

Managing
Under the
Electrical
Contractors
Collective
Agreement

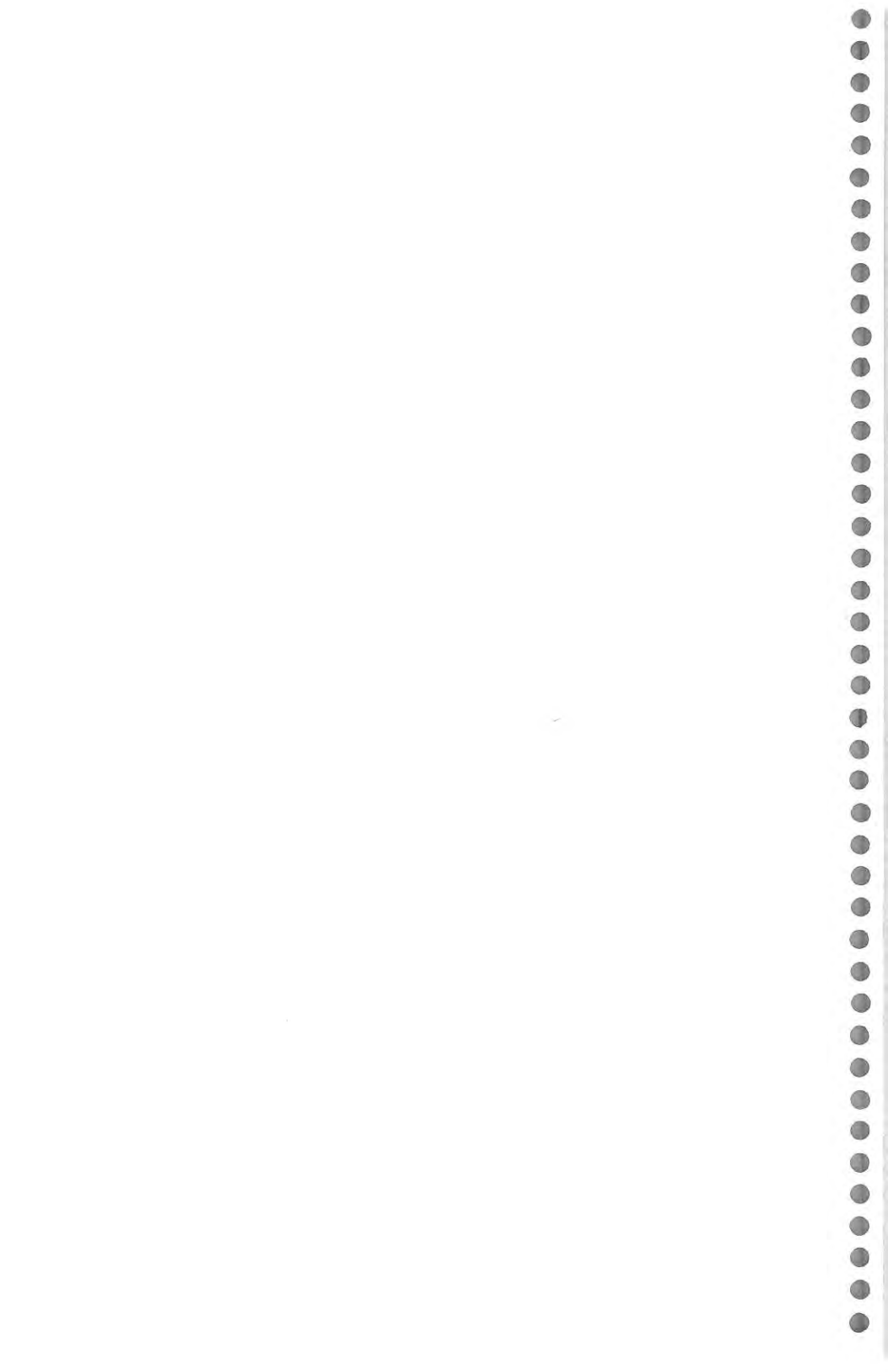
Site Summary



Scott G. Thompson
in consultation with

Eryl M. Roberts

*The Electrical Contractors
Association of Ontario*



Electrical Contractors Association of Ontario
presents

Managing Under the Electrical Contractors Collective Agreement

A SITE SUMMARY

written by

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Introduction

THERE HAVE BEEN numerous books and manuals written on the day-to-day administration of industrial collective agreements. This book of Scott Thompson's is the first to deal specifically with a construction industry collective agreement. More importantly, the emphasis is on the day-to-day labour relations under a construction collective agreement.

In 1975 the Ontario Labour Relations Board was given the power to hear expedited arbitrations of construction industry grievances. In the intervening years there have been many important decisions which must be considered in interpreting a collective agreement. The effects of such decisions on various parts of a collective agreement are dealt with by Scott Thompson in an even-handed and perceptive way.

Of growing importance however, are the other statutory matters which, more and more, are having an important

effect on how a jobsite should be managed. It is no longer sufficient to rely solely on the collective agreement, but it is necessary to take into account Health and Safety legislation as well as Human Rights and Employment Standards laws.

The present work canvasses a number of these problems in a manner that will be of value not only to the electrical contractors, for whom it was written, but also the various unions and other employers in the construction industry. Although the work specifically deals with the electrical collective agreement, the topics dealt with apply across a broad range of the construction industry.

The ECAO is to be congratulated for commissioning this work and Scott Thompson is to be commended for his endeavors on this subject.

Donald E. Franks

A Contractor's Right to Manage

THE CONTRACTOR HAS the right to manage its workforce as it sees fit, subject to any restrictions contained in the applicable collective agreement or any applicable legislation. In fact this basic right is expressly stated in Section 4 of the Principal Agreement as follows:

SECTION 4 – MANAGEMENT RIGHTS

§400 RIGHT TO MANAGE

Subject to the terms of this Agreement, the Union acknowledges the right of the individual contractor to manage the business in which he is engaged and to direct the working forces, to discharge or discipline employees for just cause.

However, the mere statement of the right does not always convey the necessary knowledge required to exercise the

right. Although this site summary is not intended to provide legal advice, it will provide guidelines on how a foreman or site superintendent can exercise their rights to manage in the more routine situations where the need to exercise those rights arises. For a fuller understanding of a contractor's rights and obligations reference should be made to the full text of the ECAO manual, *Managing Under the Electrical Contractors Collective Agreement*.

The first step electrical contractors must take in understanding their rights and obligations is to develop a familiarity with the general provisions of the Principal Agreement. The best procedure to obtain this familiarity is to read it. Chapter 2 of the ECAO manual discusses the more significant clauses of the Principal Agreement in detail.

It is important to point out that because this site summary focuses to a large extent on the contractor's right to manage the workforce, at the job site, a significant portion of the site summary will deal with managing situations where order and discipline break down. In fact, the number of times when order and discipline break down, in percentage terms, is very small. The reason is that the vast majority of employees are conscientious and want to do a good job. It may, therefore, seem inappropriate to spend so much energy discussing those situations which in fact turn out to be the exception rather than the norm. The justification is two-fold. In the first place, those exceptional situations can give rise to extensive liabilities which might be avoided or reduced if properly managed. In the second place, the mere knowledge of how to manage those exceptional situations will reduce the likelihood of their occurrence.

Hiring & the Discretion to Reject Referrals

UNDER THE Principal agreement the contractor is generally required to hire and employ only members of the IBEW on all electrical work (\$700). However, the Principal Agreement also provides that journeymen must be capable of performing in an efficient manner the functions of an electrician as defined under the *Apprenticeship & Tradesmen's Qualification Act* (\$600). As a general rule, while a contractor does not have an unfettered right to reject any referral, the contractor does have a discretion to reject a referral provided that, in exercising its discretion, the contractor acts reasonably, in good faith and without discrimination.

In exercising its discretion the contractor must make its decision on some factual basis that is relevant. Since journeymen electricians referred to the job site are technically qualified to do the work, it will be extremely difficult to obtain the factual basis to support a decision to reject a referral, unless the contractor has previous experience with a particular worker.

The grounds upon which a contractor can reject a referral are not closed, provided the factual basis for that rejection is reasonable, consistent with good faith and not discriminatory. In practical terms the most common grounds upon which a contractor would reject a referral will arise out of the referral's previous job experience with that contractor.

A) THIRD PARTY OBJECTIONS: The owner or general contractor may decide to exclude a particular worker from the job site. Where this occurs, at the very least, the contractor should make enquiries of the third party to determine its reasons for the decision. If the third party's reasons are not supported by the facts or are themselves unreasonable, then the contractor should try to persuade the third party to reconsider its decision.

B) MEDICAL FITNESS: As a contractor you have both the right and the obligation to satisfy yourself that referrals are medically fit to perform the essential duties of the job. Where reasonable grounds do exist to question the medical fitness of the referral the contractor is entitled to make the referral a written conditional offer of employment and request a medical certificate clarifying the referral's medical status. However, due to the often short term nature of employment in the construction industry, both the contractor and the referral are expected to act quickly to

resolve any doubt over the referral's medical status.

In rejecting a referral for medical reasons under the Principal Agreement, the contractor should be aware that, under the *Human Rights Code, 1981*, the contractor cannot discriminate against a referral because of a handicap, which includes most significant medical conditions, as well as the fact that a worker has a WCB record, unless the referral is incapable of performing the essential duties of the job. In addition a referral will not be incapable of performing the essential duties of the job unless the needs of the referral cannot be accommodated without undue hardship on the contractor, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. This means that any objection to a referral on medical grounds must be for bona fide medical reasons that affect the referral's ability to perform the essential duties of the job, and which cannot be reasonably accommodated by the contractor.

C) PAST PERFORMANCE: Although it is not a practice commonly used in the construction industry, the rejection may be based on the referral's previous job performance, attendance or disciplinary record. A contractor who wants to screen referrals based on past performance will have to maintain suffi-

cient records to establish the reasonableness of its decision. The two basic grounds for rejecting a referral for past performance would be culpable conduct, including poor workmanship, for which the former employee was disciplined, and non-culpable conduct, such as excessive absenteeism, the unacceptableness of which was brought to the former employee's attention. However, it may be that a contractor only has the right to reject a referral who has been previously designated as not for re-hire. Where the contractor has the evidentiary basis to support its decision to reject a referral on either of these grounds, it may be preferable to make the decision to reject the referral at the outset rather than to accept the referral as an employee and be saddled with the stricter test of just cause required to discharge the employee.

It should be kept in mind that the factual basis required to support the rejection of a referral may not be sufficient to discharge that referral for just cause if the referral becomes an employee. For this reason, where practical, careful consideration should be given to those referrals who have poor work records.

Since rejecting a referral carries with it the risk that the contractor will be subject to an accruing liability if its decision is overturned on arbitration, it is recommended that contractors seek outside advice, either from the ECAO or from their legal counsel, before actually rejecting a referral.

Layoffs, Transfers & Resignations

THE *Employment Standards Act* specifically excludes the application of the termination notice provisions (§40) of the statute to a person who “is employed in the construction, alteration, decoration, repair or demolition of buildings, structures, roads, sewers, water or gas mains, pipelines, tunnels, bridges, canals or other works at the site thereof.” A slightly different exemption, which includes maintenance, applies to the severance pay provisions (§40a) of the statute. This means that, except where the employee is laid off or transferred for an improper purpose contrary to some other specific piece of legislation, the only restrictions on the contractor’s right to lay off or transfer the exempted employee are contained in the Principal Agreement.

LAYOFFS: There are certain notice and procedural requirements under the Principal Agreement. Firstly, “Where

possible, the Contractor shall notify the Business Manager three (3) days prior to the layoff but no later than the day of the layoff. Failure of the Contractor to notify the Business Manager's office on the day of the layoff will entitle the employee to an additional one hour's pay in addition to the one hour notice."(\$705) Secondly, "Employees being laid off shall receive a minimum of one hours notice with pay." and "The employee shall be allowed to leave the job at the time of notification."(\$903) In addition "The employee may be allotted additional time, not to exceed one hour, to leave the job site at the discretion of the employer." and "He shall receive his wages and UIC Record of Employment at the time of layoff."(\$903) The failure by the contractor to meet this final procedural requirement will cost the contractor two hours wages for each normal work day of noncompliance up to a maximum of thirty hours.(\$905)

With respect to who can be laid off, it is important to note that there are no provisions in the Principal Agreement that would require the contractor to lay off the more junior employees first or designating any other general selection criteria. The only specific restrictions on who can be selected to be laid off are that "In all cases of layoff, the Local Union members shall retain employment priority."(\$703) and "Where five or more Journeymen are employed every fifth Journeyman shall be 50 years of age or older, where available."(\$704) In addition, "The Steward shall not have his employment terminated until as near as possible to the completion of the job, unless with just cause and unless prior notification has been given to the Business Manager."(\$503) Except for these three specific restrictions, and certain others in Local Appendices, the contractor has the

right to select the employees to be laid off as the contractor sees fit, provided the contractor is engaged in a legitimate lay off and is not surreptitiously trying to discipline an employee without giving the employee the benefit of progressive discipline.

TRANSFERS: The only specific restriction in the Principal Agreement with respect to the contractor's right to transfer employees within the contractor's own organization concerns the steward. "If it is desired to transfer the Job Steward to another job, such transfer must be approved by the Local Union Business Manager." (§504) However, a related provision provides that "The Contractor shall not loan workmen in his employ to any other Contractor without the consent of the Business Manager." (§706) Except for these two restrictions, and certain others in Local Appendices, the contractor has the right to select the employees to be transferred as it sees fit, provided the contractor is engaged in a legitimate transfer and is not surreptitiously trying to discipline an employee without giving the employee the benefit of progressive discipline.

IMPROPER LAYOFFS & TRANSFERS: Where there is no legitimate basis for the layoff or transfer, and the contractor purports to lay off or transfer an employee with the ulterior motive of disciplining that employee, the layoff or transfer will be construed as a form of discipline. In those circumstances the contractor will have to demonstrate that there was just cause for the action taken. This means that, at the very least, the employee should have been warned before the discipline was imposed. However, it should be

pointed out that where the layoff or transfer is legitimate, the fact that the contractor selects the employee to be laid off or transferred on the basis of the employee's performance is irrelevant and a prior warning is not required in these circumstances. The key is whether the action of the contractor is triggered by a legitimate layoff or transfer or whether the layoff or transfer is triggered by the contractor's hidden desire to discipline the employee.

RESIGNATIONS: An employee resigns when he develops the subjective intent to resign and conveys that intent to the contractor through some objective means. This test is usually met by the employee telling the contractor that he quits and then leaving the job site with his tools. Under the Principal Agreement, "The Company shall be given one hour's notice by any employee who voluntarily terminates his employment." (§904) The contractor then has five working days to issue by registered mail the employee's final wages and UIC Record of Employment. (§904) The failure by the contractor to meet this final procedural requirement will cost the contractor two hours wages for each normal work day of noncompliance up to a maximum of thirty hours. (§905) An employee who leaves the job site early without notifying the contractor is either in breach of his duty to get permission to leave the job site early, or has quit without notifying the contractor of his intention to do so, in accordance with his obligation under the collective agreement. In either case the employee should be disciplined.

Progressive Discipline

THE THEORY OF progressive discipline is that employees, who engage in misconduct, can be rehabilitated, if they are given adequate warning by their employer that their conduct is not acceptable. The two key principles are that the employee has adequate warning that the particular conduct is inappropriate and that the penalty imposed is just and reasonable in all the circumstances of the situation. In the construction industry, because of the unique features of the hiring hall, the adaptation of the principles of progressive discipline generates both a shorter progression of discipline for the employee and the imposition of more severe penalties at each stage of the progression. In fact, the standard progression in the construction industry is a two stage process that moves swiftly from the employee being warned to discharge. However, it must be recognized that, in the construction industry, the discharge of an employee

by one contractor in reality amounts to an indefinite suspension, because generally the employee will be referred out to another employer within a matter of days.

THE CONSTRUCTION WARNING: The purpose of a warning is to let the employee know that certain conduct is unacceptable or to bring a particular rule or procedure to the employee's attention. The warning may be either spoken or written. The form does not matter so long as the employee receives the message that the employee's conduct is unacceptable and that a failure to improve will place the employee's job in jeopardy. Clarity is the key. All warnings should be clear and unequivocal.

Although the warning can be either spoken or written, and there is no requirement for a progression from a spoken to a written warning, human nature is such that the foreman has probably already spoken to the employee about the problem before the foreman becomes sufficiently frustrated to want to impose some form of discipline. The problem is no record of these conversations exists and therefore the foreman is forced to initiate the progression by giving a formal warning or risk not being able to prove that a warning was given if a dispute arises. To avoid these problems we would recommend the following:

- A) Where a foreman speaks to an employee about a performance problem or other forms of misconduct, the foreman should either note the conversation in his daily log book or, depending on the foreman's assessment of the seriousness of the situation, confirm the warning in writing

and provide the employee with a copy. If the foreman has not confirmed the warning in writing and the problem persists, the foreman should issue a written warning.

B) Although a written warning is not essential, it is recommended that a written warning be given to the employee before more serious discipline is imposed because (a) it is easier to prove that the warning was given; (b) the employee will have difficulty claiming he didn't understand the contents of the warning, or the seriousness of the employer's concerns; and (c) a written warning creates a record that can be relied upon by other foremen who may have similar problems with the employee. All warnings should be clear and unequivocal.

For example, if an employee had previously been given an oral warning and is subsequently caught by his foreman absent from his work station without permission and without a legitimate reason, the written warning might be drafted as follows:

Yesterday I spoke to you and explained that employees are not allowed to leave their work station, without a legitimate reason, without their foreman's permission. Today you once again left your work station without my permission and your reason is not acceptable. If you continue to disobey this rule you will be

subject to further discipline up to and including discharge.

For a long term employee who is aware of the rule, the written warning might be drafted as follows;

Today you were absent from your work station, without a legitimate reason and without my permission. You are well aware that this is contrary to company rules. If you continue to disobey this rule you will be subject to further discipline, up to and including discharge.

THE CONSTRUCTION DISCHARGE: If a clear warning is given to the employee, and confirmed in writing, and the employee continues to misbehave then, depending on the circumstances, the contractor would normally proceed to the next stage and discharge the employee. If the contractor, because of the exceptional circumstances of the case, decides to give a second written warning, it should be designated as the final written warning. Otherwise the effectiveness of the rule the contractor is trying to enforce will be diminished. Finally, it should be emphasized that not all forms of misconduct require a warning before the employee is discharged. If the employee has engaged in major misconduct, which any reasonable employee would appreciate was wrong, then the contractor would probably be justified in dispensing with the warning and proceeding directly to a discharge. It must be remembered that in the construction industry a discharge by one contractor is in reality equivalent to an indefinite suspension.

On the procedural level, it should not be forgotten that §904 of the Principal Agreement provides that an employee who is discharged for just cause shall have his final wages and UIC Record of Employment sent to him by registered mail within five working days following the date of discharge. Under §905, a failure to meet this procedural requirement will cost the contractor two hours wages for each normal work day of noncompliance up to a maximum of thirty hours.

Since discharging an employee carries with it the risk that the contractor will be subject to an accruing liability if its decision is overturned on arbitration, it is recommended that contractors seek outside advice, either from the ECAO or from their legal counsel, before actually discharging an employee.

OTHER FORMS OF DISCIPLINE: The traditional suspension is not a common disciplinary response in the construction industry for the practical reason that if an employer suspended the employee for any more than a day or two the employee would return to the hiring hall to obtain another referral. The only time it may be practical for a contractor to impose a suspension, rather than discharging the employee, would be during an economic downturn where there was a realistic possibility that the worker would not obtain another referral quickly. In those circumstances, it may be prudent to impose a limited suspension rather than an indefinite discharge in order to limit the contractor's monetary liability.

The other form of disciplinary response that is not used frequently in the construction industry would be the dis-

disciplinary transfer. There may be situations where a warning has not been sufficient to control the worker's conduct but the contractor does not want to discharge the employee. In these circumstances the contractor could transfer the worker to another job site as a disciplinary response. In effect the disciplinary transfer in the construction industry may be a very effective disciplinary response because it conveys to the employee the contractor's dissatisfaction without causing the employee any significant economic harm. However, a disciplinary transfer should only be used where the employee has already received an adequate warning. In addition, the employee should be notified in writing that the employee is being transferred for disciplinary reasons.

SAMPLE EMPLOYEE DISCIPLINE RECORD

Date: _____ Project: _____

MEMO FROM: _____

MEMO TO: _____
EMPLOYEE'S NAME

Employee's Start Date: _____

IBEW Card No.: _____ Local Union _____

Foreman: _____ Steward: _____

DISCIPLINE: _____

Delivered by: _____ Date: _____

SAMPLE EMPLOYEE DISCIPLINE RECORD

Date: September 1, 1990 Project: Yonge King

MEMO FROM: Robert Supervisor

MEMO TO: Matthew Electrician
EMPLOYEE'S NAME

Employee's Start Date: August 15, 1990

IBEW Card No.: 2035 Local Union 353

Foreman: Jim Foreman Steward: Bob Steward

DISCIPLINE: Yesterday I told you that employees must get their foreman's permission before leaving their work station for personal business. Today you once again left your work station without your foreman's permission and your explanation is not acceptable. If you continue to disobey this rule you will be subject to further discipline up to and including discharge.

Delivered by: Jim Foreman Date: Sept 2, 1990 @ 9:15 am

Grounds for Discipline

ONE OF THE KEYS to properly managing any job site is to have clear rules of conduct that are applied consistently to all workers who find themselves in similar circumstances. A breach of one of these rules constitutes grounds for discipline. The contractor's right to make rules is recognized in Section 4 of the Principal Agreement dealing with Management Rights and in particular clause 401, which provides as follows:

§401 To maintain order and to make, from time to time, reasonable rules and regulations to be observed, which will not be inconsistent with the provisions of this Agreement. All such rules must be posted in an accessible location and/or made available to all employees.

The local union shall receive a copy of any rules or regulations made by the Electrical Contractor.

Many of these rules of conduct which apply at the con-

struction site are common sense rules of conduct that do not need to be specifically explained to employees or written down, because employees know the rules exist and apply to them. One example would be the rule prohibiting theft of the contractor's or a fellow employee's property. Another example would be statutory obligations, such as those imposed upon employees under the *Occupational Health & Safety Act*. Other rules of conduct are dealt with in the collective agreement, either expressly or by implication. An example is the rule contained in clause 600(B) which states that "Workmen shall install all electrical work in a safe and workmanship-like manner, and in accordance with applicable code and contract specifications."

In addition the contractor has the right under §401 to unilaterally establish rules provided they are reasonable and not inconsistent with the terms of the Principle Agreement. In this regard, the validity of any unilateral rule established by a contractor will be subject to review by an arbitrator or the Board if its validity is disputed. Special rules that apply to a particular contractor or to a particular job site should be posted and/or made available to all employees. Where the rules are posted a copy should be sent to the local union. To avoid any doubt about which rules apply at a particular job site it doesn't hurt to prepare a general list which can then be posted and/or made available to all employees and sent to the local union. A sample list of rules might look like the one provided on the following page. For a fuller discussion of the specific application of these rules reference should be made to the full text of the ECAO manual, *Managing Under the Electrical Contractors Collective Agreement*.

RULES OF CONDUCT FOR EMPLOYEES OF ABC ELECTRICAL CONTRACTORS LTD.

The following list contains the general rules of conduct which employees of ABC Electrical Contractors Ltd. are expected to follow. The list is representative, not exhaustive. A failure by an employee to follow these rules of conduct will result in discipline up to and including discharge.

A) SAFETY & PERFORMANCE RELATED RULES

- 1) Employees shall comply with all safety regulations established under the *Occupational Health & Safety Act*, the Principal Agreement, the ECAO/IBEW/CSAO Safety Manual and by the contractor.
- 2) Employees shall, in an efficient manner, install all electrical work in a safe and workmanship-like manner, and in accordance with applicable code and contract specifications.
- 3) Employees shall obey all reasonable directives and procedures and shall not be insubordinate.

B) UNAUTHORIZED ABSENCES

- 4) Employees who are late, leave early without permission, or take extended breaks or lunches will be disciplined.
- 5) Employees who are going to be late or absent from work, for whatever reason, are required to report each day to the site superintendent's office and to their foreman, at least one hour before the commencement of their shift.

- 6) Employees who are absent from their work station, without a legitimate reason, will be disciplined.
- 7) Employees who accept overtime cannot afterwards refuse to perform the overtime, without obtaining the Contractor's permission.

C) GENERAL MISCONDUCT

- 8) Employees who arrive at work under the influence of, or use or have in their possession, intoxicating liquors or drugs, on a job or during working hours, will be disciplined.
- 9) Employees who engage in fighting, horseplay, or who damage or destroy other people's property, will be disciplined.
- 10) Employees who engage in dishonest conduct will be disciplined.
- 11) Employees who harass fellow employees, contrary to the *Human Rights Code*, 1981, will be disciplined.
- 12) Employees who threaten, encourage or engage in unlawful strikes or picketing will be disciplined.

D) SITE SPECIFIC RULES

- 13) Employees shall only smoke in designated smoking areas.

In All the Circumstances

THE CONCEPT OF just cause for discipline or discharge carries with it the concept that the level of discipline must be appropriate given all the relevant circumstances of the situation. In fact, through §124(3) and §44(9) of the *Labour Relations Act*, the panel of the Board hearing a construction industry grievance has the power to consider all the relevant circumstances and substitute a lesser penalty where to do so seems just and reasonable. Since the Board will look at all the circumstances, the contractor needs to consider all the circumstances and exclude any irrelevant factors when assessing what penalty should be imposed for particular misconduct.

THE VALIDITY OF THE RULE: The first circumstance to be considered is whether or not the rule, which the employee is alleged to have breached and which is relied upon to support the discipline, is a valid rule. In order to be

valid the rule must be reasonable, clearly articulated, consistent with the terms of the Principal Agreement, and must have been brought to the attention of the employee affected before the employer can act upon it.

HAS THE RULE BEEN APPLIED CONSISTENTLY:

Assuming that the rule is otherwise valid, it is critical for the contractor to apply it consistently. This means that employees who are in like circumstances should be treated similarly. This does not mean that all employees who breach the same rule must receive the same discipline since there may be circumstances peculiar to an individual employee's situation which would justify a variation in the level of discipline imposed. However, in circumstances where there are no relevant distinguishing characteristics, two employees who have breached the same rule should receive the same level of discipline.

HAS THERE BEEN ANY CONDONATION:

A related issue is whether or not there has been any condonation with respect to the rule on the job site generally or with the particular employee concerned. Condonation occurs where the contractor is aware a rule is being breached and does not enforce it by disciplining the employees involved. For example, if the contractor has in the past allowed employees to leave the job site early without getting the foreman's permission the contractor has condoned that conduct and cannot discipline an employee for that conduct without taking steps to negate that condonation. A contractor who has been condoning certain conduct should explain to the employees that although the

conduct has been condoned in the past it will no longer be tolerated in the future. This in effect re-establishes the rule by putting the employees on notice that a breach of the rule in the future will result in discipline.

HAS THERE BEEN ANY PROVOCATION: The issue of provocation usually arises in cases of insubordination or assault against a foreman for which the employee has been disciplined. Provocation would exist where the foreman's own conduct towards the employee provoked the incident. For example, if the foreman swore at the employee and insulted him, the employee could take the position that any similar response by the employee towards the foreman was provoked. The existence of provocation will not necessarily negate the discipline imposed but it may reduce the penalty if it has not already been taken into account by the contractor.

LENGTH OF SERVICE: Length of service is an important factor in an industrial system of progressive discipline. In the construction industry it is not always relevant because the nature of the employment is short term, with most employees not even lasting the length of the project. However, some larger contractors have such a large workforce that a core group of employees have only worked for that contractor for a number of years without a layoff. It would not be appropriate to apply the normal construction industry progression of a warning and then discharge to these long service employees. Depending on the seriousness of the misconduct involved, a longer progression of progressive discipline will be more suitable.

WHAT IS THE EMPLOYEE'S DISCIPLINE

RECORD: In assessing the penalty to be imposed it is important to assess not only the seriousness of the offence but also the employee's previous discipline record. The existence of a previous discipline record will have an impact on the level of penalty to be imposed unless the discipline record is so old that it can no longer be considered relevant. However, the existence of a recent disciplinary record is the foundation upon which progressive discipline is based and should be taken into account.

For long service employees who have been transferred from project to project the importance of the prior disciplinary record becomes apparent when the contractor is faced with a series of minor infractions by an employee, none of which by themselves would justify termination. However, provided that the employee has engaged in some misconduct which merits discipline, the contractor is entitled to rely upon the prior discipline record. When the discipline record is viewed as a whole, the contractor may legitimately reach the conclusion that just cause exists to terminate the employee. This is known as the doctrine of the culminating incident. The culminating incident, while not justifying discharge by itself, when viewed in the context of the discipline record as a whole, justifies the termination. In these circumstances where the contractor relies upon the previous discipline record it is appropriate to refer to that fact in the document imposing the discipline.

OTHER MITIGATING FACTORS: Depending on the nature of the misconduct involved there may be other mitigating circumstances which should be taken into

account in assessing the level of discipline to be imposed. In deciding the weight to be given to any mitigating factor the purpose of progressive discipline should be kept in mind as well as the fact that if no discipline is imposed the incident cannot be relied upon later. Therefore, if the conduct merits some discipline mitigating factors should not necessarily eliminate a warning not to let the misconduct occur in the future. It is not possible to anticipate all forms of possible misconduct, nor is it possible to anticipate all possible mitigating factors. The contractor must make a balanced assessment taking into account all the relevant circumstances and weighing them against the principles of progressive discipline. The key is to recognize that progressive discipline is a flexible system designed to encourage employees to comply with the reasonable rules and regulations of the contractor.

IMPOSING DISCIPLINE – TIMELINESS AND OTHER MATTERS:

Once the contractor becomes aware that an employee has engaged in misconduct, the contractor should discipline the employee within a reasonable time. In unusual circumstances the contractor may have to delay imposing discipline, while investigating the relevant facts, but in these unusual circumstances the contractor should complete any investigation as quickly as possible. If the investigation is going to be prolonged, the contractor should consider placing the employee on notice that his conduct is under investigation and that discipline may be forthcoming. A failure to discipline an employee for misconduct within a reasonable time could result in an arbitrator concluding that the conduct has either been

condoned or that the discipline is not valid because of the untimely delay. Once the contractor has all of the information necessary to make an informed decision, and has taken whatever advice the contractor feels is necessary in the circumstances, then the employee should be disciplined at the earliest opportunity.

Although there is nothing improper about disciplining an employee on the spot, and this may be appropriate in many circumstances, a disciplinary interview in the site office is to be preferred. In the first place it brings home to the employee the seriousness of the misconduct. Secondly, it gives the contractor an opportunity to interview the employee prior to imposing the discipline to determine whether there are any mitigating circumstances which should be taken into account in assessing the penalty. Thirdly, it avoids any unnecessary incidents that can arise when an employee is disciplined in front of his colleagues. Finally, it gives the contractor an opportunity to get the Steward involved. Although there is no legal obligation under the Principal Agreement to have the Steward present at a disciplinary interview, where possible it is appropriate to have the Steward present so that the Union is aware of the contractor's concerns and the Steward has an opportunity to explain to the employee the risks involved if his conduct does not improve.

The Grievance & Arbitration Procedure

THE WORK NOW GRIEVE LATER PRINCIPLE:

One of the cornerstones of the *Labour Relations Act* is the prohibition, contained in §42, and confirmed by §1306 of the Principal Agreement, against strikes and lockouts so long as the collective agreement continues to operate. Counterbalancing this prohibition against strikes and lockouts is the requirement that every collective agreement contain an arbitration procedure. The significance of the prohibition against strikes and lockouts, coupled with the requirement that a collective agreement provide for an arbitration procedure, lies in the fact that where the Union or the employees disagree with the contractor's conduct under a collective agreement, it is illegal for the Union or the employees to try to enforce their interpretation of the collective agreement on the contractor by engaging in any form of strike activity, so long as the agreement continues to operate. If the Union or the em-

employees believe that the contractor is acting contrary to the terms of the collective agreement, then their obligation is to work in accordance with the contractor's directions and grieve the alleged violation of the collective agreement. This is known as the work now grieve later principle which applies in most circumstances, with the primary exception being those situations where the employee believes that the work is unsafe, in which case the employee has the right to refuse unsafe work under Part V of the *Occupational Health & Safety Act*.

EXPEDITED ARBITRATION: In the construction industry the traditional forms of arbitration under a collective agreement have been supplemented by a form of expedited arbitration under §124 of the *Labour Relations Act* which provides the parties with the opportunity to have a grievance heard by the Labour Relations Board within fourteen days after receipt of the application. The application can be made by a party to the collective agreement at any time after delivery of the written grievance to the other party. Under the Principal Agreement there is one procedural requirement, contained in §1304, with respect to a §124 application, which requires the parties to notify specified persons prior to filing the application with the Labour Relations Board.

THE GRIEVANCE PROCEDURE: The grievance procedure under the Principal Agreement is designed to give the parties an opportunity to resolve their disputes without the need of proceeding to arbitration either under the collective agreement or under §124 of the *Labour Re-*

lations Act. The purpose of the grievance procedure is to eliminate, through an informal series of steps, involving more senior participants at each successive level, those grievances that can be resolved informally. Frequently the parties can informally find a solution to a problem that could not be achieved through the more formal arbitration process.

STEP 1: Under the Principal Agreement the first step of the grievance procedure for an aggrieved employee is an informal verbal discussion of the issue by the employee, his Steward and the Foreman. This discussion is to take place within five working days of the time the employee became aware or reasonably should have become aware of the incident giving rise to the grievance. The Foreman has one working day to respond verbally. If the Foreman's response is unsatisfactory the grievance can proceed to step two.

STEP 2: It is only at the second step of the individual grievance procedure that the grievance is put in writing by the Local Union and is submitted to the Contractor's designated representative. Within two working days a grievance meeting is to be held between the Contractor's designated representative and the Local Union representatives in an effort to resolve the grievance. If the grievance is not settled at this step two grievance meeting, the next step is to submit it to the Local Joint Conference Board.

In circumstances where the dispute does not arise from an individual employee's grievance, §1302 of the Principal Agreement provides either party with the option of submitting the grievance in writing to the designated representative of the other party, within five (5) working days of

the time they became aware, or reasonably should have become aware of the incident giving rise to the grievance. This procedure can be used by the Union to process grievances that affect its interests directly, such as the collection of union dues, rather than the interests of an individual employee. It could also be used by a contractor to claim damages for an illegal strike.

STEPS 3 & 4: If the grievance is not settled at the step two grievance meeting, then it can be submitted to the Local Joint Conference Board which is step three of the grievance procedure. If the Local Joint Conference Board is unable to reach a majority decision, or if one of the participants is not satisfied with the decision of the Local Joint Conference Board, then the grievance can be referred to the Provincial Joint Council which is the Committee, established by §1309 of the Principal Agreement, to hear step four of the grievance procedure. In addition, if the grievance concerns the interpretation or application of a Provincial Clause then the Local Joint Conference Board should refer it to the Provincial Joint Council.

ARBITRATION: If the Provincial Joint Council is unable to reach a majority decision, or if one of the participants is not satisfied with the decision of the Provincial Joint Council, then the grievance can be referred to arbitration within thirty (30) days of the receipt of the decision of the Provincial Joint Council. At this stage the grievance can be referred to arbitration either through a §124 application under the *Labour Relations Act*, or in accordance with §1303 of the Principal Agreement.

TIME LIMITS: Time limits are important in any grievance procedure because they encourage the parties to resolve disputes quickly so that problems do not fester and undermine the working relationship between the parties. In addition they provide finality to disputes so that the parties can leave old issues behind and focus on fresh concerns. In the construction industry the need to resolve disputes quickly is particularly acute because of the transitory nature of the working relationship. For these reasons and others the time limits in the grievance procedure should be taken seriously. However, it is recognized by the parties that circumstances may necessitate extending a time limit and for this reason the parties have made provision in §1310 of the Principal Agreement to do this by mutual agreement. Even if the parties are not willing to mutually agree to extend a time limit, the arbitrator has the authority under §44(6) of the *Labour Relations Act* to extend a time limit where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and the opposite party will not be substantially prejudiced by the extension.

From the contractor's perspective the two critical time limits are the five (5) working day time limit, after which a grievance cannot be filed, and the thirty (30) day time limit, after which the grievance cannot be referred to arbitration. The five (5) working day time limit, after which a grievance cannot be filed, runs from the time that the employee or the union became aware or reasonably should have become aware of the incident giving rise to the grievance. When a grievance or a notice to arbitrate is received the contractor should always assess whether or not it has

been received within the time limits, since it is important to raise the issue of timeliness immediately or risk the conclusion that the objection has been waived. With respect to a grievance the contractor can always object to the time limit and then, in the alternative, deal with the grievance on its merits. For example, if the employee claims that he did not receive his shift premium for a particular shift that occurred six weeks earlier the foreman can always say: "Your grievance is out of time, but I'll look into it and get back to you." This will preserve the contractor's right to rely on the time limit argument in an appropriate case.

The decision to rely on a time limit objection requires a judgement call by the contractor since the arbitrator has the authority to extend the time limit where there are reasonable grounds for the extension and the opposite party will not be substantially prejudiced by the extension. For this reason, although it is appropriate to raise a time limit objection to preserve the contractor's rights, the contractor will usually only want to rely on the objection in appropriate circumstances.

Unlawful Strikes

THE ONTARIO *Labour Relations Act* regulates strikes by trade unions and employees and lockouts by employer organizations and employers. The primary rule is that where there is a collective agreement in operation there shall be no strikes or lockouts since all disputes are to be resolved through the grievance and arbitration procedure. The secondary rule is that there shall be no strikes or lockouts where no collective agreement is in operation unless the legislated collective bargaining procedure has been followed.

For those employers for whom the union has bargaining rights and for whom no collective agreement is in operation, the employees are still prohibited from striking until the collective bargaining procedure set forth in the statute has been exhausted. Under that procedure one of the parties gives the other notice to bargain, which is followed by the appointment of a conciliation officer by the Minister, which is then followed by the conciliation officer's

report to the Minister and the Minister's report to the parties that he does not consider it advisable to appoint a conciliation board, from which point fourteen days must elapse before the parties can legally engage in strike or lockout activity, provided the provisions regulating strike and lockout votes have been complied with. During this procedure, which is intended to give the parties an opportunity to conclude a collective agreement without resorting to strike or lockout activity, the parties are required to bargain in good faith and make every reasonable effort to make a collective agreement.

Provincial Agreements in the I.C.I. sector of the construction industry must expire on the 30th day of April in each even numbered year, which is every two years. Since the Principal Agreement is a multi-sector collective agreement that even covers maintenance, strikes by the IBEW or their members at any time other than as a result of the biennial renegotiation are probably illegal. The Ontario *Labour Relations Act* has extensive provisions to regulate illegal strikes. In the first place it states what the participants cannot do.

§72 (3) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

§74 No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support

or encourage an unlawful strike or threaten an unlawful strike.

§76 (1) No person shall do any act if he knows or ought to know that as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lockout.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

As a result of the intermeshing of the prohibitions contained in the *Labour Relations Act* and the rights and obligations of the employer under a collective agreement any unlawful strike or lock-out activity will probably constitute a breach of both the statute and the collective agreement. However, from the contractor's perspective, it is better to manage a potential walkout to diffuse it, rather than wait for the walkout to occur and then enforce its rights at the Labour Relations Board. Before discussing what a contractor can do to manage a potential walkout, it is important to consider what constitutes a strike. In order to prove that a strike has occurred the contractor merely has to establish that two or more employees acted together to either walk off the job or otherwise reduce their productivity. There is no need in Ontario to establish that the purpose of their concerted activity was to persuade the employer to alter its position with respect to terms and conditions of employment. Merely to engage in the concerted activity constitutes a strike and, if it occurs at any time while a collective

agreement is in operation or before the legal strike/lock-out deadline has passed, then it is an illegal strike.

PROCEDURE FOR MANAGING UNLAWFUL STRIKES

1) It should be remembered that it is contrary to the *Labour Relations Act* to either engage in or threaten to engage in an illegal strike and, therefore, the contractor should deal with any threat by issuing an immediate warning. When a contractor becomes aware that his employees may engage in an illegal strike, he should immediately notify them that to engage in an illegal strike will constitute improper conduct for which they will be disciplined and direct them to continue working. At the same time the contractor should explain to the Steward that he has an obligation under the Principal Agreement to ensure that the employees do not engage in an illegal strike and that the contractor expects the Steward to do what is reasonable and necessary to ensure that the employees do not engage in an illegal strike.

2) The contractor should then immediately notify the IBEW and its business agent at the Local Union office, preferably by fax or telegram, that its employees are threatening to engage in an illegal strike and indicate that the contractor expects the Union and the Business Agent to do what is reasonable and necessary to ensure that the employees do not engage in an illegal strike.

3) In all likelihood these two steps should be sufficient to avoid an illegal strike since if the employees proceed at this stage with an illegal walkout the union runs the risk of exposing itself to damages under the Principal Agreement and the employees run the risk of being disciplined. If despite these steps a walkout occurs, or if a walkout occurs before the contractor has had an opportunity to put the employees and the union on notice, then the contractor must proceed on the basis that the opportunity to prevent the illegal walkout from occurring in the first instance has been lost.

4) Where a walkout occurs the union should be notified immediately, preferably by fax or telegram, and they should be directed to do what is reasonable and necessary to persuade the employees to return to work and direct them to resolve their disputes through the grievance and arbitration procedure. If the employees are still at the job site they should be told that they are engaging in illegal conduct and ordered back to work. Do not get frustrated and send them home. It should be explained to them that a failure to return to work immediately will result in disciplinary notices being issued. At this stage the steward, if he is still at the work site, should be told that he has an obligation to return to work himself as well as an obligation to use his best efforts to get the employees to return to work. It should be pointed out to the steward that a failure to meet those obligations will result in the contractor disciplining him up to and including discharge.

5) In the meantime the contractor should be contacting the ECAO and their legal counsel. There are three legal

avenues open to the contractor. The first is an application to the Labour Relations Board for a cease and desist order. The second is to exercise its management's right to impose discipline. The third is to exercise its right as a contractor to file a grievance under the Principal Agreement against the IBEW for damages. The decision as to which legal avenues to pursue will depend on the particular facts in each case and will require a judgement call by the contractor, which is best made in consultation with legal counsel.

6) Throughout this period the contractor needs to be gathering facts about the underlying cause for the illegal walkout, the names and addresses of the ringleaders, as well as the names and addresses of all those employees who have walked off the job. Depending on the underlying cause for the walkout, it may be possible to get the employees back to work and resolve the dispute through the Local Union's business agent, once he arrives. For this reason the contractor should be practical and, if possible, try to deal with the underlying cause of the illegal walkout without compromising his legitimate interests. However, the contractor should not forget that he is legally entitled to have the employees return to work without conceding or altering his position with respect to any issue that may have caused the dispute, and therefore the contractor must balance resolving the dispute expeditiously, against enforcing his strict legal rights to have the employees return to work in order to discourage future similar misconduct by the employees.

7) While trying to resolve the dispute on a practical basis at the job site the contractor should at the same time be pro-

viding its legal counsel with the names and addresses of the ringleaders and those employees who have walked off the job so that the Ontario Labour Relations Board can be notified that an expedited hearing is required and a cease and desist application prepared. Frequently a contractor fails to take these procedural steps because it looks like the walkout will only last for a short duration, particularly if it occurs on a Friday afternoon. However, a common pattern is for a series of short illegal walkouts to occur, particularly if the underlying cause is not dealt with. It is therefore preferable to proceed as quickly as possible with an expedited application to the Labour Relations Board before the employees return to work. Once the employees have returned to work there is little point in proceeding with the application, until a pattern has developed. However, if the Board has been notified and an application has been filed, then the matter can be adjourned, in the event that the walkout recurs. This has the advantage of increasing the pressure on the IBEW, the Steward, and the employees to live up to their obligations under the Principal Agreement and ensure that the illegal walkout does not recur.

8) If the contractor and the IBEW's business agent are unable to persuade the employees to return to work, then it will be necessary to proceed with the cease and desist application before the Ontario Labour Relations Board. The Board will normally appoint a Labour Relations Officer who will meet with the parties and try to resolve the dispute before it proceeds to a hearing. If the Labour Relations Officer is unable to resolve the dispute and get the employees to return to work, then the hearing before the Board will

proceed, generally within one day of the filing of the application with the Board.

9) Finally, at some stage the contractor will have to decide what if any discipline should be imposed and whether or not a grievance against the IBEW should be filed, pursued or withdrawn. Any grievance would have to be filed within five working days of the walkout. The contractor's decisions in these matters will depend on all the circumstances of the dispute. As a general rule a written warning to the employees who engaged in the illegal walkout is not only justified but has the salutary effect of reducing the employees' inclination to engage in an illegal strike with that contractor in the future. Depending on all the circumstances of the dispute, it even may be appropriate to discharge the ringleaders. This is particularly appropriate if the ringleader was the Steward who was abusing his responsibilities under the Principal Agreement.

STRIKES ARISING OUT OF JURISDICTIONAL DISPUTES

In the construction industry jurisdictional disputes frequently trigger illegal strikes and in these circumstances it can be particularly difficult for an electrical contractor to resolve the dispute with the IBEW alone because there will generally be other parties involved over whom the electrical contractor and the IBEW have no control. The parties to

the Principal Agreement have recognized this problem and have specifically dealt with jurisdictional disputes in the Principal Agreement.

§509 JURISDICTIONAL DISPUTES (STIPULATED)

When a work claim dispute arises between the Union which is a party to this agreement and any other Union, person or organization which cannot be settled to the satisfaction of all parties concerned, such a dispute shall not be the subject of a grievance under this agreement, or the OLRA, but shall, without any stoppage of work or interference with the progress of the job, be processed in accordance with the Plan for Settlement of Jurisdictional Disputes in the Construction Industry or to any similarly structured board, which may be established if the said plan is not available to the parties.

In the meantime, work will continue as assigned by the employer until otherwise changed by decision of the Joint Board or the Ontario Labour Relations Board.

(emphasis added)

When a jurisdictional dispute arises that triggers an illegal walkout, despite the parties' agreement that jurisdictional disputes are not to result in a stoppage of work or interfere with the progress of the job, the most effective course of action, from the electrical contractors perspective, is to file

an application under §135 of the *Labour Relations Act* seeking a cease and desist order with the Labour Relations Board. The fact that the employees have walked off the job because of a work assignment does not mean that the employees have not engaged in a illegal strike.

Health & Safety

THE IMPORTANCE of occupational health and safety cannot be emphasized too much. In Ontario the *Occupational Health and Safety Act* applies to all employers and therefore to all electrical contractors. In addition Section 14 of the Principal Agreement confirms the obligation of the contractor and every employee to fully comply with the *Occupational Health and Safety Act* and the procedures outlined by the ECAO/IBEW/CSAO Safety Manual, as well as individual company safety manuals or owner/client safety policies. For an overview of the obligations of the constructor, employer, supervisor and employee, as well as the rights and duties of the joint health and safety committee and the health and safety representative, reference should be made to both the legislation and the full text of the ECAO manual, *Managing Under the Electrical Contractors Collective Agreement*. Because of the need to handle safety work refusals properly at the job site, this site summary will

focus on the correct procedure to be followed when confronted with a safety work refusal. However, the importance of each individual's responsibility for safety must be stressed.

OFFENCES & PENALTIES: Individuals, including workers and foremen, who fail to meet their obligations under the *Occupational Health and Safety Act* are subject to a fine of not more than \$25,000 or to imprisonment for a term of not more than twelve months or both. Corporations, on the other hand, who fail to meet their obligations under the *Occupational Health and Safety Act*, are now subject to a fine of not more than \$500,000. There can be little doubt that the increase of the maximum fine for corporations from \$25,000 to \$500,000 will not only result in stiffer penalties for corporations, but will also result in stiffer penalties for individuals, including workers and foremen, who are charged and convicted under the *Occupational Health and Safety Act*.

THE RIGHT TO REFUSE OR TO STOP WORK WHERE HEALTH AND SAFETY IN DANGER

The main exception to the work now grieve later principal is the right of workers to refuse to work for safety reasons under Part V of the *Occupational Health & Safety Act*. Under section 23 each individual worker has the right to refuse work when the work he is asked to perform is likely to endanger himself or another worker. Under the new provi-

sions of Bill 208, two certified members of a joint health and safety committee will have the additional right, in dangerous circumstances, to stop work or, if they are unable to agree, one may call in an inspector. Although the individual worker always has the right to refuse to do his work when it is likely to endanger himself or another worker, only a certified member of a joint health and safety committee has the right to stop other workers from working, in dangerous circumstances. Unless the construction project has more than fifty workers regularly employed and is expected to last more than three months, then the employer contractor need only be concerned about the individual worker's right to refuse work for individual safety reasons because there will be no designated certified committee member on site.

REPRISALS BY EMPLOYER PROHIBITED: Before discussing the procedures available to workers to refuse to work or to certified members of a joint health and safety committee to stop work because of health and safety concerns, it is important to emphasize that the exercise of these rights by workers is protected. For this reason no employer shall discipline or penalize or threaten to discipline or penalize a worker or intimidate or coerce a worker because the worker has acted in compliance with the Act or the regulations or has sought the enforcement of the Act or the regulations.

AN INDIVIDUAL WORKER'S RIGHT TO REFUSE WORK: An individual worker, except in certain limited circumstances that do not apply in the construction

industry, has the right to refuse to work where he has reason to believe that to do the work is likely to endanger himself or another worker. Once a worker exercises this right to refuse to work for safety reasons under section 23(4), even if the worker is unaware of his rights and does not claim the protection of the Act, the employer and the supervisor should carefully follow the legislated procedure or risk contravening the Act.

PHASE I – REASON TO BELIEVE: The right to refuse work for safety reasons is a two phase process. In the first phase the individual worker has the right to refuse work where he has reason to believe that to do the work is likely to endanger himself or another worker. This is a subjective test which is tied to the worker's individual belief, not to any objective standard of what is reasonable in the circumstances. Upon forming this belief the worker is required to report the circumstances of his refusal to the employer or his supervisor. Since the trigger for this procedure is the worker's subjective belief, the employer or supervisor should comply with the legislated procedure and forthwith investigate the worker's concerns, in the presence of a committee member; a health and safety representative; or another worker who because of his knowledge, experience and training has been selected by the IBEW to represent the workers with respect to health and safety matters. In the process of conducting this investigation the supervisor should carefully question the worker about the nature of his concern. This is important not only from the perspective of conducting a proper investigation of a legitimate concern but also from the perspective of discouraging

workers from raising frivolous concerns. If more than one worker is raising a concern at the same time, each worker should be questioned about the nature of his individual concern. Once the supervisor has determined the nature of the concern raised by the worker it should be investigated forthwith. The extent of this investigation should be sufficient to adequately deal with the worker's complaint in the circumstances keeping in mind both the employer's and the supervisor's duty to take every precaution reasonable in the circumstances for the protection of the worker. Until the investigation is completed, the worker is required to remain in a safe place near his work station. Where as a result of the investigation the employer or supervisor determines that steps need to be taken to satisfy the workers legitimate concerns, then those steps should be taken. Where as a result of the investigation the employer or supervisor determines that, contrary to the worker's subjective belief, performing the work as directed is not likely to endanger the worker or another worker, then the employer or supervisor is entitled to direct the worker to proceed to perform the work that has been assigned. If the worker is still not prepared to do the work then the work refusal has entered phase two.

PHASE II – REASONABLE GROUNDS TO BELIEVE: Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work, the worker has reasonable grounds to believe that to do the work is likely to endanger himself or another worker, then the worker has the right under subsection 23(6) to refuse to do the work for a second time. At

this stage both the employer and the worker have the right to notify an inspector of the Ministry of Labour. Therefore, in order to resolve the dispute expeditiously, the employer should immediately phone the inspector.

In the second phase the individual worker has the right to refuse work where he has reasonable grounds to believe that to do the work is likely to endanger himself or another worker. This is an objective test which means that it is no longer tied to the worker's subjective belief, but to an objective standard of what is reasonable in the circumstances. This is a higher standard and the employer or supervisor should carefully question the worker at this stage to determine the basis for his concerns and explain to him that at this stage he must have reasonable grounds for his concerns. However, even if the employer or supervisor at this stage believes that the worker's concerns are not based on reasonable grounds they should comply with the legislated procedure and call the inspector immediately. When the inspector arrives, it is then up to the inspector to investigate in the presence of the employer, the worker and a committee member; a health and safety representative; or another worker who because of his knowledge, experience and training has been selected by the IBEW to represent the workers with respect to health and safety matters, and determine whether or not the work to be performed by the worker is likely to endanger the worker or another person. Once the inspector has completed his investigation and made his decision he is required to give his decision in writing, as soon as practicable, to the employer, the worker, and the person representing the workers with respect to health and safety matters.

The inspector's power to make decisions, whether under section 23 or otherwise, is governed by section 29 of the *Occupational Health and Safety Act* which provides that where an inspector finds that a provision of the Act or the regulations is being contravened he may order, orally or in writing, the contravener to comply with the provisions and may require the order to be carried out forthwith or within such time as the inspector specifies. Where the inspector makes an order and finds that the contravention is a danger or a hazard to the health and safety of a worker, he may issue a stop work order. While the inspector's views on safety matters should be treated with respect, and any orders or requirements complied with, the employer or supervisor should not hesitate to explain their views to the inspector and try to persuade the inspector that performance of the work is not in breach of the Act or the regulations or, if it is, that the contravention can be remedied without endangering the worker or another person. If the inspector makes orders or imposes requirements that the employer or supervisor does not agree with, there is an avenue of appeal, under section 32, which should be utilized. Anyone aggrieved by an order of an inspector may appeal to the adjudicator, within fourteen days of the making of the order. The appeal may be made in writing or orally or by telephone, although the adjudicator may require the grounds for the appeal to be specified in writing before the appeal is heard. Where an order is appealed, the adjudicator may suspend the operation of the order appealed from pending the disposition of the appeal.

If the inspector confirms the employer's assessment that the performance of the work by the worker is not likely to

endanger the worker or another worker, then the worker should be ordered to return to work.

DISCIPLINE IN THE HEALTH & SAFETY ARENA: At this stage it is appropriate to discuss the concept of discipline in the health and safety arena. As has already been indicated the *Occupational Health and Safety Act* prohibits an employer from, among other things, disciplining, suspending or dismissing a worker because he has acted in compliance with the legislation or has sought the enforcement of the legislation. This does not mean that the employer has no power to manage a health and safety dispute or to discipline a worker in appropriate circumstances. Obviously, if a worker raises a health and safety complaint and it is found to be valid by either the employer or an inspector, then there are no grounds for discipline. On the other hand, if the worker is abusing the system and raising health and safety complaints for frivolous or ulterior reasons then the employer is entitled to discipline the worker. The problem from the employer's perspective is obtaining sufficient satisfactory evidence to support a decision to discipline a worker. This problem is exacerbated by the fact that whether the worker grieves under the Principal Agreement or files a complaint with the Ontario Labour Relations Board, the onus will be on the employer to satisfy the tribunal that it was entitled to discipline the worker. For this reason, in all but the most outrageous circumstances, it makes practical sense to wait until the inspector has rendered his decision before imposing any discipline.

Although there may be unusual circumstances where the evidence may be so blatant that the work refusal is

frivolous that it may be appropriate to disregard the legislated procedure and discipline the worker at either the first or second refusal, prudence suggests that the employer should follow the legislated procedure and assess whether or not discipline should be imposed after the inspector has made his decision. This is one of the reasons why it is important to question the worker about the reasons for his refusal to perform the work at both stages of the procedure. Where required, the advantage of having the inspector conduct an investigation is that it will provide the employer with a more complete evidentiary picture. If the inspector agrees with the worker and the employer accepts that decision without appeal, then no discipline should be imposed. On the other hand if the inspector agrees with the employer the worker should be ordered to return to work. If the worker continues to refuse to work at this stage, after the inspector has rendered his decision, then the employer can assess the situation and, in appropriate circumstances, discipline the worker.

Even if the worker returns to work after the inspector's decision has been made, the employer should still assess all the evidence, and in particular the reasons given by the worker for both refusals to work, to determine whether or not the worker acted improperly at any stage of the process and decide whether or not the worker should be disciplined. If the evidence establishes that the worker acted frivolously or in bad faith then he should be warned not to do so in the future. However, in making that judgement it is in the employer's best interests to keep in mind that the purpose of the worker's right to refuse work is to encourage the worker to work safely and any discipline should make it

clear that legitimate work refusals will not be disciplined. Since disciplining a worker in the health and safety arena carries with it the risk that the contractor's decision will be challenged, it is recommended that contractors seek outside advice, either from the ECAO or from their legal counsel, before actually imposing any discipline.

MASS WORK REFUSALS: Occasionally, a group of workers will refuse to work alleging that it is for safety reasons and when this happens the question arises whether or not the workers are engaging in a legitimate work refusal or an illegal strike. It is possible to have a mass work refusal for safety reasons that is legitimate and therefore the contractor should respond to it in the same manner as he would to an individual work refusal, keeping in mind that each worker must form his own subjective belief as to the existence of a hazard that is likely to endanger himself or another worker. The fact that one worker is entitled to refuse to work for safety reasons does not entitle his fellow workers to refuse to work to support his concern. Each individual worker who refuses to work must have a legitimate reason to do so and if, after the inspector has investigated, the evidence establishes that not all of the workers had a legitimate basis for their refusal, then those that did not should be disciplined.

PENDING THE INSPECTOR'S INVESTIGATION: During the first phase of the work refusal, when the employer is conducting its investigation, the worker is to remain at a safe place near his work station. However, once the work refusal enters the second phase and the in-

spector has been contacted, the employer is entitled, subject to the Principal Agreement, to assign the worker reasonable alternative work, or if no such work is available, to give other directions to the worker, such as sending the worker home, provided those directions do not constitute a reprisal. If the contractor has other work for the worker to perform, whether on that project or elsewhere, then, subject to any special provisions in a Local Appendix, there is nothing in the Principal Agreement that would restrict the contractor's right to assign that work to him pending the inspector's arrival. On the other hand, if there is no other work available, the contractor will want to assess how best to handle the situation so as not to incur additional costs under the Principal Agreement. This will depend, in part, on the inspector's anticipated arrival time. If the inspector is expected to arrive within the hour there is little point in sending the worker home since, depending on the circumstances, this could trigger a payment under the reporting time provisions of clause 804. However, where an assignment of reasonable alternative work is not practicable, the contractor is not restricted to sending the worker home, since he is entitled to give any other directions to the worker that are not contrary to the Principal Agreement and do not constitute a reprisal under section 24 of the *Occupational Health and Safety Act*. Since, under subsection 23(7), the worker is expected to be present during the inspector's investigation, almost any other direction, short of sending the worker home, is preferable, unless a considerable delay is expected before the inspector arrives. A worker who refuses to obey those other directions, pending the investigation and decision of the inspector, should be disciplined unless the reason

for the refusal is because the worker has reason to believe that to comply with the directions is likely to endanger himself or another worker.

THE RIGHT TO REASSIGN THE WORK: Another issue that frequently arises is the employer's right to assign another worker to do the work the first worker has refused to perform for safety reasons. Pending the inspector's investigation and decision, the employer is entitled to assign the work to another worker who is willing to perform it, provided the second worker is advised of the first worker's refusal and the reason for that refusal. Under Bill 208 that explanation will have to be given in the presence of a committee person, preferably a certified committee person; a health and safety representative; or another worker who because of his knowledge, experience and training has been selected by the IBEW to represent the workers with respect to health and safety matters.

A CERTIFIED MEMBER'S RIGHT TO STOP WORK: The individual worker has never had the right to issue a stop work order to another worker for health and safety reasons. On construction projects, which regularly employ more than fifty workers and are expected to last more than three months, Bill 208 will provide two certified members of the joint health and safety committee with the additional right, in dangerous circumstances, to jointly stop work, or, if they are unable to agree, one may call in an inspector. Since a particular electrical contractor may not have any certified members on the constructor's joint health and safety committee, the two certified members jointly

issuing the stop work direction may not even be his employees. Although it may be some time before certified members are fully trained under Bill 208, it is appropriate to outline how the stop work provisions will apply.

DANGEROUS CIRCUMSTANCES: In the first place the rights of the certified member only arise in dangerous circumstances which is defined as a situation in which a provision of the legislation is being contravened, the contravention poses a danger or a hazard to a worker and the danger or hazard is such that any delay in controlling it may seriously endanger a worker. It is important to recognize that there are three criteria that must be met before dangerous circumstances exist.

THE JOINT STOP WORK DIRECTION PROCEDURE: Where a certified member has reason to believe that dangerous circumstances exist at a work place he may request that a supervisor investigate the matter. The supervisor shall investigate the matter promptly in the presence of the certified member. If after this investigation and any remedial action taken by the supervisor, the certified member still has reason to believe that dangerous circumstances exist, he may request that another certified member representing the other work place party investigate the matter. The second certified member shall promptly investigate the matter in the presence of the first certified member. If both certified members find that the dangerous circumstances exist, they may jointly issue a stop work direction and the constructor or employer shall immediately comply in a way that does not endanger a person. If the certified

members do not agree whether dangerous circumstances exist, either certified member may request that an inspector investigate the matter. After taking steps to remedy the dangerous circumstances, the constructor or employer may request the certified members or an inspector to cancel the direction and the certified members who issued the direction may jointly cancel it or an inspector may cancel it.

THE UNILATERAL STOP WORK DIRECTION PROCEDURE: A certified member at a work place or an inspector who has reason to believe that the usual joint stop work direction procedure will not be sufficient to protect the workers at the work place from serious risk to their health or safety may apply to the adjudicator for a declaration that the constructor or employer is subject to the unilateral stop work direction procedure for a specified period or a recommendation that an inspector be assigned to oversee the health and safety practices of the constructor or employer at the work place on a full-time basis for a specified period, or both.

Where the unilateral stop work direction procedure applies, one certified member may issue a stop work direction if the certified member finds that dangerous circumstances exist and the constructor or employer shall immediately comply in a way that does not endanger a person. Only after the stop work direction has been issued does the constructor or employer have the opportunity and the duty to investigate the matter in the presence of the certified member. If the certified member and the constructor or employer do not agree whether dangerous circumstances exist, either one may request that an inspector investigate the

matter and the inspector shall do so and provide them with a written decision. After taking steps to remedy the dangerous circumstances, the constructor or employer may request the certified member or an inspector to cancel the direction and the certified member who issued the direction may cancel it or an inspector may cancel it. Under this unilateral stop work direction procedure the certified member has the authority to stop work on his own direction before the constructor or employer has had an opportunity to investigate. On a construction project the employer contractor may have no control over which procedure is in place. In these circumstances the electrical contractor may have a stop work direction issued by a certified member who is not employed by the electrical contractor.

COMPLAINTS AGAINST A CERTIFIED MEMBER: Because of the significant opportunity for abuse inherent in the new stop work direction procedures, a constructor or employer or other interested person may file a complaint with the adjudicator if he has reasonable grounds to believe that a certified member at a work place recklessly or in bad faith exercised or failed to exercise a power to stop work. Any complaint must be filed not later than fourteen days after the event to which the complaint relates. The certified member who does exercise his power recklessly or in bad faith does run the risk of being decertified.

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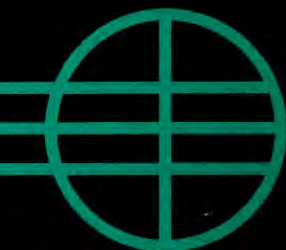
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