consider which is the right tool for the job. For a given piece of information you seek, it may be the case that you can get the relevant records either from your employer or from another source (such as a governmental agency that has the information on file.) Think about whether giving your employer a heads up as to what you're investigating might give them a chance to cover up or circle the wagons. Or perhaps the opposite is true: letting them see that you're on to something might cause them to reconsider their course of action is.

- Since often you will have the choice of invoking either a contractual right to information or a right under a statute, work through whichever forum (grievance arbitration, labour board, or perhaps a court of law) might be best to enforce your rights. You will want to think through the time frames involved using each

method, cost of any necessary enforcement action, and other practical considerations.

- Think about using an information request to lock in employer positions. If you ask for the reasons the employer took some action, or the evidence they relied on in making some decision, they'll have a hard time later on if they want to come up with some other justification for the action they took.

- See what leverage you might be able to gain by using an information request. A request that would be particularly burdensome to the employer — taking up a lot of

time to search for records, for example, or revealing information the employer hopes won't see the light of day — can be used as a bargaining chip. You could find yourself in position to say, "If you drop your plan to do

X, we'll then have no need to pursue our information request."

- If you're bargaining in a jurisdiction where the employer can impose terms and conditions once an impasse in negotiations is reached, information requests can be a valuable technique to avoid impasse. This is because if there is a pending information request, then legally no impasse can exist. (And keep in mind that there are no time frames for when in the course of negotiations information requests have to be submitted.)

Just one caution, though, about the tactical use of information requests. Be careful; some of these tactics run on a two way street. Employers generally can make requests for information to the union, so be aware of the risk that the other side will try to be as clever and crafty as you now have learned to be!

— Michael Mauer. The writer is a labor lawyer and author of *The Union Member's Complete Guide*.

Think about using an information request to lock in employer positions.

Interpreting Your Contract

The first document every Steward has to understand is the contract or collective agreement. Like any other document, it consists of words, which are supposed to represent the agreed-upon intentions of the union and management negotiators. However, because people other than the negotiators are involved in making decisions at the workplace, mistakes are made over the meaning of a sentence or clause or the contract is violated because it is convenient to do so at the time.

When contract interpretations are made, the meaning of a single word can have a major result in the outcome of a grievance. If you are not sure about a meaning of the wording, you should consult your chief steward or Officer who may have dealt with a similar situation in the past.

The following are some basic interpretation rules that will usually determine whether you have a grievance under the contract:

What did the parties intend when they made the agreement?

The intent of the parties can be the most important part of contract interpretation and it can be very difficult to determine in many agreements. When the intent of the clause is argued before an arbitrator, witnesses are called and if possible, documentation-like minutes of the negotiation proceedings are produced. If you are in doubt about what was intended you should seek advice.

The whole contract must be used.

While at first glance it may appear that one part of the collective agreement supports a grievance you may find that other provisions do not. You cannot ignore those parts and only “cherry pick” those that are supportive. Your interpretation must come from using the entire agreement because the intent will usually

be identified from using a collection of clauses or sentences.

Contract wording which is clear and definite will usually prevail.

Arbitrators uphold the wording of the contract over any common practice whether or not that practice has been done by mutual agreement. Knowing this can sometimes help to determine whether or not to grieve a certain incident. A winning grievance may jeopardize a current benefit enjoyed by certain members over and above what may be in the agreement.

Past practice will sometimes be recognized if the contract wording is vague and/or missing.

If the parties have agreed to a certain practice either by discussion or by non-action for a period of time and the contract is not specific on the issue, an arbitrator may consider that practice to resolve an ambiguity. However, that resolve will not be made if it in any way alters or changes the intent of the agreement.

Past decisions by arbitrators or agreement by the parties on similar cases can affect the present case.

Although not always bound by previous decisions, most arbitrators will give considerable weight to those cases when deciding the present one. If the previous case was wrong or the facts of the present case differ in some way, including the amount of supporting evidence, then those facts must be offered to show how an error was made.

If it's not in the contract, then it's usually excluded and should not be relied on.

If, for example, the contract says that the paid holidays will be a certain number and is specific about which ones they are, it implies that those which are not mentioned will not be paid and therefore cannot generally be claimed unless there is some other side agreement which covers the ones not mentioned.

When the general contract and a special side agreement deal with the same thing but do not conflict, the side agreement will generally prevail.

If the contract says that all employees will receive a half hour unpaid lunch break while a special agreement says that certain employees who are potentially on-call will be paid for their lunch break, the special agreement would take priority over the general agreement. In contract interpretation, reason will prevail over absurdity and unreasonable positions. If you can show that your interpretation of the collective agreement presents a much more reasonable approach toward a certain issue than the management's position, then in most cases your position will be upheld. This rule generally reverts back to the intent of the negotiators who would not likely have intended an unreasonable position.

Management Rights

Generally, all rights which are not defined in the collective agreement or in various legislation belong to the employer and are referred to as “residual rights”. Although arbitrators have generally upheld management rights when challenged, on occasion they have said there may be some limitations on arbitrary management decisions when they are done in “bad faith” or are “unreasonable”. In some cases, they have ruled that the general provisions of the collective agreement suggest that management has an obligation to at very least discuss the issues with the union before imposing new or unreasonable rules or conditions on the workers. When you are not sure if management is acting within their rights, check with your senior representative.

— Prepared by the William W. Winpisinger Education and Technology Center.

Drug and Alcohol Testing

Just as children tend to be sucked into the latest craze — Hannah Montana or Webkinz, anyone? — employers can be caught up in the management craze of the moment as well. One of the hottest of those today is the drug and alcohol testing fad. However, while a decision by the boss to start collecting Star Trek figurines wouldn't affect you, his fascination with monitoring the lives of the workforce can spell real problems for everyone.

It's pretty remarkable, when you think about it. Employers who routinely demand mandatory overtime, resist efforts to deal with repetitive stress injuries in their workplaces, or regularly expose people to highly toxic substances all of a sudden profess concern for the health and welfare of their workers and subject them to mandatory drug and alcohol tests.

Testing Is Usually Negotiable

Keep in mind that the only place drug and alcohol testing is legally *required* in the U.S. is for workers performing "safety sensitive functions" in transportation industries under the Omnibus Transportation Employee Testing Act of 1991. If your workplace isn't required by law to have a testing program, and you've escaped the demands so far, remember that it's a negotiable issue. If a policy is already in place and your employer wants to change it, that is negotiable as well.

Moreover, remember, especially if there's no testing policy at your workplace today but your employer decides it wants one, there's no real reason to even *have* one. Employers already have the right to discipline for just cause, and being drunk or high on the job counts as just cause. Education and employee assistance programs have been found to be effective in dealing with workplace drug and alcohol abuse. There are *no* data to support the effectiveness of drug testing.

If for whatever reason you cannot avoid implementation of a testing pro-

gram at your workplace, here are some basic elements the union should fight for in negotiations:

- No random testing.
- Testing for "just cause" or "reasonable cause" only. These can be defined as slurred speech, inability to walk straight, erratic behaviour or other visual signs that would cause a reasonable person to believe the worker was under the influence of some substance.
- If a worker admits to a problem, there should be no testing. The only discussion should be about whether a rehabilitation program is necessary, such as Employee Assistance.
- The union should fight for language that says what is unacceptable is *on-the-job impairment*. It is not the employer's place to monitor off-the-job conduct. In one case where the employer insisted on the right to respond to off-the-clock drug use, the union countered with a demand that it be able to test the employer and supervisors for immoral acts they might take part in outside the workplace. One proposal was that all management personnel take lie detector tests to see if they were racists. The employer soon agreed that testing would take place only if the employees showed evidence of on-the-job impairment.

If a Test Is Demanded

If a testing procedure is in place, what should the union do when a worker is directed to take the test? The first thing to do is demand to be notified and to be present, if the employee consents, when the test is administered. But even before that happens, ask and document the answers to these questions:

- Why does the employer want to test this employee?
- What are the consequences for refusing to submit?
- How will confidentiality be protected?
- What are the consequences of a positive test? Will a second test be given?
- Will the employer provide the union with a copy of the laboratory report?


Remember that *no* drug test is 100 percent accurate. Some labs have been found to have false-positive rates as high as 66 percent!

If a worker tests positive and are disciplined, stewards should be prepared to raise a number of issues and defences. These include a lack of probable cause (perhaps the erratic behaviour can be explained: get a statement from the worker when the issue first comes up); citing deficiencies in the employer's or the lab's procedures; or charging the test result to be a "false positive" due to a prescription drug, over-the-counter medication, or passive exposure.

If a worker has a drug or alcohol problem it should be everybody's concern to help him or her get through it — not by taking away a much-needed job or by exposing the worker to humiliation and censure, but by doing everything possible to help.

— Adapted from the UE Steward Handbook, published by the United Electrical, Radio & Machine Workers of America.

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OFFICE OF THE INTERNATIONAL PRESIDENT

Dear Sisters and Brothers:

First, I would like to take this opportunity to say "Happy New Year," with the hopes that the year ahead brings good health and cheer to you and your families. The holidays are a time to enjoy family and friends and start fresh on a new year.

Too many of our Brothers and Sisters are suffering the loss of their job, more expensive health care, a less secure retirement or trying to figure out how to pay the ever increasing costs for their kids' education. As stewards, we appreciate the job that you do to assist our members' day in and day out.

The first place to start on your New Year's resolution is to participate in your local lodge meetings. We will have a lot to do in 2008. There will be Canadian Federal Election called sometime in the spring and a US election next November. We have to have our members vote and sign them up as sponsoring members of the Canadian Machinists Political League (CMPL). Talk to your co-workers and let them know how important it is to vote and change the current anti-worker philosophy that walks the halls of power.

Your role in the election is critical. You can be the voice of our union on the shop floor to educate our members about the candidates. It's one New Year's resolution you'll be glad you kept.

We also have to make organizing part of our everyday life. The right to choose a union is important and every bit as valuable as freedom of speech or freedom of assembly. It is the responsibility of every IAM member and representative to help grow this union.

And for your role as Steward, in this issue of the IAM Educator you'll find advice on using information requests to the employer tactically; how stewards can help our members on the job; how to deal — and negotiate — terms for employee drug testing; and how to warn members before "horseplay" goes too far.

I hope you had a joyous holiday season and I wish you a prosperous New Year. And, thank you for all you did in 2007 and will do in 2008 as a steward in our great union.

Again, thank you, IAM Steward,

In Solidarity,

R. Thomas Buffenbarger
International President

