CHAPTER 3

ARBITRATORS AND THE REMEDY POWER

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In all of the fuss and furore over the impact on the arbitration process of the decisions of the Supreme Court in first, *Lincoln Mills*,[1] and second, the Steelworker Trilogy,[2] it seems to me that there is a distinct danger that some of the participants in the dialogue will become—or have become—so enmeshed in the legal niceties of the question that they may tend to overlook the basic function of the arbitration process as a service to the parties. If the current trend of court decisions is expanding the role of the arbitrator, and the framework within which he may operate beyond the desires of the parties, we can anticipate that corrective action will be taken at the bargaining table. While I have made no scientific survey to ascertain the fact of the matter, I have the distinct impression that there has been no concerted effort to redress arbitration clauses in the light of the rulings of the Supreme Court in the summer of 1960, and the subsequent rulings of lower courts taken in the light of the trilogy. The fact that there has not been more of a reaction at the bargaining table comes as something of a surprise in view of the rather extreme concern expressed by management and union spokesmen—and some arbitrators— after the Steelworker Trilogy was handed down.

To be sure there has been some disaffection from the arbitration process by both labor and management interests. One notable example was the demand by southern locals of the International

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1 *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), 40 LRRM 2113.

2 *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960), 46 LRRM 2414; *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), 46 LRRM 2416; *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), 46 LRRM 2423.

Longshoreman's Association in the 1962 negotiations to eliminate arbitration from their contract as a result of a decision by the U.S. District Court, Eastern District of Louisiana [3] confirming an arbitration award which ordered that the membership of the union cease and desist from engaging in work stoppages. I suppose that the final verdict on the acceptability to the parties of the state of the arbitration law, as that acceptability is reflected in attempts to modify existing arbitration clauses, will have to await further developments, and perhaps even a paper at some future Academy meeting.

The proper role of arbitration in its labor relations context has been carefully spelled out by many authorities. One of the Philosophers of Labor Relations, the late Harry Shulman, perhaps stated it best in one of his last essays:

> A proper conception of the Arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obligated to accept. He has no charter to administer justice for a community which transcends the parties. He is rather a part of the system of self government created and confined to the parties. He serves their pleasure only, to administer the rules established by their collective agreement.[4]

Some concern has been expressed that this very perceptive interpretation of Shulman's on the role of labor arbitration has been distorted by the court, which, in the trilogy, relied to a considerable extent on Shulman's views. Harold Davey has set forth a rather vigorous warning that the court, particularly in the *Warrior* opinion, may have assigned an unreasonably wide sweep to the nature of the arbitrator's authority, and Davey suggests that support for the Court's view on this point will be at a minimum among union and management spokesmen, as well as among arbitrators.[5]

The potential for variation in interpretation as to the proper course for an arbitrator to follow is pointed up very nicely in the

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[3] *New Orleans Steamship Association* v. *General Longshore Workers*, 49 LRRM 2941 (1962).

[4] Harry Shulman. "Reason, Contract and the Law in Labor Relations," 68 *Harvard Law Review* 999 (1955), reprinted in *Management Rights* and *The Arbitration Process* (Washington: BNA Incorporated, 1956).

[5] Harold W. Davey, "The Supreme Court and Arbitration: The Musings of An Arbitrator, *Notre Dame Lawyer*, March 1961.

question of remedies. Should the arbitrator refrain from awarding a remedy unless he has direct language to support his authority to do so? Is a remedy an integral part of most alleged contract violations and, therefore, is there authority implied in the arbitrator's appointment to award a remedy even absent specific language? The answers to these queries and to other related questions can be sought from two sources—the law and sound labor relations practice. Robben Fleming has recently developed a very thorough analysis of the legal framework for the arbitrator's remedy power,[6] and at the Academy's Thirteenth Annual Meeting in Washington, Emanuel Stein presented a very thoughtful paper which dealt primarily with the environmental aspects of the award of remedies by arbitrators.[7]

Because Professor Fleming did such a thorough job of researching the court cases bearing on the question of remedies, I am going to take the liberty of quoting here in some detail his summary of the situation with respect to the arbitrator's power to award remedies:

> 1. Awards which are thought to contravene the law, or to be against public policy are likely to be held unenforceable.
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> 2. The parties can, via the collective bargaining contract, the submission agreement, or the rules under which they agree to arbitrate, give the arbitrators power to award compensating damages, injunctions, and writs of specific performance. Courts will, in general, enforce remedies pursuant to such authorizations.
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> 3. Despite clear authorization to the arbitrator legal problems of enforcement will remain where: (a) the damages are punitive in nature, (b) the injunction is against a strike or slow-down and may come within the anti-injunction statute which binds the court, or (c) where the writs of specific performance call for fulfillment of a personal services contract. What little authority there is on this subject, however, suggests that the courts will enforce injunctions and orders for specific performance in such situations. And the uniformly critical attitude which law journal notes have taken of the court's reluctance to enforce punitive damages when awarded by an arbitrator, suggests that this, too, may change.
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> 4. As to implied remedial powers, arbitrators have always claimed

[6] R. W. Fleming, "Arbitrators and the Remedy Power," 48 *Virginia Law Review* 1199 (1962).

[7] Emanuel Stein, "Remedies in Labor Arbitration," in *Challenges to Arbitration* (Washington: BNA Incorporated, 1960).

them, and *Enterprise,* as interpreted in *Cameron,*[8] is certainly being read to mean that the arbitrator has the power to effectuate a remedy unless that power is *negated* in the contract.

5. The Supreme Court has said in *Lucas*[9] that a no-strike clause will be implied as to those issues which are subject to arbitration. In *Drake Bakeries*[10] the same court said that Section 301 suits for damages must be stayed pending arbitration when the arbitration clause is broad enough to contemplate submission of such an issue to the arbitrator. Taken together these cases certainly mean that the scope of grievance arbitration is being broadened. When one adds the *Cameron* decision, this means that arbitrators are going to have power, unless contracts are revised to specifically negate such power, to award remedies. The teaching of the cases surely is that the parties to collective contracts now find themselves in a position where the power of the arbitrator is being greatly expanded. This will make possible types of remedies with which arbitrators have in the past not been much concerned.[11]

My discussion here will be directed mainly toward two areas of the remedy question which I believe require further analysis from both the legal and the institutional points of view. Those two areas are compensatory damages—particularly as they relate to discipline cases and violations of no-strike clauses—and injunctions. My thesis is that the courts have not given us a clearcut answer as to the legal power of the arbitrator to award remedies of either compensatory damages or injunctions. I suppose it is unnecessary to make the observation, but obviously there can be no clearcut answer to the policy question of arbitral remedies in their institutional framework, although I will add my views to the many already expressed.

The state of the law on arbitration as the Supreme Court viewed it in the triology was summarized very usefully by Sam Kagel in his presentation to the Fourteenth Annual Meeting of the Academy at Santa Monica:

On arbitrability: The courts are limited to finding whether there is a collective bargaining agreement in existence; whether there is an arbitration clause; and whether there is an allegation that a

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[8] *IAM* v. *Cameron Iron Works, Inc.,* 292 F. 2d 112 (5th Cir. 1961), 48 LRRM 2516, *cert. denied* 368 U.S. 926 (1961), 49 LRRM 2173.

[9] *Local 147, Teamsters Union* v. *Lucas Flour Co.,* 369 U.S. 95 (1962), 49 LRRM 2717.

[10] *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers Int'l., AFL-CIO,* 370 U.S. 254 (1962), 50 LRRM 2440.

[11] Fleming, *op. cit.*

> provision of the agreement has been violated. If the arbitration clause is broad enough to include the alleged "dispute," then arbitration must be ordered.
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> *On enforceability of awards:* If the arbitrator stays within the submission and makes his award on his construction of the contract, then the award must be enforced.
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> In either arbitrability or enforcement cases the courts are not to get into the merits of the case; they are not to substitute their judgment for that of the arbitrators; they shall not refuse to act because they believe a claim is frivolous or baseless.[12]

The aspect of this law which is of particular interest to us here is that which has to do with remedies by arbitrators, especially as it appears in the *Enterprise* case where the court said:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There is need for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[13]

This statement takes on particular significance when it is noted that it follows closely the observation in the opinion that "arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process." The court seems to recognize well the relationship of arbitration to the regular collective dealings of the parties, and that the arbitrator is a creature of the agreement to which he owes fidelity and from which he derives his authority. While the arbitrator brings "his informed judgment to bear in order to reach a fair solution of a problem," the resulting award must "draw its essence from the collective bargaining agreement."

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[12] Sam Kagel, "Recent Supreme Court Decisions and the Arbitration Process," in *Arbitration and Public Policy* (Washington: BNA Incorporated, 1961).
[13] 363 U.S. 593, 597, 46 LRRM 2423, 2425.

What all of us must bear in mind is the compelling circumstance of labor contracts that was so lucidly described by Dean Shulman:

> The agreement then becomes a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith.[14]

Arbitration clauses in labor contracts are many and diverse. Some offer explicit standards in the matter of remedies, some offer general directives and some offer not even the expression of hope and good faith that Dean Shulman spoke about. It is in the latter category that most of the problems over remedies fall, and it is in the context of a contract which makes no direct reference to remedies to which most of my remarks will be addressed.

First, I would suggest that no real problem over the power or the propriety of an arbitrator fashioning a remedy is presented when a contract deals as directly and broadly with the question as this clause which appears in a contract in the garment industry:

> Any and all disputes, complaints, controversies, claims or grievances whatsoever between the Union or any employees and the Employer which directly or indirectly arise under, out of or in connection with or in any manner relate to this Agreement, or the breach thereof, or acts, conduct or relations between the parties shall be adjusted . . . by (grievance procedure and arbitration).
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> The award or decision of the arbitrator, in addition to granting such other relief as the arbitrator may deem proper, may contain provisions commanding or restraining acts or conduct of the parties . . .
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> It is the intention of the parties that the procedure herein established for the adjustment of disputes shall be the exclusive means for the determination of all disputes, complaints, controversies, claims or grievances whatsoever, including claims based upon any breach of this agreement. It is intended that this provision shall be interpreted as broadly and inclusively as possible. Neither party shall institute any action or proceeding in a court of law or equity state or federal, other than to compel arbitration . . . or to enforce the award of the arbitrator. This provision shall be a complete defense to any action or proceeding instituted contrary to this agreement.[15]

14 Shulman, *op. cit.* p. 176.
15 *Glendale Mfg. Co.,* 32 LA 224 (1959).

I dare say that not too many arbitrators find themselves in this kind of a remedial Utopia. Rather we are usually confronted with somewhat less precise authority ranging from some sort of a general directive that "no grievance involving the payment of money will be made retroactive beyond the date of the written grievance," to the bare, "standard" clause authorizing the arbitration "of any grievance involving the interpretation or application of this agreement," with the further admonition to the arbitrator that he has no power "to add to, subtract from, or otherwise alter the terms of the agreement."

Even where the contract makes no reference to remedies, the question can be quickly resolved by a submission agreement stated in two parts:

1. Did the company violate the contract by its action, etc?

2. If so, what shall the remedy be?

There is nothing novel about this approach. I find it is used more and more—almost as a matter of routine—by the experienced advocates who present cases to me. The troublesome cases are those in which the contract is completely silent on remedies and the parties do not agree in the submission that the arbitrator has the authority to order one.

Consider first a discipline case being arbitrated under such circumstances. Has *Enterprise,* as interpreted by *Cameron,* given us final assurance that the courts will support an award by an arbitrator ordering reinstatement and full or part back pay in such a situation? Remember that the contract governing the *Enterprise* case contained language specifically authorizing the arbitrator to order reinstatement of an employee found to have been suspended or discharged unjustly, and that the finding in *Enterprise* was that the reinstatement beyond the expiration of the contract was valid. In *Cameron,* where the court supported the right of an arbitrator to include a remedy in a discharge case unless there was language which negated such authority, there was other language which may very well have been of critical importance. The contract in the *Cameron* case, in addition to the usual arbitration clause for grievances limited to interpretation and applica-

tion, contained this provision: "The terms and settlement (of the grievance) shall be within the sole discretion of the Board and the decision of a majority of the Board shall be final and binding on the parties . . ." In addition, the grievance itself demanded reinstatement and back pay. One cannot help but wonder if the court's ruling would have been the same if this language had not been present. Perhaps the arbitrator in the *Cameron* case drew the essence of his remedy power from the contract statement that he had the sole discretion over the settlement of the problem.

It should be recalled that the opinion in *Enterprise* suggests that an award, in order to be enforceable, must draw its essence from the collective bargaining agreement. I am not convinced that we have heard the last of this question in cases where there is *no* language upon which to build the remedy power. Even if, in the final analysis, the Supreme Court has given us final clarification in such a case, it will probably be a long while before some of the lower courts, and especially some of the state courts, adopt this view giving broad remedy power to arbitrators in discharge cases, absent specific language on remedies.

As far as I can discover, for example, the view of the courts in Connecticut is still that expressed by the Connecticut Supreme Court of Errors in a 1949 case: "the charter of an arbitrator is the submission and no matter outside the submission may be included in the award." [16] Under this doctrine the Connecticut courts have consistently set aside remedies in discipline cases which were not specifically authorized in either the contract or the submission.[17] I will be very much surprised if the Connecticut Courts reverse this view, even in the light of *Enterprise* and *Cameron,* since in those cases it can be argued that there was language which either spelled out (Enterprise) or implied (Cameron) the remedy power. There can be no question as to the direction of the U.S. Supreme Court on this point, but I suspect that there will be a certain amount of foot-dragging until a ruling is made directly on a case

[16] *Pratt Read & Co.* v. *United Furniture Workers,* 136 Conn. 205, 13 LA 577. The Connecticut Superior Court confirmed this doctrine as recently as March 28, 1961, in a case involving the Anaconda American Brass Co. and Local 1078, UAW.

[17] See *Arterberry* v. *Lockheed Aircraft Service* (Calif. Super Ct), 33 LA 292 and *Textile Workers Union* v. *American Thread Co.,* 291 F. 2d 894 (4th Cir. 1961), 48 LRRM 2534, for additional judicial opinion along this line.

with only the bare skeleton of an arbitration clause, a claim of improper discharge in the face of a clause granting the Company the right to discharge for just cause, and nothing else.

The Connecticut Board of Mediation and Arbitration has recently been advised by an Assistant Attorney General of the State that it should not award remedies in discipline cases unless the question of a remedy is included in the submission, and I have no doubt that this opinion quite accurately reflects the Connecticut law on the subject. Since state courts have concurrent jurisdiction with federal courts over suits seeking enforcement of agreements to arbitrate arising out of Section 301 of the Labor Management Relations Act,[18] and may apply state law if it is not incompatible with the purpose of Section 301, who is to say, at this point, that Connecticut law is at variance with the interpretation of the purpose of 301 by the federal courts.

In order to avoid a charge that I am tilting at windmills, let me quote verbatim a short colloquy from an arbitration case conducted several weeks ago by the author:

> ARBITRATOR: Have the parties agreed on a statement of the issue?
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> COMPANY ATTORNEY: I think we are in agreement that the issue to be determined is: Was the disciplinary action taken by the Company against X unjust?
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> UNION REPRESENTATIVE: We are looking for a remedy?
>
> COMPANY ATTORNEY: That is for us to decide after the arbitrator makes a decision. I won't agree that he has jurisdiction over a remedy.
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> UNION REPRESENTATIVE: What the Company has suggested as the issue is all right, except you put on the tail end of it, "and if so, what shall the remedy be?"
>
> COMPANY ATTORNEY: I think the sole question is whether or not the disciplinary action we took was within our managerial prerogative.

These are spokesmen with years of experience in presenting arbitration cases. It seems to me that this exchange illustrates very nicely the fact that a problem still exists. Many management representatives are still convinced that the arbitrator's remedy power is circumscribed by the contract and the submission,

[18] *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957), 40 LRRM 2113.

and only direct language in one or the other endows him with authority to fashion a remedy. This is a reflection of the reserved-rights-of-management view of the labor contract, a view subscribed to by a significant segment of the management-labor relations fraternity, and also one that finds some support among the arbitrators in the reported cases.

There is one other variation on this theme that I would like to offer for consideration. Suppose a union files for arbitration a grievance which claims a discharge is not for just cause and also requests reinstatement and back pay. The contract provides for arbitration of grievances involving the interpretation and application of terms of the agreement, limits the company's right to discharge for just cause, and makes no mention of remedies. At the arbitration hearing the company will not agree to submit the question of a remedy to the arbitrator and so there is no stipulation on the issue. Under these circumstances does the grievance become the issue, thus putting the question of the remedy in the hands of the arbitrator? If so, doesn't this place a large burden on the author of the written grievance to be sure to include a demand for a remedy? If not, what is the issue? Does the case become a stand-off in which the arbitrator cannot proceed in the absence of an agreed-upon issue?

My answer would be that the arbitrator has a responsibility to go forward using the grievance as the submission and that the issue then encompasses a remedy. The parties have agreed to arbitrate future grievances, and one party should not be prevented from seeking adjustment of a grievance through arbitration simply because the other party will not stipulate an issue. The grievance in this circumstance involved a demand for a remedy, presumably the parties in their grievance meetings discussed the merits of the claim for the remedy, and the arbitrator should rule on the merits of the whole grievance, not just part of it.

This means, of course, that the written grievance can assume critical importance on the question of the arbitrator's authority to fashion a remedy. The arbitrator, in any event, must construct his award in the light of the contract, and cannot use a demand in a grievance to restructure any part of that contract. In other

words, the arbitrator must use restraint in applying "judicial inventiveness," but he must resolve the grievance.

Similar analysis can be applied to the question of the power of the arbitrator to award damages in a case brought by a company against a union for violation of a no-strike clause, and the same uncertainty will be revealed. The Supreme Court made it clear in the *Drake Bakeries* case that such a dispute is properly within the scope of a broad arbitration clause, but the concurrent *Atkinson*[19] decision suggests that a narrower clause may lead to a different conclusion. The arbitration clause governing the *Drake Bakeries* case provided:

> The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by the contract, or any act or conduct relation between the parties hereto directly or indirectly . . .
>
> . . . either party shall have the right to refer the matter to arbitration.

The court observed that this is broad language indeed, and refused to permit the company to file a claim for damages in court. Rather the court said, "we remit the company to the forum (arbitration) it agreed to use for processing its strike damage claim." This decision was made at the same time that the *Atkinson* case was being decided in the reverse—that is, the company was not obliged to arbitrate a damage claim over a strike in violation of the contract but could seek damages in court since the arbitration clause governing the *Atkinson* dispute was limited to employee grievances.

The language of the *Drake Bakeries* opinion may assume considerable importance in other questions of remedies by arbitrators. The court said:

> . . . under this contract, by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes. They have thus cut the ground from under the argument that an alleged strike, automatically and regardless of the circumstance, is such a breach and repudiation of the arbitration clause by the union that the com-

[19] *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962), 50 LRRM 2433.

> pany is excused from arbitration upon theories of waiver, estoppel or otherwise. Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach . . .

This decision should lay to rest any argument that arbitrators have no business ruling on damage claims against unions, at least where the language of the arbitration clause is as broad as it was in the *Drake Bakeries* case. The legal problem still remains with such claims when a narrow arbitration clause governs the dispute. I suggest that where there is language in either the contract or the submission (which may be the grievance under circumstances described above), from which the remedy power can be fairly inferred, the arbitrator has the same responsibility to award damages against the union as he does against the company in discharge cases. Stated another way, where language authorizing a remedy by the arbitrator is totally absent and the arbitrator awards a remedy, he does so at the risk of inviting litigation, or at least so it seems to me.

The third general area that I have delineated for consideration is that of injunctions by arbitrators calling for one of the parties to cease and desist certain activity or calling for the institution or reinstatement of a condition required by the contract. Closely related are awards which render a declaratory judgment, clarifying the requirements of the contract where the parties differ over meaning of a clause or clauses. This area includes such diverse questions as injunctions against strikes in violation of a no-strike clause, the supplying of certain labor cost and other data under a profit-sharing clause, limitation on the time spent by union stewards in handling grievances, charges that a supervisor is abusing employees, demands for the return of a runaway shop, and a broad sweep of other questions.

The question of injunctions by arbitrators against strikes in violation of no-strike clauses is one that the courts are now wrestling with, and is tied to the necessity to square the requirements of Section 301 of the NLRA with Section 4 of the Norris-LaGuardia Act prohibiting injunctions in labor disputes. In *Sinclair Refining Co.* v. *Atkinson* [20] the Supreme Court ruled that the courts cannot enjoin such strikes, but a New York court [21] and

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[20] 370 U.S. 195 (1962), 50 LRRM 2420.

[21] *Rupert* v. *Egelhofer,* 3 NY 2d 576, 148 N.E. 2d 129, 170 NYS 2d 285 (1958).

a federal district court [22] both upheld arbitration awards enjoining strikes in violation of the agreement. Mr. Fleming has done an excellent job of posing this dilemma [23] so I will disengage myself from this problem, pleading inability to forecast the final result. In doing so, however, I would observe that the opinion in the *Drake Bakeries* case offers a basis for some interesting speculation that the Supreme Court could very well support an arbitration award enjoining a strike, given a broad enough arbitration clause.

The arbitrators do not seem to have been consistent in their interpretation of their right to issue injunctions or declaratory judgments, and again, the question of enabling language assumes critical importance. The New York Supreme Court [24] has expressed the view that declaratory judgments by arbitrators are just as desirable as in any other legal proceeding, and unless the contract language forbids such an award, it seems to me that the arbitrator who is empowered to interpret a contract should not hesitate to render this kind of a service where one or both of the parties requests it.

I would apply the same reasoning to the question of the legal power of an arbitrator to issue injunctions or orders of specific performance as I have to the question of the award of damages by an arbitrator. If there is language in the contract or the submission from which the remedy power can be inferred, then the arbitrator has the right and the duty to rule on the remedy, assuming of course that a remedy is requested by the moving party. If there is no language upon which the arbitrator can rely for the remedy power, and one party is resisting his jurisdiction over a remedy, then the arbitrator may be well advised to decline to rule on the remedy.

There can be no question that the general thrust of the court cases is toward granting to the arbitrator the power to fashion a remedy, if there is any semblance of a language basis for such an award. The overwhelming weight of practice by the parties is also to grant to the arbitrator remedy power, either by contract

22 *Supra*, note 3.
23 Fleming, *op cit.*
24 *Columbia Broadcasting System, Inc.*, 34 LA 552.

language or by the submission agreement. There is growing acceptance of the view that a right without a remedy is a hollow right indeed.

It seems basic that a violation of the contract which results in money damage to an employee—loss of holiday or vacation pay, denial of promotional opportunity or overtime work, or of wages by reason of improper discipline—should be corrected by a money remedy. This appears to be only simple justice. It should follow that if the union violates a contract prohibition against strikes and thereby causes the company to suffer a loss of money, then the company should be able to recover its losses. The question of course remains, in what forum should the recovery be sought? Where the parties have provided for arbitration of all disputes or grievances over the interpretation or application of their agreement, it is this forum to which they must turn. The arbitrator will have to render his award, in Shulman's words, "within the system of self government created and confined to the parties." If the power to award remedies can be read into that system of self government, then the arbitrators should assume that responsibility.

There are cases where the fair and equitable remedy is not at all clear, and the arbitrator should be careful not to fashion a remedy that does not reflect the needs of the parties. Especially where there is evidence that the parties can resolve the remedy question once the issue of alleged contract violation has been bridged, the arbitrator might better avoid the danger of a serious miscarriage by declining to rule on the remedy, or even remanding the remedy to the parties and retaining jurisdiction if the parties are unable to resolve the question. Cases involving violation of seniority in promotions or layoffs, or improper discharge for medical reasons, are illustrative of types that may contain complicating factors bearing on an appropriate remedy. I recognize that retention of jurisdiction is an exceptional procedure and should only be utilized on a highly selective basis where the contract and/or the parties will permit it.

If arbitrators are to serve their proper function in administering the rules established by the collective agreement from which they derive their authority, they will have to be eternally alert to the wide disparity in the clauses which endow them with author-

ity. There is distinct hazard in asserting any broad generalizations about an arbitrator's power to award a remedy. That power is as changeable as the proverbial weather. To repeat the words of Mr. Justice Douglas in the *Enterprise* decision, the arbitrator's award "is legitimate only so long as it draws its essence from the collective bargaining agreement." It might be appropriate to close with the observation that an essence is a substance distilled from another and containing the latter's virtues in concentrated form. If there is no substance in the contract relating to remedies, an award containing a remedy must have derived its essence from some other source.

Discussion—

M. S. RYDER *

Professor Stutz has presented a competent analysis of many of the factors having bearing on the variegated problems connected with the remedial powers of the arbitrator. He wisely set his paper, propounding his hard questions and supplying a few soft answers, in the context of that labor agreement which speaks of rights but not of connected remedies. He wishes, along with his fellow arbitrators, for a general remedial empowering phrase in the contractual arbitration clause; for a submission agreement containing a neatly posed supplication for a proper remedy to be awarded if the grievance is sustained; for some sign or signal that may relate to and draw remedy power from the so-called "essence of the collective bargaining agreement." But, none of these wishes is fulfilled, so—how do the parties want their remedies, if any?

Bob gave you his thoughts in this hard setting of the problem. Let me append several of mine:

Sans any prohibiting contractual language, I would suggest that where an arbitral holding finds there to be a deprivation of a right, a concomitant arbitral direction should also issue seeking to fairly correct the wrong done, if this is at all possible. I submit that this should be in the natural order of labor disputes arbitra-

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tion and should be assumed and expected by the parties and their arbitrator. I believe that in this more sophisticated age of industrial relations the parties ordinarily go to arbitration with this in mind.

Third-party resolution of an issue should embrace third-party correction, unless the parties want it specifically otherwise. This effects a whole disposition. Parties unable to jointly resolve a dispute need to transfer their power to jointly and fully resolve and correct to a third party who then becomes the single agency to effect full disposition of their dispute and the quietening or elimination of their conflict.

Now, as to the form and extent of the correction:

Again, where there is no enlightening aid from the contract, I would suggest that the test of proper remedial form and extent might embrace the following standards:

1. In form the remedy should be one that would appear to most directly effectuate the intent and purposes of that provision in the labor agreement in connection with which the right was contracted.

2. The party called upon to give remedy should not be subjected to well-founded surprise by the form, nature, extent and degree of the remedy. What is awarded should be within the realm of conceivable and reasonable remedial expectation by the party in error or by other parties were they to be similarly circumstanced.

3. Remedies that are punitive in monetary or exemplary nature should be avoided, on the ground that parties bargaining collectively in a more or less perpetual relationship should not seek that one or the other partner be punished for a mistake. To so seek and to obtain punishment is putting a mortgage on the future happiness of the joint relationship. The trauma and embarrassment of an exposed error should be enough. Engaging in a mistake and acting accordingly should not be in a setting of perilous consequences.

4. Remedies that are novel in form should be avoided, again for reasons of unexpectedness or possible well-based surprise. A novel remedy might bring with it unforeseen contractual and

other impacts on one or both of the parties and create uncertainty as to what may result from future submissions to arbitration. The concept of the arbitrator having an "arsenal" of forms of relief, with the parties in a position of uncertainty rather than expectation, should be avoided in what is a private litigation seeking to resolve a dispute. Suspense in a private relationship might subvert the efficacy of that relationship.

Within these standards, perforce general in their expression, I would say that specific performance of a contractual commitment could be directed of either party. A no-strike commitment could be reached in this connection. A clearly demonstrated, repetitive violation, indicating a practice of repeated contractual disrespect by the employer or the union, could be enjoined. Compensation for wages unfairly lost should be forthcoming as a matter of course, the Connecticut courts notwithstanding. Punitive damages should not be granted. Actual broad damages to the employer or union institutions should not be granted unless contractually called for or jointly submitted as an arbitral proposition. I would await a well-developed historical practice of specific authorization of the arbitrator in this connection—spreading out across the field of arbitration—before accepting this to be called for as an implicit remedy.

Finally, if the parties want more or want less of remedy in form or extent, they should bargain out and contract their desires and thus tender their policy to an arbitrator—who, believe me, is always seeking such guidance.

Discussion—

DUDLEY E. WHITING *

I have heard it asserted that most Americans are poor listeners and that, while ostensibly listening to a speaker, many of us are inwardly formulating our remarks to stun the audience when we obtain the floor. My experience in listening to and reading reports of the remarks of discussants makes me suspect that some of them were guilty of such action.

Regarding those who obviously listened to the speaker or read

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his paper, I place them in three classifications. First, the discussant who restates the paper in his own superior terminology. Second, the discussant who tears the paper into tiny bits and flushes them down the drain. Third, the discussant who says he "agrees with the philosophy expressed but . . ." and then proceeds to a discussion of some subject dear to his heart but not particularly related to the subject matter of the paper.

I expect that I would prefer to proceed in accordance with the third category. Some time ago I was invited to be a discussant of a paper to be presented by Robert Stutz on *Arbitrators and the Remedy Power*. A few days ago, I learned that I was actually a discussant of a paper upon what the courts have said about the remedy power of arbitrators. I recognize that I was naïve in not anticipating such a change in subject matter because the June 1960 decisions of the U. S. Supreme Court seem to have pervaded every area of discussion about arbitration, almost to the exclusion of other and perhaps more pertinent factors.

In explanation of my naïveté I can only say that the title of the proposed paper reminded me of interesting discussions among arbitrators, in years past, about their remedy powers. For example, whether one could modify a discharge, absent specific contractual authorization, on the basis that just cause for lesser discipline is not necessarily just cause for discharge. Another example involves a grievance filed by A, when it develops at the hearing that, under the contract, B was the employee entitled to the relief claimed. Query: can the arbitrator award any relief either to A, not entitled to it contractually but an alert grievant relative to a violation of the contract, or to B, whose contractual rights were violated but who is not a grievant.

In his paper, Bob says "if the current trend of court decisions is expanding the role of the arbitrator . . . beyond the desires of the parties, we can anticipate that corrective action will be taken at the bargaining table," but a little later he expresses surprise that there has not been more reaction at the bargaining table. At least indirectly related to this proposition, in my view, is the survey conducted by Russ Smith among arbitrators asking whether the 1960 Supreme Court decisions have affected their views and awards on questions of arbitrability and upon substantive issues.

If the answer to any of these questions is yes, I submit that the corrective action is more likely to be a change of arbitrators than a change in contract provisions which have heretofore served the needs of the parties satisfactorily. This appears true because it matters not whether the subject is arbitrability, substantive rights or obligations, or the proper remedy; the source of the authority of the arbitrator is an agreement of the parties in the contract, a stipulation of the issue, or mutually accepted rules of procedure. Absent any change in such agreement, court decisions should not effectuate any change in the arbitrator's determination of an issue, except as they have held the contract or an award unlawful.

The recent consuming interest in and analysis of court decisions, and particularly the language of the opinions, which may be pure dicta, is probably interesting and may serve some useful purpose with respect to evaluating possible future decisions of the courts. This might act as a deterrent to parties who may be tempted at times to seek intervention by the courts into their bargaining relationship or their private system of impartial adjudication, arbitration. To the extent that such interest or analysis is aimed at some change in arbitral decision making, it must be deplored because it may seriously affect existing acceptable relationships and arbitration systems, or it may cause arbitrators to upset them through a misguided sense of duty or authority.

Certainly, Professor Stutz' paper does not contribute to any such result to the extent that may be intimated by the foregoing remarks, because it clearly recognizes that the source of the arbitrator's power to award a remedy is found in the agreement of the parties. Hence much of my discussion, so far, places me in the third category of discussants and should not be interpreted as a criticism of Bob's paper.

In his paper he asks: is a remedy an integral part of most alleged contract violations and, therefore, is there authority to award a remedy implied in the arbitrator's appointment even absent specific (contract) language? He states that the answer can be sought from two sources—the law and sound labor relations practice. There is, then, considerable discussion of the law as a source but very little as to the other source. I submit that the latter is the more important source.

Many contracts contain no provision respecting remedies for violation of the substantive provisions establishing rights and obligations of the parties or the employees covered thereby. It has been traditional labor relations practice, however, to make an employee whole if, for example, his seniority rights have been overlooked or violated. Similarly other provisions, such as that discipline or discharge must be for just cause, have been treated in practice as including an implied obligation to make the employee whole if just cause did not exist. It appears that the incorporation of such employee rights in an agreement is a recognition of such implied obligations and hence implies authority by the arbitrator to award such remedies.

It appears very doubtful, however, that there is any basis for an implication of authority to award remedies that have not been traditional in labor relations practice. Thus it seems that an arbitrator should have some contractual authority for an award of such a remedy as a penalty or a restraining order.

I have one final word of caution for arbitrators who feel impelled to exercise their inventiveness or to demonstrate their expertise in fashioning remedies: resist it. Many years ago I heard a discharge case in which I was convinced the troubles of the dischargee were due solely to his misunderstanding and abuse of his authority and responsibility as a recently elected union committeeman. I reinstated him upon condition that he resign from that union office. When the parties next had a case, several months later, they congratulated me upon having made a Solomon-like decision and assured me that the results were excellent in every way.

About seven or eight years later I heard another discharge case in which I was convinced that the cause of the problem was identical in nature. Remembering the approbation of the parties, sweet to any arbitrator's ears, evoked by my prior Solomon-like decision, I dusted it off and used it again. It had hardly hit the press before union representatives were castigating me and soliciting others to refrain from using or recommending me as an arbitrator on the basis that I had dictated who would represent the union.

Thus you can see that an arbitrator, who is beguiled by some language used by Supreme Court Justices into using his inventiveness to formulate novel remedies designed to establish a fair solution of a problem, may well be subjected to that occupational hazard of all arbitrators, the blackball.