late ourselves about if the award without back pay is based upon the easy way out or simply upon a time element. Even though the results may appear satisfactory, such an approach does little to enhance the arbitration profession, nor does it provide justice for the individual.

The need for research in this area is clear. It is strange that so little has been done. We need to know more concerning the thought processes of the arbitrator. Research into present procedures in discipline cases might lead to innovation in these procedures which could better insure that justice is done the individual as well as permit greater consideration of the total problem. There are many other facets of the problem which have to be explored if we are to do our job well. Let us hope that a beginning will be made soon.

II. RAMIFICATIONS OF BACK PAY IN SUSPENSION AND DISCHARGE CASES

PATRICK J. FISHER *

The title of this discussion is "Ramifications of Back Pay in Suspension and Discharge Cases." As far as your speaker is concerned, it is appropriate to place the accent on the ram. It could be said that he got rammed into this. From the viewpoint of some of the guests who will be here tomorrow, they might consider harpoon to be a better word.

Perhaps it should be pointed out that back pay can have ramifications in other than suspension and discharge cases. Don't you think that back pay could apply in cases relating to failure to grant overtime, layoff out of seniority, and refusal to recall? Although one memorable case was in the last category, I'll forgo the advantage over this captive audience and restrict my comments to the area designated by the program committee—suspension and discharge cases.

It is expected that all of you will participate in this discussion. It is not a lecture course. I don't know that we have any answers. However, we do have some questions.

* Member, National Academy of Arbitrators, Indianapolis, Ind.

Even if we had some answers, a particular question might be answered one way in a given relationship and a different way for other parties. In order to limit the possibility of varying answers because of an arbitrator's relationship with certain parties, perhaps we should confine our discussion to problems which arise for an *ad hoc arbitrator*—an arbitrator who has never seen the parties before and, perhaps, will never see them again.

I suppose that we can all agree that the authority of the arbitrator comes from the contract and the submission agreement, if there is one. Few contracts to which I have been exposed say anything about back pay in the event of reinstatement.

Let us start off by assuming that you, as the ad hoc arbitrator, are presented with a contract which provides that "An employee found to have been discharged without just cause shall be reinstated with full back pay." What do you do when you hear a case and find from the evidence that the grievant committed some infraction which warranted a lesser disciplinary penalty? Don't you decide that the grievant was discharged without just cause? However, if the grievant gets full back pay, isn't he, in effect, getting a bonus for his misbehavior?

It is more likely that you'll get a case where the contract is silent about back pay and the parties come to the hearing without a submission agreement. Whether they have one or not, they may be willing to agree that the issue they want you to decide is: "Was the discharge of X for just cause?" If that is as far as they go, should you, as the ad hoc arbitrator, raise a question at that point about the remedy? If you don't raise the question, do you have the power to award back pay?

Let us assume that the parties are cooperative and agree that you, the ad hoc arbitrator, should decide two issues:

1. Was the discharge of X for just cause?
2. If not, what shall the remedy be?

Wouldn't we all agree that in such a case the ad hoc arbitrator has the power to include back pay in the award if he finds in favor of X on the first issue?

Does the ad hoc arbitrator have an obligation to inquire whether X earned money elsewhere during his absence from work?

If, during the hearing, X states that he doesn't want to return to work for that employer, is back pay appropriate?

Assume that the ad hoc arbitrator hears a case *four* months after X's discharge and finds that discharge was not warranted for a particular rule violation and that X should be restored to his job without back pay. If, in another case, the ad hoc arbitrator is presented with the same facts *seven* months after Y's discharge, what should he do?

If extensive delay in getting a case to arbitration is the fault of the union, should it be directed to pay part of the back pay?

Is the responsibility of the ad hoc arbitrator any different in a situation where the parties appear to be sophisticated, calm, and amicable than it is in a case where there is a new bargaining relationship and the parties are tense and at each other's throats?

How Should an Ad Hoc Arbitrator Compute Back Pay?

1. If overtime was common during the period of X's absence from the plant, should that be included in the computation?

2. If X was a second-shift employee, should the shift differential be included?

3. If X was the senior bidder, or the only bidder, on a posting for a higher-paying job at the time of his discharge, is he entitled to that higher rate?

4. Should interest be added to the back-pay award?

5. If X had to borrow money to live on during the period of his absence, is he entitled to the 8-percent or 10-percent or 12-percent interest he had to shell out?

6. If X was hospitalized during the period of his absence and thereby failed to collect accident and health benefits which had been negotiated for all employees, should the amount of lost benefits be added to the back-pay award?

Does a Discharged Employee Have a Duty to Seek Other Employment?

1. What if the discharged employee could obtain employment only in a community that is 30 miles away?

2. What if the only employment available is degrading?

3. How about a disc jockey being required to seek alternate employment?

Should the Ad Hoc Arbitrator Direct that Certain Deductions Be Made from the Back-Pay Awards?

1. Should unemployment compensation be deducted?

2. Should earnings from other employment be deducted?
   a. What if X earned more at the new job?
   b. What if X worked at two jobs during his absence?
   c. What if X earned more because he worked overtime?
   d. What if X's total outside earnings were less than the amount of back pay, but the outside earnings still included overtime?
   e. What if X worked Saturdays and Sundays during his absence?

3. Should any union benefits be deducted?

4. If X took employment which required the use of transportation, whereas he had previously walked from home to the employer's plant, should an adjustment be made for the cost of additional travel?

5. What if employment was available locally and X made no effort to obtain it?

Where Do You Draw the Line?

Some of our most troublesome cases are those discharges in which we are persuaded that there was not just cause for discharge but that some lesser penalty should have been imposed. Where do you draw the line? In many instances, you are writing your award long after the time has run for a penalty which you would have deemed appropriate, so you hesitate to award back pay for the excessive period because of a feeling that the grievant should not be rewarded for his misconduct. Just yesterday I heard of a case where an employee was reinstated one year and three months after his discharge.

We recognize that we have a responsibility to the parties. On the other hand, they have a responsibility to themselves. It is understandable that a management representative would be reticent about bringing up setoffs against a back-pay award at the conclusion of the arbitration hearing. He might feel that he would thereby weaken his previously stated position that the penalty was for just cause and should be sustained in its entirety. That dilemma could be avoided if a method of computation had been arrived at prior to the hearing.

It seems to me that the parties should be able to agree on a formula for computing back pay in the event of reinstatement. If they can't, then the employer can write a letter to the union stating that if at a future time the grievance of a disciplined employee should be sustained in arbitration, then certain designated deductions will be made from any back-pay award. It is unlikely that in such a situation there would be any need to refer to the computation of back pay at the arbitration hearing.

Another device which has been used is to submit to arbitration the propriety of a proposed penalty *before* dismissing or suspending the employee. Surely there are other solutions which can be devised.

Not all the questions which have been posed are hypothetical. Let me give you an example of a case which occurred not too far from the scene of this meeting: E was termintated on September 1. On November 1 he obtained a higher-paying job. On January 1 an arbitrator reinstated E with back pay for the period from September 1 to November 1. Then the company claimed that the amount due E from September 1 to November 1 should be reduced by the extra amount E earned from November until the date of the award. Let's say E earned $300.00 a month from the company and $400.00 a month from his new employer. The arbitration award determined that the company had to pay E $600.00 for the months of September and October when he was out of work. The company now says that it should get a $200.00 credit on that obligation because E earned that much more in November and December. How would you handle that one?

Here is another: On July 8 a female employee said she was going to quit on August 1 to get married. On July 15 the company

discharged her, allegedly for poor production. She grieved and in September an arbitrator issued an award restoring her with back pay. Should back pay extend beyond the date of her marriage on August 1?

This group should be fairly well convinced before the afternoon is over that back-pay issues can cause many problems for arbitrators. However, we expect problems. That is the name of the game.

Discussion—

Of particular concern among the problems posed by the speakers were the implications of the time lag between suspension and the arbitration award, the retention of jurisdiction following an award, and the responsibilty of the arbitrator for the back-pay formula.

Thomas McDermott drew attention to the psychological effects of a back-pay award in cases which come to an arbitrator many months after the discharge and the filing of a grievance. If an arbitrator awards partial back pay, the employee may question the basis for an award which has the effect of imposing a suspension of three months, for example, when nothing in the history of disciplinary practice would justify a three-month suspension for the infraction. In cases where the contract does not provide for penalties, the arbitrator has a choice only of reinstatement with pay or reinstatement without pay, if he decides there was not just cause for dismissal. If he decides the man is not entitled to back pay, he is creating an injustice, but if he reinstates the employee with full pay, that man does not feel he has been penalized at all.

Commenting on the problem, Chairman Luskin cited the expedited procedure which has been introduced in discharge (not suspension) cases in some industries, under which it is mandatory on the umpire and the parties that all cases be filed, docketed, processed, and heard and an award issued within 60 days of the time effective action was taken. Irving Bernstein suggested that it might make more sense at this time to have a "blend" of the European and American systems, which would give the arbitrator the additional option of upholding the dismissal and awarding money damages. Chairman Luskin added that some of the contracts in the radio and television industry provide for discharge for cause or

without cause but with payment of severance pay attached to the termination.

There was a division of opinion on the wisdom of reserving jurisdiction following a back-pay award. Mr. Jones and others indicated that they preferred to reserve jurisdiction, where possible, in case any problems arose which the parties were unable to settle. Mr. Fisher pointed to the Academy Code of Ethics which states that an award should be definite, certain, and final, and should dispose of all matters and reserve no future duties to the arbitrator except by agreement of the parties. Although several members expressed confidence that in most cases the parties were experienced and competent to work out their own formula for back pay, panel members suggested that the arbitrator could indicate "an intelligent way to handle a settlement" or what he meant by "make whole."

In response to a question about the deduction of unemployment compensation from back pay, Chairman Luskin warned that the law varies from state to state. His advice was to "let the employer worry about it or let U.C. worry about it. They have their avenues of information. . . . I think it is very dangerous for you or for me to go into the area of U.C."

The members agreed that the arbitrator should specify when an award should be implemented. Some use the term "forthwith" and consider two, three, or four days a reasonable time lapse. Others set a definite time schedule in the award, allowing ample time. There was an apparent consensus that the arbitrator could try to obviate the time problem by asking where the award should go—to the plant, the company office, the union, and/or the attorneys for each party.