charged without just cause automatically binds an arbitrator to award full back pay upon reinstatement. There are principles of equity as well as principles of contract to be considered. These principles must be applied in a manner designed to serve the best interests of the continuing bargaining relationship."[127]

Summary

This brief and random treatment indicates that there are indeed diverse positions taken by arbitrators with respect to remedies. What is apparent is that an arbitrator's powers with respect to remedies are plenary, provided they are not unfaithful to the agreement. In this respect it appears that the arbitrator's remedy powers have a wider range of authority in the disciplinary area than with respect to contract issues. Moreover, there often are unique or unusual remedies provided by arbitrators. However, when such unusual remedies are applied, they are often subject to more pitfalls and further complications. Nevertheless there are occasions when reliance on such unusual remedies is necessary and even expected. It is in this connection that it is instructive to take note that arbitration is a private system which continues to be flexible and adaptable to the peculiar needs of the parties in each dispute. While the average case lends itself to the usual remedy, it is not unexpected, nor has it been the experience as reflected in the published awards, that unusual awards and remedies have been issued.

Comment—

Robert S. Katz*

The title and focus of our program is "Remedies: New and Old Problems," and my limited role is to comment upon the papers presented by our principal speakers, Professors David Feller and Anthony Sinicropi. Although both papers treat the same topic, their perspective is quite different. Professor Feller offers us a provocative and philosophical view of how arbitrators should approach the issue of remedies. In contrast, Professor Sinicropi has provided us with a highly informative catalogue of how arbitrators have decided the issue of remedies in a variety

[127] *Mercer, Fraser Co.*, 70-2 ARB ¶8615, at 5037 (Eaton 1970).

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of situations. In light of the purely informative nature of the Sinicropi paper, my comments will deal primarily with Professor Feller's theory of how arbitrators should act. In doing so, however, I do not mean in any way to denigrate the value of Professor Sinicropi's work, which will soon be out in book form and I, for one, will be in line to purchase my own copy.

I would like to begin my own commentary on Professor Feller's paper with a brief confession. After reading his introductory reflections on his prior intellectual disagreement with another distinguished member of this Academy, Professor Theodore St. Antoine, my first reaction was that, as a former student of Professor St. Antoine, I should decline to proceed further on the basis of an irreconcilable conflict of interest. But upon further reflection, my intellectual curiosity, which had been so strongly piqued by Professor St. Antoine during those idyllic days at Ann Arbor, and my own sense of gratitude to Professor Feller for all that he has contributed to the growth of industrial arbitration (and, coincidentally, my own livelihood) compelled me to read on and thereby learn, to my great relief, that the prior disagreement, like my conflict of interest, was more apparent than real.[1] So, having been freed of all ethical considerations, I plunged ahead into the provocative challenge of Professor Feller's philosophical discourse on how arbitrators should approach the issue of remedies and, to my pleasant surprise, found myself mostly in agreement with both Professor Feller and Professor St. Antoine.

The first and perhaps central viewpoint expressed by Professor Feller and, incidentally, Professor St. Antoine as well is that arbitrators are "contract readers" and not "contract enforcers." Accordingly, in deciding what remedy to impose, the arbitrator ". . . must decide what the agreement says about [the appropriate] remedy" rather than undertaking the role of a judge and unilaterally determining what the remedy should be. In Professor Feller's view, "as the parties' 'contract reader,' the arbitrator determines what remedy is provided for in the agreement and awards it." As a lawyer representing employers and having been raised on Professor St. Antoine's frequent reminder that even Justice Douglas, in *Steelworkers* v. *Enterprise Wheel & Car Corp.*,[2]

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[1] *See* St. Antoine, *Judicial Review of Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny,* in Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1977), 31–34, 51.

[2] 363 U.S. 593, 597, 46 LRRM 2423 (1960).

expressly recognized that an arbitrator, in awarding a remedy, "does not sit to dispense his own brand of industrial justice," but rather is restricted to interpreting and applying the collective bargaining agreement, I find nothing in Professor Feller's characterization of the arbitrator's role as a "contract reader" with which to quarrel seriously.

To the contrary, it is my own opinion that the apparent recent increase in successful judicial challenges to arbitration decisions and the reluctance of our Supreme Court to grant a greater role to arbitration in our federal labor statutory scheme stems primarily from the tendency of arbitrators to characterize themselves as "industrial judges" and then to assume that, like their judicial counterparts in our society at large, they have been ordained by their employer and union nominators to promulgate some Solomon-like judgment which incorporates all of the most progressive teachings of modern-day sociology, psychology and philosophy, religion, economics, and so forth. The result of such lofty aspirations is frequently a decision that reflects only the arbitrator's personal vision of what the contract should say to comport with such progressive teachings rather than what the contract does say.

Such a result has little value for the unfortunate first-line supervisors and rank-and-file employees who must strive each day to conform their conduct to the more mundane language of the contract and who look to the arbitrator for a common-sense, straightforward reading of the contract. For unless such a straightforward "reading of the contract" is forthcoming, the contract loses its principal function as a predictable source of how to behave. Since most arbitration today is of the ad hoc variety, which by its very nature means that several different arbitrators with widely different personal prejudices and perspectives will be arbitrating cases under the same contract, Professor Feller's argument that the arbitrator must serve as contract reader, confined to what the parties have stated in their agreement, rather than as a contract enforcer, armed with the authority to frame his own solutions based on his personal vision of what the contract should say, is not only compelling but, in my humble view, necessary if ad hoc arbitration is to retain the confidence of those who must live day to day under collective bargaining agreements.

My principal difference with Professor Feller, and it may be primarily one of method rather than substance, arises from the

second part of his theory of how arbitrators should approach the issue of remedies: namely, that "the authority to act as the parties' contract reader includes the authority to read into the contract those provisions which the arbitrator finds can reasonably be expected to have been assumed to exist by the parties even if they fail to signify it by words."

Professor Feller considers the addition of such implied authority as only a minor exception to the objective foundation for arbitration erected by his first and principal contention that the arbitrator serves simply as the parties' "contract reader," which is necessary to legitimize the common practice by arbitrators of awarding reinstatement with back pay in cases of discharge that are found to be without just cause, even though the labor agreement does not expressly provide for such a remedy.

My concern, and therefore disagreement, with Professor Feller's grant of "implied authority" to an arbitrator to read into the agreement those provisions that the arbitrator feels the parties assumed they had already inserted into that agreement is that it invites the all too familiar situation of the exception which swallows the rule. To tell arbitrators, on the one hand, that they must simply "read the contract" and avoid dispensing their own notions of industrial justice, and then to tell them, on the other hand, that they can "read into the contract" whatever they feel the parties assumed they had already inserted in the agreement, may be asking arbitrators to walk too thin a tightrope, especially when we move beyond the basic example cited by Professor Feller for his proposition—the award of reinstatement with back pay, which has received literally universal acceptance by arbitrators—and encounter the far more numerous kinds of remedies about which there is considerable disagreement among arbitrators—interest on back-pay awards, compromised or modified penalties, conditional reinstatements, or retained jurisdiction to permit postaward arbitral oversight hearings.

Moreover, while the exception for "implied authority" to read into the contract provisions deemed necessary and within the reasonable expectations of the parties sounds fine in those cases where the contract permits discharge only for just cause and the arbitrator finds that there was no just cause, it raises serious questions in many other cases, especially those involving contracts that have the commonly included prohibition that the arbitrator's decision may not "amend, change, add to or detract

from the language of the contract."[3] I believe that *Torrington* and its progeny require arbitrators to decline Professor Feller's invitation to imply assumed remedies into labor contracts and, instead, to heed more closely the sage words of the late Marion Beatty in *American Sugar Refining Co.*:[4]

> "In grievance arbitrations, arbitrators are employed to interpret contracts, not to write them, add to them or modify them. If they are to be modified, that has to be done at the bargaining table. If this Union is to have 'jurisdiction over work,' it must obtain this at the bargaining table in language which fairly imparts this.
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> "Arbitrators are not soothsayers and 'wise men' employed to dispense equity and goodwill according to their own notions of what is best for the parties, nor are they kings like Solomon with unlimited wisdom or courts of unlimited jurisdiction. Arbitrators are employed to interpret the working agreement as the parties themselves wrote it.
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> "I am not unmindful that some arbitrators have read contracting-out restrictions into contracts containing no clear statements on the subject. In contract interpretation, we are trying to ascertain the mutual intention of the parties. We must be guided primarily by the language used. Admittedly, certain inferences may be read into it, but they should be only those inferences which clearly and logically follow from the language used and which reasonable men must have mutually intended. To go far afield in search of veiled inferences or ethereal or celestial factors is a mistake. I believe Labor contracts are much more earthly; they are not written in fancy language purposely containing hidden meanings.
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> "When an arbitrator finds that the parties have not dealt with the subject of contracting-out in their working agreement, but that the employer is nevertheless prohibited from contracting-out (a) unless he acted in good faith; (b) unless he acts in conformance with past practice; (c) unless he acts reasonably; (d) unless his act does not deprive a substantial number of employees of employment; (e) unless his acts were dictated by the requirements of the business; (f) if his act is barred by the recognition clause; (g) if his act is barred by the seniority provisions of the working agreement; or (h) if his act violates the spirit of the agreement, the arbitrator may be in outer space and reading the stars instead of the contract."

One final comment on Professor Feller's second proposition regarding an arbitrator's "implicit authority to award specific performance of the provisions of the agreement" is appropriate in light of his somewhat intimate connection with the so-called *Steelworkers Trilogy*. While Justice Douglas did state in *Enter-*

[3] *Torrington* v. *Metal Products Workers*, 362 F.2d 677, 62 LRRM 2495 (2d Cir. 1966).
[4] 37 LA 334, 337–338 (1971).

prise[5] that an arbitrator may look to the "law of the shop" or the so-called industrial common law of the industry involved in the arbitration, I believe the "look" Justice Douglas referred to was limited to looking for guidance reflected in the parties' own undisputed practices to construe an ambiguous contract provision and not looking for new requirements that could be added to the agreement.

Professor Feller's third proposition, that an arbitrator's authority is "ordinarily limited to the payment of sums calculated in terms of the collective bargaining agreement, not by measures external to it," signals a return to his original and principal premise that the arbitrator is a "contract reader" and not a quasi-judicial "contract enforcer." While I have no difficulty with Professor Feller's statement of this proposition, I am again troubled by his suggested implementation of this proposition and especially his compulsion to resurrect his so-called "implicit in the agreement" exception. Thus, in his example of the employer who "willfully" reschedules an employee's vacation, I find his suggestion that, notwithstanding any expressly stated contractual remedy, an arbitrator could "imply" a monetary penalty as an inconsistent bit of backsliding. Such an approach seems to more accurately reflect the very "contract enforcer" role (that is, for every wrong there must be a remedy and all I have to do is devise one for the parties) that Professor Feller claims to have eschewed in favor of the "contract reader" role and to be at odds with the approach of Ben Fischer at the 24th Annual Meeting of the National Academy of Arbitrators,[6] which Professor Feller quotes with approval. You may recall that Ben Fischer's concern was that industrial arbitration was becoming too far removed from the front-line supervisors and rank-and-file employees who have to conform to the requirements of the labor contract. Fischer's approach was to avoid the temptation to fabricate a remedy in the guise of an implicit provision of the agreement and, instead, to send the problem back to the parties to decide through negotiations what remedy they want to impose.

Now I can already hear Professor Feller's retort: namely, that if I am opposed to an arbitrator's "implying" remedies into an

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[5] *Supra* note 2.

[6] *See Implementation of Arbitration Awards,* in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1971), 126-137.

agreement, how else can I justify the traditional arbitral practice of reducing an employee's back pay award by his "outside earnings" or his failure to mitigate his damages when neither is expressly provided for in the agreement. My answer is that both the reductions for outside earnings and failure to mitigate are simply part of the calculations made by the arbitrator in deciding back pay. In other words, if a contract provides for back pay, then inherent therein is the act of calculating the amount of back pay the employee should receive to make him whole, and such calculations, unless expressly limited by contract to a mathematical computation of the missed work hours multiplied by the employee's hourly rate, must include every appropriate element of a back-pay calculation such as actual outside earnings and mitigation of losses.

In closing my comments on Professor Feller's paper, I would be remiss in not thanking him for a thoughtful and provocative paper and reiterating my basic agreement with him and Ted St. Antoine that arbitrators should be "contract readers" and not "contract enforcers." But I would be equally remiss if I did not also reiterate my belief that along with the authority to "read the contract" comes the responsibility to avoid the temptation to add your own epilogue or denouement. Arbitrators, unlike judges, have not been licensed to dispense their own notions of social justice or to expand constitutional *notions* of due process from criminal cases to arbitrations in response to "the felt necessities of our time."