parties. It's not attached to the award itself. If it's ever remembered, it's usually because someone has a good memory and not because it has been memorialized in any permanent way.

Occasionally a further hearing is required. In those instances usually there is an issuance of a supplemental award or a formal document that becomes part of the case, but even that is rarely published. The problem is that, with the few that get through this process and get published, the facts are often peculiar to the case, and the question arises as to just how representative this disposition of the remedy is in the larger scheme of things.

Marvin Hill and Tony Sinicropi have drafted a book on remedies, and several chapters in that book touch on monetary relief.[1] I think that's a very valuable document, and I urge you to consult it when you do have a difficult issue in this area. My personal view, however, is that because these cases are so peculiar and so unique, it is a mistake to put too much stock in what some other arbitrator has done. The Hill-Sinicropi volume is a very good starting point for analysis, however. This book helps you reach your own conclusions.

II. INTEREST AWARDS ON BACK PAY: STRENGTHENING MAKE-WHOLE REMEDIES

STEPHEN H. JORDAN*

As a general rule, interest awards have not been granted in arbitration proceedings. A significant reason for this tendency has been the general prevailing practice in the field. In denying an interest award, one arbitrator simply stated, "The important point is that it is not customary in arbitration for the arbitrator to grant interest on claims which he finds owing. . . . In view of the almost unanimous practice on the part of arbitrators not to grant interest, and the failure of the parties to authorize the arbitrator to do so

[1] *See, e.g.*, Marvin Hill, Jr. & Anthony V. Sinicropi, Remedies in Arbitration (BNA Books 1981), at 40–96.

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here, I would think it highly inappropriate to do so."[1] The lasting effect of the prevailing norm in arbitration is still apparent in more recent arbitration opinions, with little or no analysis as to the merits of a claim for interest, but a denial on the grounds that awarding interest is simply not a current arbitral practice.[2]

Reasons for Denial

Interest awards are all too often denied simply because they were never requested. In *Alliance Manufacturing Co.*,[3] the arbitrator denied interest because "neither the grievant nor the Union asked for interest on any back pay award at the initial arbitration hearing."[4] When the union did request interest through a post-hearing brief, the arbitrator found that it would be inappropriate to require interest on the back pay at a later date.[5]

The arbitrator in *Lightning Industries*[6] predicated his denial of interest on several factors, the most significant being that the request for an interest award in addition to back pay was not made prior to the holding of the arbitration hearing.[7]

A common justification for the denial of interest is that it is not expressly provided for in the contract language. The arbitrator does not want to impose interest when the parties have not stipulated that interest would be a proper remedy. Arbitrator Herman M. Levy has denied interest claims, stating that "[i]t is not customary for an arbitrator to award interest in these circumstances absent a provision to that effect in the collective bargaining agreement [CBA] or some statement in the submission to the arbitrator."[8] Another arbitrator, after careful examination of the CBA, found that absent an express provision for the payment of interest, and without bad faith on the part of the employer, interest should generally not be awarded.[9]

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[1] *Intermountain Operators League*, 26 LA 149, 154 (Kadish 1956).
[2] *Helix Elec.*, 101 LA 649, 654 (Kaufman 1993); *West Co.*, 103 LA 453, 459 (Murphy 1994); *Willamette Indus.*, 107 LA 1213, 1216 (Kaufman 1997); *International Ass'n of Machinists*, 109 LA 339, 341 (Bernhardt 1996).
[3] 61 LA 101 (Gibson 1973).
[4] *Id.* at 105.
[5] *Id.*
[6] 105 LA 417 (Mikrut 1995).
[7] *Id.* at 422.
[8] *San Benito Health Found.*, 105 LA 263, 264 (Levy 1995).
[9] *Kings County Truck Lines*, 94 LA 875, 880 (Prayzich 1990).

Further limiting the number of interest awards granted is the notion by some arbitrators that it may be deemed a sort of penalty or punitive award against the employer. The theory is that "to add interest would be to cause compensatory damages to become punitive damages and it was thought unfair to penalize the employer further by adding interest on the award."[10] It has also generally been accepted that arbitration is a restorative, not a punitive, proceeding and, as such, interest is not usually appropriate.[11] Furthermore, it has been understood regarding past practices that "arbitrators usually add interest not as a right but as a type of additional penalty."[12]

Exceptions to the General Rule

When arbitration awards have included interest, it has been primarily a result of the arbitrator finding "special circumstances" in a particular situation. Typically, interest awards have been granted when the employer has not complied with an arbitration award, thus leading to post-judgment relief for the further harms against the grievant. Arbitrator Robert Landau, in *Laidlaw Transit*,[13] awarded interest in the decision based on the acts of the company regarding cooperation during the arbitration hearing. Landau summarized his position, stating: "Although most arbitrators generally decline to include interest on monetary awards, some arbitrators have done so where special circumstances exist. . . . [T]he grievant was forced to wait more than an additional year to receive his back pay award. Therefore, it is appropriate to include interest on the back pay award."[14]

Miami Township v. Fraternal Order of Police,[15] decided on appeal in 2000, further exemplifies the notion that if an employer does not comply with an arbitration award, interest may be imposed. In this case, the arbitrator found that the grievant was terminated from employment in violation of the CBA and thus was entitled to reinstatement. The township failed to follow the arbitration award, and appeals were taken. The court in this case decided that

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[10] *Safeway Stores, Inc.*, 114 LA 1551, 1556 (DiFalco 2000).
[11] *City of Bridgeport*, 94 LA 975, 978 (Stewart 1990).
[12] *Kings County Truck Lines*, 94 LA at 880.
[13] 109 LA 647 (Landau 1997).
[14] *Id.* at 651.
[15] 165 LRRM 2107 (Ohio Ct. App. 2000).

statutory interest should be imposed on the township because they refused to comply with the arbitration award, which was a binding order.

Special circumstances have also been established where there has been evidence of bad faith, dilatory tactics, and egregious or willful acts engaged in by the employer. In *Hollander & Co.*,[16] the company did not follow procedures regarding seniority when dealing with layoffs for fear of violating the Civil Rights Acts of 1866 and 1964. The arbitrator awarded interest to the grievant on the justification that there was a clear violation of the CBA, admitted to by the employer, and the violation occurred at a time when jobs were difficult to find.[17]

Interest was also awarded in response to bad faith through an examination of the routine procedures of an employer regarding arbitration in *Synergy Gas Co.*[18] Here, the arbitrator found that, on more than one occasion, the company had refused to abide by an arbitration award. Furthermore, the arbitrator reasoned that interest was appropriate given that the employer had "consistently, and as a matter of conscious policy, acted in bad faith. These acts of bad faith were not due to oversight or a mere discrepancy . . . ."[19]

An egregious act by an employer led to an interest award in *Kent Worldwide Machine Works.*[20] Here, the arbitrator found that the employer had "brazenly refused to pay obligations without even claiming any reasonable excuse."[21] The company in this case admitted the liability and its failure to pay as promised in its commitment to the employees. The company instead retained $22,000 that it had promised to the employees and used this money to satisfy obligations to its vendors. The arbitrator found that interest was proper given the overdue period and the egregious nature of the employer's conduct.[22]

Further analysis of arbitration awards demonstrates that, as recently as the mid 1990s, interest is still often predicated on the acts of the employer and whether they fall into the category of bad faith or dilatory acts. Arbitrator Frank Murphy denied interest in

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[16]64 LA 816 (Edelman 1975).
[17]*Id.* at 821.
[18]91 LA 77 (Simons 1987).
[19]*Id.* at 93.
[20]107 LA 455 (Duda 1996).
[21]*Id.* at 460.
[22]*Id.*

West Co.,[23] reasoning that "[g]enerally, for interest to be granted a showing must be made that the Company has acted in bad faith or with undue delay either in regard to the processing of the matter to arbitration or in regard to the payment of back wages and benefits due the grievant under the award."[24] In this case, the arbitrator found that, although the parties took a long time in determining the remedy due, the company never acted in bad faith or with undue delay, but rather consistently attempted to resolve the matter.

Recent Trends

Even today, arbitrators routinely deny interest awards on the basis that "interest payments are the exception rather than the rule in arbitration decisions and should be given only when the Employer's conduct is egregious. Interest payments act as a penalty to deter the employer from future egregious conduct."[25] However, attitudes appear to be shifting in favor of interest. Most indicative of this contrary trend is the recent analysis regarding the prevailing norm that interest awards should be contingent on the acts of the employer. In *Atlantic Southeast Airlines*,[26] the arbitrators advocated for interest awards by attacking the common rationale that interest is more punitive in nature and should not be granted absent a showing that the employer's conduct was egregious. The arbitrators stressed that this widely held belief misinterprets the concept of interest. The purpose of interest is to compensate the injured employee for the delay in payment; they further stated that interest is appropriate regardless of the nature of the employer's breach.[27]

The rationale behind not awarding interest may have originated with "the one-time and now-abandoned practice of the National Labor Relations Board (NLRB) of not awarding interest on backpay awards."[28] This practice was abandoned in 1962, with the reasoning that back pay was not a fine or penalty imposed on the respondent by the Board. Instead, it is an indebtedness arising out of an obligation imposed by statute, and as such, under accepted legal

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[23]103 LA 452 (Murphy 1994).
[24]*Id.* at 459.
[25]*Burlington Med. Ctr.*, 101 LA 843, 849 (Bailey 1993).
[26]101 LA 515 (Nolan 1993).
[27]*Id.* at 525.
[28]Goggin & Ruben, eds., Elkouri & Elkouri, How Arbitration Works, 5th ed. (BNA Books Supp. 1999), at 91.

and equitable principles, interest should be added to back pay awards.[29] Since the NLRB changed its stance on interest, arbitrators have been more willing to award interest in an effort to more justly compensate the grievant. As one panel of arbitrators reasoned: "Our Award includes interest . . . it is awarded for the purpose of granting a full remedy to the Grievant . . . it is routinely granted by courts and the NLRB, and we see no reason why this should not apply to an arbitration remedy when interest is requested."[30]

Emerging Reasons for the Award of Interest

A Make-Whole Remedy

In the past, interest awards have not been granted given the understanding that the purpose of an arbitral remedy is to make the grievant whole, and the belief by some arbitrators that an interest award would amount to enrichment for the grievant. It was generally thought that grievants who are awarded back pay are justly compensated and made whole given the fact they are receiving monies for which they did not work.[31] However, this reasoning is becoming outdated, and some arbitrators now believe that without interest, a person is not truly made whole. As Arbitrator Dennis R. Nolan stated in *Niemand Industries*,[32] "merely getting the money one should have had a year or two or later does not make one whole. In arbitration, as in law suits, interest should be the normal means of compensating for delayed payment."[33] Interest awards are becoming more prevalent, whereas the connotation that interest is a penalty is being dismissed. As one court stated, "[i]nterest is not a penalty against the company. Its function is to make the employees reasonably whole, and that is the proper remedy."[34]

Another arbitrator recently expounded the necessity of interest awards in making a person whole in today's arbitral climate by saying that, "[w]hen a successful grievant is forced to wait a long

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[29]Hill & Sinicropi, Remedies in Arbitration, 2d ed. (BNA Books 1991), at 452.
[30]*Atlantic Southeast Airlines,* 102 LA 656, 660 (Feigenbaum 1994).
[31]*Safeway Stores, Inc.*, 114 LA 1551, 1556 (DiFalco 2000).
[32]94 LA 669 (Nolan 1990).
[33]*Id.* at 673.
[34]*Falstaff Brewing Corp. v. Teamsters Local 153,* 479 F. Supp. 850, 862 (D.N.J. 1978).

time before recovering back pay he has lost as a result of an unjust disciplinary penalty, denial of interest means that he cannot be made whole. Indeed at least one reason for the practice of denying interest on back pay in arbitration cases may be that the average length of time between the filing of a grievance and the arbitrator's decision used to be considerably less than it is today, and the denial of interest did not significantly affect the 'made-whole' remedy of reinstatement with back pay."[35]

Within the Powers of the Arbitrator

Interest has also become more acceptable given that it is now viewed as a remedy clearly within the inherent powers of the arbitrator to award. This recent shift in arbitration directly contradicts the former belief that interest was only proper if the parties had stipulated such in the CBA. The court in *Falstaff Brewing Corp. v. Teamsters Local 153*[36] held that, in awarding interest, "the arbitrator was well within the bounds of his authority to fashion the remedy."[37] In *Falstaff*, the contract was silent as to whether interest was a proper remedy; however, the parties submitted their grievance for arbitration with the stipulation that the "arbitrator [was] commissioned to interpret and apply the [CBA] . . . to bring his informed judgment to bear in order to reach a fair solution to the problem."[38] Upon review of the arbitration award, the court further reasoned that "interest is within the traditional inherent powers of an arbitrator to award in order to make an employee whose rights have been violated reasonably whole."[39]

Time Value of Money

A more recent theory in support of interest awards in arbitration has been the "time value of money" argument. This argument relies on the fundamental principle that an amount of money in the present is worth more than the same amount of money in the future. The value of a fixed amount of money decreases over time because of lost investment opportunities.[40] The time value of

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[35]Hill & Sinicropi, *supra* note 29, at 450.
[36]479 F. Supp. 850 (D.N.J. 1978).
[37]*Id.* at 862.
[38]*Id.*
[39]*Id.*
[40]*See generally* Wolma, *Ambushed in a Safe Harbor: Taxation of Intrafamilial Installment Sales Contracts*, 33 Val. U. L. Rev. 309, 316 (1998).

money can be defined as the amount of money given at a certain date plus the amount of the investment opportunity.[41] In *Hollander & Co.*,[42] the arbitrator awarded interest and justified his decision by stating that "[t]he grievants were improperly deprived of funds they would have used to their benefit during the period of their layoff while the employer had use of those funds."[43]

When faced with the question of interest, a panel of arbitrators stated succinctly that "[i]n virtually all other forums—courts and administrative agencies—a prevailing party routinely receives interest on delayed payments. That is a matter of simple justice: getting a sum a year late does not make the recipient whole. Interest is the normal way to compensate the injured party for delayed payment."[44] The arbitrators further elaborated on the time value of money and the necessity of interest regarding make-whole remedies:

> If getting money in 1993 had the same value as getting it in 1982, there would be no need for interest. Of course, money does carry a time value. At the very least, inflation whittles away at the dollar's worth; to give the Grievant the full value of what she was due, more is required than payment of the same nominal amount a year or more later. The additional amount is called interest. Without it, she would be worse off than if the Company had not breached the Agreement.[45]

Conclusion

Although interest awards are becoming more widespread, there are still some lingering problems. First, interest awards are still rarely requested, and some arbitrators will not take it upon themselves to award interest, even though it is in their power to do so. Second, there is still no consensus as to whether interest is proper in all cases, or whether there is a need for a showing of special circumstances. Third, arbitrators often dismiss requests for interest without any discussion as to the merits of the claim, basing their opinion solely on "prevailing arbitral practices." Finally, because arbitration has no precedential value, each arbitrator is free to decide the issue of interest independently, relying on whichever argument he or she deems to be controlling at the time.

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[41] *Id.*
[42] 64 LA 816 (Edelman 1975).
[43] *Id.* at 821.
[44] *Atlantic Southeast Airlines*, 101 LA 515, 525 (Nolan 1993).
[45] *Id.* at 526.