

## CHAPTER 4

### REMEDIES: NEW AND OLD PROBLEMS

#### I. Remedies in Arbitration: Old Problems Revisited

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The topic for today's discussion is "Remedies: New and Old Problems." That naturally suggests a bifurcation of the discussion, and I have chosen that portion which reasonably can be said to fit under the rubric of "old problems."

The subject is, indeed, an old one in the annals of the Academy. I have no intention of reviewing what has been said in the prior proceedings on this subject, but I wish to note that the first formal paper dedicated to the problem was that of Emmanuel Stein more than 20 years ago.<sup>1</sup> Since then the subject has been addressed by, among others, Robben Fleming in the *Virginia Law Review*,<sup>2</sup> and by papers delivered by Robert Stutz,<sup>3</sup> Peter Seitz,<sup>4</sup> Sidney Wolff,<sup>5</sup> and Lou Crane,<sup>6</sup> not to speak of innumerable commentators on their papers, among whom I am numbered, as well as discussion of remedies in papers not specifically addressed to that subject.<sup>7</sup>

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<sup>1</sup>*Remedies in Labor Arbitration*, in *Challenges to Arbitration*, Proceedings of the 13th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1960), 39.

<sup>2</sup>*Arbitrators and the Remedy Power*, 48 Va. L.Rev. 1199 (1962).

<sup>3</sup>*Arbitrators and the Remedy Power*, in *Labor Arbitration and Industrial Change*, Proceedings of the 16th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1963), 54.

<sup>4</sup>*Remedies in Arbitration*, in *Labor Arbitration—Perspectives and Problems*, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1963), 165.

<sup>5</sup>*Id.*, at 176.

<sup>6</sup>*The Use and Abuse of Arbitral Power*, in *Labor Arbitration at the Quarter Century Mark*, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1973), 66.

<sup>7</sup>See, e.g., Cox, *Arbitration in the Light of the Lincoln Mills Case*, in *Arbitration and the Law*, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1959), 24, 38; Aaron, *Arbitration in the Federal Courts: Aftermath of the Trilogy*, in *Collective Bargaining and the Arbitrator's Role*, Proceedings of the 15th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1962), 60, 69; Fischer, *Implementation of Arbitration Awards*, in *Arbitration and the Public Interest*, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1971), 126.

Although not specifically and directly involved with the remedy question, then Dean St. Antoine's address to the Academy in Toronto in 1977<sup>8</sup> furnishes me with what I think is the best takeoff point for a re-examination of some of the remedy problems which have been discussed over the years before the Academy. Ted's paper purported to be a refutation of a controversial speech I made to the Academy the year before.<sup>9</sup> That speech has been widely misinterpreted. It was deliberately put in provocative language for the purpose of arousing controversy and succeeded, at least, in doing so. But that is neither here nor there. What I want to do today is to emphasize my essential agreement with Ted and to take his thought a bit further. What he said, in supposed disagreement with me, was that an arbitrator is essentially the parties' "contract reader." When the arbitrator interprets the agreement, as applied to the particular situation in front of him, his result should be treated as if it were written *in haec verba* into the agreement. When a court is called upon to enforce the award, it is essentially being called upon to enforce what the arbitrator has inserted into the agreement with the consent of the parties.<sup>10</sup>

I emphasize Ted St. Antoine's statement as to the function of the arbitrator because it contrasts with the view of Robben Fleming in his 1962 article on "Arbitrators and the Remedy Power." In that article Fleming described the arbitrator as "in effect, the enforcer of the agreement."<sup>11</sup> He is not. His function, no more and no less, is to say what the agreement means. And—this is my first thesis—this is not only his function in determining whether a violation has occurred, it is also his function, and his only function, when it comes to the question of remedy. To put the matter affirmatively, it is my view that an arbitrator's sole function in deciding what remedy should be given, where he finds that the employer has not complied with the rules set forth

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<sup>8</sup>*Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel And Its Progeny*, in *Arbitration—1977*, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1977), 29.

<sup>9</sup>*The Coming End of Arbitration's Golden Age*, in *Arbitration—1976*, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1977), 97.

<sup>10</sup>Although purportedly in opposition to my view of the arbitrator's function, this is essentially my position. What I add, and what Ted does not appear to agree with, is that the arbitrator's role as "contract reader" derives from the function of grievance arbitration in the collective bargaining relationship as a substitute for the strike rather than as a substitute for litigation in the courts, but that disagreement is immaterial for present purposes.

<sup>11</sup>*Supra* note 2, at 1222.

in the collective agreement, is to determine what the agreement says about remedy. In so doing, he is performing a quite different function than a court is performing when it determines what remedies for breach of contract should be awarded.

I have previously written about this at some length.<sup>12</sup> Let me repeat here, in brief compass, what I said about eight years ago and what I still believe to be the essence of the matter. The arbitrator's function is not to award damages. What he sometimes does may look like damages. Indeed, when back pay is involved, his order looks like damages because it involves the payment of money. But it is not. It is what the arbitrator finds is the remedy provided for in the agreement. As the parties' "contract reader," the arbitrator determines what remedy is provided for in the agreement and awards it.

Sometimes, although rarely, the agreement says just that. The Jones and Laughlin agreement with the Steelworkers says (or said), "The decision of the Board will be restricted as to whether a violation of the Agreement as alleged in the written grievance . . . exists and if a violation is found, to *specify the remedy provided in this agreement*"<sup>13</sup> (emphasis added). Neither the United States Steel nor the Bethlehem Steel agreements contain the emphasized language, but I think I can say without much hesitation that the arbitrators involved do not consider their functions to be different because of the presence or absence of those words.

Perhaps I should pause here to say what should have been said in the beginning. I am speaking specifically and exclusively to grievance arbitration under what has been called the standard form in this country, a form in which the arbitrator's jurisdiction consists only of resolving disputes as to the proper interpretation or application of the agreement. The agreement may add a specific limitation that the arbitrator may not alter, add to, or detract from the terms of the agreement, but the result is the same: the arbitrator is limited to reading the contract for the parties and telling them what it means as applied to the particular factual situation presented.

This is equally true, of course, in a suit for breach of contract. When a buyer or seller brings suit for breach of contract of sale,

<sup>12</sup>Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L.Rev. 663, at 749, 778-791 (1975).

<sup>13</sup>See Alexander, *Discretion in Arbitration*, in *Arbitration and the Public Interest*, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1971), 84, 96.

or even when an employee brings suit for breach of an individual contract of employment, a court's function is to determine whether in fact the contract, properly read, has been violated. There, however, the similarity ends. In a suit for breach of contract, the rules governing remedies are determined by what the society, as it expresses its will through legislation or judicial determination, deems appropriate.<sup>14</sup> Those rules governing remedies are external to the agreement, may not in fact correspond to the intention of the parties, and may in some instances not fully compensate the wronged party for the injury suffered. Thus, for example, although the parties may specify a penalty for failure to perform an agreement, modern law will, by and large, not enforce that penalty. As Corbin put it: "[I]t has seemed to [the courts], that, in case of breach of contract, justice requires nothing more than compensation measured by the amount of the harm suffered. Penalties and forfeitures are not so measured."<sup>15</sup>

It was not always thus. Recall Portia's defense in *The Merchant of Venice*. Shylock had specified in his loan to Antonio that upon failure to repay at the stipulated time, Antonio should forfeit a pound of flesh. Portia's successful defense was not that the penalty specified bore no relationship to the harm suffered by the failure to perform on time. Nor was it that the sum owed had in fact been tendered, although late. It was assumed by all that upon nonperformance of the contractual obligation, the penalty, neither more nor less than one pound of flesh, and without any blood, became due. Today the defense, even if the penalty were a specified sum of money, would be that it is unenforceable except to the extent of the harm proved to be suffered by reason of the nonperformance of the contract.

This is emphatically not true of the remedies specified in a collective bargaining agreement for a violation of the terms of the agreement. Penalties are routinely awarded without regard to the question of whether they can be said to constitute "liquidated damages," or whether there is any damage at all. If the

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<sup>14</sup>See Farnsworth, *Legal Remedies for Breach of Contract*, 70 Col. L.Rev. 1145 (1970). Professor Farnsworth sets out seven critical choices involved in the system of judicial remedies, among which are the choice between relief to redress breach rather than compulsion to perform, and the choice between substitutional relief (*i.e.*, damages) rather than specific performance. These choices, he argues, are influenced by the free enterprise economy. He concludes that "all in all, our system of legal remedies for breach of contract, heavily influenced by the economic philosophy of free enterprise, has shown a marked solicitude for men who do not keep their promises." *Id.*, at 1215-1216.

<sup>15</sup>Corbin, *Contracts* 334 (1964). See also *Restatement of Contracts*, §339(2).

agreement provides for the award of one day's pay for each individual claim filed against a railroad for a change in scheduling practices, the Adjustment Boards routinely enforce that penalty, although it is not specified as liquidated damages and, in fact, there is no showing that the aggrieved employees suffered any monetary loss or hardship from the violation of the agreement.<sup>16</sup> Many of the rules governing compensation include penalties and are negotiated as such: premium pay for hours worked on Saturday and Sunday, or before or after the normally scheduled hours, is often intended to penalize improper scheduling. The punitive character of these compensation rules is evidenced by the magnitude of such premiums as compared to the much smaller premiums for shift work, or by comparing the premiums paid for Sunday work in most industries with those provided in continuous process industries or others where Sunday work is normally expected.

The distinction is sometimes explicitly made in the agreement, as in the early case of *Public Service Electric & Gas Co.*<sup>17</sup> Walter Gelhorn there offered the following definitions of "premium pay" and "penalty pay," as those terms were used in the contract:

" 'Premium pay' may be defined as an extra wage granted for special effort; it is earned by that effort, as for example, by working overtime or on seven consecutive days or on a holiday. It is compensatory in purpose and effect. 'Penalty' pay, on the contrary . . . is, rather, punitive in character, being an impost upon an employer in the nature of a fine for failure to carry out some understanding."

A more modern example is provided by the agreement in *Ralph's Grocery Co.*<sup>18</sup> The agreement there provided that if bargaining unit work was performed by nonbargaining unit employees (in that case book or advance salesmen), the union would notify the employer in writing. If thereafter there was a further similar violation within six months, "damages" for such willful violation would be calculated by computing the amount of pay, and the value of the fringe benefit costs, which would have been incurred by the employer if the work had been done by a bargaining unit employee. If a second violation occurred

<sup>16</sup>The courts, at least under the Railway Labor Act, not recognizing the difference between remedies provided for in a collective agreement and damages, have, wrongly I submit, refused on occasion to enforce such awards. See, e.g., *Railroad Trainmen v. Denver & R.G.R.R.*, 338 F.2d 407, 409-410 (10th Cir. 1974).

<sup>17</sup>2 LA 2 (1946).

<sup>18</sup>70 LA 1001 (T. Roberts, 1978).

within the six-month period, the multiplier would be increased by one digit for each violation. This ascending "damage" calculation obviously bore no relationship to the damage actually suffered because of the violation and was inserted as a penalty. Yet I think few, if any, arbitrators would refuse to enforce those provisions if, in fact, a series of willful violations within the six-month period were proven. Conversely, as Tom Roberts held in that case, no award could be given for the first violation other than a declaration that the agreement had been violated. The arbitrator was to award only the remedies provided in the agreement. No remedy could, therefore, be given because the agreement itself specified no remedy except for the second and successive violations within a six-month period.

I immediately hear the objection. It can perhaps be best put in the words of Archibald Cox in the paper he delivered to the 12th Annual Meeting of the Academy: "Arbitrators frequently fashion remedies for breach of a collective agreement without a shred of contract language to guide them. Although a few agreements prescribe the remedy for an unjust discharge, the majority simply forbid discharge without just cause."<sup>19</sup> How then can it be said with any degree of reality that in awarding back pay, an arbitrator is merely acting as the parties' "contract reader" and applying the remedy that he finds in the agreement? The answer is, I submit, that arbitrators frequently find, and should find, implicit in an agreement, although nowhere expressed, obligations and rules. To take the discharge case one step further, assume that an agreement contains no provision at all limiting discharges to situations in which there is "just cause." It is now too well established to warrant dispute, I submit, that, at least if the agreement contains a seniority provision, the limitation on the employer's power to discharge is implicit in the agreement and can be enforced, although there is not a shred of language indicating that there is any such limitation.<sup>20</sup> The arbitrator, in reading a collective bargaining agreement, reads not only the words of that agreement, but also the commonly accepted standards which the parties may be assumed to have agreed upon even if they fail to express them in words. The authority to act as the parties' "contract reader" includes the authority to read into the contract those provisions which the

<sup>19</sup>Cox, *supra* note 7, at 38.

<sup>20</sup>See COX, *Reflections Upon Labor Arbitration*, 72 Harv. L.Rev. 1482, 1502 (1959). Cf. Feller, *supra* note 12, at 749.

arbitrator finds can reasonably be expected to have been assumed to exist by the parties even if they fail to signify it by words.

Indeed, one of the characteristics of the collective bargaining agreement is that much must be necessarily implied. What parties address themselves to in the agreement are the problems or the uncertainties which they recognize as requiring resolution, one way or the other. What is assumed to exist is often simply assumed, and not expressed.

I can think of one familiar example. The first of the *Steelworkers Trilogy* was the *American Manufacturing Company* case.<sup>21</sup> I will recall for you what the issue was in that case. An employee was injured on the job and filed a workers' compensation claim. It was settled on the basis of a partial permanent disability. He then sought to return to work. The employer refused to re-employ him. A grievance was filed and the employer refused to arbitrate.

What is interesting about *American Manufacturing* for present purposes is not the arbitrability question that the Supreme Court decided, but the ground on which the court of appeals held that no arbitrator could possibly find that the grievance should be sustained. The reason was that the contract contained a seniority provision which gave preference in the filling of vacancies to employees based on seniority only if their abilities were relatively equal. The court assumed that the seniority provision was applicable to a worker seeking to return to his job after absence due to an injury. The grievant, having received a settlement for his workers' compensation claim based on a claim of partial and permanent disability, could not possibly, the court said, be found to have the ability to perform his job relatively equal to that of an uninjured employee. Now, obviously, if the agreement had said that an employee off because of injury was entitled to return to his job if he could perform it—the test that the arbitrator ultimately found to be the test—it would have been clear that the seniority provision for the filling of vacancies had nothing to do with the case. What is interesting for present purposes is that the agreement contained no such provision. Indeed, after having looked at what must be hundreds of collective bargaining agreements, I have rarely seen one which establishes the proposition that an employee who leaves his position

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<sup>21</sup>*United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960).

because of sickness or injury is entitled to return to it if he can perform the work of the position. But I imagine most arbitrators would assume that to be the case, as ultimately the arbitrator did in *American Manufacturing*, even though there are no words in the agreement so stating.

So it is with respect to remedy. Agreements rarely, if ever, specify that if a seniority grievance is granted, the grievant who was denied a position, or a promotion, is entitled to back pay. Arbitrators routinely award it nevertheless, as they do overtime pay when an employee is improperly denied the opportunity to work overtime, or straight-time pay when an employee is denied recall rights under the agreement.

My argument so far has been only that the arbitrator, in awarding remedies, should award only those which he finds implicit in the agreement. That does not advance us very far if we assume that the parties normally intend to provide implicitly in their agreement that the arbitrator shall have authority to award damages or, to put it in the words used by those arbitrators who have awarded damages, "by necessary implication the parties contracted for arbitration on the implied condition that if a violation were found an arbitrator could frame an appropriate remedy to undo the wrong that has been done."<sup>22</sup> Or, as an arbitrator in a second case put it, "It has always been the law that where there is a wrong there must be a remedy; and absent a specific limitation on possible remedies, a Court or arbitrator should order a remedy which is based on principles of equity and justice."<sup>23</sup> If a collective agreement can be read as authorizing an arbitrator to "frame an appropriate remedy to undo the wrong that has been done," or, as in the second case quoted, to "order a remedy which is based on the principles of equity and justice," then my first proposition does not advance the inquiry very far, but simply changes the locus of the source of the arbitrator's authority.

My second proposition, therefore, is that unless the contrary is stated in the agreement, as it sometimes may be, the primary authority implicitly granted to the arbitrator is the authority to award specific performance of the provisions of the agreement. There has been much discussion—foolish, I believe—as to the authority of an arbitrator to issue an injunction. The argument

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<sup>22</sup>*Schott's Bakery*, 69-1 ARB ¶ 8118 (Joseph H. Jenkins, 1968), at 3397-3398.

<sup>23</sup>*Vallejo Times-Herald*, 76-2 ARB ¶ 8746 (Francis R. Walsh, 1976), at 6720.

is foolish, I submit, because that is all that an arbitrator ever does, or should do. When an arbitrator orders the company to reinstate a grievant, he is issuing an injunction. When an arbitrator directs the company to remedy a condition that is unsafe, he is issuing an injunction. He is ordering the company to take specific action.

Common law courts, of course, had no such power. They were limited to a finding that the defendant, because he had breached a contract, was indebted to the plaintiff for a specific sum of money which we today refer to as damages. As Oliver Wendell Holmes put it in *The Common Law*: "The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses."<sup>24</sup> In my view, the usual meaning of a collective bargaining agreement is precisely to the contrary. The parties intend that the employer have an obligation to perform in accordance with the contract, not the option of performing or paying the damages. And the remedy power which the parties give to the arbitrator is the authority to order the performance that the contract requires.

At common law, the judicial focus was on the damage suffered by the promisee in return for the promisor's exercise of his option not to perform but to pay. Complex rules, such as, for example, those governing when interest was payable, were developed. In collective agreements there are also rules governing the payment of money, but they perform a different function: filling a time gap. If it were possible to have an instantaneous grievance and arbitration procedure, in which all violations of the rules set forth in the agreement could be instantly grieved and decided, the only remedy power of the arbitrator would be to order the employer to do that which the contract specifies he should do.

The concept of an instantaneous procedure, like the concepts of infinity and a perfect vacuum, is impossible of achievement but serves as a conceptual end point defining the rules governing the process. There must always be a time gap between the uncorrected event upon which the grievance is based and the arbitrator's determination that the event constituted a failure of

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<sup>24</sup>*The Common Law* (1881) 301.

the employer to comply with the rules. The usual function of a money award is precisely to fill that time gap. Many collective agreements contain rules limiting money awards, but those rules are almost never phrased in terms of limiting "damages." To the contrary—and I believe the terminology precisely reflects the kind of remedial power they envisage—the rules speak in terms of "retroactivity." What the parties normally intend is that the arbitrator's order to perform can be made retroactive to fill the time gap between the event and the specific performance ordered by the arbitrator. If the grievant should not have been discharged, the arbitrator orders him reinstated and orders the employer to pay the sum he would have paid if it were known at the time of the discharge that it was improper. Back pay, which is ordered to fill the time gap between the event and the decision (or, more properly, the action of the employer in complying with the decision) may look like damages because it involves the payment of money, but it is not.

If the parties wish to limit the amount payable, they do not limit damages but the period of retroactivity. The United States Steel agreement, in referring to monetary awards, calls them awards "involving the payment of monies for a retroactive period."<sup>25</sup> And it limits the back pay in a seniority case in the following way:

"Awards of the Board may or may not be retroactive as the equities of a particular case may demand but . . . the effective date for adjustment of grievances relating to . . . seniority cases shall be the date of the occurrence or nonoccurrence of the event upon which the grievance is based, but in no event earlier than 30 days prior to the date on which the Complaint For was initiated. . . ."<sup>26</sup>

Where even stricter limitations are intended, the agreement then provides, as an exception, that:

"If the Company recalls the wrong employee from a layoff to a job in a pool, it will not be liable for any retroactive pay to the employee who should have been recalled, with respect to any period prior to 4 days, or the beginning of the payroll week, whichever is later, after receipt by the Company of a specific written notice. . . ."<sup>27</sup>

Again we have a parallel in the development of judicial remedies. When courts of equity filled the gap created by the inability

<sup>25</sup>Agreement between United States Steel Corporation and United Steelworkers of America (1977), Sec. 7(E).

<sup>26</sup>*Ibid.*, Sec. 7.

<sup>27</sup>*Ibid.*, Sec. 13(L)(6)(b).

of the common law courts to direct action, they sometimes awarded money. This was not damages, but, rather, a direction that the defendant perform the obligation to pay money.<sup>28</sup> The usual form of an arbitrator's back pay award follows the equity form rather than that of the law courts. The judgment at law reads that the plaintiff recovers so much money; the decree in equity, that the defendant is ordered to pay the sum.<sup>29</sup>

There is, however, a difference. The arbitrator does not issue an order specifying in dollars and cents the amount to be paid, as a court must if its order is to be enforced. An arbitrator orders reinstatement with back pay, leaving to the parties the determination of the amounts which the agreement requires to be paid for the period in which the grievant was not permitted to work, or was not given the position which the seniority provisions require.

This leads to my third proposition: The power to order specific performance, retroactively if necessary, which the parties may be assumed to have vested in the arbitrator is ordinarily limited to the payment of sums calculated in terms of the collective bargaining agreement, not by measures external to it.

In many cases, of course, measurements derived from the rules of the agreement are available. They may, however, bear little or no relationship to the "damage" caused by the breach of the agreement. Reporting pay is a classic example of a remedy, usually provided in the agreement, for failure of management to provide the notice of the nonavailability of work which the agreement requires. Whether the reporting pay be two, four, or eight hours, it bears no relationship to the hardship or inconvenience the employee may suffer as a result of the failure of management to give notice.

Where there is no measure internal to the agreement which

<sup>28</sup> . . . [E]quity acts specifically, and not by way of compensation; which embodies a general principle running through the whole system of chancery jurisprudence. The principle is that equity aims at putting parties exactly in the position which they ought to occupy; giving them in *specie* what they are entitled to enjoy. . . . Thus equity decrees the specific performance of a contract, and does not give damages for its breach." Bispham, *The Principles of Equity* (10th ed., McCoy, ed., 1925), 81.

"The efficiency of the English courts of equity in granting specific relief has been increased by the power conferred upon them of giving damages . . . by virtue of the Statute 21 and 22 Vict., c. 27, commonly known as Sir Hugh Cairns's Act, which provides that the courts may . . . grant that relief, which would otherwise be proper to be granted by another court—i.e., award damages. Before this act the law had been the other way." *Id.*, at 630.

Today, of course, law and equity have been merged.

<sup>29</sup>Cooke, *Powers of Courts of Equity*, 15 Col. L.Rev. 106, 108 (1915).

can be applied, it follows that, unless the contrary is stated, there can be no monetary award at all. Assume, for example, a rule in a collective agreement, or in a rule authorized by the collective agreement, that an employee shall not smoke in designated areas. An employee smokes. The plant burns down. Now in that case, if the employer discharged the employee, an arbitrator would find that the employee had violated the agreement and the discharge would be sustained. But suppose the employer filed a grievance asking for damages in the amount of the value of the burned establishment. Should an arbitrator order the employee to pay damages? I submit he should not. There is nothing in the agreement by which the damage can be measured.

It may be objected to in this example that most agreements do not provide for employer grievances and, hence, the claim for damages for breach of the no-smoking provision could not be heard at all. Suppose we try an example not subject to that objection: a violation of the safety and health provision of an agreement. Whatever the nature of the particular provision, assume that the employer has acted or failed to act in such a way that an arbitrator would sustain a grievance claiming it was being violated. Ordinarily the arbitrator in such a situation would order the employer to remedy the unsafe condition. Or, if the case arose as the result of an employee's refusal to work under the unsafe conditions, the question might be whether he was justified in so doing. But suppose there is no grievance and the employee works and suffers serious injury as a result of the violation of the agreement. If a grievance is filed by an employee (or by an employee's spouse if the violation was serious enough to cause death) requesting damages for the harm reasonably foreseeable as a consequence of the violation, should the arbitrator, in the absence of language specifically giving him that power, issue such an award? I submit he should not.

To take another example: Suppose that an agreement specifies that employees shall be given a choice of vacation periods and that vacations, once scheduled, shall not be changed except under specified circumstances. Further, suppose that an employer, having scheduled an employee for a particular vacation period, then reschedules that vacation to a later time under circumstances not permitted by the agreement. Suppose that the employee, obedient to the direction of the employer, appears for work during his originally scheduled vacation and, as a consequence, suffers damage of an entirely predictable kind:

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the deposit he paid on a vacation cabin was lost, the schedules of his wife and children had to be rearranged, and he was generally subjected to considerable inconvenience. Should an arbitrator, given these facts, assess the entirely foreseeable damages suffered and award them to the employee? I think not. Some agreements do, indeed, provide for reimbursement for such losses. But, in the absence of a specific remedial provision, should an arbitrator reasonably read the contract as providing for such relief? The answer should be no.

Sometimes a specific performance remedy can be found in cases such as that last given. Suppose the unpermitted vacation schedule change was to assign a shut-down period as the employee's vacation and give him vacation pay for the weeks of shut-down. An arbitrator, if he later found after the originally scheduled vacation period had passed that the violation was willful, might conclude that the employee had not received the vacation required by the agreement and order the employer to provide an additional period off from work, with pay, in order to comply with the terms of the agreement.<sup>30</sup> That might, in fact, be of greater value than the damage suffered by the employee, but it would be a remedy implicit in the agreement and measured by its terms.

The working foreman is, of course, another familiar example. The appropriate approach to that problem was eloquently set forth by Ben Fischer, a learned and experienced advocate, now retired, at the 1971 meeting of the Academy:

“Management says: ‘Foremen won’t work.’ And when they do work, management says: ‘That’s wrong. We’re going to look into this and do something about it.’ They do, and the foreman is told not to work—and this keeps going on and on until you go to arbitration, and then you’ve got a new kind of remedy. Now the arbitrator says that the foreman shouldn’t work.

“And the way you implement this is by giving the foreman a copy of the award, and if he can read he knows he violated the contract. Perhaps management takes him aside, if he can’t read, and explains it to him. But nothing happens. If you think it’s a great deal of satisfaction to a union member to say, ‘We won!’ when it costs us \$1,200 to get this little lecture to the foreman, you are quite wrong. People are not concerned with this sort of elusive victory.

“I don’t know that this is the arbitrator’s problem; I think it is the parties’ problem. It seems to me that in responsible collective bargaining at this late date, if you’re going to say that there is a rule,

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<sup>30</sup>*Cf. Bethlehem Steel Co.*, 37 LA 821 (R. Valtin, 1961).

then you ought to say that there should be some penalty for its violation. When a member of the union violates a rule, there's a penalty; there's not much of a problem involved in that. When management violates a rule, there ought to be a penalty, and it is not primarily—in my judgment—the responsibility of the arbitrator to fashion such a remedy. If he can do so, God bless him—and I'll help him if I can—but I'm not going to lose sight of the fact that it is the contract itself that really fashions the remedy."<sup>31</sup>

Shortly after Ben made that statement, the basic steel agreements were indeed amended to provide a remedy, and one which bears no necessary relationship to the kind of remedy that a court would provide for breach of contract. The basic steel agreements were amended in 1971 to provide that if a supervisor performs work in violation of the agreement and the employee who otherwise would have performed the work can reasonably be identified, the company would be required to pay such employee two hours' pay or, if greater, the rate for the time which that employee would have worked on the job if the supervisor had not violated the agreement.<sup>32</sup> This penalty apparently having been proven to be inadequate, the provision was modified in 1974 to provide a minimum of four hours' pay.<sup>33</sup> The fact that the identified employee may have been fully paid for the time, and thus would receive double pay for a minimum of four hours, is immaterial. The provision is plainly a penalty measured in terms of the agreement and would be enforced as such by an arbitrator under the agreement irrespective of the lack of damage.

There is an exception to the rule that, unless otherwise specifically provided, the only monetary arbitral remedies should be those measured by computations internal to the agreement. That exception is the deduction of outside earnings from back pay. My thesis that the arbitrator, in ordering a remedy, simply directs the employer to do, retroactively, what the arbitrator finds he should have done, including the payment of money to a grievant who has been discharged wrongly or has been improperly laid off, would lead to the result that there should be no deduction for outside earnings during the period of absence from the workplace.<sup>34</sup> Yet agreements often provide for a de-

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<sup>31</sup>Fischer, *supra* note 7, at 132.

<sup>32</sup>Section 2-A-3 (1971).

<sup>33</sup>Section 2-A-3 (1974).

<sup>34</sup>Deductions for periods when the employee was sick or would have been laid off, even if not improperly earlier discharged or laid off, are proper under this formulation

duction for outside earnings, and arbitrators almost uniformly provide for such a deduction even where there is no language directing them to do so. The only exception is the case where the remedy is set forth in words in the agreement and does not provide for such a deduction.<sup>35</sup>

Ben Fischer, whom I have already quoted at length, has criticized this practice,<sup>36</sup> but it can be regarded as a fixture of the industrial scene. It arises, I suspect, because arbitrators feel that it would be somehow unjust to permit the grievant to enrich himself because of the employer's violation of the agreement. But even here I can maintain my thesis that the arbitrator is acting as the parties' contract reader rather than acting as a court would in assessing damages. Given the existence of provisions for the deduction of outside earnings in many agreements, it is perhaps proper for arbitrators to assume that the parties contemplated such a deduction even though they do not say so in so many words. Although the parties generally do not include remedial provisions that require computations or assessments of amounts not based upon the wage or other formulas contained in the agreement, they clearly have the power to do so.

In any event, the deduction of outside earnings does not correspond to what a court would do in assessing damages. In court, damages for breach of a contract of employment normally include interest. Arbitrators rarely award it. In court there is a deduction for the amount the dischargee earned or could have earned in other employment but there is also a counterbalancing addition of any costs that he incurred in seeking other employment, whether or not successful. I have yet to see an arbitrator's decision that enhances the back pay due an employee by an assessment of the costs that he incurred in unsuccessfully attempting to "mitigate damages."

There is, I submit, no duty to "mitigate damages" because the arbitrator does not award damages. There is, or should be, therefore, no requirement that the employee seek other employment and no deduction from back pay because of his failure to do so. I concede that arbitrators often speak in terms of the duty

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since the employer would not have paid the employee for those periods even if there had been no violation of the agreement.

<sup>35</sup>See *United States Steel Corp.*, 40 LA 1036 (C. McDermott, 1963). The agreement has since been modified to permit the offset, but to also give the arbitrator discretion to modify or eliminate it "where circumstances warrant."

<sup>36</sup>Fischer, *supra* note 7, at 133.

to mitigate damages and sometimes do, indeed, refuse to award back pay for periods in which it can be shown that the employee did not seek alternative employment.<sup>37</sup> But the cases in which an employer raises this defense are, at least in my opinion, rare, as are the agreements providing for such a duty. That fact indicates to me that the parties do not really regard this as an element to be considered in determining the appropriate arbitral remedy in a discharge case.

The provision for the deduction of outside earnings in an order of reinstatement with back pay can serve as an illustration of the limitations of my thesis. It is not my thesis that there is something inherent in the nature of the arbitration process that restricts the arbitrator to remedies calculable by use of the wage and other formulas of the agreement. It is my thesis that arbitrators, in awarding remedies rather than damages, are awarding only the remedies that they find inherent in the agreement and that, by and large, the remedies which the parties prescribe in the agreement, and those which can be found to be implicit in it even if not described in words, are so measured.

The parties can always provide otherwise, and they sometimes do. It is perfectly possible for an employer and the union to specify in their agreement that if an employee's grievance is sustained, the arbitrator shall have authority to award damages to him such as a court would in the case of a breach of an individual contract of employment. I have not been able to find an example of that kind of provision, but it is certainly conceivable that the parties could write one. And there are cases in which the parties provide for damage remedies for the employer in arbitration—not against the employees, but against the union. In the *Drake Bakeries* case,<sup>38</sup> the Supreme Court ordered arbitration of an employer claim for damages for an alleged violation of a no-strike clause. My own view is that *Drake Bakeries* was wrongly decided on its facts. But we can take the agreement as read by the Court as an exemplary one under which a damage remedy not calculable by provisions internal to the agreement can be awarded. Insofar as an agreement so provides, however, it is really not grievance arbitration in the usual sense. It does not involve adjudication of the rules governing the relationship

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<sup>37</sup> See, e.g., *E. F. Hauserman Co.*, 64 LA 1065 (Rankin M. Gibson, 1975), citing judicial precedents in suits for damages. *Contra: Dubuque, Lorenz, Inc.*, 66 LA 1245 (A.V. Sinicropi, 1976).

<sup>38</sup> *Drake Bakeries, Inc. v. Local 50, Bakery Workers*, 370 U.S. 238, 50 LRRM 2440 (1962).

of employer and employee, but the quite different matter of the contractual rights between union and employer. It is not provided as a substitute for the strike, but as an alternative form of litigation. Arbitration of employer claims for damages are more properly analogized to commercial arbitration than to grievance arbitration, and my view is that the presumption of arbitrability which the Supreme Court has specified in the case of grievance arbitration is wholly inapplicable.<sup>39</sup>

There are examples of provisions in which the parties have consciously given the arbitrator the authority to do more than simply provide a retroactive remedy for grievances, strictly defined. A remedial problem very much akin to the problem presented by the situation where a foreman works in violation of the agreement but without any loss of pay to any employee is presented by provisions, now fairly common as a consequence of the Supreme Court's *Fibreboard* decision,<sup>40</sup> requiring the employer to enter into discussions with the union before contracting out work. The remedy to be applied where an arbitrator finds a violation of a provision not prohibiting the contracting out but simply requiring prior discussions presents obvious difficulties. They were addressed in the 1977 basic steel agreements by simply giving the arbitrator broad remedial power. Where the employer fails to give notice of contracting out and the failure to give notice deprives the union of a reasonable opportunity to suggest and discuss practicable alternatives, the United States Steel agreement provides that "the Board shall have the authority to fashion a remedy, at its discretion, that it deems appropriate to the circumstances of the particular case." That language is significant not only because of the discretion it vests in the arbitrator, but also because of its negative inference. The parties seem to have assumed, correctly in my view, that in the absence of that language, the arbitrator might find no remedy implicit in the agreement which would be meaningful.

The next question remains, however, as to why arbitrators should have the limited role I have described. Is it a function of the nature of the arbitration process, or is it a function of the collective bargaining process? The answer is, I believe, a bit of both. There is nothing in arbitration as such that would prevent arbitrators from acting the way courts do: taking testimony as to

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<sup>39</sup>The argument is more fully spelled out in Feller, *supra* note 12, at 800-803.

<sup>40</sup>*Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 57 LRRM 2609 (1964).

the damage suffered by the grievants and issuing an award in dollars and cents. Commercial arbitrators do that all the time. Indeed, that is their principal function. But, at least with respect to grievance arbitration, there are serious limitations on the competence of arbitrators to make such determinations. Our judicial system has evolved an enormous set of procedures designed to facilitate the adjudication of such questions as damages. There are, first of all, discovery procedures which in many cases involve more time and effort than the trial of a case itself. There are provisions governing the allocation of court costs. There are somewhat elaborate provisions governing offers of settlement and the consequences to a party that refuses an offer of settlement and receives less than the offered amount at trial. All of these procedures are meant to facilitate the disposition of claims that will end up in a monetary award in dollars and cents. None of them is available in grievance arbitration. The reason they are not is that the parties have not provided the arbitrator with these tools. And the reason they have not goes back to the collective bargaining process out of which grievance arbitration arises.

If one looks at the history of grievance arbitration in this country, one will find, in every instance in which it was opposed, the theme that the parties opposing the use of arbitration did not want third parties telling them how to run the business (or, today with school boards, in telling them how to run the schools). Grievance arbitration attained the stature that it has today as a substitute, not for litigation, but for the strike. It became acceptable as such a substitute because the arbitrator was limited to the function of reading the agreement for the parties. The strike, for which arbitration is the substitute, was not normally directed toward the payment of damages by the employer, but directed toward compelling action by it. Just so, the remedies that an arbitrator has available are remedies directed at action, retroactive in some cases, but limited to actions of the kind called for by the agreement, including the payment of monies measured by the terms of the agreement. Although it is stretching the analogy quite far, what the parties have in effect done might be said to reinstitute what used to be the rule with respect to the bond under seal. Upon failure of the employer to meet the condition set forth in the bond, the penalty provided for therein, and only that penalty, must be paid,

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whether or not that penalty adequately redresses the injury or, indeed, much more than adequately redresses the injury.

What I have said here in a sense parallels what I have said on the subject of the application of "external law." I have argued that arbitrators, unless specifically authorized to do so by the agreement, should limit their determination as to what action is or is not required by the agreement to the terms of that agreement, including the terms which the arbitrator may find implicit in it, although not spelled out, and should ignore the requirements of the external law.<sup>41</sup> Just so, my view here is that in determining remedies, the arbitrator should not analogize himself to a court and award remedies of the kind that a court would award, but should limit himself to awarding the remedies that he finds either explicitly or implicitly within the agreement.

It is perhaps appropriate to insert here a comment on a particular class of cases: the cases in which the National Labor Relations Board defers to arbitration under its *Collyer* doctrine.<sup>42</sup> It is uncertain at this moment where the Labor Board stands with respect to *Collyer*. The last definitive announcement was that the Board would not defer to arbitration cases involving complaints of violation of individual rights, that is, complaints involving claimed violations of Section 8(a)(3) of the Act, but would defer to arbitration in cases involving complaints of violation of the duty to bargain expressed in Section 8(a)(5).<sup>43</sup> The deferral of such cases poses obvious remedial problems. Suppose parties, subservient to the Board's direction, do submit to the arbitrator the question of whether the employer has refused to bargain in violation of Section 8(a)(5) of the Act, but do not specify what remedy the arbitrator is permitted to award. The Labor Board, if it found a violation, is authorized by statute to order the offending party to cease and desist from the violation "and to take such affirmative action . . . as will effectuate the policies of this Act."<sup>44</sup> Further, the statute specifically provides that "such order may require such person to make reports from time to time showing the extent to which it has complied with the order."<sup>45</sup> The Board has utilized a variety of remedies in order

<sup>41</sup>Feller, *supra* note 9.

<sup>42</sup>*Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971).

<sup>43</sup>*General American Trans. Corp.*, 228 NLRB 808, 94 LRRM 1483 (1977); *Roy Robinson Chevrolet*, 228 NLRB 828, 94 LRRM 1474 (1977).

<sup>44</sup>Section 10(c).

<sup>45</sup>*Ibid.*

“to effectuate the policies of the Act.” It normally requires that the parties bargain. Where the act constituting a refusal to bargain is unilateral action, it may order the employer to rescind that action. In *Fibreboard* the Board ordered the employer to recreate its maintenance department and to pay back pay to the employees it terminated when it contracted out its maintenance work without first bargaining with the union. The Board routinely orders the posting of notices. Where it finds an egregious violation, it may go further and order the employer to assemble the employees and read to them, or permit a Board agent to read to them, the findings of the Board and its order. It may order the employer to give the union access to bulletin boards, or to provide the union with the names and addresses of employees.<sup>46</sup>

Should an arbitrator in a case deferred to him by the Board assume the power to grant such remedies if he finds them appropriate? Again, if the parties stipulate that he may issue such orders as the Board might issue, the parties may be deemed to have authorized him to engage in a continuing policing role. But unless they do so, I submit, he should not. He has neither the jurisdiction nor the physical capability to police compliance with his order. The Labor Board carefully separates the process of deciding whether a violation has occurred and determining the general nature of the remedial order to be issued, on the one hand, and the determination of whatever sums may be due and whether the order has been complied with on the other. The latter function is performed by the regional offices, each of which has an individual designated as the “compliance officer” whose function it is to assure compliance with the Board’s order after it has been issued. No such facilities are available to the arbitrator, nor should he assume authority to police compliance with his order unless the parties specifically indicate that he should do so.

All that I’ve said thus far should have been phrased in descriptive terms: a statement of what arbitrators in fact do. It has largely been phrased, however, in normative terms: what arbitrators should do. The reason is that, in preparation for this paper, I attempted to read at least a sampling of the recent

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<sup>46</sup>*J.P. Stevens & Co.*, 239 NLRB No. 95, 100 LRRM 1052 (1979), enforced in part, *J.P. Stevens & Co. v. NLRB*, 623 F.2d 322, 104 LRRM 2573 (4th Cir. 1980). The Board had also ordered the payment of the union’s negotiating and litigation expenses. The court remanded that portion of the order to the Board for further explication.

reported arbitrators' decisions dealing specifically with remedies. Any such survey is subject to a serious qualification. As we all know, only a small proportion of arbitrators' decisions are submitted for publication, and only a small proportion of those submitted are, in fact, published. The editors of the publishing agencies naturally and understandably choose to publish those decisions that add something new to those already published. Decisions that simply follow well-established norms are not new, but simply repetitive, and, hence, are usually not published. A survey of the published decisions, therefore, will tend to give greater weight than should be given to what the statisticians call "outliers."

Statisticians, as a matter of routine, disregard "outliers" in doing regression analysis. Reliance on published decisions as indicating what arbitrators in fact do, to the contrary, gives undue weight to the "outliers." Despite this qualification, however, a sampling of the reported decisions produces such a significant number that do not correspond to what I have described as the proper scope of the arbitrator's remedial power that it is fair to conclude that what I have described as what arbitrators should be doing is not, in fact, a fair description of what at least a number of them are doing.

Let me give you a few examples. I have already said what I believe the arbitrator's function should be when presented with a claim for damages as a result of a violation of a safety and health provision. When I last wrote on this subject, in 1973, I was able to say that I could find only a single published decision in which an arbitrator had awarded damages to a grievant injured as a result of a violation of a safety and health provision, and in that case the arbitrator's powers were not limited to interpretation and application of the agreement. This is no longer the case. I have found at least one in which an arbitrator awarded not only back pay for the period in which the grievant lost time because of an injury caused by a violation of the safety and health provision of the agreement, but also the cost of the drugs prescribed by his physician and mileage for the cost of his transportation to his physician.<sup>47</sup> (Presumably he did not order payment of the physician's fees only because that was already covered by workers' compensation.)

That decision may be fairly classified as an "outlier." But

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<sup>47</sup>*Vallejo Times-Herald*, 76-2 ARB ¶ 8522 (Francis R. Walsh, 1976).

surely it would be presumptuous to describe the soon-to-be-president of the National Academy of Arbitrators as an "outlier," so let me describe to you a series of three decisions in the same case issued by that arbitrator.<sup>48</sup>

The case involved the discharge of two employees who refused, on October 3, 1974—the dates are important—to agree to work a changed schedule that was to begin on October 8. They were instantly discharged. On October 4, still before the change in schedule was to take place, they recanted and asked for reinstatement. The company refused. A charge of violation of Section 8(a)(3) was filed with the Labor Board because it appeared that the discharge of at least one of the grievants was in part motivated by a desire to get rid of a troublemaker, that is, a shop steward who had been filing a large number of grievances. The Board, under its then application of *Collyer* to 8(a)(3) cases, deferred to arbitration. The arbitrator, quite properly, refused to address the statutory issue since the case could be resolved under the contract. In his award, dated May 7, 1975, he found that the grievants had unequivocally offered to retract their refusals and to accept the disputed work assignments without any condition other than the pursuit of their claim that the assignments were improper. Accordingly, he ordered that they "be reinstated effective October 4 without loss of pay, computed on the basis of the straight-time hours they would otherwise have worked but for their wrongful separation from the payroll." So far, so good: specific performance retroactive to October 4. He then went on to specify that "any monies received by them in lieu of their wages, including unemployment compensation, shall be deducted from the sum due them and they shall submit sworn statements of such earnings to the Employer as a condition precedent to receipt of back pay." This point is perhaps questionable, but certainly not contrary to accepted practice. Finally, he ordered that the hearing should remain open and jurisdiction be retained until June 15, 1975.

Before that date both parties asked the arbitrator for resumption of the hearing with respect to the sum due the grievants, as well, apparently, as to whether the employer was obliged to reinstate them. The employer introduced testimony that the grievants would have been laid off by November 1974. The arbitrator, after citing and discussing the California Code of

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<sup>48</sup>*Farmer Brothers Co.*, 64 LA 901 (E.A. Jones, 1975), 65 LA 884 (1975), 66 LA 354 (1976).

Civil Procedure and the United States Arbitration Act, concluded that this evidence should have been tendered at the first hearing and could not, therefore, be considered. The union sought an award of its costs, including attorneys' fees, on the ground that the company had unwarrantably and unreasonably abused the post-award procedure provided for in the first award. The arbitrator rejected this claim in view of the specific provisions in the agreement specifying that each party should bear its own costs. The award was that the employer and the union should comply forthwith with the terms of the May 7, 1975, award. Again, however, the arbitrator retained jurisdiction, this time until October 31, 1975.

Sure enough, the case came back again. From his third opinion in the same case, it appears that subsequent to the second award the employer offered to pay one of the two grievants, the trouble-making shop steward, back pay from the date of his discharge to May 7, 1975, the date of the first award, provided he would accept layoff status and agree that he would not accept any recall. Reinstatement and back pay had been given neither grievant. The arbitrator was duly enraged. "The employer," he said, "has purposely retained and converted to its own use monies long overdue, that are rightfully the Grievants." Accordingly, he issued a new award. There was to be added to the accrued back pay health and welfare payments and prorated vacation time, and this liability should continue to accrue until an unconditional offer of reinstatement was made. But, under this third award, there would be no subtraction of unemployment compensation payments. Furthermore, to the sums thus calculated there was then added interest at 10 percent, compounded daily. The employer and the union were to seek concurrence on the sum due, and upon failure to concur each was to submit his proposal and the arbitrator would choose one or the other. The hearing was again left open and jurisdiction retained. There is no report as to whether any further proceedings became necessary.

This very distinguished arbitrator's outrage at the employer's refusal to comply with his award is understandable. As he said, the employer did not have one scintilla of justification for its continuing failure to comply with the award of May 7, 1975.<sup>49</sup> But,

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<sup>49</sup>It is not quite true, as he said it was, that the award was entirely unambiguous. It did not specifically include the health and welfare payments or the vacation accruals, nor did it specify as the final award did that there should be deducted federal and state paycheck withholdings. But that was not a fault in the first award. Arbitrators, in my view,

despite his understandable indignation, the arbitrator, I submit, had no authority whatsoever to order the payment of interest or to eliminate the deduction of unemployment compensation payments if it were proper in the first place to provide for their deduction. Either the agreement should be read as providing for a deduction of unemployment compensation payments, or it should not. Either the agreement provided for interest payments on back pay—as most do not—or it did not. Most arbitrators do not award interest because it is not normally included as a contractual remedy. A court, when called upon to enforce an arbitrator's award, could indeed provide for interest. Indeed, it could direct the employer to comply upon penalty of contempt and jail (a remedy which the arbitrator apparently did not entertain). The additional burden he did place upon the employer might well have been imposed by a court determined to do justice and equity, and undoubtedly was so imposed by the arbitrator for that purpose. In so doing, however, I submit that he exceeded his function as an arbitrator.

There is a story that Judge Learned Hand, when departing from one of his meetings with Justice Holmes, said, "Do justice." Holmes is reported to have replied, "My job is not to do justice but to see that the game is played according to the rules." Holmes was not speaking of remedies and of arbitration. But his thought is apt. The arbitrator's function is not to do justice, even with respect to remedies. His function is to read the contract, including its provision as to remedies, and to tell the parties what those provisions mean as applied to the particular case. Where the agreement is silent, he may find implied in it, as the common law of industrial relations, the kind of remedies customarily provided in collective agreements or by arbitrators. Those remedies are almost universally injunctive in nature and, where the payment of money is involved, based on calculations interior to the agreement. The remedy in a particular case may be more or less than justice. But, as the parties' "contract reader," the arbitrator's function ends when he tells the parties what the remedy provided in their agreement is and directs performance of that remedy.

This is, concededly, a narrow view of the arbitrator's function. But the institution of grievance arbitration as we know it today

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do not direct the specific form of calculation; they simply tell the employer to pay what he should have paid if the wrongful discharge had not taken place.

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has been built upon the assumption that arbitrators are not courts and do not have the power, unless they are expressly given it, to see that justice and equity are done. They are, and should be, restricted to performing the narrow function that the parties have given them. Concededly, in determining the meaning of an ambiguous contractual provision, or in determining what remedy should fairly be read into an agreement, the arbitrator should choose the alternative among those offered to him which best corresponds to what he believes the parties intended and that, in turn, may involve an assumption that the parties intended to do that which is right as the arbitrator sees it. But surely an arbitrator should not read an agreement as providing for the deduction of unemployment compensation and not providing for interest on back pay when it is first presented to him and then, when the employer refuses to comply, read that same agreement as not providing for a deduction of unemployment compensation and providing for interest at 10 percent.

It takes discipline to issue an award that the arbitrator firmly believes does not do justice to the parties. It takes, to push the analogy further, the same kind of discipline that, under the *Steelworkers Trilogy*, requires a court to enforce an award interpreting a collective bargaining agreement in a way which the court believes is plainly erroneous and unjust. I am sure you are all familiar with the cases in which a court, through one device or another, has failed to exercise that kind of discipline because, in the court's view, the result reached by the arbitrator was plainly wrong and did an injustice to one of the parties. I regret such instances. I'm sure that everyone in this audience does. There are at least an equal number of cases, however, in which arbitrators, bemused perhaps by the freedom from review which the disciplined courts have granted them, or perhaps only confused by the similarity of orders for back pay to the damage remedy available in the courts, have not imposed upon themselves the discipline which I urge they should. I hope, although I doubt, that everyone in this audience also agrees.