

TAMI

E D U C A T O R

Update for Stewards Vol. 10, No. 2

Theft on the Job



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Employers generally consider theft an occasion for immediate discharge. This makes it especially important that stewards learn how to handle these cases and educate members about them.

In some union contracts, theft may be excluded from the requirements of just cause and progressive discipline, along with assault, fighting, or felonious behavior. Stewards in this situation need to try to make an argument that the case they're handling does not justify summary discharge because of extenuating circumstances, questionable evidence, lack of intent to steal, or disparate treatment compared to other similar cases. You may find help in your contract if it has a clause in which all discipline, with no exceptions noted, is brought under just cause and progressive discipline, or even just due process.

Examine Evidence and Context

In representing an employee accused of theft, both the evidence and the context should be critically examined, since the employer bears the burden of proof. As in any defense, you should challenge the evidence, raise extenuating circumstances, and see if there has been disparate treatment. In general, a "preponderance of the evidence" is a sufficient level for discipline cases in arbitration. However, because summary termination for theft is such a high form of industrial capital punishment, many arbitrators demand "clear and convincing evidence" from the employer and some even hold out for "beyond a reasonable doubt." For the worker, there is no presumption of innocence, no Fifth Amendment protection, no double jeopardy protection, and there is even a possibility that other employees who know about but fail to report a theft may be disciplined.

In one famous case an employer accused a union steward of theft for taking the employer's paper pads and pens out of the supply cabinet, which the steward admitted. The context, though, made

all the difference. He had taken them to give to union stewards to use in preparation for the next labor-management meeting, a practice of many years standing in that company. The arbitrator found for the steward. Besides the past practice, there was clearly no intent to steal for personal gain but rather, this was a reasonable part of the longstanding labor-management business relations. Intent is particularly important for employers to prove if they have only circumstantial, not eyewitness, evidence for a theft.

What's the Value?

One strategy for dealing with accusations of theft is to look at the value of what has supposedly been stolen. Big thefts are carried out by financial officers, comptrollers or others with opportunities to embezzle from substantial streams of money, but typical cases involving workers are about something worth only a few dollars or even a few cents. A grocery store worker may be accused of eating a candy bar without paying for it, a food service worker may take home food, or a hotel housekeeper may be accused of stealing a washcloth. Accusations like this should be a red flag that the worker is on the receiving end of disparate treatment or perhaps is being targeted. This is especially likely to be true if the worker has been there a long time, has a good work record, or is a union steward.

One worker, a produce clerk who routinely ate lunch in the store, purchased a chicken breast and rolls but then allegedly took a small pecan pie and, when accused, could not produce a receipt. The employer waited until he had finished eating the pie before accusing him. The pie was worth 99 cents and he had worked there for 21 years. There is even a question of entrapment if the supervisor knows about a theft but does not intervene until the stolen property has actually left the premises (or in this



case, is eaten). The arbitrator reinstated the worker, but without back pay for the time he was suspended.

A stronger case can be made where the worker is accused of "taking from waste,"

such as leftover containers or scraps on a construction site, in a garment-making shop or in a manufacturing plant. Historically, workers had the right to gather scrap, a tradition that goes all the way back to picking up the leftovers in the fields. Unless there is an explicit, enforced policy against taking from waste, arbitrators tend to be reluctant to terminate people for this.

Tolerance Policies

Employers are often advised by security consultants to have a zero-tolerance policy about theft, but any zero-tolerance policy is hard to enforce fairly. According to the International Foundation for Protective Officers, employers who are concerned about theft need to do background and reference checks on all employees, install covert video devices, conduct surprise audits, and protect inventory or accounting functions with access codes. They warn that employees typically cannot be counted on to report other employees. Thus a lot of theft goes undetected or ignored, meaning that the zero-tolerance policy is inevitably disparately applied.

The employer's list of things that can be stolen includes money, supplies, merchandise, company property, trade secrets, designs, recipes, formulas, and cash that is pocketed after overcharging or not ringing up a sale. Time is also on this list. This article will not deal with the issue of time theft, except to note that the struggle over what is on the clock and what is not is one of the reasons unions exist.

—Joe Berry and Helena Worthen. The writers are veteran labor educators.

Stewards and Electronic Communications

Whenever workers come up with a good strategy for building their unions, employers try to make it illegal. In the case of technology, employers are cracking down on the use of electronic equipment, and laws that could protect us have been interpreted by both the court system and the National Labor Relations Board to support the employers' authority.

One consistent principle for every steward is *kaizen*—it is a Japanese term that is roughly translated “constant self-improvement.” For a steward, *kaizen* means keeping up on the latest decisions, since any one of them could impact basic union procedures. There are now literally hundreds of different cases backed up, both in the court system and at the labor board, involving the use of new technology, and things can change daily.

Using Company Equipment

Aggressive union activity has set off a long-standing dispute at the labor board over the use of company equipment. In 2000, an officer of the Newspaper Guild in Portland, Oregon, sent e-mail messages from the union office to her members at *Register-Guard* newspaper, at work, and was disciplined. The union argued that the use of company computers is equivalent to passing out union leaflets in the lunchroom, and that the members were allowed to use the company computers for all kinds of personal purposes, so any ban on union distribution represented “disparate”—and therefore illegal—treatment.

Taking a “my house, my rules” position, the newspaper's management insisted it had the right to restrict the content of e-mails. After seven years of litigation, the George W. Bush-era NLRB initially upheld this position. In a critical reversal in late 2009, however, a federal circuit court bounced the case back to the Board, which then decided against the *Register-Guard* and opened up the use of company

computers by employees for union solicitations in workplaces where the employer otherwise allowed workers to use the same computers for non-work purposes.

Ever-Expanding Frontier

In one case, involving DIRECTV, in July 2011 an Administrative Law Judge reinforced the right of workers to use company computers when the judge criticized a provision in a company handbook that would “reasonably tend to inhibit union or protected concerted activity by precluding employees from discussing wages, hours, and working conditions with employees and others.” Union officers should make a consistent effort as well to keep stewards up to date, recognizing that new technology is a constantly expanding frontier.

At the same time, in case an employer's system can't be used, a shrewd steward should always have an alternate plan. Developing a communications network with the members through their own electronic devices is the best way to go. Get personal e-mail addresses so you can bypass the boss and go directly to the members. You can build a terrific communications network that can include YouTube videos or other creative efforts, as well as the usual e-mail or text messages, and build the union's visibility.

Work with union bargaining teams to negotiate with employers over the use of the employer's equipment. Use of employer equipment is clearly a “term and condition of employment” and thus open to bargaining under the recognition clause of every union contract.

Employers Counterattack

As a counterattack, some companies are now trying to post work rules that prohibit workers from accessing their personal electronic devices during work hours. Would a boss try to keep a parent from calling home to check up on a sick child? Isn't using an electronic device to check on the child the

same thing? This is an area of workplace control that, once again, should be a subject of bargaining for the union.

Obviously, not all electronic issues in the workplace are union-related. In a decision dealing more with privacy than union issues, in June 2010 the U.S. Supreme Court ruled in the case of *City of Ontario, CA v Quon* that the employer has the right to look at all messages sent on employer-provided electronic devices. In this case, there was alleged sexual harassment via text but the court threw aside any constitutional or contractual rights to privacy and allowed a discipline to stand.

Off-Duty Conduct Issues

Stewards should also recognize another complicated electronic issue that combines social media with a more traditional area of dispute, off-duty conduct. Our members are using “outside” communications, such as Facebook and Twitter, to publicly—or “collectively”—discuss work-related issues, but employers are now trying to discipline them for their opinions. Online discussions among employees can be considered “concerted activity” and protected by the labor board, but it's all in the eye of the beholder—and the vision of the beholder happens to be blurry indeed.

The issue of electronic communications and the use of employer equipment is a promising but very fast-moving new area for building your union. Take advantage of it, use it, but be aware that the boss is watching and will probably try to stop us. And above all, keep in mind that the law is in a constant state of change.

To keep up with the latest decisions and opinions from the NLRB, go to their web site www.nlr.gov. For a special focus on electronic communications and social media, go to <http://www.nlr.gov/search/simple/all/social%20media>.

—Bill Barry. The writer is director of the labor studies program at the Community College of Baltimore. Thanks to Wayne Gold, Regional Director of the NLRB, Region 5, for help with the legal issues.

A New Steward's Most Common Questions

New stewards come into the job with a million questions, ranging from the simple, like where to obtain grievance forms, to the difficult, like how to achieve just the right kind of working relationship with management. Here are some of the most basic questions—and answers—designed to help new stewards get up and running and familiar with their new responsibilities.

1. What are my rights in handling grievances?

You have the right to aggressively enforce and police the contract, to get information from your employer to aid in enforcing the contract, and to vigorously represent co-workers in grievance handling. You have the right to investigate grievance matters. That investigative authority includes interviewing witnesses, visiting areas where grievances occur, and getting all relevant documents from management.

2. What are my other rights?

You have the right to sign up new members. You have the right to listen to complaints from all employees. You have the right to conduct other union business, at appropriate times: Examples include helping employees with worker compensation claims, passing out leaflets and helping people get registered to vote, and so forth. You can't interrupt someone's work for routine union business, but nor can you be prevented from conducting any union business you believe appropriate during breaks and before and after work. You have the right to speak up forcefully, in a way that recognizes your equal status with employer representatives when dealing with union representation issues.

3. Is the union legally bound by my actions?

When acting as the union steward you are the agent of the union. Your actions are no longer personal actions, they are legally con-

sidered the actions of the union. For example, sexual harassment or racial bias displayed by a union steward can create financial liability for the union. At the same time, stewards do not have the legal right to agree to anything barred by the union contract, or to ignore language of the contract.

4. Do I have to go to the boss's office to talk about a worker's grievance?

No. It's not up to management to decide where a grievance is discussed, but it's not up to you, either. It's a negotiable issue. While you might want to enforce the contract in front of a worker whose rights have just been violated, you don't have that right. You and the supervisor have to come to agreement on a time and place to talk about it.

5. Can management refuse to hear a grievance?

No. The union has the right to file and process grievances that it believes are legitimate. If your supervisor refuses to acknowledge your grievance, the union has the right to take it to the next level of management.

6. Can I lead a workplace action to protest management's failure to honor a grievance settlement?

A protest is considered protected union activity when it is held in a peaceful, non-violent manner during nonworking time. You can also do certain things during the workday: boycott the company cafeteria, for example, or, assuming no dress codes are in place, wear identical, message-bearing T-shirts.

7. If my contract gives me paid time for union business, what kind of business does that include?

You have the right to police the contract, file and process grievances, and speak out in enforcing the contract. Fulfilling these

duties comes under union business. Some contracts may outline additional duties considered union business, for which stewards may be paid.

8. Can I be disciplined for insubordination?

Only if your extreme actions threaten the authority of a supervisor in the presence of other workers. Generally a steward (when acting in his or her role as a steward) can be disciplined only for conduct that is "outrageous" or "indefensible" and is "of such serious character as to render the employee unfit for further service." Gesturing and talking loudly and forcefully cannot be considered "outrageous." But you can't use racial epithets or extreme profanity or threats of violence. Nor can you organize illegal slowdowns or work disruptions, lead prohibited work stoppages or file grievances in bad faith.

9. Can I put whatever I want on a bulletin board?

Not necessarily. Check your contract: some things may be barred, like notices supporting political candidates or documents that personally attack management representatives. But if your union contract allows the use of bulletin boards, you can probably post a wide range of things, including notices, cartoons, photos—most anything that promotes the union's legitimate work.

10. Can I be held to a higher standard than other workers?

No. If you come in late or make an error on the job, you can't be treated any differently than any other worker who does the same thing. Who would want to be a steward if it meant higher work requirements or more severe discipline? Employers must apply the same standards to stewards as they do to everyone else.

—Adapted with thanks from *Solidarity in Action: A Guide for Union Stewards*, by the Labor Center, University of Iowa, Iowa City.

Ten Rules of Tactics

In the world of give and take, said legendary community organizer Saul Alinsky, tactics is the art of doing what you can with what you have. A smart use of tactics can help your union win justice and opportunity for its members. Failure to think and act tactically can spell defeat.

Alinsky illustrated tactics this way:

“Take parts of your face as the point of reference; your eyes, your ears, and your nose. First the eyes: If you have organized a vast, mass-based people’s organization, you can parade it visibly before the enemy and openly show your power. Second, the ears: If your organization is small in numbers, then do what Gideon did: conceal the members in the dark but raise a din and clamor that will make the listener believe that your organization numbers many more than it does. Third, the nose: If your organization is too tiny even for noise, stink up the place.”

Alinsky offered some Rules of Tactics, many of them appropriate for consideration in today’s workplace. The wise steward will keep them in mind.

1 Power is not only what you have but what the opposition thinks you have. Make sure management knows it’s not just you, the steward, presenting the workers’ case, but the union and all of labor.

2 Never go outside the experience of your people. When the union employs a tactic, make sure your people understand what it is and are comfortable with it. If you don’t, you risk confusion, fear and retreat.

3 Whenever possible go outside the experience of the opposition. The unexpected always works better than the expected.

4 Make the opposition live up to its own book of rules. You can score a lot of points by showing how workers can’t be expected to follow a stupid rule or undertake a dangerous task if management won’t do the same itself.

5 Ridicule is a potent weapon. It’s hard to launch a counterattack against ridicule, which tends to infuriate the target. And when the target is infuriated, it’s likely to react to your advantage.

6 A good tactic is one your people enjoy. If your people can’t have fun doing it, it’s probably not a good tactic to begin with. T-shirt days, informational picket lines, letter-writing campaigns to your local newspaper that take on the employer... Tactics can and should capture the imagination of your members.

7 A tactic that drags on too long becomes a drag. If a tactic goes on too long it becomes a ritualistic commitment. People get bored and lose their enthusiasm. It’s time to come up with a new tactic.

8 Keep the pressure on. Use different tactics and actions. Take advantage of what’s happening in the workplace, in your community, in the world, to focus on your cause and on the opposition.

9 The threat is usually more terrifying than the action itself. Keep your opposition off guard. The more unsettled management is, the more likely it will be to want to get the problem resolved.

10 The price of a successful attack is a constructive alternative. Don’t fall into the trap of having the employer suddenly agree with your demand — but you don’t have a concrete and workable resolution to offer. Know exactly what you want to accomplish and be prepared to help see it executed.

— Adapted with thanks from *Rules for Radicals* by Saul D. Alinsky, published by Vintage Books.

It Smells Like a Great Idea

Saul Alinsky, identified by *The Nation* magazine as “this country’s leading hell-raiser” before his death in 1972 at the age of 63, helped poor and working-class people across the country organize to gain power in their communities. He was famous for his successes and for his clever, outrageous tactics.

For example, to put pressure on the Eastman Kodak Co., the heart of the Rochester, New York business community, to address the needs of the city’s black population, Alinsky suggested buying one hundred seats for one of Rochester’s symphony concerts.

“We would select a concert in which the music was relatively quiet,” Alinsky wrote in *Rules for Radicals*. “The hundred blacks who would be given the tickets would first be treated to a three-hour pre-concert dinner in the community,” in which nothing but beans would be served. “Then the people would go to the symphony hall — with obvious consequences. Imagine the scene when the action began! The concert would be over before the first movement!”

The “fart-in” tactic was good, Alinsky wrote, because it would be “utterly outside the experience of the establishment, which was expecting the usual stuff of mass meetings, street demonstrations, confrontations and parades... All of the action would ridicule and make a farce of the law for there is no law...banning natural physical functions. The law would be completely paralyzed. (And) it would make the Rochester Symphony and the establishment look utterly ridiculous.”

The only way for the establishment to respond would be to cancel the symphony season — an unacceptable solution, in the view of the city’s powerful social elite — or address the black community’s concerns. Whether such a “fart-in” ever took place is immaterial — it was a tactic that employed the powerful tool of ridicule.

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OFFICE OF THE INTERNATIONAL PRESIDENT

Dear IAM Shop Steward,

This year is shaping up to be pivotal for our great union. We ended the latest round of airline mergers on a positive note after winning an election for 17,000 Passenger Service and Reservation employees at the new United Airlines. The election victory increases the IAM's membership in all classifications at the new United to 31,500. Previous wins for 14,785 Ramp & Stores workers at United and 2,200 Flight Attendants at ExpressJet brings to nearly 34,000 the number of members organized by the IAM Transportation Department during the past eight months.

In the aerospace industry, we resolved one of the largest National Labor Relations Board (NLRB) cases in history with an innovative settlement with The Boeing Company that preserves pensions for new hires and protects thousands of jobs by keeping future 737Max production in Washington State's Puget Sound region.

In Canada, as this edition was going to press, our brothers and sisters at Air Canada were in the middle of a high-profile struggle with the carrier and the Canadian government to win a fair agreement that recognizes our members' years of sacrifices to keep Air Canada solvent.

Because of your efforts to educate and mobilize our members, we have made progress this year in the face of a hostile Conservative government in Canada and steadfast opposition by Republicans in the U.S. Congress to any initiatives that help the unemployed or spur faster job growth.

With barely six months to go before the November elections in the United States, we have important tasks ahead of us. We must work extra hard to reverse the GOP near-sweep in 2010 of state legislatures and governors' mansions. And, we must ensure that the presidency, with all its regulatory and judicial appointment authority, remains in friendly hands.

That's why the Machinists Non-Partisan Political League voted unanimously to endorse Barack Obama for a second term. Our differences with the administration have been over the speed of the economic recovery, but I believe IAM members recognize that the slow pace of job creation rests largely with Republican efforts in Congress to delay or derail every proposal that would bring economic relief to America's working families.

2012 has seen a good start. Let's keep up the good work in organizing and political action to ensure North American families can look forward to better economic times ahead.

In Solidarity,

R. Thomas Buffenbarger
International President

