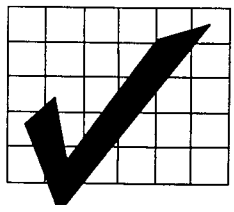
The TCU Rep's Checklist--

Defending a Member Charged with Insubordination



The 'Obey Now, Grieve Later' Doctrine

As a TCU representative, you stand a good chance of someday having to defend a TCU member against a charge of insubordination. This article is designed to help you better understand the concepts involved in such cases and how to prepare the best possible defense.

B*lack's Law Dictionary* defines insubordination as the "Refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a willful or intentional disregard of the lawful and reasonable instructions of the employer."

When formulating disciplinary charges, employers sometimes prefer to use a more general term such as "failure (or refusal) to follow instructions." This is particularly so when the order or instruction is written rather than verbal.

Regardless of the term used, this disciplinary issue is one of the most serious you will encounter as a TCU representative because a finding of guilt may result in dismissal of the employe. To make matters more difficult, a special rule applies in insubordination cases. That rule is the doctrine of "obey now, grieve later."

Arbitrators generally endorse the proposition that an employer has the right to make reasonable rules which are related to the operation of its business, as well as the right of an employer's supervisors or officers to give both written and verbal instructions and to have those orders carried out promptly and completely.

But what if the employe believes he or she has a good reason for *not* doing as management says? The short answer is that there is only *one* universally accepted reason for not following the orders or instructions of management: the order requires unsafe actions which would be dangerous to the employe, the public or coworkers. (A rare additional reason would be that the disputed order is against the law.) But proving that condition may be more difficult than it seems.

What if the order is a clear violation of the Agreement, such as an employe being told to work an entire shift without a meal period? What if an employe is told to perform work which is clearly outside of the craft? What if the order is just plain stupid? In those instances, arbitrators have consistently held that the employe must follow the instructions as given and then protest through the proper grievance channels. That is known as the "obey now, grieve later" doctrine, and it is applied as a threshold issue in almost all insubordination cases. In fact, the major obstacle in defending a TCU member charged with insubordination is proving that the "obey now, grieve later" rule should *not* apply.

Consider the following case decided by Third Division Award No. 29078, in which the Board made clear the importance and effect of the "obey now, grieve later" doctrine. In denying the employe's claim for reinstatement, the Board held:

> "The Organization, in its brief, suggests that Claimant had 'good reason' for not appearing at work on the days in question; to wit, he felt the work being assigned him was outside of his craft. The rare exception to the 'Obey now, grieve later' maxim in insubordination cases, such as genuine health or safety concerns, is well recognized by this Board. Third Division Awards 21538 and 27290. However, an employe attempting to invoke such exceptions bears a heavy evidentiary burden of proving that the circumstances warranted such concerns. In the instant case, it is well established on the record that Claimant unilaterally determined he would withhold himself from service until he was satisfied that he would do track work and not repair work. In short, the Claimant resorted to self-help to enforce his interpretation of the Agreement between the parties.
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> "Under the circumstances, the dismissal should be upheld... There is no basis on this record for making an exception to the 'Obey now, grieve later' maxim."

Nor is simply raising safety as a defense always enough to convince an arbitrator that an exception to the "obey now, grieve later" maxim is warranted. In Award No. 92 of Public Law Board No. 1952, another case involving a refusal to perform certain work functions, the Claimant was dismissed for refusing to unload a boxcar load of axles because he believed it was not his job and it was unsafe. He was warned by the supervisor that his refusal would lead to discipline and then was given a few minutes to reconsider his decision, following which he again refused. He was removed from service on the spot and ultimately dismissed. The boxcar was subsequently unloaded without incident by his fellow employes, although an after-the-fact inspection by a member of the safety

committee found conditions unsafe. The Board upheld this Claimant's dismissal by saying:

> "The Carrier has established by substantial credible evidence in the record that Claimant repeatedly refused orders to unload the axles from the boxcar. This action constitutes a clear violation of the cited provisions of Rule 801. Moreover, there is adequate evidence in the record to support the Carrier's conclusion that the inspection by McKenzie and Harris and the actual safe unloading by the other clerks provide the basis for the Carrier to conclude that the orders by McKenzie and Harris did not place Claimant at risk. The insubordination and the lack of an adequate defense to refusal seal the case against Claimant. The discipline of dismissal is severe, but in light of the incident and Claimant's record, it is neither arbitrary, capricious nor discriminatory."

This case shows just how difficult it can be to prove safety as grounds for refusal to follow an order. Here is another example.

In Case No. 64 of Special Board of Adjustment No. 973, the Claimant had been ordered to report for an assignment as a Block Operator. However, he stated that his assigned work area was unsafe because of the existence of asbestos and on this basis he refused to comply with the Carrier's orders. The Claimant was then assessed a ten-day suspension. The Board upheld the discipline:

> "The Board is not unmindful of the Claimant's concern for his health and safety. However, given the Carrier's uncontroverted findings with respect to asbestos levels at his work site, his concerns were not reasonably based.
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> "In view of the foregoing, the Claimant erred when refusing to perform service. The Claimant is a long-time employe with a good work record. Nonetheless, proven insubordination is a serious offense which may ultimately lead to serious consequences, including dismissal. Accordingly, given the evidence before us, there is no proper basis to overrule the Carrier's determination to assess a 10 day suspension for the proven charge."

In another case decided by Third Division Award No. 20772, the Claimant refused to perform certain climbing work on a bridge, citing a fear of heights. Ultimately, he was dismissed. The Board held that:

> "Concerning the merits, we note that on a number of consecutive work days, Claimant refused to perform certain climbing on a bridge--which was necessary in order to perform his work. Although the record contains suggestions that Claimant's refusal dealt with matters of safety, we are

compelled to hold that the prime cause for Claimant's refusal dealt with a fear of working in the open at significant heights. The initial refusals to work resulted in varying degrees of suspension and the final refusal resulted in the termination now before us. The record indicates that there had been refusals previous to the consecutive work days material to this dispute, and that Carrier has suggested to Claimant that he be concerned with his inability to climb.

"It is, indeed, unfortunate that an individual may develop an acrophobia which interferes with his ability to perform his services. However, it appears that Claimant's duties required periodic climbing, and he was aware of that fact when he assumed employment. Under the circumstances, we have no alternative but to deny the claim."

In Third Division Award No. 17045, another claim involving acrophobia, the Claimant was suspended for 30 days when he refused to work at a height of some 30 feet on a bridge. But in this case, the Board reversed the discipline. Note that the circumstances in this case gave the Board more "room to maneuver" than in the previous case, which no doubt resulted in the following sustaining Award:

"In this case, there is no showing that Claimant ever performed work at such height prior to the date involved herein; no showing that the work Claimant was instructed to do was inherent in his position; and no showing that Claimant acted with indifference to authority or displayed a rebellious attitude.

"To the contrary, the record shows that there was other work Claimant could have been doing, such as clean-up work, or painting the top of the bridge. The fact that this employe was allowed to return to the same position at the termination of his suspension, after learning of his acrophobia, is persuasive to the finding that he (Claimant) could handle the normal duties of the position.

"Absent evidence to the contrary, this Board finds that Claimant was and is a victim of acrophobia; that an attempt of Claimant to perform the painting from a substantial height would have subjected himself and his fellow employes to danger and unwarranted personal injury, and that Claimant's refusal in this case was, therefore, justified. See First Division Awards 13118, 14266, 15532, 17398; Second Division Award 2540; and Third Division Award 14067."

Another issue which frequently results in the charge of insubordination is the refusal to work overtime. Once again, the "obey now, grieve later" doctrine applies. A surprising but classic example of the harsh consequences of refusing to work overtime is found in Third Division Award No. 27290 which upheld the Claimant's dismissal, even in the presence of substantial mitigating circumstances. The Board held as follows:

> "On January 20, 1985, Claimant was called off the Extra Board to work as a Janitor at Gary, Indiana. Upon reporting to work, Claimant was asked and agreed to rearrange to work outside on the Yard I Tower job, to cover a vacancy. It is significant that a record cold temperature of -27° F, with wind chill factors of -60° to -70°, were recorded at Gary that day.
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> "When Claimant reported to the Yard I Tower he learned that the heating system was not capable of keeping internal temperatures above the freezing mark. Not only was there no heat in the Tower, but also the water and toilet facilities were not operating because of frozen pipes. Claimant and other employes at that location did work eight (8) hour tours of duty at the Yard I Tower, notwithstanding these conditions.
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> "About 2:30 p.m., the Supervisor telephoned Claimant at the Yard I Tower and ordered him to double onto the 4:00 p.m. tin-mill job. Claimant protested that he was not the youngest Clerk. The supervisor informed Claimant that the most junior Clerk's father had died and again ordered him to work the 4:00 p.m. job. Claimant protested that he was cold and his feet hurt. The supervisor again ordered Claimant to work the job and Claimant responded in words or substance: 'No, I am going home.' The supervisor told Claimant that he would have to write this incident up to which Claimant responded 'Fine' and hung up the telephone.
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> "The safety and health exception to the "Obey now, grieve later" maxim in insubordination cases is well recognized by this Board. Third Division Awards 14067 and 21538 among many others. However, the employe who invokes this exception bears the evidentiary burden of proving by persuasive evidence that s/he had a reasonable well-founded fear of immediate danger. Moreover, we find it critical that the safety reasons for refusing a direct order be explained or at least communicated to the

supervisor. Requiring proof on this latter point serves a two-fold purpose: 1) It provides in a subsequent review of the situation objective evidence that safety fears were motivating the employee to refuse the order at the time, rather than a belated after-the-fact defense to an insubordination charge; and 2) It allows an informed judgment whether the supervisor was aware of the safety conditions and acted reasonably in insisting nonetheless upon compliance with the order.

"In this particular case Claimant initially resisted the supervisor's order on grounds that he was not the youngest Clerk. When the objection was explained away he merely said he was cold and his feet hurt. The record does not show whether the supervisor was aware that Claimant had been working without heat or bathroom facilities, although he was aware that the outside temperature was extremely cold. We do note, however, that the job Claimant was ordered to work on hold-over was not at Yard I Tower, but at the tin-mill where heat and water facilities were available.

"From the available evidence, neither the supervisor nor this Board could make an informed judgment whether Claimant actually had a legitimate and reasonable concern for his health and safety at the time he refused the direct order. There was no objective indication of this at the time he refused the order and we cannot engage in after-the-fact speculation of this critical evidentiary point. We conclude that Claimant has not presented sufficient proof of his motivation at the time of refusing a direct order to warrant application of the health and safety exception or justification for what otherwise appears to be an act of insubordination."

If we learn nothing else from these awards, we should conclude that it is very difficult to overcome the "obey now, grieve later" theory.

Difficult, perhaps, but not impossible.

For example, in Third Division Award No. 22556, the Claimant was dismissed because he refused to operate an unsafe automobile. However, in that case the Claimant was able to introduce sufficient evidence and testimony to prove that an exception to the "obey now, grieve later" theory was warranted. In restoring this Claimant to service with full back pay, the Board held:

"The Board has carefully reviewed the lengthy transcript of the investigation, as well as the submission of the parties. The Claimant contended throughout that the car involved...was not safe to drive and that he had notified

his supervisors to that effect. The transcript also contains substantial evidence that other clerks, who had driven the car involved, considered it unsafe and had so reported to their supervisors, including the Trainmaster who removed Claimant from the service. One clerk testified that he had driven the car...and when he had to apply pressure to the brake 'the front brake grabbed,' causing the car to swerve into oncoming traffic and an accident was barely averted.

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"The Board does not condone insubordination on the part of any employe. Neither will it support a Carrier requiring an employe to perform a service when a real safety hazard may be involved. It is our considered opinion that, with the complaints that had been received as to the car being unsafe, the Carrier would at least have had it checked by an expert mechanic before insisting upon the Claimant driving it, especially when the record shows that Claimant could have been assigned another vehicle to drive."

In essence, all of the awards cited merely show *what* must be established in order to successfully defend against the charge of insubordination: a safety or health hazard. Conspicuously absent, however, is any guidance as to *how* to accomplish that task.

So the next matter to consider is what standards arbitrators use when determining whether an exception to the "obey now, grieve later" doctrine is warranted. Here are some phrases used by arbitrators in various arbitration cases which set out what the Claimant needed to prove or did prove:

- "a sincere and genuine fear"
- "a hazard was demonstrated to exist"
- "a real and imminent danger to life and limb"
- "valid and reasonable grounds for refusing..."
- "the work constituted an abnormal hazard"
- "the work was clearly and evidently unsafe"
- "*prima facie* evidence must be shown"
- "evidence must be more than a mere presumption"

As you can see, the standards used by arbitrators range from purely subjective considerations of the Claimant's own honesty ("sincere and genuine fear") to the cold and hard reasoning of "more than a mere presumption" and "*prima facie* evidence." In short, these examples are all over the map and are of little help in making our determination.

Fortunately, the greatest number of arbitrators appear to take some form of the "reasonable man" approach. This means simply that the facts and circumstances known to the employe at the time of the order would also have caused a "reasonable" person to fear for his or her safety or health. (See Elkouri & Elkouri, *How Arbitration Works*, Third Edition, Washington, D.C., 1981.)

One arbitrator expressed this "reasonable man" doctrine this way:

> "The principle...is that an employe may refuse to carry out a particular work assignment if, at the time he is given the work assignment, he reasonably believes that by carrying out such work assignment he will endanger his safety or health. In such an instance the employe 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, if called upon, of showing by appropriate evidence that he had a reasonable basis for his belief. In the case of dispute, as is the case here, the question to be decided is not whether he actually would have suffered injury but whether he had a reasonable basis for believing so." (Laclede Gas Co., 39 LA 833, 839 [1962])

An additional source of defense strategies you might want to turn to is the article entitled "The Seven Tests of Just Cause" featured in the Spring '95 issue of *The Winning Edge*.

This award gives a general idea of what must be presented in order to establish an exception to the "obey now, grieve later" doctrine. While developing your strategy, keep in mind that an arbitrator will distinguish between mere discomfort or displeasure and a situation in which a real threat to employe safety or health is present.

The "reasonable man" doctrine gives us one more related strategy: some arbitrators have held that once the employe expresses a reasonable belief--which can be shown by appropriate evidence--that he or she would be injured while performing the disputed order, the burden then shifts to the employer. Thus, in such cases we can strongly assert at the hearing that the employer must provide conclusive proof that the employe's fears were unfounded.

In many instances, however, safety or health considerations are not applicable. In such cases, we fall back to the definition of insubordination, which stipulates that the order must be *reasonable and related to the employer's business.*

An example of an unreasonable order might be the case of a manager ordering an employe to wash a company vehicle during a snowstorm. Another example might be management's order that an employe must mow the lawn at the superintendent's home.

The "unreasonable order" defense carries far less weight than a defense based on safety or health concerns and should be a subordinate or secondary defense in cases where safety issues are present. Moreover, in terms of the "obey now, grieve later" doctrine, most arbitrators hold that the employe *must comply with the order*, however wrongheaded, and protest the issue through the grievance process.

To recap, here is a checklist of what you will want to consider as you prepare to defend a member against an insubordination charge:

✓ Was the order clearly given and understood?

✓ Was the order reasonable?

✓ Was the order related to the employer's business?

✓ Was the employe given a reasonable opportunity to comply with the order?

✓ Was the employe warned that failure to follow the order would result in disciplinary action?

✓ Did the employe have a legitimate fear for his health or safety under the "reasonable man" doctrine?

✓ If safety or health is a consideration, have other employes complained about the same issue?

✓ Was the employe provoked into being insubordinate by the actions of management?

As with any discipline case, you should be meticulous when gathering the facts; the insubordination hearing is not the place to be surprised by the testimony of your member or a witness for the defense, let alone the case presented by the employer. You will be able to prepare the member to present the best defense by knowing and employing the principles applied by arbitrators in insubordination cases, as explained in this article.

In sum, get all the facts, develop a defense theory, and prepare, prepare, prepare. If you can accomplish all that, your member couldn't have better representation if he were represented by Perry Mason *and* Matlock. And once again you will have done your job well as a TCU rep.

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There is also *a separate and distinct issue which frequently results in the charge of insubordination and that is an employe's refusal to submit to a drug or alcohol test.* From a technical standpoint, suffice it to say that drug or alcohol testing is either mandated by Department of Transportation regulations or by individual employer testing policies which may vary from employer to employer. The issues are of sufficient complexity to warrant a separate article limited to this subject alone, and will be fully covered in a future issue of *Winning Edge*.

If you are called on to represent a TCU member who has been charged with insubordination or failure to follow instructions as a result of the refusal to take a drug or alcohol test, you should contact your General Chairman for assistance. **You must never advise a member to refuse to take a drug or alcohol test**, because in most cases a refused test can be treated the same as a positive test.