II. REMEDIES: ANOTHER VIEW OF NEW AND OLD PROBLEMS*

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Two Views of Arbitral Remedial Authority

David Feller has expressed a point of view emphasizing what he feels *should* be the basis or foundation of arbitral remedy power. In addition, he has thoroughly explained why that power should be narrowly circumscribed. I have elected to concentrate on what arbitrators do with respect to formulating remedies and on what basis they predicate their actions. In doing so, it is important to note that these conclusions are based on published arbitration awards. The danger of relying on published arbitration awards has already been voiced by Professor Feller. Despite his admonition, I am of the view that these published awards are indeed reflective of the trends that have developed with regard to remedies in "arbitration." On that basis, I feel a review of the findings is useful.

There are two perspectives from which to examine arbitral remedy power.[1] One is based on the "legal" authority of the arbitrator to formulate a specific remedy under the labor agreement. The other is based on a policy foundation, that is, what the likely effect, or impact, of a specific remedy will be on the collective bargaining institution.

A review of the "legal-authority" concept must include an examination of specific contractual provisions as well as of state and federal statutes and the common law. In addition, such a review must examine the judicial response to remedial determinations because, despite the directive of the Supreme Court in the *Steelworkers Trilogy,*[2] state and federal courts are increasingly accepting the invitation to review the merits of arbitrators'

*The main body of this paper has been excerpted from Remedies in Arbitration, by Marvin Hill, Jr., and Anthony V. Sinicropi (Washington: BNA Books, 1981).

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[1] *See, e.g.,* Fleming, *Arbitrators and the Remedy Power,* 43 Va. L.Rev. 1199, 1201 (1962); Stein, *Remedies in Labor Arbitration,* in Challenges to Arbitration, Proceedings of the 13th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1960), 39.

[2] *Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593, 46 LRRM 2423 (1960).

awards under the premise of determining contractual restrictions on arbitral authority.[3] As a result, a truly innovative, yet fair, arbitrator may face the hazard of having his awards overturned.

In analyzing remedial power under the policy concept, it is essential to understand that the focus is not on whether the remedial measure is permissible under the collective bargaining agreement or the law but, instead, on how the measure, if awarded or implemented, might affect the collective bargaining institution.

It should not be assumed that policy and legal-authority concepts are independent. Clearly, they are often interdependent and, when taken in combination, affect the formulation and application of arbitral decisions.[4]

Any examination of arbitral remedial authority, whether from a legal-authority or policy point of view, must address the question of what the arbitrator's function should be within the "private rule of law" established by the collective agreement. Arbitral opinion is divided on this question.

Some arbitrators and practitioners would equate the arbitrator's remedy power with that of a court on contractual disputes. This approach has been advanced by Arbitrator Sidney Wolff[5] and has been characterized by Arbitrator David Feller[6] as: "What is the proper measure of damages in a suit for breach of a labor agreement which happens to be decided by an arbitra-

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[3] *See, e.g.,* St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny,* in Arbitration—1976, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1978), 29; Christensen, *Judicial Review: As Arbitrators See It,* in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting National Academy of Arbitrators, National Academy of Arbitrators (Washington: BNA Books, 1973), 99–114.

[4] The late Dean Harry Shulman, Sterling Professor of Law at the Yale Law School, noted in a Holmes Lecture that appeared in the Harvard Law Review, 68 Harv. L.Rev. 999 (1955), that collective bargaining is not concerned merely with the return for employees' services. Rather, collective agreements are pacts adopted to set up systems of industrial democracy in complex industrial societies. Shulman writes: "No matter how much time is allowed for the negotiation, there is never time enough to think every issue through in all of its possible applications, and never ingenuity enough to anticipate all that does later show up." Dean Shulman went on to state that the parties recognize that all contingencies have not been anticipated and that, in any event, there will be many differences of opinion as to the proper application of the standards used by arbitrators. Clearly, Shulman recognized that both legal-authority and policy factors are present in the collective bargaining arrangement and that the grievance-arbitration mechanism is designed to address and incorporate both of those concepts.

[5] Wolff, *The Power of the Arbitrator to Make Monetary Awards,* in Labor Arbitration—Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1964), 176–193.

[6] *See* Feller, Discussion of *Remedies in Labor Arbitration,* in Labor Arbitration—Perspectives and Problems, *id.,* at 194.

tor?"[7] Under this approach, arbitration is viewed as a speedy and informal way of dealing with what is essentially a suit for breach of contract. Hence, the basic remedies available in breach-of-contract cases—damages, restitution, and equitable remedies—may, unless proscribed by the agreement, be awarded by the arbitrator, who essentially acts as a surrogate for a judge. Questions concerning the propriety of a specific remedy may readily be understood by reference to Corbin or Williston. As one observer has stated: "[T]he never-say-die Willistonian view . . . [is] that a contract is a contract is a contract, and that although some contract rules are too narrow to qualify as full-fledged principles, the general principles . . . of contract law are always applicable."[8]

At the other extreme is the view that the arbitrator's only function is to explicate what is implicit in a collective bargaining agreement. David Feller, in his classic piece, "The Coming End of Arbitration's Golden Age,"[9] and in his paper at this meeting, argues that arbitration is not a substitute for judicial adjudication, but a method of resolving disputes over matters which, except for the collective bargaining agreement and its grievance-arbitration machinery, would be subject to no governing adjudicative principle at all. Arbitration is an adjudication against standards, but the standards are not those which would be applied by a court charged with adjudicating a contractual dispute. Labor arbitration requires treatment different from that accorded commercial arbitration cases, Feller contends, since in the commercial setting arbitration is a substitute for litigation rather than a system to avoid industrial strife.

For this reason arbitration of labor disputes has functions quite different from arbitrations under an ordinary commercial agreement. Feller argues that it is important to draw a sharp distinction between the role of the arbitrator in construing and applying the collective bargaining agreement and that of an

[7] *Id.*, at 194–195.

[8] Mueller, *The Law of Contracts—A Changing Legal Environment,* in Truth, Lie Detectors, and Other Problems in Labor Arbitration, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1979), 204–217. In *Local 636* v. *J.C. Penney Co.*, 484 F.Supp 130, 103 LRRM 2618 (W.D.Pa. 1980), a federal district court, in determining whether an employer was contractually bound to arbitrate, stated: "Although the technical rules of contract do not necessarily control all decisions in labor management cases, normal rules of offer and acceptance are determinative of the existence of a bargaining agreement. . . ." *Id.*, at 2620.

[9] Feller, *The Coming End of Arbitration's Golden Age,* in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1976), 97–139.

arbitrator functioning as an adjudicator of contractual controversies subject to resolution under the general law of contracts. In another article he states:

> "[Y]ou 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 *do* address—to a court of law in which you are suing for breach of contract.
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> "When you arbitrate, however, you are not suing through an informal domestic tribunal. . . . 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?' "[10]

The majority view, as argued by Addison Mueller,[11] is probably somewhere between the views of Wolff and Feller, namely, that collective bargaining agreements are special types of contracts[12] with respect to which the principles of ordinary contract law, though not strictly applicable, are nonetheless helpful to arbitrators because they tap the wisdom of the past. Although the parties are free to make the arbitrator the equivalent of a judge formulating remedies in a contractual dispute, in general the parties do not anticipate that he will act in such a fashion. If, as claimed by the Supreme Court, the arbitrator is usually chosen because of the parties' confidence in his knowledge of the "common law of the shop," it is expected that he will draft remedies that may not explicitly be authorized within the four corners of the agreement. After all, the Court, in *Warrior & Gulf,*[13] has stated that "the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it."[14] Justice Black has likewise declared that "a collective bargaining agreement is not an ordinary contract for the purchase of goods

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[10]Feller, *supra* note 6, at 194–195.

[11]Mueller, *supra* note 8; *See, e.g., Metal Specialty Co.,* 39 LA 1265 (Volz 1962); *Coca Cola Bottling Co.,* 9 LA 197 (Jacobs 1947).

[12]In this regard, *see* Feller, *A General Theory of the Collective Bargaining Agreement,* 61 Calif. L.Rev. 663 (1973).

[13]*Steelworkers* v. *Warrior & Gulf Navigation Co., supra* note 2.

[14]*Id.,* at 2419.

and services, nor is it governed by the same old common-law concepts which control such private contracts."[15]

Whichever view one endorses—the extreme positions may not necessarily be mutually exclusive since an agreement may be explicit in specifying the remedy that is to apply if a violation is found—it is the author's premise that the parties in the arbitration procedure spend much time on the merits of the dispute, as they should, and sometimes almost as much time on the question of arbitrability, which perhaps they should not. The matter of an appropriate remedy, if addressed at all, is usually noted merely by asking the traditional question: "If so, what shall be the remedy?" While in some cases this will be sufficient, in others the remedy is far from apparent and is not easily determinable.

In view of the potentially great impact of an arbitration decision and the limited judicial review available to the parties, it is puzzling to note the extent to which remedy issues have been ignored by the parties and practitioners alike.

Discipline and Discharge—Problem Areas

Perhaps the most frequently encountered remedy problems arise in the disciplinary area. Reinstatement with full benefits is usually not a problematic factor, but conditional reinstatement with back pay, reinstatement without back pay, and obligation for mitigation of damages all present difficulties that will be touched on briefly.

Last Chance or Conditional Reinstatement

Under this structure, arbitrators have provided that an employee be reinstated, but not until the occurrence of some future event (condition precedent); or, an arbitrator may provide for reinstatement, but if some event or condition materializes in the future, the remedy shall no longer be binding on the employer (condition subsequent). Some common examples of both types of conditional remedies are noted as follows:

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[15] *Transportation Communications Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157, 160, 63 LRRM 2481, 2482 (1966). *See also, Emery Freight Corp.* v. *Teamsters Local 295*, 356 F.Supp. 974, 81 LRRM 2393 (E.D.N.Y. 1972), citing *Columbia Broadcasting System* v. *American Recording & Broadcasting Assn.*, 293 F.Supp. 1400, 69 LRRM 2914 (S.D.N.Y. 1968) ("collective bargaining contract not necessarily governed by common law principles").

In an example of a remedy conditioned upon an event subsequent to reinstatement, an arbitrator[16] considered the discharge of an employee who allegedly concealed on his employment application his problem with hand eczema. Finding that the condition was not work-related, the arbitrator reinstated the grievant, but placed him on probation for five years, with the provision that if at any time during that period the grievant was unable to perform a full schedule, including overtime, he should immediately be terminated.[17]

Where it is demonstrated that the basis of a discharge was due not to an intentional individual fault of the grievant, but rather to a defect in mental or physical capacity, arbitrators have not hesitated to order reinstatement conditioned upon a proper showing of mental or physical fitness. Remedies in this area range from merely requiring the employee to submit to a physical examination,[18] to undertaking serious long-term mental therapy. As an example, one arbitrator[19] found that a discharge for excessive absenteeism was improper because the employee demonstrated that his poor attendance was due to an alcohol problem. As a remedy, the arbitrator converted the discharge to a disciplinary layoff and, effective as of the date of the award, ordered the grievant immediately to place himself in the care of a hospital rehabilitation center and carry out whatever recommendations it should make, including submission to long-term hospital treatment and/or Alcoholics Anonymous. The arbitrator also directed the employer to reinstate the grievant unconditionally within six months provided that the rehabilitation center certified that the grievant was able to work. If the conditions were not met, the arbitrator declared that the grievant could be treated as a voluntary quit.

Another arbitrator[20] was called upon to consider the discharge of an employee who was diagnosed as a manic-depressive with no clear prognosis. In reversing the discharge, the arbitrator stated:

> "Although cause for discharge is not *always* based on fault on the employee's part, it normally requires such a finding. For example,

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[16]64 LA 1129 (1975).

[17]*Id.*, at 1132.

[18]*See* Elkouri and Elkouri, How Arbitration Works (Washington: BNA Books, 1975), at 649–650. *See also Atlas Metal Parts Co.*, 67 LA 1230 (Kassoff 1977); *Lever Bros.*, 66 LA 211 (Bernstein 1976); *MGM Grand Hotel*, 65 LA 261 (Koven 1975).

[19]67 LA 847 (1976).

[20]*Consolidated Foods Corp.*, 58 LA 1285 (1972).

cases of chronic illness, lack of requisite skill in job performance and the like are not normally analyzed in terms of fault; yet in such cases inability to do the work, or continuous unreliable attendance, are regarded as disqualifying conditions over a period of time.

". . . Fault has no place in this situation. Since Grievant was helpless to prevent what he did while mentally ill and since Management could not reasonably be expected to tolerate his conduct, it would seem more reasonable to remove him from the work place until one of two things occur.

"1. He fully recovers and can establish his recovery to the reasonable satisfaction of Management's physicians, or to a board of those psychiatrists chosen jointly by a physician selected by Management and a physician designated by the Union on Grievant's behalf.

"2. He reaches retirement age. If he reaches retirement age first, he should be retired under the pension plan then current. . . ."[21]

In *Johns-Manville Perlite Corp.*,[22] the arbitrator converted a discharge into a two-year suspension where the record indicated that the employee was schizophrenic. The arbitrator found that discharge was inappropriate, in part because it would result in the grievant seeking employment elsewhere and merely passing the problem on to another employer. Ordering an indefinite suspension not to exceed two years from the date of the award, the arbitrator attached the following conditions:

"1. The Grievant places himself under the care and treatment of a qualified psychiatrist for treatment of his mental illness.

"2. That when at any time within the two-year period the Grievant's psychiatrist declares the Grievant recovered, or that his illness is and can be controlled so that he can function in a factory environment without engaging in disruptive conduct attributed to his illness, the Union and Management are to agree on an independent psychiatrist, or in the absence thereof, a Board of three psychiatrists, consisting of one selected by the Company, one by the Union, and a third selected by the two psychiatrists selected by the parties, for the purpose of evaluating the Grievant. Such independent psychiatrist or Board's evaluation shall be determinative of the issue herein and if favorable to the Grievant's employment, he is to be reinstated without back pay but with full seniority and other contractual benefits as if he had been on a leave of absence. If unfavorable to the Grievant, the suspension is to be converted into a discharge."

Where it was shown that an employee's weight problem placed undue restrictions on his capacity to perform assigned

[21] *Id.*, at 1288.
[22] 67 LA 1255 (Traynor 1977).

work, the arbitrator overturned a discharge,[23] with the following conditions:

> "If the grievant undertakes a program to reduce his weight under the care of his physician, and is successful within a period of one year in reducing his weight within the normal and optimum limits for an adult of his age and height, as determined by the Company Medical Director, and can produce a medical certificate that he can work without restrictions, he shall be reinstated to the labor classification with his seniority as of the date of his termination. If he is so reinstated he will be on probation for attendance for one year. . . . If his absences exceed the average for all employees at the plant he may be terminated. . . . The arbitrator retains jurisdiction to decide any questions as to this award."

In *Newkirk Sales Co.,*[24] the arbitrator found that an employer did not have just cause to discharge an employee who had a proven disability. Although the employee had been restricted by his doctor from lifting in excess of 200 pounds—and the employer's workers' compensation insurance carrier had determined that he had suffered a permanent partial disability of 16 percent—the arbitrator nevertheless held that the standard of "just and sufficient cause" presupposes some wrongful act on the part of the grievant. The arbitrator refused to reinstate the grievant to his old position even though the employee had performed his old duties for eight weeks after his return to work. The arbitrator reasoned that there was no evidence that his reinstatement would not create a risk to himself, to his fellow workers, and to customers. Absent evidence that the grievant would not recover sufficiently to perform the required tasks, the arbitrator ordered the employer to carry the grievant on a "suspended" status for a period of three years, or until such time as medical proof was established that he could perform all the requirements of his job.

Arbitrators have frequently ordered reinstatement conditioned upon the nonrecurrence of the conduct giving rise to the initial disciplinary penalty. Often referred to as "last chance" remedies, they are applied in a variety of situations. For example, in cases where an employee is discharged for excessive absenteeism, an arbitrator may find mitigating circumstances and order reinstatement, but condition it upon some satisfactory level of attendance in the future.

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[23] *Reynolds Metals Co.,* 71 LA 1102 (Bothwell 1978).
[24] 61 LA 1144 (Hutcheson 1973).

Similarly, an arbitrator conditioned a reinstatement order on the fact that if within the 12-month period from the date of reinstatement the grievant was again charged with habitual absenteeism, it would be considered a third offense and he would be subject to the usual contractual provisions.[25] The arbitrator considered the initial discharge for absenteeism as a suspension and, accordingly, designated it as equivalent to a second offense under the agreement.

In yet another absenteeism case, the arbitrator stated that a common remedy where discipline is upheld, but discharge is found to be too severe, is to reduce the penalty to a suspension and to place the grievant on permanent probation in case of future offenses, thus placing the burden and responsibility on the employee if he or she wants to retain employment.[26]

In *Intalco Aluminum Corp.*,[27] the arbitrator ordered conditional reinstatement of an employee who was discharged after pleading guilty, in a criminal proceeding, to an unlawful delivery of marijuana. Finding that there was no evidence that the employee's conduct had adversely affected the employer, the arbitrator nevertheless stated that he would fashion a remedy to insure the legal rights of the grievant and to protect the employer's right to pursue its objectives with minimal interruption and disturbances. The grievant was ordered to be reinstated without back pay and with loss of seniority from his discharge to the date of reinstatement. In addition, the reinstatement was conditioned upon the following: "(a) [I]f the Grievant is found to possess marijuana on Company property, the Company is free to discharge him at will. (b) [I]f the Grievant is again found guilty of selling or buying marijuana outside the Company premises by a court, the Company is free to discharge him at will."[28] The arbitrator further provided that the grievant would lose all further protection under the just cause provision of the contract in criminal matters, absenteeism, and tardiness.[29]

An arbitrator declared authority for arbitrators to condition remedies upon some special act or promise by an employee and ordered the reinstatement of an employee who was discharged

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[25] *Menasha Corp.*, 71 LA 653 (Roumell 1978).

[26] *Stevens Shipping & Terminal Co.*, 70 LA 1066, 1972 (1978). *See also Microdot, Inc.*, 66 LA 177 (Kelliher 1976).

[27] 68 LA 66 (LaCugna 1977).

[28] *Ibid.*

[29] *Ibid. See also Inmount Corp.*, 58 LA 15 (Sembower 1972) (any recurrence of disruptive activity); *United Tel. Co.*, 58 LA 1246 (Seinsheimer 1972) (company rules).

for calling in sick during a period when he was attending to his private garage business.[30] In reinstating the grievant, the arbitrator nevertheless designated that the following conditions must be maintained for a period of one year after reinstatement:

> "The Grievant shall waive in writing any sick and accident benefits during the period prior to his reinstatement.
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> "The Grievant prior to reinstatement is to cease and desist from any outside business or employment and continue to do so during said (1) one year period. The Grievant shall furnish the Company with an affidavit that he has discontinued his business."[31]

Policy Considerations Under Conditional Reinstatement

Although conditional reinstatement is commonly used in arbitration, arbitrators ought to proceed with caution before formulating such remedies. One recurring problem in conditioning the terms of reinstatement is illustrated in the following decision:[32] In an arbitration involving an employee with alcohol problems, the arbitrator ordered the employee to be reinstated to his former job as soon as he was medically cleared to return to work. In this regard, a doctor's review was ordered, with the arbitrator retaining jurisdiction over possible disputes over implementation of this aspect of the decision. Moreover, the grievant was mandated "to refrain from, resort to or indulgence in alcoholic beverages at any time." The arbitrator similarly retained jurisdiction over the grievant "with respect to discipline meted out on a charge of imbibing alcoholic beverages for the purpose, only, of insuring that the fact of violation of the mandate . . . transpired."

The grievant was subsequently returned to work, but thereafter was suspended after being arrested for reckless driving and having drugs and alcohol in his possession. The employer requested an arbitration to authorize a termination "in light of [the grievant's] . . . incident involving alcoholism." The record, however, indicated that the supervisor who effected the employee's suspension asserted that the suspension was attributable to the grievant's excessive absenteeism.

The arbitrator in the second arbitration involving the same grievant declared that the actual narrow ground on which jurisdiction was reserved was plainly limited to discipline meted out

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[30] *Microdot, Inc.*, 66 LA 177 (Kelliher 1976).
[31] *Id.*, at 180.
[32] *City of Sandusky*, 73 LA 1237 (Keefe 1979).

on a charge of imbibing alcoholic beverages, and not at all with respect to absenteeism. Consequently, the arbitrator reasoned that if the complaint related only to attendance infractions, the charge would not automatically position the arbitrator to hear the case. He further noted that management was requesting him to terminate the grievant under the conditions of the prior award, to which he correctly responded that arbitrators do not impose discipline. They simply pass judgment on actions which have been taken. Finally, in holding that the suspension should continue, the arbitrator issued an additional set of conditions, including an order for the grievant to present himself to the arbitrator for readmittance to work at the end of a six-month recovery period.

It is important to stress that a conditional reinstatement may, in the abstract, be a suitable way of dealing with an industrial problem. In the final analysis, however, the parties must implement the award and, in the process, it is not uncommon that the conditions imposed by the arbitrator will cause another round of litigation in the arbitral forum,[33] which, in turn, may create continued antagonism between the parties. The arbitrator, rather than acting as the parties' contract reader, instead becomes a "legislator" and an important and sometimes unwanted fixture in the grievance process.

Another problem involves the terms of the conditions themselves. If the conditions are deemed to be repugnant to a statute or some public policy, the award is subject to reversal if appealed. To illustrate: in *Douglas Aircraft Co.* v. *NLRB,*[34] the Ninth Circuit considered an award where back pay was denied for two reasons: (1) a pattern of abusive and uncivil conduct by the grievant, and (2) the grievant's refusal to agree to a settlement worked out by the union and the employer, which called for reinstatement, arbitration of the back pay issue, and withdrawal of the unfair labor practice charge. The General Counsel of the NLRB issued a complaint alleging that the discharge was an unfair labor practice and that the arbitrator's award was repugnant to the National Labor Relations Act. The company and the union then requested the arbitrator to clarify his decision. The

[33]As in *Taystee Bread Co.,* 52 LA 677 (Purdom 1969); *Bethlehem Steel Corp.,* 54 LA 1090 (Porter 1970); *Kurz Kasch, Inc.,* 68 LA 677 (Imundo 1977); *Story Chemical Corp.,* 65 LA 1257 (Daniel 1976).

[34]See Hill and Sinicropi, *Collateral Proceedings,* in Evidence in Arbitration (Washington: BNA Books, 1980), 60–68.

arbitrator responded that there was no evidence that the grievant's union activities were a reason for his firing, and that the two reasons for denying back pay were each independent and sufficient. Although an administrative law judge recommended deference to these arbitral findings and dismissal of the unfair labor practice charge, the NLRB found that the arbitrator's award was clearly repugnant to the purposes and policies of the statute and refused to defer to it. The Ninth Circuit, while agreeing with the Board that the conditioning of an award of back pay on surrender of an unfair labor practice charge is repugnant to the Act, nevertheless held that the NLRB abused its discretion in not deferring since the two reasons given for denying back pay were independent and not cumulative.

Finally, the various arbitration reporting services publish numerous awards where reinstatement is conditioned upon a designated period of "probation" or "good behavior." Such conditions are ambiguous and potentially troublesome. For example, if an employee is reinstated and placed on probation, does this indicate that the employee is to be treated as a "probationary employee" (however these employees are treated), or does it mean that if the reinstated employee is found to have engaged in any violation of the agreement (as opposed to disciplinary offenses), he is subject to discharge with full access to the grievance-arbitration procedure? Again, it is important to note that the parties are faced not only with administering their negotiated agreement, but also with the possibility that the conditions imposed by the arbitrator may themselves be subject to interpretation.

In addition to reinstatement, back-pay questions are of grave concern and the decisions in this area demonstrate a wide diversity of reasoning. There is no genuine issue concerning the power of an arbitrator to make a monetary award of back pay. Even where this power is not expressly provided for in the collective bargaining agreement,[35] or expressly requested in the parties' written submission to the arbitrator, arbitrators have

[35]BNA reports that reinstatement with back pay for employees improperly discharged is required in 43 percent of the contracts it surveyed—44 percent of the manufacturing agreements and 40 percent of the collective bargaining agreements in nonmanufacturing. BNA states that 63 percent of these provisions grant full back pay, 34 percent leave the amount awarded to the arbitrator, and 4 percent place a limitation on the amount awarded. In some instances unemployment compensation or money earned from other jobs is deducted from back pay. Basic Patterns in Union Contracts (Washington: BNA Books, 1979), at 9.

held that the power to decide the disciplinary issue includes the power to formulate a remedy including, but not limited to, back pay. It must be remembered, however, that the parties may, through appropriate contractual language, limit the amount of back pay that may be awarded by an arbitrator. For example, in *Columbus Show Case Co.,*[36] the arbitrator ruled that a back-pay award must be limited where the contract provided that "awards or settlements shall in no event be made retroactive beyond the date on which the grievance was first presented by the employee to his foreman." Similarly, the arbitrator, in *Yellow Taxi of Minneapolis,*[37] ordered reinstatement with only 10 days' back pay pursuant to an agreement which limited any make-whole compensation to 10 days' pay.

It is noteworthy that even where the contract specifically designates or limits the amount of back pay that is to be awarded in a disciplinary case, there are reported decisions indicating that arbitrators have not always adhered to such constraints.

Back Pay Without Reinstatement

When an arbitrator finds that discharge was improper, he has a range of remedies; he may grant reinstatement with full, partial, or no back pay. Infrequently, an arbitrator may award back pay but not order the grievant reinstated. Thus, in *Safeway Stores, Inc.,*[38] the arbitrator held that reinstatement was inappropriate where the grievant's behavior was not correctable. Although the contract provided that an employee may not be discharged except for just cause, the arbitrator pointed out that such a remedy would be justified since nothing in the parties' bargaining history, contract language, or other precedent precluded him from ordering back pay without reinstatement. Attention is called to his reasoning:

> "It is important to note that the Agreement is silent with regard to any mandated remedy. Neither party quarrels with the view that the Arbitrator has the authority under the Agreement to provide for reinstatement with back pay with interest. But what is significant is that the Arbitrator under this Agreement is not mandated to fashion any particular remedy. The parties could have bargained for such a contractual provision. Limitations upon arbitral remedial discretion

[36] 64 LA 1148 (Leach 1975).
[37] 68 LA 26 (O'Connell 1977).
[38] 64 LA 563 (Gould 1974).

> are not unknown to American labor-management contractual relations. But under this collective bargaining agreement, the arbitrator was provided remedial flexibility."[39]

The arbitrator also found that the discharge was not for cause, since "procedural due process" guarantees were violated. Specifically, he found that the agreement provided that "before a regular employee is discharged for incompetency or failure to perform work as required, he shall receive a written warning (with a copy to the union), and be given opportunity to improve his work." Since the union did not receive copies of the written warnings until five days before the discharge, it was denied the opportunity to counsel with the employee, as was clearly provided in the agreement. Accordingly, back pay without reinstatement was ordered.

In another situation where an employee, found to have been improperly discharged, had secured employment elsewhere and did not desire to be reinstated, the arbitrator, in *American Building Maintenance Co.*,[40] found a back-pay remedy appropriate. Noting that the agreement spoke only in terms of reinstatement, and was silent about relief where the discharged employee had secured alternate work, the arbitrator nevertheless held that the failure of the parties to include this contingency in the agreement should not work to the detriment of an otherwise improperly discharged employee.[41]

While arbitrators and parties are not of the same view regarding the specificity of the back-pay remedy and the retention of jurisdiction by the arbitrator, it appears that when the remedy can be specifically formulated, it should be; and when this is inappropriate, the arbitrator, with the concurrence of the parties, should retain jurisdiction for a specified period of time, and such jurisdiction should be exercised only in the event the parties cannot reach accord on the extent of the remedy.

Computing Back Pay

In computing back pay, the principle of "make whole" relief for an employee who was wrongfully discharged has been uniformly applied by the NLRB and the courts where an unfair

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[39] *Id.*, at 570.
[40] 58 LA 385 (McDonald 1972).
[41] *Id.*, at 397.

labor practice has been found. Thus, the Supreme Court has declared: "[A]n order requiring reinstatement and back pay is aimed at 'restoring the economic status quo that would have originated but for the company's wrongful refusal to reinstate.' . . ."[42]

Similarly, the Eighth Circuit has stated: "The amount which serves as the basis for the back pay award is the amount which the employee discriminated against would have earned but for the discriminatory act. It is grounded upon the rate of compensation normally to be expected during that period."[43]

The Fifth Circuit has voiced this principle as follows:

> "[T]he 'make whole' concept does not turn on whether the pay was wholly obligatory or gratuitous, but on the restoration of the *status quo ante*. . . . The Board's discretion to take such affirmative *remedial* action as will effectuate the policies of the Act included more than placing the employee in position to assert contractual or legally enforcible obligations. 'Back pay' . . . includes the monies, whether gratuitous or not, which it is reasonably found that the employee would actually have received in the absence of discrimination."[44]

The Court of Appeals for the District of Columbia has stated the policy reasons for allowing back pay as "make whole" relief:

> "The purpose of requiring that the employer make the discriminatee whole in such a case has a two-fold objective. First, the back pay remedy reimburses the innocent employee for the actual losses which he has suffered as a direct result of the employer's improper conduct; second, the order furthers the public interest advanced by the deterrence of such illegal acts."[45]

Arbitrators have borrowed from court and Board decisions and applied similar "make whole" concepts when ordering back-pay relief. The arbitrator in *Alliance Mfg. Co.*[46] advanced the following principle for awarding back pay:

> "The theory upon which back pay is awarded a discharged employee upon reinstatement is the same theory upon which courts of law award damages for breach of contract of employment, viz., to make the employee whole for the loss sustained by reason of his discharge. The purpose is to put him in the same position finan-

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[42]*Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168, 84 LRRM 2839, 2847 (1973), citing *NLRB* v. *J.H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 263, 72 LRRM 2881 (1969).

[43]*NLRB* v. *Columbia Tribune Pub. Co.,* 495 F.2d 1385, 86 LRRM 2078 (8th Cir. 1974).

[44]*Nabors* v. *NLRB,* 323 F.2d 686, 54 LRRM 2259 (5th Cir. 1963). *See also Segarra* v. *Sea-Land Service Inc.,* 581 F.2d 291, 99 LRRM 2198 (1st Cir. 1978).

[45]*NLRB* v. *Madison Courier, Inc.,* 472 F.2d 1307, 80 LRRM 3377, 3382 (D.C. Cir. 1972).

[46]61 LA 101 (1973).

cially that he would have been in had the discharge not occurred."[47]

In the same regard, Ralph Seward has stated:

> "The ordinary rule at common law and in the developing law of labor relations is that an award of damages should be limited to the amount necessary to make the injured party 'whole.' Unless an agreement provides that some other rule should be followed, this rule should be followed, this rule must apply."[48]

It is of interest to note that Archibald Cox has observed that back pay awards are punitive as well as compensatory:

> "[T]he company pays twice when it improperly discharges a man or violates his seniority. It pays back wages and also pays the person who took the grievant's place. And the 'only justification for an award of back pay is that there is no method of doing perfect justice.' Thus the dilemma lies in being forced to choose between denying the employee an adequate remedy or forcing the employer to pay twice for the same work. When the employer causes the loss, however innocently, it is more just that he should be forced to suffer a denial of contract rights without a remedy."[49]

Some practitioners, however, have questioned whether "make whole" relief can ever be fully effectuated in the arbitral forum. Ben Fischer, in an appearance before the National Academy, has argued as follows:

> "You never make a discharged employee whole by putting him back to work. In this day and age, when workers are developing dignity and status in the community and in their family, and you operate almost in an industrial gold-fish bowl, you can't make him whole. He was offended; he was embarrassed; his family was embarrassed. 'I saw your husband the other day. Isn't he working? What's the matter?' Do you reply, 'He was fired'? Or, 'He's ill'? Or, what do you do to avoid the stigma? How do you make that whole? What do you do about the guy who loses his car, whose TV is picked up, who has to borrow money and pay interest, who loses his home? We've had those cases. How do you make him whole?"[50]

Although arbitrators are by no means legally or otherwise bound to apply damage principles developed by the Board and the courts under Taft-Hartley, many of the concepts and policy

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[47] *Id.*, at 103.

[48] *International Harvester Co.*, 15 LA 1, 1 (Seward 1950).

[49] *Electrical Storage Battery Co.*, AAA Case No. 19–22 (Cox 1960), as cited in Fairweather, Practice in Labor Arbitration (Washington: BNA Books, 1973), at 294.

[50] *See* Fischer, *The Implementation of Arbitration Awards—The Steelworkers' View*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1964), 133–134.

reasons applicable under the Act have been incorporated by arbitrators in formulating "make whole" relief for a breach of a collective bargaining agreement.

Employee's Obligation to Mitigate Damages

In determining remedies, the question of the employee's obligation to mitigate damages often arises. Professor Feller has stated that he finds no reasonable basis for a grievant to mitigate damages. However well-grounded that view happens to be, the majority position seems to be to the contrary. The view preferred by most arbitrators is simply that the grievant's failure to mitigate damages reduces the employer's liability. In this respect, except in unusual circumstances, arbitrators require that an aggrieved employee has a duty to attempt to mitigate any loss he might suffer as a result of the employer's improper assessment of discipline. One arbitrator has stated this principle as follows: "I believe that 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."[51]

Under a contract providing that an unjustly discharged employee "shall be . . . paid for all time lost," another arbitrator held:

> "It is commonly and generally recognized that the purpose of a contract provision calling for payment of 'all time lost,' where disciplinary action or discharge has been found to be without justifiable cause, is to compensate and indemnify the injured employee and make him whole for loss of earnings suffered by him as a result of the inappropriate exercise of judgment by the Company. The loss of earnings is usually to be measured by the wages he would have earned for the period they were improperly denied him, subject however, to a recognized duty and responsibility reposed in the employee to mitigate, so far as reasonable, the amount of that loss. If, as a result of employee's action or inaction, he has failed to mitigate the loss, then to the degree of such failure he is himself partially responsible."[52]

Another arbitrator has declared:

> "A grievant has the responsibility of lessening his damages, if possible. He cannot fairly expect to sit back and reject the economic

[51]Wolff, *supra* note 5, at 178.
[52]*Love Brothers,* 45 LA 751, 756 (Solomon 1965).

> resources at hand to tide him over the period of his dispute with his employer. Here [G] chose to undertake a four months project of building his home. It would hardly be equitable to allow him to compel his employer to underwrite that project."[53]

A difficult issue within the employment context is determining what constitutes a "willful loss of employment." Court decisions, Board rulings, and arbitration awards reveal that an employee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept "substantially equivalent" employment, fails to search for alternative work, or voluntarily quits alternative employment without good reason.[54] Particularly troublesome is determining what constitutes similar employment which, if not accepted, will constitute failure to avoid loss and, thus, a reduction in back pay. The Court of Appeals for the District of Columbia has declared:

> "A discriminatee need not seek or accept employment which is 'dangerous, distasteful or essentially different' from his regular job. . . . Similarly, he is not necessarily obligated to accept employment which is located an unreasonable distance from his home. . . .
>
> ". . . [T]here is no requirement that such a person seek employment which is not consonant with his particular skills, background, and experience."[55]

The Fifth Circuit has likewise stated: "In order to be entitled to backpay, an employee must at least make 'reasonable efforts' to find new employment which is substantially equivalent to the position [which he was discriminatorily deprived of] and is suitable to a person of his background and experience."[56]

The First Circuit has ruled that the principle of mitigation of damages does not require success but only an honest good-faith effort, and an employee is held "only to reasonable exertions in this regard, not the highest standard of diligence."[57]

Applying this principle, the arbitrator in *Albertson's Inc.*[58] stated that even those arbitrators who recognize a duty to mitigate damages may not require the employee to use more than

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[53]*Olson Brothers, Inc.*, 61-3 ARB ¶8855 at 6678 (Jones 1961).

[54]*NLRB* v. *Mastro Plastics Corp.*, 354 F.2d 170, 174, No. 3, 60 LRRM 2578 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966).

[55]*NLRB* v. *Madison Courier, Inc.*, 472 F.2d 1307, 80 LRRM 3377, 3384–3385 (D.C.Cir. 1972).

[56]*NLRB* v. *Miami Coca Cola Bottling Co.*, 360 F.2d 569, 575, 62 LRRM 2155 (5th Cir. 1966).

[57]*NLRB* v. *Arduini Mfg. Co.*, 394 F.2d 420, 422–423, 68 LRRM 2129 (1st Cir. 1968).

[58]65 LA 1042 (Christopher 1975).

"ordinary diligence" to obtain other work. In that decision an assistant manager in a retail food store was discharged after he refused to give up his interest in an outside business venture. Before dismissing the grievant, however, the employer had given him the option of accepting a clerk's position if he insisted on retaining his interest in his business. Granting the grievant full back pay, the arbitrator held that the mitigation rule does not require an employee to accept unsuitable or "lower rated work" and that, since the grievant received a large income as assistant manager, it would have been difficult for him to secure the same or a substantially equivalent position in the immediate labor market.

This principle was again voiced by the arbitrator in *Crowell-Collier Broadcasting Co.,*[59] where he held that a radio disc jockey, improperly discharged because of poor station ratings, could not be faulted for not searching for alternative employment.[60]

At some point in the mitigation process an employee may be reasonably required to lower her/his expectations concerning alternative employment. As the Sixth Circuit noted in *NLRB* v. *Southern Silk Mills:*[61]

> "We are of the opinion, however, that the usual wage earner, reasonably conscious of the obligation to support himself and family by suitable employment after inability over a reasonable period of time to obtain the kind of employment to which he is accustomed, would consider other available, suitable employment at a somewhat lower rate of pay 'desirable new employment.' The fact that a married woman employee is being supported by her husband during the discharge period should not relieve her of the obligation to accept suitable employment. The failure . . . under the conditions existing in the present case, to seek or take other suitable employment, although at a lower rate of pay, over a period of approximately three years, constitutes to some extent at least loss of earnings 'willfully incurred.' "[62]

One caveat, however, has been noted by the D.C. Circuit:

> "If the discriminatee accepts significantly lower-paying work too soon after the discrimination in question, he may be subject to a reduction in back pay on the ground that he willfully incurred a loss

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[59]45 LA 635 (Jones 1965).

[60]*See also McLouth Steel Corp.,* 23 LA 640 (Parkers 1954); *Airquipment Co.,* 10 LA 162 (Aaron 1948); *Honeywell, Inc.,* 51 LA 1061 (Elson 1961).

[61]242 F.2d 697, 700, 39 LRRM 2647 (6th Cir.), *cert. denied,* 355 U.S. 821, 40 LRRM 2680 (1957).

[62]*Id.,* at 700

> by accepting an 'unsuitably' low-paying position. On the other hand . . . if he fails to 'lower his sights' after the passage of a 'reasonable period' of unsuccessful employment searching, he may be held to have forfeited his right to reimbursement on the ground that he failed to make requisite effort to mitigate his losses."[63]

Cases have arisen where an employee rejects an offer of reinstatement without back pay and thereafter pursues the matter in the arbitral forum. Should refusal to accept reinstatement preclude the employee from receiving an award of back pay past the period where the employee refused employment?

In *Cagles, Inc.*,[64] the arbitrator considered this problem where the employer offered to reinstate the grievant, without back pay, two weeks after her discharge. The grievant refused and, in a subsequent arbitration, was reinstated without back pay from the date she refused reinstatement until the date of the award. Because the employer made an offer of reinstatement albeit without back pay, the arbitrator reasoned that this was effectively a "two-week layoff for which it had just cause." The grievant's refusal was accordingly used to mitigate the employer's back-pay liability.

The difficult case is where the employer offers the employee *unconditional* reinstatement without back pay, the offer is rejected, and the employee is subsequently reinstated by an arbitrator. In a case similar to this condition, an arbitrator, declaring what appears to be the better rule, held that the employer could not mitigate a back-pay obligation where an employee refused an improper transfer to a lower paying job *at a time when the employee could not subsequently challenge the action:*

> "Having held that the transfer . . . was unjustified, it necessarily follows that she should be made whole for her full loss unless she was obligated to accept the transfer and thereby to mitigate her damages. Under the peculiar facts here, however, I cannot find that she was so obligated. My conclusion on this might be different if, at the time of the incident, the parties had been bound by a collective bargaining contract which included a grievance procedure affording her protection in securing a retroactive adjustment of her monetary loss while continuing at work in her new job. But there was no such contract in existence at the time and had she accepted the transfer to an inferior job, it would clearly have constituted a full settlement of her grievance, as she had no right, nor was she given the opportunity by the Company to accept the transfer conditionally. As testified

[63] *NLRB* v. *Madison Courier, Inc., supra* note 55, at 3855.
[64] 48 LA 972 (King 1967).

> by the Company, the only alternatives she had were to accept the transfer or terminate her employment."[65]

The arbitrator, citing a decision from the Tenth Circuit, went on to state that in similar circumstances, where an employee had refused an undesirable job offer by the employer, there had been no mitigation of the employer's liability:

> "They [the employees] were in effect discharged from the jobs they were entitled to hold. Under the circumstances their refusal to accept the discriminatory jobs was not willful. While they should be charged with earnings actually received and with earnings not received because of the unjustifiable refusal to take desirable new employment, they should not, in our opinion, be charged with the earnings they would have received at the discriminatory jobs proferred them."[66]

Selected Problems in the Nondisciplinary Areas

Although a number of problems in the nondisciplinary area could be considered, in the interest of time and space I have decided to address only a few of them on a random basis.

Vacation Scheduling

Arbitrators are split in their views concerning the remedy that should apply when an employee has been improperly denied a preference in vacation time. One view is that monetary damages should be assessed against the employer since forcing an employee to take a vacation at a rescheduled time causes an inconvenience for him. On the other hand, a significant number of arbitrators have held that no effective remedy is possible in such a case because the employee is not damaged merely by being forced to take a vacation at a different time (as opposed to being denied a vacation). Still other arbitrators have reasoned that if there are any damages, they are not of the type that can be compensated in the arbitral forum. What follows are a few examples of those positions.

In *Combustion Engineering, Inc.*,[67] the collective bargaining agreement provided that "a scheduled extended vacation shall not be changed without at least 60 days' notice to the employee, unless the employee consents to the change in the schedule."

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[65] *Gardner-Richardson Co.*, 11 LA 957, 962 (Platt 1948).
[66] *Id.*, citing *NLRB* v. *Armour & Co.*, 154 F.2d 570, 18 LRRM 2469 (10th Cir. 1946).
[67] 61 LA 1061 (Altrock 1973).

The arbitrator held that the employer was not justified in rescheduling extended vacations of six employees for a poststrike period and, as a remedy, ordered payment for the vacation weeks the grievants were forced to take on an unscheduled basis.

In *Bethlehem Steel Corp.*,[68] the arbitrator found that back pay was a proper remedy when the employer, contrary to the explicit terms of the contract, failed to give timely notice of a change in the employees' vacation preference. In making the award, the arbitrator explained that there was a problem of timing with regard to the remedy:

> "For those grievants whose preferred dates have already passed, by the time this decision is issued, it is of course impossible to grant their requests, and back pay is the obvious alternative. . . .
>
> "Some of the grievants' preferences are still chronologically possible to grant, however, calling for specified weeks in late November or early December. In those cases, I think management should be given the alternative of granting those weeks or pay in lieu thereof. It would not be proper, in my view, simply to direct that the weeks be granted, since that might create severe operational problems."[69]

It is interesting that the arbitrator did not credit the employer's argument that an award of back pay would be improper since that remedy had not been discussed in the earlier steps of the grievance procedure. Finding that all but one of the grievants asked to be "made whole," the arbitrator reasoned that this was an effective request for back pay and that, at any rate, it was well within an umpire's discretion to award back pay as an alternative to the requested weeks when granting those weeks was inappropriate or impossible.[70]

In *Lucky Stores, Inc.*,[71] the arbitrator considered what remedy should apply for an employer's failure to secure the union's permission before allowing employees to take vacations outside of a stipulated vacation period. In this case, the arbitrator noted, no employee was injured, monetarily or otherwise. The injury was to the labor organization and the collectivity that it represented. The appropriate remedy, the arbitrator reasoned, was one that would correct the situation that caused the violation—the employer's lack of awareness of the requirement that the

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[68] 48 LA 223 (Gill 1966).
[69] *Id.*, at 226–227.
[70] *Id.*, at 227.
[71] 70-1 ARB ¶8271 (Feller 1969).

union's consent should be secured before making changes in the schedule. The employer was accordingly ordered to issue a notification to the appropriate supervisor at each store covered by the agreement to prevent similar violations in the future.

A number of arbitrators have directed employers to compensate employees for unemployment compensation payments lost as a result of improperly scheduled vacations during a shutdown.[72] One arbitrator, after finding that an employer violated the agreement by requiring employees to take vacations during a two-week plant shutdown, ordered lost unemployment compensation payments to the affected employees. In making that award, the arbitrator reasoned that the claim for unemployment compensation was for a "distinctly monetary and measurable loss":

> "Looking at the situation from a realistic rather than a technical point of view, however, there is simply no doubt that the men lost out on unemployment compensation benefits *because of the Company's violation of the contract in the first place.* This was a definite monetary loss, and I think it falls squarely within the language of the Award which is here to be applied—'The appropriate employees shall be made whole by the Company for whatever losses, if any, they suffered because of the action by the Company.'"[73]

It is noteworthy that 21 employees were affected during the first week of the shutdown and 38 during the second week, yet only two employees actually filed claims with the unemployment compensation bureau. The arbitrator, nevertheless, did not find it improper to award all employees relief, since the claims of the employees who had filed were rejected by the bureau and it was reasonable to assume that the other employees had concluded that their claims would similarly be denied.[74]

A contrary result was ordered by an arbitrator in *Scovill Mfg. Co.*[75] Because the employees were required to take the second week of a plant shutdown as a vacation period, the arbitrator provided an extra week of vacation with pay. His reasoning in that decision is instructive:

> "[I]t may be argued that giving them another week's vacation [with pay], as requested, would have the effect of giving them an *extra*

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[72] 37 LA 134 (Gill 1961).

[73] *Id.*, at 137. *Accord: Cone Mills Corp.*, 29 LA 346 (McCoy 1957); *Caterpillar Tractor Co.*, 23 LA 313 (Fleming 1954).

[74] *Id.*, at 139.

[75] 31 LA 646 (Jaffee 1958).

week off with pay. But this argument loses sight of the fact that these girls suffered damage, and the question before us is how we ascertain the amount. And there *was* damage, even if it is difficult to assess its precise amount. What the Company did in violation of the Agreement did cause them inconvenience which may be inferred to be substantial, and presumably some monetary loss as well. One of the difficulties in fixing the precise amount of loss is, of course, the fact that it would undoubtedly vary to some extent from girl to girl. But although the Company acted in good faith in what it did . . . the fact remains that it was its breach which has created the uncertainty. . . .

"On the whole, I believe that it is not unreasonable to infer that the resulting inconvenience plus some monetary loss was in general equivalent to one week's pay for each of the twelve employees with whom we are presently concerned. Even if there can be an element of uncertainty as to the scope of the damages, as distinguished from its existence, it would be more speculative to try to assess an offset credit to the Company. Moreover, the monetary assessment of an imponderable like inconvenience is hardly more difficult than trying to assess the value of pain and suffering to an injured plaintiff in an accident case."[76]

Some of the arbitrators have refused to award monetary damages of any kind where employees are forced to take a vacation during a shutdown but, nonetheless, have ordered that the employees be rescheduled for a vacation of their choosing.[77]

Absence of a Remedy. Where employees were not allowed to exercise their contractual preference for vacation, some arbitrators have found that there could not be an effective remedy. The following reasoning explains this point:

"An arbitrator is authorized to assess damages, but these damages must be related to the losses suffered by the aggrieved party. In the instant case the difficulty in determining a proper remedy lies in making a determination of just what damages an individual employee has suffered, when he was forced to take his extended vacation at a time other than his original first preference. With some employees it will make no real difference, as the time selected was one of personal preference, rather than one based upon personal

[76] *Id.*, at 651. *Accord: U.S. Steel Corp.*, 33 LA 82 (Garrett 1959). Of interest is *Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248 (1931), a decision cited by Arbitrator Jaffee, where the Court stated that the wrong having been proven, the risk of uncertainty as to the scope of damage is on the party who committed the breach, and recovery may be had even if the extent of damage is only an appropriate inference. *See also Westinghouse Electric Corp.* v. *IBEW.* 56 F.2d 521, 96 LRRM 2084 (4th Cir. 1977).

[77] *Harlo Products,* 59 LA 613, 620–621 (Howlett 1972); *Interstate Industries, Inc.,* 46 LA 879 (Howlett 1966) (fixing of vacation period); *Huebsch Originators,* 47 LA 635 (Merrill 1966) (no specific relief awarded absent request for remedy by union).

needs. For some others there may be circumstances, such as personal needs, family requirements or long range plans, which might actually cause a real injury to the employee. . . .

"Therefore, for those grievants who have already received their extended vacation, I cannot find any effective remedy."[78]

It is noteworthy that the arbitrator rejected the union's request that each grievant be given another extended vacation at a time of his own choosing, financed by the employer.

In a 1958 case, an umpire denied a union request for monetary damages where vacations had been accelerated to avoid layoffs. The umpire reasoned as follows:

"The complaint in these grievances was not against a *denial* of vacations; it was concerned entirely with the *dates* on which the grievants were required to *take* their vacations. And though the grievants may justly feel that—because of the changes in dates—their vacations in 1957 were less happy and enjoyable than they otherwise would have been, the Umpire does not see how he can hold that they had no vacations at all or how—for that matter—he can assign a monetary value to the grievants' mental discomfort."[79]

Although the arbitrator declined to award damages, he did point out, however, that the employer's action in accelerating the vacations was taken in the good-faith belief that the contract permitted such action—a belief to which the union had contributed by its failure to protest such accelerations in the past. The arbitrator made it clear that in cases of "repeat" violations, deliberately forcing an employee to take an accelerated vacation, an award of back pay would be appropriate.[80]

Another arbitrator similarly found no effective remedy where employees were forced to take one week of vacation during a period of work shortages. Rejecting the union's claim for another week of vacation with full vacation pay, at a time of their choice, he declared:

"As to 'another week of vacation,' the reality of the situation is that, at the time of the writing of this decision, the 1959 vacation year is over. It is clearly not for the arbitrator to order that the vacation year be elongated. The most that he could hold is that the grievants be reimbursed a week's vacation pay in lieu of taking a vacation. Even this, however, would be 'too much.' As the result of the Agreement violation here found, the grievants did *not* lose a week's vacation pay —for there is no disputing the fact that they could not have worked

[78] *Pittsburgh Steel Co.*, 42 LA 1002 (McDermott 1964).
[79] Umpire Decision No. 498, cited in *Bethlehem Steel Corp.*, 48 LA 223, 225 (Gill 1966).
[80] *Bethlehem Steel Co.*, 31 LA 857 (Seward 1958).

on their scheduled Iron Power Plant operations during the week in question."[81]

Still, the arbitrator found that what the employees lost was "whatever they would have been entitled to had they been laid off from their jobs." He noted that the record did not reveal whether the grievants would have been laid off "to the streets" or merely demoted to other jobs. The parties were accordingly directed to "reconstruct the situation as best they can," paying each grievant the sum to which he would have been entitled had there been a layoff.[82]

One arbitrator has characterized a monetary award for improper changing of vacations as "punitive" in nature:

"The union asserts that the remedy in this case should be additional vacation pay for all those employees who took their vacations at the time scheduled by the company under the pressure of the company.

"The legal principles concerning damages and remedies, however, cannot justify such a remedy. The company correctly says adopting the proposed remedy would be punitive rather than a compensatory matter. . . .

"The short answer concerning damages in this case is that no damage has been shown. The board of arbitration has no power to award damages where damage has not been shown."[83]

Summary. Apart from unemployment compensation losses, most claims arising out of rescheduling of vacation periods are for nonmonetary losses, such as inconvenience. Absent special circumstances, such as the case where a rescheduling is made with full knowledge that the agreement is being violated, the better view is not to award monetary damages for the mere inconvenience of employees. This view is perhaps best expressed by an analogy offered by one arbitrator:

"I think that it can hardly be doubted that an employee who is fired from his job is subjected to much greater 'inconvenience,' to put it mildly, than an employee who is forced to take his vacation at a time not of his own choosing. The uncertainty about his future

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[81] *Alan Wood Steel Co.*, 33 LA 772, 775 (1960).

[82] *Id.*, at 775. *But see Bethlehem Steel Co.*, 37 LA 821, 823–824 (Valtin 1961) (remedy of vacation pay was appropriate in accordance with past awards under similar contract where employer failed to give employee first choice of vacation and failed to offer employee second opportunity to state preference).

[83] *ACF Industries*, 39 LA 1051, 1057 (Williams 1962). *Accord: Pittsburgh Steel Co.*, 42 LA 1002, 1008 (McDermott 1964) (no punitive remedy); *Philip Carey Mfg. Co.*, 37 LA 134 (Gill 1961) (employees were not entitled to one week's pay as "punitive" damages for "inconvenience" resulting from employer's designation of plant shutdown as vacation period in violation of contract). *Lucky Stores Inc.*, 70-1 ARB ¶8271 (Feller 1969) (no authority to issue a punitive sanction).

status, the worry over whether a serious blot on his record will be removed, the problem of keeping financially afloat while his case is being adjudicated (presumably with no unemployment compensation payments to cushion him in the meantime)—these matters and others all add up to a vastly more impressive catalogue of inconvenience and hardship than anything we are talking about here. And yet it has never to my knowledge been the practice to go beyond back pay for actual loss of wages in fashioning a remedy for unjust discharge. . . .

". . . [T]here is no established concept of which I am aware to the effect that contract violations involving no monetary loss to employees are to be remedied by payments based on inconvenience or designed as punitive damages."[84]

Employers' Claims for Damages

One other area which is not often encountered, but nevertheless presents difficult questions, is that of employers' claims for damages. There is no uniform rule for determining when a claim for damages arising out of a breach of the no-strike clause will be arbitrable since what is subject to arbitration depends upon the particular contract at issue. For example, where the parties' agreement provided for arbitration of all disputes and all grievances involving an act of either party or any conduct of either party, the Supreme Court, in *Drake Bakeries* v. *Bakery & Confectionery Workers,*[85] held that an employer's Section 301 damage action against the union for breach of the no-strike clause should be stayed pending arbitration of the damage claims. It is especially worth noting that the Supreme Court found that the determination of damages may be particularly suited to arbitration:

"If the union did strike in violation of the contract, the company is entitled to its damages; by staying this action, pending arbitration, we have no intention of depriving it of those damages. We simply remit the company to the forum it agreed to use for processing its strike damage claims. That forum, it may be true, may be very different from a courtroom, but we are not persuaded that the remedy there will be inadequate. Whether the damages to be awarded by the arbitrator would not normally be expected to serve as an 'effective' deterrent to future strikes, which the company urges, it is not a question to be answered in the abstract or in general terms. . . . The dispute which this record presents appears to us to be one particularly suited for arbitration, if the parties have agreed to arbitrate."[86]

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[84]*Philip Carey Mfg. Co.*, 37 LA 134, 136 (Gill 1961).
[85]370 U.S. 254, 50 LRRM 2440 (1962).
[86]*Id.*, at 2455. See also *Capital City Telephone Co.* v. *Communications Workers,* 575 F.2d 655, 98 LRRM 2438 (8th Cir. 1978); *Pietro Scalzitti Co.* v. *Operating Engineers Local 150,*

In this same regard, one arbitrator has argued that an arbitrator needs no special grant of authority to award an employer monetary damages for a breach of the no-strike agreement:

> "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 special grant of authority to award damages for a violation of the no-strike covenant?
>
> "When arbitration is properly invoked, no purpose can be gained by determining a breach has occurred and then remitting the parties to the courts to determine damages."[87]

While the parties are free to make such claims arbitrable, there is some authority to support the theory that an employer's claim for damages arising out of a breach of the no-strike clause is not accorded the traditional strong presumption in favor of arbitrability.[88] As pointed out by David Feller and others, adjudication of damage claims is not a substitute for industrial strife, but rather a substitute for litigation. The presumptions that apply to grievance arbitration under the *Trilogy* standards may simply be inapplicable.[89] Absent a submission as to the issue of damages, an arbitrator ought to proceed with caution before concluding that the parties have in fact vested him with authority to make a monetary award for such a breach.

Elements of Damages

A review of arbitral authority indicates that arbitrators have invariably applied damage principles adopted by the courts when awarding monetary relief for breach of no-strike clauses. Under both Sections 301 and 303 of Taft-Hartley,[90] the amount of damages recoverable are "actual" or "compensatory" damages, representing those damages directly caused by the breach of the collective bargaining agreement or other illicit activity. Both arbitrators and courts have required that these damages be foreseeable and within the reasonable contemplation of the parties. At the same time, however, it is not necessary that the damages be calculated with precise specificity so long as the existence of some damage is certain. Thus, in *Sterling Gravure*

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351 F.2d 576, 60 LRRM 2222 (7th Cir. 1965); *Minnesota Joint Board Clothing Workers* v. *United Garment Mfg. Co.*, 338 F.2d 195, 57 LRRM 2521 (8th Cir. 1964).

[87]Wolff, *supra* note 5, at 185–186.

[88]*See, e.g., Welded Tube Co.* v. *Electrical Workers*, 91 LRRM 2027 (E.D.Pa. 1975); *Affiliated Food Distributors* v. *Local Union No. 229, International Brotherhood of Teamsters*, 483 F.2d 418, 84 LRRM 2043 (3d Cir. 1973).

[89]Feller, *supra* note 6, at 198.

[90]29 U.S.C. §§187(a) and (b).

Co.,[91] the arbitrator, in computing damages for a breach of a no-strike clause and an illegal secondary boycott, stated this principle as follows:

> "Once the threshold question of direct and proximate cause is answered in the affirmative, the amount claimed in damages demands a less rigid test. 'Reasonable estimates' or 'a fair and just approximation' are acceptable, and economic losses caused by a union's unlawful conduct or breach of contract need not be proven with mathematical certainty. . . . However, while the wronged party need not establish damages with exactitude, a court will not allow damages to be recovered by mere indulgence, speculation or guesswork. . . .
>
> "Upon a determination that the injured party is entitled to recover for the breach of contract, the theory is that the resulting damages were presumed foreseeable by the offending party's unlawful conduct. . . ."[92]

When direct and proximate cause has been established, arbitrators have allowed recovery for a variety of economic losses sustained by employers as a result of an "illegal" strike or boycott. The most comprehensive review of damage awards is contained in the opinion of Arbitrator Joseph Gentile in *Dan J. Peterson Co.*,[93] and cited at length are selected components and corresponding cases analyzed by Gentile as a summary of the possibilities in this area.[94]

Abandonment of Independent Project Caused by a Strike. In *Lewis* v. *Benedict Coal Corp.*,[95] the Court of Appeals for the Sixth Circuit considered, in a Section 301 action, an employer's claim for damages for losses sustained on an independent project abandoned during a strike. Although the court found that the strike contributed to the decision to abandon the project, it held nevertheless that such abandonment was not a foreseeable consequence of the strike for which damages could be awarded.

Attorney's Fees. While recovery of attorney's fees incurred in prosecuting an action under Section 301 is unlikely, it may nevertheless be possible to obtain such fees in the arbitral forum.[96]

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[91]79–2 ARB ¶8325 (Kaplan 1979).

[92]*Id.*, at 4354.

[93]The leading case is *Hadley* v. *Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854), cited by Arbitrator Kaplan in *Sterling Gravure Co.*, *supra* note 91, at 4355.

[94]66 LA 389 (1976).

[95]For corresponding citation, the reader is urged to review Arbitrator Gentile's decision at 66 LA at 392–398.

[96]*See* Marvin Hill, Jr. and Anthony V. Sinicropi, Remedies in Arbitration (Washington: BNA Books, forthcoming), Ch. 11, notes 39–42 and topic titled "Awarding Attorneys' Fees."

Consultant's Fees Expended as a Result of a Strike. Where evidence exists that consultants were hired as a result of an improper strike, such fees may properly be awarded as compensatory damages.

Costs of Obtaining Goods Elsewhere to Sell to Customers During a Strike. Arbitral authority supports awarding lost profits as well as the difference between the cost in obtaining goods from other suppliers and the lower price at which the employer then resells to customers. As an example cited by Arbitrator Gentile, in *Mercer, Fraser Co.,*[97] the arbitrator allowed an employer to recover from the union profits lost as a result of an illegal strike. In addition, the company was awarded the difference between the company's cost in obtaining concrete from other suppliers and the lower price at which it was then resold to customers.

Depreciation. Where it can be demonstrated that actual depreciation results from nonuse of tools or equipment, such depreciation may properly be awarded. While there is authority to the contrary, the better rule in this regard would appear to be that depreciation estimates for mere accounting purposes are not controlling as a measure of damages as a result of actual depreciation from nonuse of equipment. Thus, in *Master Builders Assn. of Western Pa.,*[98] the arbitrator disallowed a claim of depreciation on equipment idled during a strike. This denial was based on the fact that the tools and equipment were not in actual use during the strike, and the evidence did not establish any actual depreciation from nonuse.

Destruction of Business. In the extreme case where a business has been completely destroyed, there is precedent for allowing recovery of the value of the business.

Equipment (Owned by Company) Idled by a Strike. Both arbitrators and courts have appropriately awarded the fair rental value of idled equipment. For example, in *Foster Grading Co.,*[99] the arbitrator ruled that an employer was entitled to recover damages for a two-day work stoppage in violation of a no-strike agreement called by a union steward at a construction site. As items of damages, the employer was awarded (a) labor costs for supervisors and office men; (b) the fair rental value of the employer's own equipment which sat idle for two workable days (the rental value to be computed from monthly rental figures based on the

[97] 70-2 ARB ¶8615 (Gentile 1970).
[98] 67-1 ARB ¶8243 (Kates 1967).
[99] 52 LA 198 (1968).

18th edition of Monthly Rental Rates by Associated Equipment Distributors); (c) the actual rental value of six pickup trucks and other equipment rented from rental companies prorated on a daily basis; and (d) the prorated costs of maintenance and protection of traffic. And in *Denver Building Trades Council* v. *Shore,* [100] the Colorado Supreme Court stated:

> "[T]he rule has generally been adopted that where through unlawful or wrongful acts of defendants heavy equipment has been kept idle and the work expected to be accomplished thereby delayed, the fair rental value of such equipment during the period of prevention of its use is generally adopted as a proper measure for determining the extent of damage."

Equipment Rented Idled by Strike. Where it is demonstrated that, because of an improper strike, rented equipment was not used or, alternatively, it was necessary to keep the equipment longer than was originally planned, the arbitrator may properly award damages for equipment idled by the strike.

Freight Loss and Damage. Damages for loss and damages to any freight caused by strikers may properly be awarded in either the court or arbitral forum.

Inability to Receive Shipments of Goods During Strike. An inability to receive deliveries of raw materials during a strike may result in a damage award to the employer.

Insurance. In *Vulcan Mold & Iron Co.,* [101] an arbitrator awarded the pro-rata portion of fire and other insurance for the period of the illegal strike. Similarly, in *Master Builders Assn.,* [102] an arbitrator awarded as damages the amount paid to extend a builder's risk insurance to cover completion of a job delayed by an improper strike.

Interest. [103] In general, it has not been the practice of arbitrators to award interest as part of the traditional "make whole" package, primarily because (1) the parties rarely request it in the submission or argument, and (2) it is not considered customary in the forum. It is clear, however, that unless a contract specifically prohibits the awarding of interest, such assessments may be made and have been made by arbitrators. Nevertheless, it is the exception rather than the rule to award interest, and when

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[100] 36 LRRM 2578 (1955).
[101] 70-1 ARB ¶8080 (Kates 1970).
[102] 50 LA 1018 (McDermott 1968).
[103] *See* Hill and Sinicropi, *supra* note 96, Ch. 11, notes 1–15 and topic titled "Awarding Interest."

it is done it usually is the result of some dilatory tactic by an employer.

Labor Costs. Arbitrators and courts have awarded various categories of labor costs as damages for a breach of a no-strike agreement. Such an award of damages may include compensation for any of the following:

(a) Direct pay to idle workers. In *Mason-Rust* v. *Laborers Local No. 42,*[104] the federal district court awarded call-in pay for workers unable to work because of an illegal work stoppage, as well as fringe-benefit costs incurred as a result of the employees' showing up for work.

(b) Overtime pay required to catch up on work delayed due to a strike. In *Sheet Metal Workers* v. *Sheet Metal Co.,*[105] the Court of Appeals for the Fifth Circuit, in a damage action under Section 303 of Taft-Hartley, allowed recovery of overtime pay required to catch up on delayed work, provided that the employer could demonstrate that such damages were purely compensatory. In so ruling, the court declared: "Section 303 is purely compensatory, all elements of damages must be directly related to or caused by the unlawful secondary activity."

(c) Recovery of portion of wages paid to workers working at a reduced rate of efficiency. The District Court for the Eastern District of Missouri, in *Mason-Rust* v. *Laborers Local No. 42,*[106] stated that damages due to reduced efficiency could not be awarded where the job at issue was still in its planning stage, and hence any award would be speculative. However, in *A.I. Gage Plumbing & Supply Co.* v. *Local 300,*[107] the California District Court of Appeals ruled that, by virtue of an illegal strike, some plumbers had a more difficult time installing pipes and thus were made less productive. Damages were accordingly awarded to persons who worked at a reduced efficiency rate. In making such an award, the court stated the general principle which is applied in awarding damages:

> "In an action against the union under Section 301 for damages caused by a breach of a no-strike provision in a contract, the measure of damages recoverable is the actual loss sustained by the plaintiff as a direct result of the breach. . . . Such loss would be that which may reasonably and fairly be considered as arising naturally

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[104]306 F.Supp. 934, 72 LRRM 2743 (E.D.Mo. 1969).
[105]384 F.2d 101, 65 LRRM 3115 (5th Cir. 1967).
[106]*Supra* note 104
[107]50 LRRM 2114 (1962).

> from the particular breach of contract involved and which may reasonably be supposed to have been in the contemplation of the parties at the time the agreement was entered into in the event of such violation. . . . Damages stemming directly from a strike with which the collective bargaining contract was concerned and which contained a 'no strike' clause are clearly within the contemplation of the parties."[108]

Loss of Goodwill. An employer may appropriately claim loss of reputation resulting from the inability to deliver orders on time, or loss of company goodwill due to the inability to accept new orders or fill old ones.

Overhead Expenses. In *United Electrical Workers* v. *Oliver Corp.*,[109] the Court of Appeals for the Eighth Circuit stated:

> "Overhead expense is the necessary cost incurred by a company in its operation which cannot be easily identified with any individual product and which by accepted cost accounting procedures is spread over or allocated to the productive labor, which is labor performed in the processing of the company's products. Such expenses do not fluctuate directly with plant operations. They are expenses necessary to keep the company on a going concern basis and are based upon the company's production which is planned for a year in advance. They are constant regardless of fluctuations in plant operations. When productive labor in a plant is reduced for any period to less than the normal, the company sustains a loss in expenditure of necessary overhead for which it receives no production."[110]

Finding that the plant had operated at 52.5 percent of normal production, the court concluded that a jury could indeed determine that its loss amounted to 47.5 percent of overhead for which no return was received in the form of productive labor.

Similarly, in *Canadian General Electric Co.*,[111] an employer was allowed to estimate its overhead by taking a percentage of overhead costs for a year, determined by the ratio of the number of working hours lost during the strike to the total number of hours worked for the year. The arbitrator included in the calculation of overhead the following items: depreciation on fixed assets; insurance premiums, mainly for fire insurance; rent of outside property used for storage; salaries of office and managerial staff; local taxes; telephone and telegraph service; traveling expenses; and heat. In making such an award, the arbitrator declared: "[I]t

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[108] *Id.*, at 2117, 2119.
[109] 205 F.2d 376, 32 LRRM 2270 (1953).
[110] *Id.*, at 387, 2278.
[111] 18 LA 925 (1952).

is axiomatic that the company is not entitled to double recovery," but, as summarized by the arbitrator, an award of these overhead expenses in conjunction with lost profits was allowable, because they were not overlapping.

Another example cited by Arbitrator Gentile was *Belmont Smelting & Refining Works, Inc.,*[112] where the employer requested damages for daily overhead expenses, including wages and salaries paid to nonbargaining-unit employees. The arbitrator suspended assessment of the requested damages, but indicated that breach of the conditions of suspension (that is, another work stoppage) would result in the imposition of the requested damage on the union.

In *Vulcan Mold & Iron Co.,*[113] a wrongful work stoppage resulted in a 75 percent loss in production. The arbitrator awarded damages for utilities used during the strike, but reduced the employer's request by one-third on the theory that utilities were used less during the strike. The arbitrator refused to make an award for supervisors' salaries where it was determined that the supervisors performed bargaining-unit work during the strike rather than regular supervisory functions.

Penalties for Late Completion. Any penalty suffered as a result of an illegal strike may appropriately be awarded as compensatory damages. Thus, the U.S. District Court for the Western District of Kentucky, in *Wells* v. *International Union of Operating Engineers,*[114] allowed an employer to recover $35 per day for 35 days for a late completion. Where the employer has the option to extend the time for delivery, however, it may not be appropriate to award recovery of damages even where the delay was caused by a strike.

Pension Liability. Any pro-rata portion of fringe benefits, including pension payments, that accrued during a strike may be awarded as damages. The arbitrator, however, should be satisfied that the lost benefits in fact relate to the strike period.

Lost Profits. It is well settled that an arbitrator or a court may award profits lost as a result of illegal strike activity. In addition, an award may be made for profits likely to be lost in the future. For example, in *Abbott* v. *Local 142 Plumbers,*[115] the Court of Appeals for the Fifth Circuit, in a Section 303 action, sustained

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[112] 68-1 ARB ¶8342 (Gentile 1968).
[113] *Supra* note 101.
[114] 206 F.Supp. 414 (W.D.Ky. 1962).
[115] 429 F.2d 786, 74 LRRM 2879 (5th Cir. 1970).

a lower court award of $11,218 for profits lost as a result of illegal picketing. In that case the court stated:

> "Having established disruption of the project and a lower than average rate of return on the project the plaintiffs introduced evidence showing that the low rate of profitability was not attributable to causes other than the picketing. Proof was introduced demonstrating that: (1) the project was bid in the customary manner; (2) the bid was neither excessively high nor inordinately low; (3) factors which had resulted in lower than average profits on other Abbott jobs (e.g., torrential rains, incompetent labor, unusually small size of project, discounts to religious institutions) were absent from this project; and (4) nothing about this job was especially complicated or challenging."[116]

The court sustained the lower court's determination that the loss of profits should be measured by calculating the difference between the actual profit on the picketed project and the average profit made by the employer.

Likewise, in *Canadian General Electric Co.*,[117] the employer was permitted to approximate lost profits by taking a percentage of the total profits of all operations of the company, as measured by the proportion of "shipping costs" attributable to the particular plant at issue. After a measure of the yearly profit attributable to that plant was obtained, the amount of profits lost due to the strike was calculated by taking a percentage of the estimated total, determined by the ratio of working hours lost to the total available during the year.

Protection of Freight During a Strike. In *Overnite Transportation Co.* v. *International Brotherhood of Teamsters*,[118] the Supreme Court of North Carolina, in a Section 303 case, allowed recovery of $16,662 expended for guards necessary to protect freight service from strikers.

Punitive Damages.[119] Generally, arbitrators have not awarded "damages," and when such awards have been issued, they have been limited to the amount which is necessary to make the injured employer whole. The major problem this area holds for arbitration is that arbitrators are not in agreement as to whether such a remedy is "punitive" or "compensatory." The bottom

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[116] *Id.*, at 790, 2881.

[117] *Supra* note 111.

[118] 257 N.C. 18, 50 LRRM 2377 (1962), *cert. den.*, 371 U.S. 862, 51 LRRM 2267, *rehearing den.*, 371 U.S. 899.

[119] *See* Hill and Sinicropi, *supra* note 96, Ch. 9, notes 20–33 and topic titled "Punitive Remedies."

line in this area seems to be whether the contract prevents a "punitive" or "compensatory" remedy and/or whether such a remedy is reasonable in light of the arbitrator's findings.

Recovery Where Business Is Operating at a Loss Before the Strike. There is arbitrator-cited authority for the proposition that where the company is operating at a loss prior to an illegal strike, it is entitled to recover fixed charges until operations return to normal, but no more than the amount by which the overall loss is aggravated by the strike.

Salaries of Nonbargaining-Unit Employees. Amounts paid to supervisory and nonbargaining-unit personnel necessarily retained by the company while the illegal strike is in progress may be awarded as compensatory damages. Before such an award is made, it should be clearly established that supervisors did not perform bargaining-unit work. Thus, in *Vulcan Mold & Iron Co.*,[120] the arbitrator refused to make an award for supervisory expenses during a strike where it was demonstrated that no supervisory functions were performed. And in *Master Builders Assn.*,[121] an arbitrator denied a claim for damages as a result of reduced efficiency of supervisors who had 26 rather than 36 workers to supervise during a strike. The arbitrator stated that the supervisors had to be paid the same no matter how many men had to be supervised. In addition, there was evidence that they performed unit work during the strike.

Telephone and Telegraph Charges. Additional telephone and telegraph expenses incurred as a result of a strike have been allowed by both arbitrators and courts.

Travel Expenses. Travel expenses incurred because of an improper strike may appropriately be awarded as compensatory damages.

Factors Used in Considering Damages

As a final note on this topic, arbitrators have generally relied on the testimony of experts, including certified public accountants, in determining the amount of damages arising from a temporary shutdown.[122]

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[120] *Supra* note 101.
[121] *Supra* note 102.
[122] *See, e.g.*, the discussion of Arbitrator David Kaplan in *Sterling Gravure Co., supra* note 91.

Individual Liability for Breach of a No-Strike Clause

Section 301(b) of Taft-Hartley[123] provides, in relevant part: "Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

When a union is found liable for damages in violation of the no-strike clause of a collective bargaining agreement, its officers and members are not liable for those damages. The Supreme Court, in *Atkinson* v. *Sinclair Refining Co.*,[124] made it clear that "where the union has inflicted the injury, it alone must pay." The Court, however, specifically did not reach the issue of whether the officers or members of the union could be liable for activity, not on behalf of the union, but in their personal and nonunion capacity.[125]

To date, the lower courts are split with respect to the issue of members' liability for unauthorized individual acts. The better weight of authority, however, is that individual members may not be held financially liable for the consequences of a "wildcat" strike conducted without union authorization or approval. As stated by the Court of Appeals for the Seventh Circuit, "the primary remedy of *Sinclair* is discharge or discipline of individual defendants."[126]

Adopting this same line of reasoning, this writer believes that the better rule is for an arbitrator not to award damages against any individual for a breach of the no-strike agreement, but rather to limit such a monetary award to assessments against the union.

It is important to stress that arbitrators exercise considerable discretion in awarding damages for a breach of the collective bargaining agreement. This is especially true when violations of the no-strike clause are found. One arbitrator has stated that merely the finding of a violation does not necessarily imply that damages will be awarded:

> "Finding a violation of the no-strike clause by the union does not automatically bind the arbitrator to an award of full compensatory damages, any more than finding that an employee has been dis-

[123] 29 U.S.C. §185(b).
[124] 370 U.S. 238, 50 LRRM 2433 (1962).
[125] *Id.*, at 249, note 7.
[126] *Sinclair Oil Corp.* v. *Oil, Chemical & Atomic Workers Int'l Union*, 200 F.2d 312, 48 LRRM 2045 (7th Cir. 1961).