CHAPTER III

REMEDIES IN LABOR ARBITRATION

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We have come a long distance in labor relations from the days when courts rejected the notion that a labor-management agreement constituted a contract which was enforceable at law. The dominant judicial view was that there was no real resemblance, at least in a legal sense, between collective bargaining agreements and conventional contracts. Hence, the former were at best to be regarded as memoranda of understanding whose usefulness and life were entirely governed by the desires of the parties to observe them. Even after the courts began generally to enforce collective bargaining agreements, they still took occasion to point out that there were substantial differences between these agreements and contracts. Thus, Mr. Justice Jackson said:

> Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. Indeed, in some European countries, contrary to

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American practice, the terms of a collectively negotiated trade agreement are submitted to a government department and if approved become a government regulation ruling employment in the unit.[1]

So, too, the Court of Appeals for the Third Circuit, recognizing the "functional difference between a collective bargaining contract and a contract to buy and sell a horse," remarks that considered as a whole, the collective bargaining agreement "is *sui generis* and simply will not fit into any of the traditional legal pigeonholes." [2]

Even those who are not much concerned with the more or less subtle *legal* distinctions between collective bargaining agreements and ordinary contracts for purchase and sale are nevertheless quick to point out the *practical* distinctions. They note that, unlike the typical vendor-purchaser relationship, the relationship between employer and union is and remains a continuing one, that the tie between them is an enduring one (whether or not they like each other) which can resist even the most powerful solvents. They note, too, that employer and union (management and men) are much more dependent upon each other's cooperation freely extended than parties to a contract generally. And they are aware that conditions in the modern industrial establishment are constantly undergoing change, and that the state of flux makes it virtually impossible to accommodate in a collective bargaining agreement the modifications in production methods and operating conditions required by a dynamic technology.

Despite both the legal and practical distinctions between collective bargaining and other agreements, however, there is an increasing, perhaps irresistible, tendency to treat them as though they were one and the same. While paying full lip service to the differences, we have come more and more to view collective bargaining agreements like other contracts. This is especially true, I think, of arbitration.

The extent of this tendency is readily observable in a comparison between labor arbitration of *circa* 1930 and the situation today. The agreements of the earlier period were skeletal documents, con-

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[1] J. I. Case Co. v. National Labor Relations Board, 321 U.S. 332 (1944).

[2] Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation (3d Cir. 1954) 210 F.2d 623. The opinion by Staley, C. J., contains a discussion of the various theories of the nature of the collective bargaining agreement and a formulation of the "electric theory" preferred by the Third Circuit. As to the latter, see the opinion by Mr. Justice Frankfurter in Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U.S. 437 (1955).

stituting little more than memoranda of understandings relating to certain conditions of employment. Their language was loose (the work of unskilled draftsmen), the meaning frequently obscure and beset by internal contradictions, their legal status dubious except in a very few jurisdictions. There was little arbitration, and most of what there was was concerned not with the settlement of grievances under a collective bargaining agreement, but with the writing of the terms and conditions of employment. There were no arbitrators in the sense of persons who devoted themselves entirely, or for a major portion of their time, to the task of adjudication. Characteristically, the parties to a dispute were content to select or accept some prominent person in the community—a judge, a clergyman, or a professor, perhaps—and commit their rights and interests to his tender mercies. Before such non-professional arbitrators came, as a rule, non-professional litigants and advocates—workers, business agents, foremen, operating officials. These were much more concerned with getting a "practical" solution to a practical problem than with an answer to broad questions of principles, rights, and obligations. The emphasis on the immediate and the practical was so pronounced that sometimes there would be incorporated in collective bargaining agreements a provision forbidding the citing of arbitration awards as precedents. Sometimes, too, the parties would agree to exclude lawyers from arbitration proceedings, more, I suspect, because they were fearful of becoming involved in broader issues than the question confronting them, than for any other reason.

Those who functioned as arbitrators were more concerned with getting an "equitable" or "fair" answer to the question before them than with reaching a "legally correct" conclusion. The arbitrator was less the judge between the parties than the friend of both of them, partaking largely of the function of a mediator. Perhaps as a consequence, arbitration awards tended to compromise conflicting positions, and it was commonly remarked that arbitrators were compromisers rather than judges. At any rate, in the industrial relations environment of that period, there was really almost no occasion to consider what powers the arbitrator should have and how he should exercise them. "Remedies" were not a problem, any more than submissions or questions of procedure.

In sharp contrast to this situation stands our present system of industrial relations and arbitration: tens of thousands of collective bargaining agreements, detailed and inclusive as compared to the skeletons of an earlier day, increasingly drafted by professionals who

know what they wish to say and how to say it, covering subjects not even contemplated in 1930, and providing for elaborate methods of handling grievances with arbitration as the terminal step. Procedures for the selection of arbitrators, definitions of their power and authority, and provisions for their compensation are testimony to the enormous growth in the use of labor arbitration as well, of course, to the enormous expansion in collective bargaining itself. There has emerged the professional arbitrator who devotes all or most of his time to the settlement of labor disputes and who approaches his work from the standpoint of the professional craftsman rather than from that of the "amateur man-of-good-will" of an earlier day. There has emerged, too, the professional labor lawyer or labor relations consultant who spends a large part of his time in preparing and presenting arbitration cases. Awards of arbitrators are being published and cited as precedents; law reviews are giving increasing space to analysis of cases and problems in arbitration. Colleges and universities are offering courses in the subject; a whole host of associations and agencies provide forums and practice sessions on arbitration. Arbitration has thus become a way of life on the American scene.

Space does not permit a discussion of the reasons for this revolutionary change. It is sufficient for our purposes to take note of the change which has been so great as to have produced a difference in kind, rather than merely in degree. As a part of it, there is emerging a system of industrial jurisprudence whose major outlines are not yet readily discernible but which is clearly becoming more important daily in the settlement of industrial disputes. Along with the substantive matters which obviously are of paramount importance, there are also procedural issues in the system: the submission, the burden of proof, rules of evidence, if any, and remedies, among others.

This paper deals with arbitral remedies. The very fact that in 1960 it appears appropriate to hold a discussion on the nature and uses of remedies in arbitration is itself eloquent commentary on the growth in status of arbitration, as a system of industrial jurisprudence. If arbitration is to continue to grow in usefulness, it must reinforce its ties to the industrial relations environment of which it is an essential part. Its substantive and procedural rules must not—indeed, they cannot—develop in a vacuum. On the contrary, the ultimate test of the viability of any rule or policy is its consistency with the facts of our economic life.

I.

Remedies in arbitration may be considered from at least two points of view: authority and policy. That is, we may analyze the authority of the arbitrator to award relief in the light of the collective bargaining agreement and, to the extent applicable, the law of the jurisdiction. We may also inquire into questions of policy, of the factors which are, or should be, kept in mind in determining what and how much relief should be provided in a specified fact situation. In both cases, the environmental setting is important; on the one hand, it sets the metes and bounds within which the arbitrator may operate; on the other, it helps fix the guidelines for the exercise of a sound discretion.

The principal environmental fact is in the institution of collective bargaining, and remedies in arbitration can be no more useful than the collective bargaining system of which they are a part. The *sine qua non* for the successful functioning of collective bargaining is mutual good faith between employer and union and a willingness to live under, and abide by, their collective agreement. The relationship between employer and union is a continuing one, not a one-shot affair, and their collective agreement cannot be effectively operative unless the parties have a basic desire to live together. Living together means mutual accommodation; it means cooperative problem solving. Problems arise not only at the time an agreement is negotiated but throughout the life of the agreement. Grievance procedures are a device for solving problems, and even the best procedures are ineffective in the absence of a willingness of the parties to use them in good faith. Like collective bargaining, arbitration needs, as an indispensable requisite, good faith to make it work. Without this, arbitration becomes a frustrating "rat race" with the parties living in the atmosphere of a police court. Litigation is the order of the day, but nothing ever gets really settled. Instead of resolving disputes, the arbitration process becomes just another weapon in a cold war.

This is another way of saying that there is little room for the proper functioning of a system of remedies in a situation where the parties are basically unwilling to live with each other. I know of no collective bargaining agreement which can withstand the determination of either the employer or the union to destroy it. It is a simple enough matter for a union to pile up a mountain of grievances under a policy of harassment. It is no more difficult for a moderately resourceful employer to administer the collective bar-

gaining agreement with the same motive. Under such circumstances, forcing cases to arbitration is but an offensive tactic; where the cases do not involve discipline or money which may be effectively reached by an award, there is little use for remedies as indeed there is for arbitration itself.

The parties must not only be willing to live together, they must also be willing to bargain collectively: that is, to make earnest efforts to resolve difficulties and disputes by themselves rather than by passing them on to an arbitrator. Sometimes, the question whether arbitration is a substitute for litigation or for the strike seems less relevant than the question whether it is a substitute for collective bargaining. For the behavior of the parties sometimes gives rise to the suspicion that they have abdicated their responsibilities to resolve their difficulties by negotiation and have deposited them in the lap of the arbitrator in the expectation that he will provide the answer towards which they were either unwilling or unable to strive. It is only after the parties have tried, and failed, to settle the difference that arbitration and its remedies can be fruitful.

Since I do not believe that arbitration, though its virtues are great, should be substituted for collective bargaining, I am inclined to favor devices which may stimulate the bargaining. Thus, I raise the question whether the parties might not profitably consider in certain types of cases limiting the authority of the arbitrator to determining whether or not the agreement was violated, with the parties themselves subsequently fixing the remedy. Of course, I do not challenge the right of the parties to obtain in an award not only a determination that the agreement has or has not been violated but also specific remedies in cases of violation. Nor do I challenge their right to circumscribe the freedom of the arbitrator to fashion a remedy. There are certainly many cases in which the remedy is at the very heart of the dispute. The parties may have agreed in grievance meetings that a worker was improperly discharged but have parted company on the issue of reinstatement with back pay. Or, they may have agreed that the employer violated the agreement in respect to the equalization of overtime but cannot agree upon what is to be done about it. In such instances, it would be futile for the arbitration award to be silent on the matter of remedies. On the other hand, there are many types of cases (especially those of a technical nature, such as work assignments) in which the parties are better able to fashion remedies than the arbitrator, remedies which come closer to the parties' conceptions of justice. Here, assuming the parties are willing to take on the responsibility, what they

need from the arbitrator is an interpretation of the relevant portion of the agreement. With this in hand, they may proceed to their own solution, possibly reserving the right to go back to the arbitrator in the event they fail to resolve their problems. Such post-arbitral grievance procedures may make a significant contribution to collective bargaining and enhance the usefulness of arbitration.

II.

It scarcely needs to be said that the arbitrator's powers in respect to remedies derive from the agreement between the parties—the collective bargaining agreement itself as well as the submission to arbitration. For the most part, collective bargaining agreements are silent on the matter of remedies and the typical submission agreement does not go further than to include the question, "What shall the remedy be?" In view of the potentially great impact of awards and the limited judicial review available to a discontented party, the extent to which remedies have been ignored in collective agreements is rather surprising. Now and then, one finds a provision such as "An employee found to have been discharged without just cause shall be reinstated with full back pay." Provisions of this sort seem to me irksome and often inequitable. The necessity of giving full, and often large amounts of, back pay in reinstating an employee who was not free from fault has to be weighed against sustaining a discharge which was, in the circumstances, excessive punishment. Still, if the parties have agreed on such a circumscription of the arbitrator's authority, he has no right to depart therefrom.

A number of arbitrators have suggested that the submission agreement is especially well adapted to the definition of the arbitrator's authority on remedies. Some arbitrators apparently make it a practice to have the parties include in the submission their respective views on the remedies; prior to the hearing, when the outcome on the substantive issues is as yet undetermined, the parties may be better disposed to moderation on the remedies than after the award. At any rate, if the submission contains the claims as to remedies, there is less occasion for surprise after the award is handed down.

So far as *power* is concerned, it seems to me that the arbitrator should have the same powers as an equity court in fixing the remedies. We are definitely committed to the notion, in discharge cases, that an arbitrator should have the right to order reinstatement with or

without back pay. Apart from this, the arbitrator ought to be empowered to direct whatever is necessary, in his judgment, to right the situation.

III.

There is, of course, a great difference between the possession of power and the occasion for its exercise. The temptation is often great to embark upon innovations, especially where the conventional answer seems to do less than justice. Take the situation, for example, of a collective bargaining agreement which says that the employer shall discuss with the union candidates for promotion but that the employer's judgment shall be final. The employer has failed to discuss with the union but insists that it has considered the merits of the grievant and has decided against him. Beyond saying that the employer was wrong in failing to discuss with the union and giving the union an opportunity to make out a case for the grievant, what remedy is available in this situation? Shall the employer be directed to discuss this employee, even though the job has been filled by another? Shall we ignore this employee and direct the employer henceforth to discuss applicants with the union? If the latter, what do we do if the employer persists in his behavior? Shall we award the position to the first grievant? On what basis? Shall we award monetary damages? If so, what is to be the measure of the damage? Shall we award damages to the union? On occasion, one gets the feeling that the employer is deliberately ignoring his obligations under the collective bargaining agreement and the temptation is great to find some method of preventing him from "getting away with it." Yet, it seems to me that the arbitrator ought to eschew novel or unsuitable remedies, even in such situations. If, in his opinion, there has been a deliberate violation of the collective bargaining agreement, he should, of course, say so, but I do not believe that it is proper for him to go beyond this and fashion a remedy which would be inappropriate if the violation were not deliberate. I have said above that there are situations in which one party or the other is determined not to live under the collective bargaining agreement: the best answer to such cases it seems to me is to recognize this frankly and explicitly; rescission seems to me more appropriate than devising a remedy which does not really reach the source of the difficulty.

On a number of occasions, I have refused to direct an otherwise appropriate remedy where, in my view, the hands were not clean. Thus, a union grieving against a condition in one establishment

which it had tolerated with equanimity in other establishments, where the grievance seemed to have been grounded in extra-curricular dislike of the employer! Or, a situation in which personal relations between an employer and a union official, rather than objective and relevant considerations, seemed to be the moving cause in the presentation of specific grievances!

I see no justification for the award of punitive damages, not even in aggravated instances of violation of collective bargaining agreements. Nor do I see any basis for fines. The guideline, in my opinion, is that no monetary award should be made unless there has been monetary loss. It is often argued that the failure to assess monetarily encourages violation of agreements. Perhaps fear of money consequences may induce greater caution, but it has not been my experience that parties would raise hob with a collective agreement if they did not face the possibility of having to pay out money. Rather, it seems to me that what keeps the collective agreement effective is the parties' wish that it should be so; moreover, since the payment of money (as in reinstatement with back pay) is characteristically applied only against the employer, the question might be raised as to why the union observes the collective agreement. Certainly, there are numerous cases in which the demands of justice are entirely satisfied by an award which holds that an agreement has been violated in some specific respect, without going to the point of making a financial assessment where there has been no financial loss.

There has been some discussion recently of the propriety of injunctions by arbitrators against, for example, illegal walkouts. Apart from the hortatory effect of such action, I fail to see any real benefit to anyone in an injunction issued by an arbitrator. And, if it were disobeyed, as is quite likely in an emotion-charged situation, the result might well be to discredit arbitration and collective bargaining.

On balance, it seems to me that arbitrators ought to proceed with great caution in devising new remedies. We are still a long ways from universal acceptance of arbitration and novel remedies, like novel doctrines in substantive matters, may well stimulate suspicion and antagonism. Perhaps it would be wise to remember that arbitration was designed for the parties, not they for it, and that awards ought to reflect the expectations of the parties and their notions of propriety, rather than an abstractly-conceived notion of the best way of dealing with a problem.

IV.

Not enough attention has been paid to the special problems of the small employer. Our thinking in matters of labor relations and arbitration has focused principally on medium-sized and large bargaining units and there has been an unfortunate tendency to extend ideas developed in such a milieu to even the smallest establishments. Yet there are, I believe, cogent considerations for distinguishing small business.

Let us take as an example the subject of discharge for cause, the cause being incompetence, the establishment being a small millinery store. Here we have a situation of the proprietor working day in day out alongside an employee, perhaps earning little more than the employees and convinced that the employee is not suitable to the needs of the business. Shall we assume that the standard of judgment is the same as in a large department store and that the remedy, assuming the arbitrator find the employee not incompetent, be reinstatement with back pay?

Let us assume a quarrel between such an employee and the employer, with an exchange of hard words and a residue of bad feeling! Shall we take the same view of the situation in the small retail store as we would if it occurred in a large factory?

Suppose we have a claim by one employee that he is underpaid in comparison to another employee whom the employer believes to be superior! Are we to give no more weight to the views of the employer here than we would in a large establishment?

It seems to me that we are obliged, willy nilly, to recognize the institutional setting and to accord to the small employer somewhat different treatment, because of his special situation vis-a-vis the employees, from that which would be appropriate in a large establishment, characterized by absentee ownership and professional management.

V.

The arbitrator performs his chief function, in my opinion, in determining whether or not the collective bargaining agreement has been violated. Remedies are of secondary importance, at least in those cases where the parties have demonstrated an ability to live together and an ability to work out their problems not only at the time of negotiating a collective agreement but during its life. I see little to be gained by innovations in the area of remedies; none of those which have been suggested recently (e.g., punitive damages and injunctions) seem to me to offer anything besides novelty.

While I think the arbitrator should be entrusted with the authority to deal with a situation as he finds it, I see no need for devising remedies in addition to those which have become well established. In the last analysis, the problem is basically one of wisdom in handling a problem in such a fashion that it remains settled and perhaps gives the parties a guide to future conduct. Self-restraint on the part of arbitrators may prove a more useful tool than resourcefulness in innovation.

Discussion—

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By temperament, I am disputatious, argumentative, contentious, and litigious. I now find myself in the embarrassing position of essential agreement with the paper presented by Professor Stein. Hence, he has pricked my ego and left me with very little to say.

I am going to look at the problem of remedy a little differently from the way Professor Stein has. It seems to me he has regarded it essentially as a problem for the parties themselves. I should like to look at it a little more from the standpoint of the arbitrator.

The problem of arbitral remedies, as I see it, is that the situation is the result of an interplay between the arbitrator and the parties, namely, the designation of some type of performance in order to correct a committed wrong.

Now, this is a general problem, quite clearly, in arbitration. If the arbitrator is asked to decide whether a man is discharged for cause, is there implicit in the question, absent from any explicit authorization, the power to award back pay if he finds that the employer lacked cause?

Where by contract or submission the parties have empowered him either to sustain the discharge or to reinstate with full back pay, how does he decide if he is convinced that the employee should be reinstated, but reinstated with something less than full back pay?

In a dispute over promotion, in which the more senior employee lacks the qualifications for the job but is denied due process in determining his qualifications, is he entitled to some form of financial recompense for his loss—what the lawyers, I suppose, would refer to as liquidated damages?

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In the case in which the employer files a grievance against a strike or a slow-down, may the arbitrator impose financial penalties upon the union or the strikers, or, even more interesting, issue a return-to-work order, which he may or may not call an injunction?

There are, of course, many other illustrations.

There are, I should assume, two schools, two quite divergent schools of arbitral opinion on these questions: one is strict constructionist; the other is broad constructionist.

The strict constructionists present a traditional and quite plausible defense of their position. Arbitration, they say, is a private system of self-government in industry. It is created by the parties themselves in order to serve their own purposes. They and they alone are the source of arbitral power. They have defined the arbitrator's authority in the collective bargaining agreement and/or in the submission agreement. He may not add to or subtract from the explicit terms of those documents, to say nothing of multiplication or squaring. The arbitrator who can read and obey is sound, and from his own point of view, he is safe.

The broad constructionists chafe under this theory. While they, too, read the empowering provisions of the agreement and submission, in fact, probably read them more carefully than the strict constructionists because they must keep a wary eye out for the prospect of appeal to the courts, they are concerned with something else, as well. For them arbitration is the arena in which the continuing struggle between the contract and equity is fought out. They should like to satisfy both—to issue the award that at the same time would satisfy the contract and do justice.

Now, in my experience, arbitration cases, like Caesar's Gaul and a club sandwich, are divided into three parts: those which satisfy both contract and equity; those in which contract and equity are at war; and those that I don't understand. Before this audience I have no intention whatever of divulging the per cent constituted by this last category.

Among the others, the overwhelming majority satisfy both contract and justice in my experience. Only a small minority present the conflict and that is usually, I think, over the problem of remedy.

These are the interesting cases to the arbitrator, the cases which give a challenging edge to arbitration and open the prospect for creativity.

If we were all strict constructionists all of the time, nothing new would ever occur. Hence, I cast my vote for the broad constructionist in the area of arbitral remedy.