prove his performance, in his award, and to promote their own self-interest.

II. The Power of the Arbitrator to Make Monetary Awards

SIDNEY A. WOLFF *

The power of the arbitrator to make monetary awards is unquestioned, provided in so doing he acts within the terms of the submission. This, as we all know, is basic in the arbitration process. However, assuming authority to render a monetary award, questions do arise as to the extent of the award and how far the arbitrator may go in fixing damages and the method of computing damages.

Damages within the purview of this paper fall into three groupings—compensatory, punitive, and liquidated; I shall consider them in that order.

Obviously, an award of compensatory damages is the most common type of remedy that comes within the arbitrator's jurisdiction. This is the type of award that will issue when a breach of contract has been established resulting in a monetary loss. In the great majority of cases these involve the reinstatement of an employee found to have been unjustly disciplined, failure to grant overtime, layoff out of seniority, and similar violations of the labor contract. However, I must point out that the arbitrator does not have the power to award damages in every case of a breach. Here, too, the arbitrator is governed by the authority given him by the parties.

In the well-known *Marchant* [1] case of 1929, although the arbitrators found a breach had occurred, the New York court set aside an award of damages on the ground that the arbitration clause was not sufficiently broad to constitute a general arbitration clause so as to permit an award of consequential damages flowing from the breach. There the clause read:

> If for any reason any controversy or difference of opinion should arise as to the construction of the terms and conditions of this Contract, or as to its performance, it is mutually agreed that the matter in dispute shall be settled by arbitration * * *

* Attorney and Arbitrator, New York, N. Y.

1 *Marchant* v. *Mead Morrison Mfg. Co.*, 252 N.Y. 284.

The Court, in restricting the arbitrators, held that the arbitration clause "did not clothe the arbitrators with power to settle every difference having its genesis in the contract. Their function was more modest" [2]—a function which, because of the affirmance of the decision of the Appellate Division [3] striking out the award of damages, was only the determination of the issue of performance with the parties relegated to the courts for an assessment of damages.[4] Judge Crane, in his dissent in *Marchant,* used language most appropriate to the present subject.[5]

It is extremely doubtful that *Marchant* announces today's law. Arbitration is too dynamic a process to be so obstructed. Rules that might have applied ten or twenty years ago have no application in this Space Age. Rather, with the customary clause referring all controversies and differences to arbitration, it is submitted that, though not specifically expressed, the arbitrator impliedly has been given the remedy power.

As our confrere, Professor Fleming so aptly wrote:

> The parties were not engaged in an academic exercise in seeking a ruling as to whether the contract had been violated and that the power to decide the contract violation must therefore carry with it the power to award a remedy.[6]

Recent court decisions, particularly since the Supreme Court trilogy, sustain this principle, and hold that:

> To deny the Arbitrator power to fashion an appropriate remedy

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2 *Ibid.* at p. 300.

3 *Marchant,* 226 App. Div. 397, 235 N.Y.S. 370.

4 See *Refining Employees Union—Continental,* 268 F.2d 447, *cert. den.,* 361 U.S. 896 (1959); but see *Retail Shoe,* 185 F.Supp. 561.

5 *Marchant,* 252 N.Y. 284, 307:
"* * * To submit the question of breach of contract to arbitration, leaving the question of damages to be recovered in an action at law, is to multiply litigation, not to lessen it; to complicate our procedure, not to simplify it; to burden the businessman, not to relieve him. Arbitration has been heralded as a ready and speedy relief from the intricacies and delays of the law. We should, if possible, avoid making it another barrier to the settlement of disputes. The answer I know is that the parties have so contracted, to which I reply that to give the word 'performance' a narrow interpretation, leading to these results, is to construe the contract contrary to and not in accordance with the intention of the parties. With this brief statement of my views, I favor modifying the order of the Appellate Division, by sending this controversy back for the ascertainment of damages."

6 48 *Va. Law Rev.* 1199, 1212.

> for breach of the collective agreement, we must find clearly restrictive language negating the Arbitrator's power to fashion a remedy.[7]

I must, however, caution you that my research indicates that some state courts do not agree with this implied authority theory, Texas, for example.

I am satisfied that today arbitrators will not and should not be deterred from issuing monetary awards for contract violations unless specifically barred from doing so by the contract in which their authority is grounded. Public policy will not be served by requiring the parties to go to court to obtain monetary relief, certainly not in these days of congested court calendars.

Having determined that a breach of contract occurred, let us say that a man was unjustly dismissed and should be reinstated. What provision should be made to make good the loss sustained by the affected employee?

I believe, in a discharge or similar situation, that the employee is obligated to minimize his damages; he is required to make reasonable efforts to obtain gainful employment; he may not sit at home "licking his chops" in anticipation of the large money award that may be in the offing.

And, in determining his damages, I will consider his actual earnings elsewhere during the period of non-employment. Or, if he has no other earnings, then he must satisfy me that he took all reasonable steps to seek other employment, and, should he fail to do so, then I will rely on my "expertise" to determine what he could have earned and to fix his damages accordingly.

I recall one case some time ago involving the layoff of a group of employees in violation of seniority. Instead of taking another job, one man decided to paint his house to save some $400 that he had been about ready to pay a contract painter. In computing his damages, I deducted this $400 which he saved by staying home and doing the work himself.

Then, too, there is the case of a man who refused to work in a lesser-paying job in his job group to which the company wanted

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7 *Texas Gas Transmission Corp.* v. *International Chem. Workers*, 200 F.Supp. 521, 528; *I.A.M.* v. *Cameron*, 292 F.2d 112, *cert. den.*, 368 U.S. 926; *Meilman-Amalgamated Clothing Workers*, 34 LA 771, 774, *award confirmed*, 34 LA 876.

to transfer him. His refusal was based on the claim that his seniority entitled him to retain his old job. Instead of working in the lesser-paying job while his grievance was being processed, he preferred to stay at home.

After the hearing, it was determined that his seniority entitled him to remain on his regular job. The question of what damages should be awarded was then posed. Surely, no one ought to differ with the conclusion reached that his damages should be the amount of wages lost during the period he was taken off his regular job, less the amount he would have earned had he taken the temporary transfer.

There was another man who had several opportunities to take temporary employment which he refused because the wage did not equal the wage of the job from which he had been laid off. There, too, I reduced his back-pay award by the amount he would have received had he taken the temporary jobs.

Of course, I recognize that it is impossible in cases of this kind to compute damages with absolute certainty and mathematical exactness. However, in doing so, the arbitrator is bound to resort to his own good sense and judgment and, after considering all the pertinent facts and circumstances, make a reasonable approximation.

A recent steel industry award does not accept this principle.[8] That decision has evoked a great deal of comment, and I have been asked to discuss it today.

The arbitrator, in computing the amount due a wrongfully discharged employee, refused to deduct the sum of $2600 earned by the employee during the discharge period on the theory that the contract provided otherwise. There the clause read:

> Should it be determined by the Board that an employee has been suspended or discharged without cause, the Company shall reinstate the employee and compensate him for the time lost at the applicable rate of pay set forth in the immediately preceding paragraph.[9]

The union had argued "that grievant owed the Company no duty to work, that is, no obligation to minimize the extent of

[8] *U.S. Steel Corp.*, 40 LA 1036 (June 12, 1963).
[9] *Ibid.* at p. 1037.

damages, and, therefore, that the fact that he did work and earn in outside employment should not run to the benefit of the Company who was adjudged ultimately to have been the wrongdoer." [10]

On the other hand, the company asserted that the clause "intended that it be given its normal and reasonable effect, citing awards so stating, and concludes that doing so results in the inescapable conclusion that deduction of outside earnings of a wrongfully discharged employee is allowed because that is the common law rule, generally applied by courts, administrative agencies, and arbitrators." [11]

In rejecting the company's argument, and after considering dictionary definitions of the word "compensate," the arbitrator reached what I think is a very narrow, strict and, if I may dare say so, erroneous conclusion. He said:

> * * * the Agreement does not leave at large the matter of the specific sum of money which the wrongfully discharged employee is to receive; nor does it contain any indication of intent to adopt the common law rule on this point. On the contrary, it states the formula for determining the amount of money which the employee is to receive.[12]

Possibly that decision may be warranted under the Steelworkers contract by way of precedent or past practice, but I doubt that the principle therein enumerated will generally be accepted.

By directing full back pay for the discharge period and permitting the employee to retain the $2600 he earned during the same period runs counter to the thought that an employee should be made whole for the company's breach. In effect, this particular employee received a windfall, which I suggest neither the union nor the company ever intended.

And, in the *American Chain and Cable Co.* arbitration involving a different local of the Steelworkers, another arbitrator ruled that where the employer violated the contract in reducing the complement of certain shifts, credit was given the employer for earnings by the affected employees in other employment during the period of layoff.[13]

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10 *Ibid.* at p. 1037.
11 *Ibid.* at p. 1037.
12 *Ibid.* at p. 1039.
13 *American Chain & Cable Co.*, 40 LA 312.

Support for the position that earnings in outside employment are to be deducted in computing damages can be found in the Supreme Court's decision in *Enterprise Wheel.*[14] There the contract clause with the Steelworkers provided in case of unjust suspension or discharge,

> the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost.

But in directing reinstatement, the arbitrator deducted pay for a 10-day suspension and "such amounts as each (grievant) has received from other employment." [15]

The language of the clause in the *Enterprise* case in the Supreme Court, for all practical purposes, is similar to that of the contract in the U.S. Steel arbitration decision,[16] although there is a difference in wording. In the latter case, the clause reads, "compensate him for the time lost at the applicable rate of pay set forth," while in *Enterprise,*[17] the clause provides, "pay full compensation at the employee's regular rate of pay for the time lost." Is the language really different?

It is fundamental that labor contracts are to be interpreted in a reasonable and practical manner—the rule of reason should be applied. By submitting an issue to an arbitrator, Mr. Justice Douglas said the parties want him 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." [18]

Absent malice and intentional wrongdoing, is it a fair solution of the problem to allow the disciplined employee to receive full pay for the period of non-work, while, at the same time, he retains his earnings elsewhere? Is it a fair solution to give the employee an extra reward in the case of a bonafide contract controversy? If so, are we not extending the arbitration process to limits never intended by the parties. Such a course, I submit, in the long run, will not be helpful to the growth of the process.

At this point I would like to refer to those awards where the arbitrator directs payment of back pay, less outside earnings, and

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14 *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960), 46 LRRM 2423.
15 *Ibid.,* see transcript of record at p. 19.
16 *Supra,* note 5.
17 *Supra,* note 14.
18 *Supra,* note 14.

leaves to the parties the computation of the actual figures. I suggest this is erroneous and, unless specifically authorized by the parties, ought not to be done. I recognize this is the procedure of the National Labor Relations Board but, as arbitrators, we have the obligation to order final and definite awards on the controversy submitted. We should not inaugurate a make-work project for arbitrators.

Such an award would be held incomplete and unenforceable by the courts.[19]

As a matter of fact, that was one of the issues before the Supreme Court in the *Enterprise Wheel* case.[20] There, the arbitrator directed reinstatement with back pay, less earnings elsewhere. The Supreme Court agreed that the failure of the award to specify the amounts to be deducted from the back pay rendered the award unenforceable, and the parties were directed to complete the arbitration, "so that the amounts due the employees may be definitely determined by arbitration."

What should be done in the case where a contract violation has been established, such as the denial of overtime, and the company argues that "we don't pay for time not worked," and that no monetary award should issue?

Arbitrator McCoy recently had such a situation wherein he aptly stated:

> Where damages are proved the Company must pay damages instead of merely offering to permit a man to work at another time and thus earn pay for such work. Giving the right to earn pay is not equivalent to paying damages.
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> * * that argument (no pay for time not worked) mistakes the essential nature of the payment when awarded by an arbitrator, which is damages, not pay for time not worked. The time not worked may or may not be the measure of the damages, in arbitration just as in courts of law.[21]

The question of crediting the employer with the amount of unemployment insurance benefits paid an employee presents a difficult problem and one on which there is no unanimity of opinion. I recognize that the N.L.R.B. will not permit any such

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19 E.g. *Printing Industry of Wash. Inc.*, 40 LA 728.
20 *Supra*, note 14.
21 *Hercules Powder Co.*, 40 LA 526, 529.

credit; instead, reinstatement with full back pay is the rule, on the theory that the return of the unemployment payments received by an employee is a question to be resolved between the employee and the department.

Frankly, I do not believe this type of award to be desirable in arbitration. I believe that in most cases it results in problems that neither the union nor the company, nor even the employees will relish.

In apparent recognition of such problems, many contracts provide how Unemployment Benefits are to be handled in the computation of a pay loss. That, of course, is the ideal way.

Under the department rules, if an employee is awarded back pay covering a period of unemployment, that period is deemed converted into a period of employment for which no benefits are to be paid and the employee must refund the unemployment insurance benefits paid him.

On receiving a back-pay lump-sum payment, it is difficult to picture the employee rushing to the nearest unemployment insurance office to reimburse the department. Instead, the rules governing human behavior indicate that the reinstated employee may neglect to give up his windfall. This means that the employer will have the burden of notifying the department, which then may seek recoupment.

Inquiry on my part reveals that generally as a practical matter, the department will not take legal action against an employee, but instead will deduct, from future benefits to which an employee might be entitled, the amount he should have returned.

Are we making for a better labor climate by an award of full back pay or would it not be more desirable to deduct all monies received—unemployment insurance benefits, as well as outside earnings during the discharge period—and then to award the balance remaining as damages resulting from the breach of contract, and not as back pay?

This type of award—an award of damages as distinguished from a true, full back-pay award—should not obligate the employee to return any monies to the unemployment insurance department.

I like what Arbitrator Thomas McDermott recently said:

> No such reinstatement (reimbursement) can be made for State Unemployment Compensation, as the determination of eligibility and extent of credit is a matter of law and to achieve such would require repayment to the State of the compensation received. The red tape and problems involved in making such repayment and achieving such reinstatement would be far more trouble than any real gain that would accrue to the workers.[22]

However, it will be argued that an award reducing the back pay by insurance benefits received would penalize the innocent employee who may lose unemployment benefits in case of a subsequent layoff.

It may be that the employee had used up his benefits while wrongfully off the payroll. He would then have to have pretty steady employment in a new qualifying period before becoming eligible for new benefits. Obviously, if during the new period there was a layoff, the man might be denied unemployment benefits. This, of course, is a real problem in a seasonal industry or in the case of a plant with peaks and valleys of production. In these instances the arbitrator should take these factors into consideration in formulating his award.

Also, in some non-industrial states, unemployment insurance benefits are paid out of the state's general tax revenues and not out of a special fund to which the employers contribute on a rating basis. Then it is argued, why should the innocent taxpayer pay for the errors of a particular employer? There is no valid answer to this and, again, this is a factor that should be considered by the arbitrator.

The task of the arbitrator in formulting a remedy is complicated by the fact that unemployment benefits are administered by the individual states. As a conseqence, there are various approaches to the treatment of back-pay awards.

A spot-check of state court decisions shows a difference of opinion in the several jurisdictions as to whether unemployment

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[22] *American Chain*, 40 LA 312, 314.

benefits should be refunded following a back-pay award. Some states have resolved the problem by enacting specific legislation.[23]

Fortunately, the arbitrator makes his own law in reaching a determination but, in any event, since the parties seek his "informed judgment," it is their obligation to bring to his attention all the factors that may affect his judgment.

I trust this discussion will make it clear that there is no hard and fast rule on this subject and unless specifically covered in the labor contract, the arbitrator has no alternative but to mold such remedy as he, in his judgment, deems warranted in all the circumstances.

In increasing numbers, claims for damages arising from the breach of the no-strike clause are being submitted to arbitration. Yet, there appears to be somewhat of a reluctance to render awards in this type of case and this reluctance is only overcome in some instances on a showing of a specific direction in the contract for the arbitrator to make an award of damages.[24]

I see no validity in this position. If we justify an award of damages to an employee for a contract breach on the theory of implied power to formulate a remedy, why must we insist upon a specific grant of authority to award damages for violation of the no-strike covenant?

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[23] E.g.
Connecticut—Title 31.257—General Statutes:
"Whenever any person who has drawn benefits under this chapter subsequently receives retroactive pay without deduction for such benefits under an arbitration or other award with respect to the same period for which he has drawn unemployment compensation benefits, he shall be liable to repay to the administrator the amount of benefits so drawn, and if the amount of unemployment compensation payments which he has received has been deducted under the terms of the arbitration award from the amount paid to him by the employer, the employer shall be liable to pay the amount so deducted to the administrator who shall accept and credit the account of such person."

Pennsylvania goes to the opposite extreme. *Title 43 Purdon-Pennsylvania Statutes, Section 874:* "* * * in the absence of misrepresentation or non-disclosure of a material fact no recoupment shall be had if such overpayment is created by reason of * * (2) a retroactive allocation of wages pursuant to an award of a labor relations board or arbitrator or the like unless such award provides for the repayment of employment benefits."

[24] *Baldwin Lima Hamilton Corp.*, 30 LA 1061, 1064, 1065; '8 *Va. Law Rev.* 1199, 1221; Russell A. Smith, "Arbitrators and Arbitrability," *Labor Arbitration and Industrial Change* (Washington: BNA Incorporated, 1963), pp. 94-99.

When arbitration is properly invoked, no purpose can be gained by determining a breach had occurred and then remitting the parties to the courts to determine damages.

Professor Smith's article [25] reported on the survey he made in which he asked "Is the Arbitration Process suitable for the disposition of damage claims for breach by the Union of a no-strike agreement?" It is interesting to note the reactions received by Professor Smith, who remarked:

> Some arbitrators seem to feel that their "life expectancy" in terms of future acceptability would be jeopardized by performing their inevitable duty, if jurisdiction is assumed, of imposing what might be very heavy monetary penalties upon their good union customers. They would prefer to leave this distasteful task to the courts. Others are not concerned about this.[26]

I feel that the negative point of view expressed is completely wrong.

If the arbitration process is to grow and be more meaningful, we must not be selective. We must take the difficult with the easy ones and render our best judgment no matter how distasteful or distressing it may be to us. "The ordeal of judgment cannot be shirked," said Chief Justice Warren.[27]

It was Mr. Justice Harlan, in his dissent in the *Drake Bakeries* case, who suggested that the arbitrator was not qualified to pass upon damages for breach of the no-strike clause, but rather that this was more of a subject for the courts than the arbitrator, "whose expertise is more likely to be in the area of employees' grievance claims." [28]

However, I am happy to report that the majority of the Supreme Court in the *Drake* case agreed that arbitrators are qualified to pass on the damage question and competent to render an adequate award.

In that decision, the majority held that the disputes clause,[29]

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25 *Supra*, note 24.
26 *Ibid.* at p. 95.
27 *Dodd* v. *U.S.*, 356 U.S. 86, 104.
28 *Drake Bakeries, Inc.* v. *Local 50*, 370 U.S. 254, 267, 268.
29 Ibid. "Article V—Grievance Procedure:
(a) 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 this contract or any act or conduct or relation between the parties hereto, directly or indirectly."

providing for arbitration of all disputes, was broad enough to include damage claims for violation of the no-strike clause and that if the parties intended to exclude such claims from the arbitration process, specific language of exclusion was required.

And, our own New York Court of Appeals has made a complete turn of the wheel and has held that a clause providing for the "arbitration of all disputes" encompassed a claim for a breach of the no-strike clause.[30]

We now come to the subject of penalties or punitive damages. In the normal course of events, compensatory damages may be awarded for breach of contract, but our public policy prohibits punitive damages, except in certain cases of willful torts, such as libel and slander.

As a consequence, it is extremely doubtful that an arbitrator's award granting punitive damages for a breach will stand up in court. But suppose the labor contract specifically authorizes the arbitrator to "impose damages or other penalties"—this is where we have a problem.

I am certain that many of you are familiar with the New York publishing industry and the Newspaper and Mail Deliverers Union. (Most of the membership of the New York Chapter of the Academy, starting with myself back in 1940, have successively occupied the revered position of impartial umpire for these parties.) In any event, some while ago, following an illegal stoppage, the then impartial umpire rendered an award against the union for compensatory damages of $2000 and punitive damages of $5000, and to soften the blow, provided for the punitive-damage award to become collectible only if the union again violated the no-strike clause.

The union attacked the award and succeeded in obtaining a decision that "the allowance of punitive damages is not enforceable with the aid of the judicial power." [31]

The rationale of that decision was that public policy only permitted compensatory damages for a contract violation; since

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[30] *Publishers Association* v. *Stereo Union*, 8 N.Y. (2d) 414.

[31] *Publishers Association-Newspaper & Mail Deliverers Union*, 200 App. Div. 500; 114 N.Y.S. (2d) 401.

public policy denied the courts the power to award punitive damages, the arbitrator likewise was denied that power, despite the authorization in the contract. In other words, what a court could not do, arbitrators could not do.

I respectfully differ with the courts and contend that since the arbitration process is the creation of the parties, the scope of the arbitrator's authority can be limited only by the parties' own agreement, provided that the determination made is not tainted with illegality, such as the award, I am told, of an arbitrator, not an Academy member, who, in a discipline case, ordered reinstatement but directed that the employee stay in after the regular workday and put in several hours each day to make up his lost time, but without any compensation, overtime or otherwise. This was clearly a violation of the Wage and Hour Law, as well as the 13th Amendment to the Federal Constitution prohibiting involuntary servitude.

I believe I am now on sound ground in suggesting that the decision in the *Publishers* case, barring penalty awards as contrary to public policy, may not be authority today.

While public policy may frown on punitive damages, it also frowns on certain aspects of improper labor relations. Admittedly, a breach of the labor contract may result in costly industrial instability and warfare. Public policy seeks the maintenance of labor peace, recognizing that industrial warfare is harmful to the greater public interest. Surely then, any tool or process that can be used to attain that goal is in the public interest, and its use should be encouraged.

Let me go further, under New York and federal statutes, a court is restricted in granting an injunction in a labor dispute. Yet these courts will sustain an arbitrator's injunction against a threatened violation of the labor contract, and support for this conclusion is found in our public policy.

In *Ruppert* v. *Teamsters*,[32] Arbitrator Kheel had issued an injunction to prevent a slowdown. In arguing against the validity of the award, the union relied on public policy prohibiting injunc-

[32] *Ruppert* v. *Teamsters*, 3 N.Y. (2d) 576.

tions by the courts in labor controversies, as reflected by the New York Statutes and the Norris-LaGuardia Act.

In upholding the award, the court said:

> But, once we have held that this particular Employer-Union Agreement not only did not forbid but contemplated the inclusion of an injunction in such an award, no ground remains for invalidating this injunction. * * * Sections 876-a (no injunction in labor disputes) and article 84 (arbitration) are both in our Civil Practice Act. Each represents a separate public policy and by affirming here we harmonize those two policies.[33]

Now, let's consider the previous decision prohibiting a penalty award. There the contract specifically gave the arbitrator power to impose a penalty. In the *Ruppert* case, where the injunction was sustained, the court found that the contract "contemplated the inclusion of an injunction," although the grievance clause only spoke of "Complaints and Disputes." [34]

Then, too, as the court pointed out, in discussing the seemingly conflicting statutes—the one barring labor injunctions and the other regulating the arbitration process—"each represents a separate public policy." Yet those statutes were harmonized by directing the enforcement of an award for an injunction issued by an arbitrator acting under the authority of the labor contract, even though the court itself could not issue the injunction in a labor controversy.

Substitute the words "penalty award" for "injunction" in the *Ruppert* decision and I imagine that you will agree that present contractual authorization to issue a penalty award will now be sustained, even though a court itself may not issue a judgment for a penalty resulting from a breach of contract.

Another and even more important question, is the arbitrator's power to issue penalty awards in the absence of a specific clause.

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[33] *Supra,* note 29 at p. 581.

[34] *Supra,* note 30 at p. 40, Record on Appeal:
"Part V, Section I (second paragraph)—
All complaints or disputes which may arise between the Employer and the employees or between the Employer and the Union shall be settled, if possible, by agreement between the said local union and the Employer. If not so settled then the complaint or dispute shall be submitted to the Adjustment Committee herein provided for."

I think it is clear that in such an event an arbitrator may not impose a penalty award.

In a number of instances grievances have arisen where the company has simply disregarded specific provisions of the contract without causing actual monetary loss to the parties concerned.

The unions in such a situation rightfully ask: "What is the point of having a no-strike clause in the contract when the employer ignores the provisions to suit his own purposes?" True, the union argues no money damage was sustained by the individuals affected, but they were caused inconvenience, and demand is then made for a money award to teach the employer that he may not violate the contract with impunity.

For example, in the airlines industry, I had a situation where a small airline had a contract providing for the posting of changes in crew scheduling so that everyone knew from day-to-day his regular assignment. Instead, notice of change was given by telephone. This meant that pilots who had an opportunity to rebid were not given the opportunity to do so. Thus, the problems in crew scheduling merely multiplied.

Then again I had a situation where a captain's seniority entitled him to a preferred bid on a certain trip, but instead he was given another trip. He flew the assigned trip under protest. Here, too, he sustained no money damage.

Now, what should the arbitrator do when he finds an intentional disregard of contract provisions but no proof of damage?[35] Should the common law doctrine of *damnum absque injuria* apply, or should sanctions be imposed to assure full-faith compliance with the contract?

Despite the present willingness of the courts, particularly since the Trilogy, to make arbitration a more effective instrument for the maintenance of industrial peace, it is doubtful that the time has yet arrived for the courts to allow an arbitrator to assume the power to impose sanctions. "He does not sit to dispense his own brand of industrial justice," said Mr. Justice Douglas in *Enterprise Wheel.*

[35] Excluded from this paper is any consideration of the specialized procedures before the several *Railroad Adjustment Boards.*

I suggest that, should a case arise that might tempt the arbitrator to impose a penalty when not authorized by the contract, he consider assessing the costs of the proceedings upon the intentional violator, be it the company or the union unless barred by the contract. This might tend to prevent a repetition of a violation that does not cause monetary loss.

Or you might consider awarding interest on an award of damages. On this point I cannot understand the excitement about the recent decision of the NLRB allowing interest on a back-pay liability. Professor Fleming mentioned this yesterday but it has always been the law to allow interest when a monetary judgment has been rendered. The real question is whether the arbitrator should grant interest. This I consider is solely a matter within his discretion, unless regulated by some contract provision, and in exercising that discretion I suggest for your serious consideration what arbitrator McDermott said:

> The demand for payment of interest on the monies due is one that is only occasionally raised in arbitration cases, which involve damages. It is, however, a demand that can only be granted under very special circumstances. As an example, if it can be shown that a Company acted in a very arbitrary fashion in its handling of a case, so that the logical conclusion could be drawn that the Company was deliberately trying to injure the affected employees, an arbitrator might find cause for inclusion of interest as a part of damages. In the instant case I can find no evidence of a lack of good faith. The delay in the resolution of the case has resulted from a failure of the parties to agree, and not for any other motive.
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> Also, while the workers being recompensed in this case are receiving at the most only what they would have gotten had the cutback not taken place, they still are obtaining a monetary return for which they did not actually work. Therefore, while these workers have had to suffer a delay in the receipt of their compensation, this loss of time is offset by the above gain.[36]

From my reading, I find that arbitrators, as a rule, do not hesitate to find innovations. Russ Smith in his address last year encouraged them to continue doing so. Further, I imagine that many will consider that they have been given a mandate to do so by the trilogy with particular reference to the far-reaching language of Mr. Justice Douglas, who wrote:

> It is more than a contract; it is a generalized code to govern a

[36] *American Chain*, 40 LA 312, 315.

> myriad of cases which the draftsmen cannot wholly anticipate. * * * A collective bargaining agreement is an effort to erect a system of industrial self-government. * * * Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.[37]

I might add that if the victorious party still wants a more effective weapon than a mere award sustaining his position, perhaps an award to the effect that changes in schedule should be posted, he may apply to the courts for a judgment confirming the award, and, in the event of non-compliance, subject the other party to a contempt proceeding with the imposition of financial costs within the court's jurisdiction.

And, while on this subject, I think the procedures available in the federal courts for enforcement of an award are somewhat archaic. At present, formal suit must be commenced under Section 301 of the LMRA to enforce the award. With a suit of this kind, tied up with all the pleadings and other technicalities that go hand-in-hand with litigation, this type of procedure is not conducive to a speedy determination, which is the hallmark of an arbitration.

I suggest that a simpler procedure be adopted to obtain a judgment confirming an award. In New York practice this may readily be accomplished by a motion returnable on eight days' notice. I would go further and suggest an even simpler method—to permit the interested party to submit to the court a proposed judgment, on appropriate notice to the adversary and for its automatic entry, unless objection is raised. Thereupon, the court can pass on the objections and make its determination, but, of course, all rights of appeal should be preserved.

Thus, in the instances occurring in the administration of the arbitration process, where a party becomes difficult over an unfavorable award, the problem of enforcement will be expedited.

Under some contracts the question of what might otherwise be considered to be a penalty has been handled by reasonable provisions for liquidated damages, which are stated in the contract to

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[37] *United Steelworkers* v. *Warrior & Gulf Navigation Company*, 363 U.S. 574, 582 (1960), 46 LRRM 2416.

constitute the amount that the parties, in advance, agree should be paid in satisfaction of the loss following a breach of contract.

For example, there is a provision in the contract in the ladies' garment industry setting forth a liquidated damage formula.[38]

A provision in the labor contract along these lines would be of great help when a party, unable to establish a monetary loss as such, will still be able to obtain adequate redress from a party who is guilty of a flagrant violation of contract.

Discussion—

DAVID E. FELLER *

As some of you know, I have been, perhaps, a too frequent participant in Academy meetings, generally in the role of seeking to justify the Supreme Court's decisions in the trilogy—both before and after these cases were actually decided.

Jesse Friedin was often on the other side of this debate, and we had a few big arguments. I believe that it has been commonly assumed that in those arguments each of us tended to assume positions representing our clients' respective interests. But clients are a transitory thing, as those of you in the practice know. In any case, today's topic gives me an opportunity to express some views which may not be Steelworkers' views; I frankly don't know whether they are or not. Equally, I am not sure that Jesse will necessarily regard them as opposed to his client's views.

I suppose that I am now expected to denounce the theory that you deduct other earnings or unemployment compensation from back-pay awards, because that position would be assumed to be in the union's interest. But I am not going to deal directly with the specific problems that Sidney Wolff raised. I am going to address myself, rather, to what I think is a fundamental error in

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[38] *Regal Accessories, Inc.*, 25 LA 530, 532:
Par. 32 of Contract: "The parties also acknowledge that the damage to the Union upon such violations is difficult if not impossible of accurate ascertainment. Therefore, the parties agree to fix herein the basis for the amount of liquidated damages to be paid for each dozen of garments manufactured in violation of this agreement and they hereby agree that the damage shall be an amount not exceeding the wages the Union workers in the designated or registered shops would have earned, or the sum of $1.00 per dozen. It is agreed that an award based upon such damages shall not be deemed a penalty."

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the approach to the specific problems that were dealt with so exhaustively in Mr. Wolff's paper.

It seems to me that the nature of the answers to some of the problems he raised depends, as always, on the nature of the questions you ask. And the questions which are asked in Sidney Wolff's paper are, I think, the wrong questions.

The basic approach in his paper is: "What is the proper measure of damages in a suit for breach of a labor agreement which happens to be decided by an arbitrator?" Indeed, throughout Sidney Wolff's paper there are references which equate an arbitrator's remedy with a court's remedy: the argument, for example, that an arbitrator should make a specific monetary award because the interests of speedy adjudication, which arbitration is supposed to bring instead of litigation, will be defeated if the arbitrator does not put a specific monetary sum in his award. The suggestion that procedures be adopted which would permit a party to simply take the award and file a motion to enter a judgment on the award is premised on the assumption that what should be done with arbitration in this area, and what approach would be followed, should be decided on the basis that arbitration is a speedier and more informal way of dealing with what is essentially a suit for breach of contract.

Now, I think that is a fundamentally erroneous approach to grievance arbitration. The Supreme Court, after all, has now distinguished sharply between what is commercial arbitration and grievance arbitration. At the risk of boring everybody, I will repeat again what the court said:

> In the commercial case arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement.

That has now become trite. But it seems to me that once you reiterate that and really explore its implications, you must recognize the impropriety of questions such as: "What is the proper measure of damages in a suit or arbitration for breach of contract?" "Can an arbitrator issue an injunction?" "Can he give punitive damages?" All those questions are exactly the same questions that you would address—indeed they are the questions that

you *do* address—to a court of law in which you are suing for breach of contract.

When you arbitrate, however, you are not suing through an informal domestic tribunal (the phrase that I believe Justice Brandeis used in referring to arbitration). You are not using an informal tribunal as a substitute for a lawsuit when you establish a system of grievance arbitration. You are establishing a completely different kind of machinery, and it is therefore improper to measure an award as if it were the kind of damage judgment which the courts would render. You should not put the question in that focus or framework at all. The real question is: "What is the proper function of an arbitrator in settling a grievance under a contract?" My answer, which is startling at first sight, is that it is no part of the function of an arbitrator to award damages.

Let me withdraw that: It is possible for the parties to use something which is called arbitration under a collective bargaining agreement in the same way you use arbitration in a commercial contract, i.e., as a mechanism by which, when a suit that would involve damages would otherwise be brought, the question can be decided in a substitute tribunal. I take it that some unions do provide such mechanisms.

But what I am talking about is what I call the standard labor agreement, as found in most of our basic industrial plants, where we tell the arbitrator that when a grievance is not settled he is to interpret and apply the agreement. My radical suggestion is that what the arbitrator is authorized to do under such a provision is, strangely enough, to interpret and apply the agreement, not to award damages.

Let me explore for a moment the consequences of accepting the contrary of that proposition. What are the rules governing the issuance of compensatory damages by courts? I did a little research. It is a long time since I did any research, but I had to on the rules governing damages in breach of contract cases because that question is completely foreign to my experience in representing unions. I discovered some astonishing things.

Of course, under the Railway Labor Act there can be a suit for damages for breach of a collective bargaining agreement. The Supreme Court has said that, in those states which recognize such

a suit, a discharged employee does not have to go to the Adjustment Board and ask for reinstatement. He can accept the discharge as final and sue for damages. When he does sue for damages, he sues for the monetary loss, for compensation for the wrong that was done him in breaching the contract of employment. He thereby accepts the discharge as final and collects the damages which he has suffered, which are measured by what he would have earned under the contract, minus what he earned elsewhere.

A similar suit was *Nichols* v. *National Tube*.[1] The district court judgment was eventually reversed because the Court of Appeals did not find a violation of the contract. But in the District Court, the plaintiff who was compulsorily retired by U. S. Steel was awarded $25,000 damages because, at the age of 65, his reasonable work expectancy was seven years. The jury found that he had been wrongfully put off the payroll and he was therefore damaged in a sum which the jury found to be $25,000.

Normally in that type of suit the plaintiff introduces life expectancy tables and the jury determines how much the man has been damaged. There is an argument that you might limit that to the term of the agreement, but if the agreement is an extendable one, then I suppose the damages for discharge would be the total loss to earnings which the employee suffered by virtue of the breach of contract.

Interestingly enough, there are some cases which absolutely fascinate me in the most recent hornbook on damages I could find, which is dated 1935. These cases say that normally an employer who has discharged an employee in breach of contract cannot reduce damages by offering the employee the job back; he must prove that it is not unreasonable to expect the employee to take the job back, which the author says is very difficult in view of the normal reaction which an employee may have to a discharge. I think I can even quote the hornbook:

"The employer does not reduce damage by offering to re-employ the damaged employee unless he can show that the refusal was unreasonable and such a showing is defeated if the employee can show he has been offensively treated, or if his acceptance could be construed as an abandonment of his claim for damages."

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1 *Nichols* v. *National Tube*, 122 F. Supp 726 (1954), 34 LRRM 2183.

Now, of course, when you do sue for damages of this kind the employer is entitled to deduct earnings that were or could be earned outside, pursuant to the normal common law rule of mitigation of damages. Of course, the employee can offset against that, in turn, all expenses which he incurs in seeking or obtaining that other employment.

To move to another example which I think poses the issue most sharply: suppose an employee files a grievance, claiming the safety clause in the contract was violated and that, as a result thereof, he contracted silicosis. If he sues for damages, the jury in a court of law would determine what amount of money would compensate him for the loss of his lungs. Those damages may be quite considerable, as the Alabama courts found them to be in just such a case in which it entertained a suit for damages for breach of contract for violation of the safety clause. There are many such cases.

The law in *Hadley* v. *Baxendale* is that consequential damages can be recovered if the other contracting party was aware of the special circumstances. This poses another question. A steel company hires an employee knowing he is emotionally disturbed. The employee gets fired. There may be great damage to his personality. Can he recover for those damages?

I think that these illustrations show pretty clearly that what you arbitrators do when you reinstate with back pay is not to award money damages in the law sense at all. What you do in grievance arbitrations is to interpret and apply the agreement and draw an award from the essence of that agreement, just as Mr. Justice Douglas said you do. You decide what their agreement seems to say the parties should do. That is an inference you have to draw. Sometimes, of course, the answer is explicit; usually it is implicit. But the arbitrator's function is to explicate what is implicit in a collective bargaining agreement. That is his one and only job. When he finishes that job, that explication may say, "I read this agreement as providing that back pay should be awarded to an erroneously discharged employee. Therefore, my award is that there should be back pay."

Depending on the nature of the agreement, the arbitrator may find that the agreement implicitly says that that back pay should be awarded without deduction for unemployment compensation, or

he may find that it provides for the deduction of unemployment compensation. There are many arguments as to how the agreement should be construed, but the question is one of construction of the agreement, I repeat, not damages, because the parties have not established arbitration as an alternative method of suing for damages for breach of contract.

The approach I am suggesting here makes irrelevant, I believe, almost all of the questions which are asked in discussions of this subject. I don't think, for example, that arbitrators issue injunctions or give awards for specific performance. Arbitrators are not courts. They are something different from courts. Do not be confused by the fact that the Supreme Court has put arbitrators in an honored position and conclude that the Supreme Court has said that they are in a court's position. To the contrary. The respect which the arbitration process is given as a result of the Steelworkers trilogy is given because arbitrators are *not* judges and are *not* handling an alternate form of litigation. They are part and parcel of the collective bargaining process, and the only questions they can answer relate to the proper meaning of the collective bargaining agreement.

Now, it seems to me that is the approach and those are the questions that have to be asked when you decide all these subsidiary questions as to what you deduct and what you do not deduct, and what you add or what you don't add to an award. The answers are simply not the same as the answers you would get if you were trying a litigation. Take a simple thing like interest on a back-pay award. There wouldn't be any question but that in a law suit you would be entitled to interest on the damage verdict as a matter of course in every jurisdiction that I know of. Yet, strangely, arbitrators, as far as I know, do not regard interest as being payable as a matter of course. And rightly so. When we look at what arbitrators do, without thinking too consciously about "damages," we can formulate a notion as to what the process really is. And I think that it is quite different from the issuance of damage verdicts.

So I am not going to suggest what I think the answers are to most of the questions which are asked by Sidney Wolff, because the answers depend not on the law of damages but on the indi-

vidual contract and what the arbitrator finds implicit in that contract.

I do, however, want to draw an immediate distinction as to one question he raised: the authority of an arbitrator to award damages for breach of a no-strike clause. When we talk about arbitration generally, without being too specific or concrete, we tend to lump that kind of arbitration in with the arbitration of grievances.

But this is simply wrong. Arbitration of a claim for damages for breach of a no-strike clause, the adjudication of that claim, is obviously not a substitute for industrial strife but is a substitute for litigation. The "arbitrability" question, when an employer asks for damages for breach of the no-strike clause, is: in what forum is he to try the suit for damages? Arbitration in the sense that I have been using the term is a device for grievance handling as a substitute for the union's right to strike, not a device for trying damage suits.

Now, with that preliminary observation, is such a claim by an employer for damages for breach of a no-strike clause arbitrable? The question obviously cannot be answered in blank, because what is arbitrable depends on the agreement of the parties. The parties can make such claims arbitrable, but when they do so, they are proceeding as in the ordinary commercial contract, to provide a different way of obtaining an adjudication over something which is normally adjudicated in the courts of law. The presumptions which apply to grievance arbitration, pursuant to the Trilogy, simply are inapplicable.

This indeed fits the practicalities of the situation. It is customary among arbitrators, I am sure, to refer to the technicalities, the difficulties, and the delays involved in litigation at law. But, if you ever tried a damage action at law, you would recognize that some of the protracted proceedings and what are called technicalities are the best instruments we have been able to devise for obtaining a proper adjudication on the question of damages. The question of damages is a very difficult question, involving all sorts of intangibles. I would not try a damage suit, whether arising out of a labor contract or anything else, without serving interrogatories on my opponent, inspecting his books, and taking

exhaustive depositions. I am entitled, under the Federal rules, to have full access to everything my opponent has, except the attorney's work product, which bears on the nature and amount of damages, and I would utilize to the full my rights in that regard. These are very useful procedures if what you are trying to do is come out with a money figure which compensates someone for a breach of an agreement.

Grievance arbitrators do not ordinarily have the power to insist upon such procedures and should not, really. Oh, the parties can use arbitration that way, as in commercial arbitration. But grievance arbitrators, because their job is to explicate what is implicit in the collective bargaining agreement and tell the parties what they must do, as if it were written in the collective bargaining agreement in the first place, do not need that kind of machinery. In any case, they do not usually have it.

If you want to make your arbitrator into a commercial arbitrator, you are, of course, free to do it, but the ordinary anticipation in the ordinary collective bargaining agreement is that you do not want your arbitrator to do that; you have not picked him for that kind of skill, and you have not entrusted him with the kind of weapons enabling him to do the kind of assessment involved in the trial of an action for damages.

There is one kind of question which does indeed arise in these cases and which grievance arbitrators may properly be asked, that is whether the strike is actually in violation of an agreement. That does involve the explication and interpretation of the agreement.

The real problem in the *Drake Bakeries* [2] case was whether there was a strike or not. The employer there had simply ordered the people to work overtime, and they did not show up. He said that this was a violation of the collective bargaining agreement, so you had not only the question of what damages were involved, but whether what took place was a strike. Maybe that kind of thing is what arbitrators are typically commissioned to do, but not the assessment of damages.

So, returning to my basic proposition, the answers to the ques-

[2] *Drake Bakeries, Inc.* v. *Local 450, American Bakery & Confectionery Workers, AFL-CIO,* 50 LRRM 2440.

tions asked by Mr. Wolff are not found by references to the law of damages. I think that employers and unions would agree on that. They are found in terms of what the parties contemplate or can be deemed to have contemplated to be the kind of performance required of the employer to do what the agreement says he should. Once having decided that, the arbitrator is *functus officio.* The assumption is that the employer will then do what the arbitrator says he must do to comply with the agreement, not that the employer will pay what the arbitrator says he must pay as damages to compensate for the fact that he has broken the agreement.

The question of what you have to do to confirm or judicially enforce that award is another question. But if you do have to go to court and obtain such an order, you are not asking that there be a judge's "Yea" to an arbitrator's award of damages. What you are asking is a court order requiring the parties to do what the arbitrator says the agreement directs.

In terms of that concept, I find nothing at all disturbing in Tom McDermott's award which my friend says is so shocking. Tom looked at the whole contract and said, "As I look at the contract, it says the back pay should be paid without deduction. That being so, I will direct the parties to do what the contract says." Whether he was right or wrong—and I think he was right—he was performing precisely the function he was supposed to perform, rather than attempting to imitate a court.

Discussion—

JESSE FREIDIN *

Peter Seitz's paper and his affection for the deathless phrase, *Functus Officio,* prompted me to do a little research. I am sure that you will find the results of this research totally irrelevant to the subject matter of this discussion, but I am also certain that you will take it for what it is worth.

The word "functus," as I am sure you classicists know, derives from the Latin as the past participle of the word "fungor." Its English equivalent, the dictionary tells us, is function; its synonyms: a duty, a calling, an office. Among the ecclesiastics "functus" has a different definition. Among the ecclesiastics it is the

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equivalent of an impressive, elaborate, religious ceremony. This brings us slightly closer to our subject, but not so close as does the definition ascribed to it by the Zoroastrians. This, perhaps, you will find most enlightening of all.

The Zoroastrians, as you doubtless know, are dedicated to a lord whose name is Omas. The Mazda lamp comes from that word. He is the lord of light and reason engaged, as Peter is, in a ceaseless and unrelenting war against the evil spirits who dwell in darkness.

Now, in the second book of the Zoroastrians—their most sacred book called the Avesta—the word "function" is defined as a sweeping out, a phrase that I hope to attribute some significance to as this discourse develops.

Now, what of the word "officio"?

From the word "officio" we derive many of our English words: "office," "officer," "official," and "officious."

Now, the word "officious" has been defined as descriptive of one who proffers or offers a service or assistance that has not been asked for. And so we might say that *"functus officio"* may be freely translated as a sweeping out of one who offers a service or assistance that has not been asked for.

And this brings me to today's subject matter—the unrequested service of interim awards.

Now, I shall begin by agreeing with the basic premise, the overwhelming principle of Peter's paper, that arbitration is the most difficult of jobs. It is a task which results in a final decision that is enforceable by the courts but unreviewable, uncontestable, and unimpeachable by the courts or anybody else. It is a responsibility that must be fulfilled in cases in which the decision may be in doubt, as well as in cases in which the decision is clear, in cases in which the evidence produces a result or the contract calls for a result that offends one's sense of right, as well as cases in which the result pleases one's sense of right. It is a responsibility that the arbitrator cannot share and that must be exercised not on his terms, but on the terms fixed by the parties; and it must be fulfilled on the basis of the facts available to the parties which *they* believe provide an adequate support for their positions,

although the arbitrator may not believe that it supplies an adequate support for *his*.

As Emanuel Stein said at the 1960 meeting of this Academy, in a manner which is reminiscent of Harry Shulman: "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 expectation of the parties and their notions of propriety rather than the arbitrator's abstractly conceived notion of the best way of dealing with the problem." [1] Amen.

Now, what the parties expect and what they ask an arbitrator to provide is a final resolution of their grievance, of their difference; not a temporary one, not a partial one, not an interim one, but a final one; and I submit to you that this finality is itself a quality of worth, for it accomplishes a most useful purpose—it brings a difference to an end—the very purpose that the parties intended the arbitration procedure to provide. They do not expect, even David Feller will not expect, to be vindicated in all cases, because we cannot argue all of them before the Supreme Court. There, incidentally David has the right to expect vindication. But we who are confronted with issues that do not rise to that dignity, I confess, do not expect to be vindicated in all cases. Nor do we expect that each case will, in the arbitrator's award, provide us with a whole and a perfect act of justice.

We do expect that the system we have created, with whatever imperfections it has, the system we have created to provide an orderly resolution of our doubts, should indeed provide that resolution. And because finality is expected from the arbitrator, a responsibility devolves, it seems to me, not only upon the arbitrator, but upon the parties; a responsibility that flows from the expectation of finality and thereby bears upon the sound administration of the agreement.

The responsibility of the parties derives from the fact that because the arbitration which they have set in motion *will* produce a final decision, it is necessary for them to engage in a thoughtful and careful evaluation of their respective claims and positions, and the facts then available to support them, and to do

[1] Emanuel Stein, "Remedies in Labor Arbitration," *Challenges to Arbitration* (Washington: BNA Incorporated, 1960), p. 47.

it in a responsible manner before they submit the matter to arbitration.

I suggest to you that anything that dilutes that exercise of self-discipline is hurtful, not helpful, to the process of arbitrating contract differences. Because, I remind you, there is nothing simpler than to file a grievance. All you need is a piece of paper and a pencil and a first-line foreman to whom to hand the product of the pencil and the paper. But I also submit to you that this simple act ought to be a disciplined one, and, surely, if the offering of grievances is not a disciplined offering, the decision to carry that grievance to arbitration ought indeed to be a disciplined one. It ought to involve an evaluation of the available facts and a genuine belief that those facts support the claim and make the claim ripe for decision.

The determination to resist a grievance must be the product of a similar evaluation. What the grieving party has in fact said when he submits his claim to arbitration is that he has made such an evaluation, that the facts available to him make the issue ripe for decision, and that those facts support his claim.

When he asks for abitration he assumes the obligation of persuading the arbitrator to that end. For the arbitrator to relieve him of that obligation of persuasion, by refusing to act finally on his claim, cheapens the arbitration process by encouraging the shoot-from-the-hip grievance and the try-it-on-for-size award.

Peter says in his paper that however satisfactory the record may be to the parties for "their own particular purposes," an arbitrator ought to withhold his decision until he is supplied with the data he thinks necessary to perform his "awesome act of justice."

Now, it may be that the arbitrator thinks that the facts are inadequate; that the experience, as in Peter's machine case, is an unrepresentative one, or that the data as in Peter's qualification case, are unscientific in character, and that his mind is therefore left in a state of doubt. But the fact the case is before him means that the grievant believes the available facts *do* make the case ripe for decision. Absent agreement, I suggest the arbitrator's duty is to decide that case because, if the parties believe the facts *can* yield decision, it is not his place to say the facts *cannot*. He must, as judges do and juries do and all men from time to time

do, make weighty decisions on the basis of less information than he might wish.

If the union claims that the facts now available show that the machine *is* a hazard, but the facts now available show that the machine is *not* a hazard, the claim must be denied, even though the arbitrator may be concerned that new facts of which no one is now aware may later turn up and may conceivably show the machine to be a hazard.

The new facts, if they occur, may or may not constitute a new grievance. If they do, a new grievance can be filed. Hopefully, it will be settled in the grievance procedure, not before an arbitrator. But whether or not *new* facts provide a *new* grievance, there is no reason why the *present* grievance on the *present* facts ought not to be *presently* decided.

Peter Seitz has submitted, among his other hypotheticals, the following one:

An employee who passed an aptitude test satisfactorily completed a thirty-day probation period, satisfied the elementary task preliminary to his job assignment, and is finally assigned to the job. He is assigned to a job that ought to take thirty days. The company keeps him on the job for five months, and the fellow still cannot do the job, and in the process of not doing the job, discloses, under the facts of Peter's hypothetical, mental incapacities not previously in evidence. The union claims, as Peter suggested, that the frequent changes in supervision and unsympathetic supervisors, whatever in God's name that means, and inadequate instruction are responsible for his inability to do the work. But Peter's hypothetical arbitrator *cannot find* that the changes in supervision, the unsympathetic attitude of the supervisors, or the inadequate instruction were in fact responsible for the employee's failure. He *does find* as a fact that the employee suffers from a mental incapacity that was not previously disclosed. He does find that the company gave the employee five months to do a job that should have been done in thirty days. He does find that the employee could not do the job even in the five months. I submit that there is little cause for Peter's hypothetical arbitrator to say: "I cannot decide the case." And, in order to enable our hypothetical arbitrator to decide the case, it is suggested that

we are obliged to provide "a laboratory environment," a "carefully planned test and investigation," "proper supervision" and to conduct these tests "under the surveillance of responsible and knowledgeable personnel."

My difficulty with Peter's hypothetical is not with his hypothetical case, but with his hypothetical arbitrator, because his hypothetical arbitrator just doesn't want to decide the case. He wants to decide easy cases. Well, I suggest to you that the parties can decide the easy ones.

In his usual even-handed way, Peter has reminded us that the employers' objection to such interim awards may some day come back to haunt him, "Because, don't forget, if you resist interim awards when there is a wildcat strike and I need more information about damages, I may not be able to issue an interim order prohibiting the strike."

That is a little like David's straw man and I would like sometime to talk about David's analysis of Sidney Wolff's paper. I think that was a real straw man, not a dead horse. It seems to me that the case of the wildcat strike, and the further information that might be necessary before the arbitrator can determine the amount of damages, is not at all analogous to Peter's other cases, because the other cases, he tells us, provide him with inadequate evidence which disenables him from making a decision as to whether there has been a contract violation. In the wildcat-strike case, he tells us, the evidence enables him to determine that there has been a violation and he is prepared to make that determination, leaving for some later time simply the mechanical test, if you will, or the assessment, if you will, of the extent to which that violation of the contract so found has caused the injury.

Now, it might be that there are *some* lawyers who in *some* cases do not provide *some* arbitrators with all the evidence they should. I suggest the remote possibility that there might be *some* cases in which *some* arbitrators ask for evidence they don't need, but whether they do or not, I assure you that it is a dangerous thing indeed to say to an arbitrator who asks you for additional data that "he is not to get it." Nor do I think there is any problem in the case of the permanent umpire because I think his special relationship to the parties does indeed enable him to take special

privileges with the parties. But I do believe most strongly that when the parties submit an issue to an ad hoc arbitrator they expect a final decision; and they believe that a final decision *can* be rendered on the facts that are available to them, which they make available to the arbitrator.

I believe that an *ad hoc* arbitrator ought not, unless the parties expressly consent to it, issue interim awards, not only because they do not have legal power to issue interim awards, but because I believe that interim awards defeat the purpose intended by the parties when they created their grievance and arbitration procedure. That procedure, I submit to you, is not simply to produce an award which satisfies the arbitrator's abstract sense of justice, but to produce a final resolution of a dispute on the basis of the facts made available to him and which represents the closest approximation to justice under the contract that an honest and competent mind can supply.

Nobody has a right to ask more than that of himself or of another.

I believe that an arbitrator's assumption of power to issue interim awards, whenever he thinks that the available facts are inadequate for a final one, will encourage the filing of ill-considered and ill-prepared claims. For when the parties think themselves relieved of the certainty and risk of a final decision, they are thereby relieved of the burdensome self-discipline of evaluating and selecting and preparing those claims that are to be put to the ultimate test of a final decision.

In short, my own view is the one adopted by this Academy in 1958 as part of its Cannon of Ethics, and I will bore you for three seconds to read it:

> "The arbitrator shall render his award promptly and must render his award within the time prescribed, if any. The award should be definite, certain and final. It should reserve no future duties to the arbitrator, except by agreement of the parties."

I think that is a sound principle. I think a departure from it will weaken, not strengthen, the arbitration process.