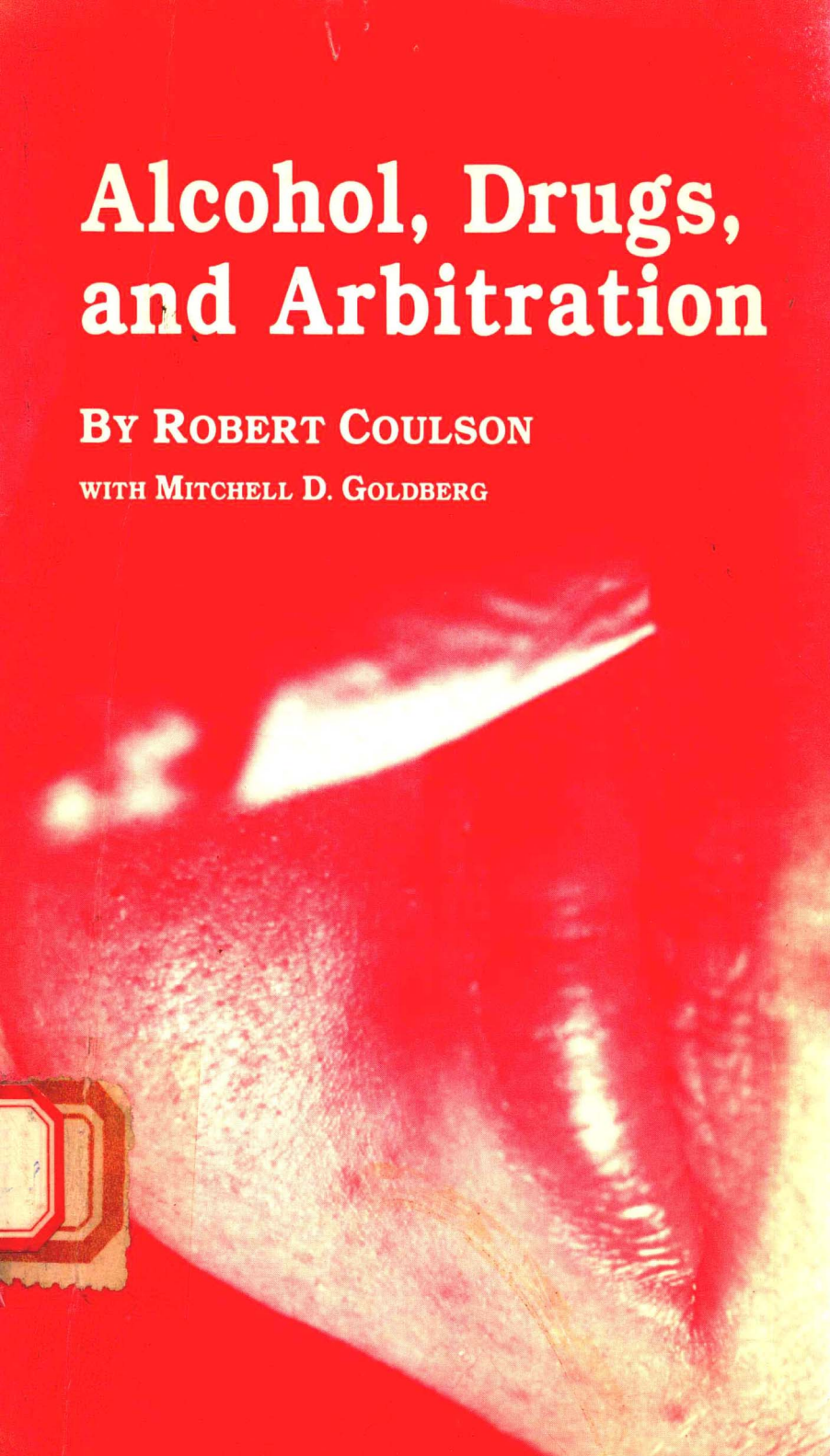
Alcohol, Drugs, and Arbitration

By Robert Coulson
with Mitchell D. Goldberg



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An Analysis of Fifty-Nine Arbitration Cases

By Robert Coulson
with Mitchell D. Goldberg

Published by the
AMERICAN ARBITRATION ASSOCIATION

ISBN 0-943001-20-X
Library of Congress Catalog Card Number:
87-71691

Second Printing, November 1988

Order from

American Arbitration Association
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Introduction

American workers consume an enormous amount of alcohol and drugs. It has been estimated that twenty million smoke marijuana, and millions more are heavy drinkers. The consumption of such substances saturates our society. On the job, it creates many kinds of problems for management, including increased absenteeism and reduced productivity.

This book looks at the drug and alcohol problem through the eyes of labor arbitrators. It is based on dozens of cases decided in recent years in which unions went to arbitration to protect the legal and contractual rights of their members.

In the United States, members of labor unions are protected by collective bargaining agreements that spell out the working conditions and other aspects of employment, establish a secure relationship between union and employer, and provide a procedure under which employee grievances can be resolved. Generally, the union has the right to complain whenever it believes that one of its members has been treated unjustly, in violation of the employee rights guaranteed by the contract. If the dispute is not resolved by discussion between the union and management, it can be submitted to an impartial arbitrator. An arbitration hearing is somewhat akin to an informal trial, with the employer attempting to justify its action and the union asserting the rights of its members. The format of the

arbitration is described in the arbitration clause of the contract, which often refers to the Voluntary Labor Arbitration Rules of the American Arbitration Association (printed at the end of this book). Usually, an arbitrator is mutually selected by the parties from among the more than three thousand professional labor experts who serve in that capacity. A main source of arbitrators is the national panel of the American Arbitration Association.

In the cases in this book, arbitrators wrestle with many kinds of problems created by substance abuse. When an employee comes to work drunk, what should management do? What kind of discipline is appropriate? Is an employer obliged to rehabilitate an alcoholic or drug addict? Should an employer have the right to terminate such a worker?

What about drug testing? How accurate is it? Should such testing be required prior to employment, used on a random basis, or imposed only when some drug-related problem has arisen? Must the union consent to such testing?

The trend today is to treat drug addiction and alcoholism as illnesses. Must arbitrators follow the same line? How concerned should they be about the business needs of employers? Should an arbitrator consider the testimony of coworkers who might not want an alcoholic or drug user returned to work? What is the relationship between substance abuse and job performance?

Drugs are hardly a novelty. Their widespread use in the United States reflects in part our unique willingness to respond to the market. In answer to consumer demand for drugs, modern production techniques, combined with diabolical marketing and distribution systems, have converted drug dissemination into an extremely profitable business.

Are we doing enough to counteract the drug industry? Eighty-five percent of the $1.7 billion anti-drug

budget for 1986 was spent on law enforcement. Only fifteen percent went into research, education, and treatment. Enforcement seems to have been ineffectual. Drugs of all kinds can be purchased in the street, even such obvious killers as heroin and "crack." It is no wonder that labor arbitrators are encountering drug cases with increasing frequency.

In this book, alcohol is treated as simply one more drug. True, drinking is not illegal, except for minors. Many American workers indulge in recreational drinking. Employers themselves provide alcohol to their employees at parties and other special occasions in the belief that it encourages socialization. But like other drugs, alcohol can be abused.

The cases in this book focus on the abuse. No attempt has been made to clarify the ethical distinctions between the various substances used by American workers. Crack. Grass. Booze. No matter!

Of the arbitration awards described here, forty-three were from private industry and sixteen from the public sector. They arose in various parts of the United States. Twenty-four were won by management, eighteen by unions. Twelve were something of a compromise in that while discharge was not upheld, the grievants were given a substantial penalty. Three of the cases are difficult to categorize because the grievants were put back to work, but only after successfully completing rehabilitation programs. In two cases, the arbitrators were asked to advise the parties about whether new drug policies could be instituted.

Management won most of the cases involving undercover investigators and cases where a termination was based on drug testing. Otherwise, the decisions fell almost equally on each side. Arbitrators seem to "call them as they see them." Every case is different. Neither side would be in arbitration unless it thought that it had some chance of winning.

In almost every case, the arbitrator's award is accepted by both parties as a final determination of the issues involved. In their collective bargaining contract, they have agreed to abide by that decision. The Supreme Court of the United States, in *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960), told courts to defer to the awards of labor arbitrators, provided they "draw their essence from the collective bargaining agreement." Courts have generally followed that ruling, although there is a compelling itch among some judges to second-guess arbitrators.

Such a case is *S.D. Warren Company v. United Paperworkers International Union, AFL-CIO, Local 1069*, 815 F.2d 178 (1st Cir. 1987), *vacated and remanded*, 108 S. Ct. 497 (1988). This case, referred to as *Warren I*, has been up to the Supreme Court once, and may be again. In the arbitration, Dr. Suzanne Butler Gwiazda, a Boston arbitrator, had agreed that three women working in a paper mill had violated plant rules by selling small amounts of marijuana to an undercover agent. They had been discharged. She reduced their discharges to suspensions.

The arbitrator noted that the company safety policy handbook said that violations of certain rules, including the marijuana rule, "*may* mean immediate discharge." She analyzed the company's past practice. The vast majority of such infractions had been penalized by something less than immediate discharge. Specifically, of the forty-one violations of the rules in the record, only two had resulted in immediate discharge. Both involved incarceration for serious crimes: manslaughter and incest.

After considering the facts of each case, the arbitrator reduced the employees' penalties to suspensions ranging from four to seven months. The grievants were to receive full back pay, seniority, and benefits, minus

interim earnings and pay for the period of their suspensions. The arbitrator concluded that the discharges should be "overturned on the grounds that they were excessively harsh in light of past disciplinary practice for similarly serious Mill Rule 7 violations. Heavy suspensions are imposed, however, to impress upon the grievants the seriousness of their misconduct." Her award was issued on September 19, 1985.

The matter went before a magistrate in the U.S. district court in Maine, who recommended that the award be vacated on the grounds that the arbitrator had exceeded her authority. The district judge did not accept the magistrate's recommendation and confirmed the award.

This decision, in turn, was reversed by a three-judge panel of the court of appeals for the First Circuit, which concluded that the arbitrator's decision did not draw its essence from the agreement and that it violated public policy.

Judge Pieras, in the First Circuit decision, emphasized the national policy against the use of drugs in the workplace: "The nation has focused on the corrosive consequences of drug sale and use and has devoted itself to their eradication. In particular, the workshop is a place where such usage is abominable not only because of the health hazard it creates, but also because it creates an unsafe atmosphere and is deteriorative of production, the quality of the products, and competition." He pointed out that it was dangerous to use drugs in a paper mill, expressing concern about possible injuries to employees.

On the issue of contract interpretation, Judge Pieras was particularly critical of the arbitrator's opinion: "The linguistic legerdemain that this arbitrator performed was an attempt to garner more authority to herself than the parties agreed to give her. As such, she exceeded her authority."