Chapter 7

WHAT HAPPENS AFTER THE ARBITRATOR'S AWARD?

I. Introduction

Moderator: Sylvia Skratek, NAA Member, Seattle, Washington
Speaker: Stephen B. Goldberg, NAA Member, Chicago, Illinois
Panelists: Tim Bornstein, NAA Member, Boston, Massachusetts
Gail Lopez-Henriquez, Freedman & Lorry, P.C., Philadelphia, Pennsylvania
Joffie Pittman, Director of Labor Relations, Philadelphia Gas Works, Philadelphia, Pennsylvania

Skratek: I would like to welcome everybody to this session. We are going to attempt to answer the question that every arbitrator asks at some time or another: What in the world happens after we issue a decision? My name is Sylvia Skratek. I'm proud to be a member of this Academy as well as the Arbitrators Association of British Columbia, which means that I'm privileged to be based not only in Seattle, Washington, which is beautiful, but the equally beautiful Vancouver, British Columbia.

I'm very pleased to be the moderator of this distinguished panel of presenters. Representing the union perspective, we have Gail Lopez-Henriquez, who is with the Philadelphia firm of Freedman & Lorry and represents union and benefit funds. Her arbitration experience has been primarily in the health care field; however, a substantial part of her practice is the representation of ballet dancers and opera singers. She's listed in the *Who's Who in American Law* and *Best Lawyers in America* and was named a Pennsylvania Super Lawyer in 2004, 2005, and 2006. In addition to her professional activities in the field of law, she's a member of the Boards of Directors of the U.S. Labor Education in the Americas project, which provides assistance to unions in Central and South America, and the Painted Bride Art Center, which works with artists to create and present programs that affirm the intrinsic value of

all cultures, the inspirational and healing powers of the arts, and their ability to affect social change. Her personal motto is: Labor creates all wealth.

Representing the management perspective will be Joffie Pittman. He is the Director of Labor Relations at the Philadelphia Gas Works where he has worked since 1999. Prior to joining the Gas Works, Mr. Pittman worked as an assistant city solicitor in the City of Philadelphia Law Department where he was assigned to both the labor and employment and civil rights units. At the Gas Works, Mr. Pittman is responsible for overseeing the company's collective bargaining agreements, which cover approximately 1,400 represented employees. As labor director, he has played an integral role in implementing interest-based negotiation through the use of mediation, which has resulted in a decrease in the number of arbitrations by about 25 percent to 30 percent. He is an active member on numerous boards and he enjoys serving, particularly, on the Board of the Hope Partnership for Life, which is an independent middle school located in one of the most depressed areas in north Philadelphia. The school, which also doubles as a community center, is dedicated to providing a quality education to children in the surrounding area through the use of smaller class settings, one-on-one training and mentoring, and year-round classes. He is a 1991 graduate of Howard University and a 1994 graduate of Temple University School of Law. He lives with his wife and two children in Philadelphia.

Representing the neutral perspective is Tim Bornstein. He is an arbitrator in Lincoln, Massachusetts, and a former governor and vice president of the Academy. For a number of years, he was a professor of law in industrial relations at the University of Massachusetts at Amherst. He is the co-editor of a two-volume *Treatise on Labor Arbitration* published by the Matthew Bender Company. He has written several dozen articles on labor law and arbitration. He currently writes a bi-monthly column on arbitration for Bender's *Labor and Employment Bulletin.* He is a permanent arbitrator under a number of collective bargaining contracts from New England to Alaska. In his spare time, he paints and draws abstract pictures, not one of which is now or ever will be in either a major or minor museum.

All of these distinguished panel members will be commenting on a study that has been conducted by Professor Stephen Goldberg. Steve Goldberg is a professor of law at Northwestern University Law School and has been a member of the Academy since 1975. He is active as a mediator and arbitrator of both labor and

commercial disputes and has published extensively on both mediation and arbitration. Most of his publications, including that which he will present to us today, are based on empirical, rather than library, research. He is perhaps best known for his efforts to encourage labor and management to resolve grievances through mediation rather than arbitration whenever possible. He is the president of the Mediation Research and Education Project, which is a not-for-profit corporation that has been promoting and administering grievance mediation since 1980. With that, please join me in welcoming Professor Stephen Goldberg.

II. Presentation by Stephen B. Goldberg*

Perhaps the most difficult aspect of this study consisted of getting human resources and labor relations personnel to respond to a 30-question survey that called for some data available at the corporate level, such as number of arbitrations, and other data available only on the shop or office floor, such as the post-reinstatement work performance of discharged employees. Despite this, I received completed questionnaires from 85 employers, 32 in the private sector, and 53 in the public sector—perhaps a reflection of the greater union density in the public sector.

I collected data only from employers, not from the unions representing their employees. The primary reason for this was that on some items, such as the number of arbitrations, the union response would be merely duplicative of the employer response; on other items, such as the discharged employee's post-reinstatement job performance, the union would be unlikely to have records enabling it to respond. Whether a different approach would have been feasible, and what effect it might have had on the results, are questions that I leave to my fellow panelists to address.[1]

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[1]Arthur Ross, in his 1957 paper, *The Arbitration of Discharge Cases: What Happens After Reinstatement*, in Critical Issues in Labor Arbitration, Proceedings of the 10th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1958) at 21, 28, reported that he received responses from only 20% of the unions to which he had sent questionnaires. According to Ross, "This was to be expected, because many unions are not in a position to follow the subsequent career of reinstated individuals." *See also* Barnacle, *Arbitration of Discharge Grievances in Ontario: Outcomes and Reinstatement Experiences* (Industrial Relations Centre, Queen's University, 1991) at 208, n.12 ("In general, trade union returns were of limited value in assessing post-reinstatement conduct. This is most likely a result of the people who completed the union survey not actually working in the workplace. Union information would also be less complete in answering job evaluation questions than employer personnel records.") Malinowski, *An Empirical*

The number of unionized employees per employer ranged from 7 to more than 50,000, with almost half (36/85) above 1,000. The arbitration frequency among employers with more than 1,000 employees ranged from a high of 1.36 cases per 100 employees per year to a low of 1.00 case per 10,000 employees per year.[2]

The 85 employers in the study reported a total of nearly 8,000 cases decided by arbitrators in 2004 and 2005. Of those, slightly more than 2,000 were discharge cases. The arbitrators sustained the discharge in 63 percent of the cases, and overturned the discharge in 37 percent. Reinstatement was ordered in 767 cases.

The proportion of cases in which the arbitrators sustained the discharge is considerably higher than that reported in earlier U.S. studies covering the period from 1942–1967, in which the discharge sustained rate ranged from 39 percent to 46 percent.[3] It is unclear, however, whether these differences reflect a genuine increase in arbitral willingness to sustain discharges, or whether the difference is due to most prior studies being limited to published decisions, while this study is not so limited.[4]

My friend, Rolf Valtin, suggests that another explanation for the greater proportion of discharges being sustained in the 2004–2005 period than was true 40 to 60 years ago is that the earlier decisions created a body of shop law or common law of the workplace, so that employers now have some reasonably clear guidelines concerning the arbitral definition of just cause for discharge in a wide variety of circumstances. As a result, employers are more likely today to discharge employees only when they—or their lawyers—

Analysis of Discharge Cases and the Work History of Employees Reinstated by Labor Arbitrators, 36 The Arbitration Journal 31, 33 (1981), did not send questionnaires to unions because "it was thought that the employer, who has the necessary records, reports, and personal observation . . ., could better answer questions about an employee's history after reinstatement."

[2]The average arbitration frequency for the 35 employers with more than 1,000 employees was 0.29 cases per 100 employees per year. The corresponding average for the 28 employers of 100–999 employees was 0.20.

[3]Holly, *The Arbitration of Discharge Cases*, in Critical Issues in Labor Arbitration, Proceedings of the 10th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1958) at 16 (discharge sustained in 39% of all published cases in 1942–1951, and in 45% of all published cases in 1951–1956); Teele, *The Thought Processes of the Arbitrator*, 17 Arb. J. 2, p. 87 (1962) (discharge sustained in 44% of all published cases in 1956–1960); Jones, *Ramifications of Back Pay Awards in Suspension and Discharge Cases*, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, ed. Dennis & Somers (BNA Books 1969), at 166–67 (discharge sustained in 46% of all published cases in 1963–1967).

[4]Dallas Jones suggested that the latter may be the case, reporting a conversation with an American Arbitration Association official who told him that many of the cases in which discharge is upheld are not published because they are "run-of-the-mill" cases, presenting no unusual issues or circumstances. Jones, *supra* note 3, at n.2. On the other hand, Peter Barnacle, whose Ontario study was not limited to published cases, also found that arbitrators sustained discharges in only 46% of all 1983–1986 awards. Barnacle, *supra* note 1, at 107.

believe that the discharge is consistent with arbitral precedent. Hence, when employers do discharge an employee, that discharge is more likely to be sustained in arbitration. If this speculation is sound, the higher proportion of discharges that are sustained in arbitration represents good news, not bad, for the union movement. Unions may prevail in fewer discharge cases than they once did, but that is because employers are more careful not to terminate unjustly than they once were.

Of the 767 employees in this study who were terminated and then offered reinstatement, nearly all (99 percent) accepted; only a handful (1 percent) agreed to a monetary buyout in lieu of reinstatement. As shown in Figure 1, one year after their reinstatement, 10 percent of the reinstated employees had been terminated, and 4 percent had quit, but the vast majority (86 percent) were still employed.[5] Thus, the common perception that reinstatement orders don't really accomplish much, because many reinstated employees do not accept reinstatement, and most of those who do are gone again within a fairly brief time, is not borne out by the data.

Nor do the data support the view that a discharged employee, if reinstated, will be more of a discipline problem than ever. According to the employers' own evaluations, and as presented in Figure 2, slightly more than half (55 percent) of the reinstated employees had better disciplinary records after reinstatement than before, and a third (32 percent) had disciplinary records about the same after reinstatement as before. Seventeen percent (17 percent) were the subject of discipline within one year of their reinstatement.[6]

Almost none of the employees whose discharges were sustained filed a duty of fair representation suit. Of the 1,303 cases in which the discharge was upheld, there were only 12 reported duty of fair representation suits, fewer than one in 100 cases. In the eyes of

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[5]These findings are similar to those reported in earlier studies based upon direct inquiry, rather than published decisions. Ross, *supra* note 1, at 52, found that 10% of 111 reinstated employees were terminated within a year of their reinstatement, and another 10% had quit. Eighty percent were still employed. Malinowski (*supra* note 1, at 36) found that 8% of 59 reinstated employees were terminated within 2 years, 12% quit, and 80% were still employed. George Adams' Canadian study found that 13% of 110 reinstated employees had been discharged within a year, 25% had quit, and 62% were still employed. Adams, *Grievance Arbitration of Discharge Cases* (Queen's University at Kingston, Ontario 1979), 64–65.

[6]In Ross' study, the employers reported that 65% of the reinstated employees had satisfactory records subsequent to their reinstatement, *supra* note 1, at 53, and that 30% had a recurrence of disciplinary problems within 1–5 years after reinstatement, *id.* at 54. Malinowski reported that 59% of reinstated employees were characterized by their employers as satisfactory, *supra* note 1, at 41, and that 44% had a recurrence of disciplinary problems within 1–2 years after reinstatement, *id.* at 39. According to Barnacle, employers reported satisfactory work performance by 70% of reinstated employees; 48% were subject to further discipline within 2–5 years after reinstatement, *supra* note 1, at 209.

Figure 1: Reinstated Employees One Year After

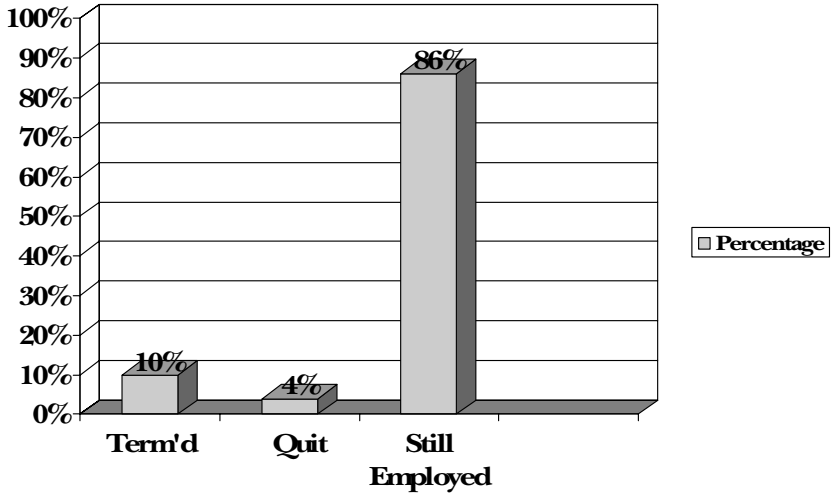
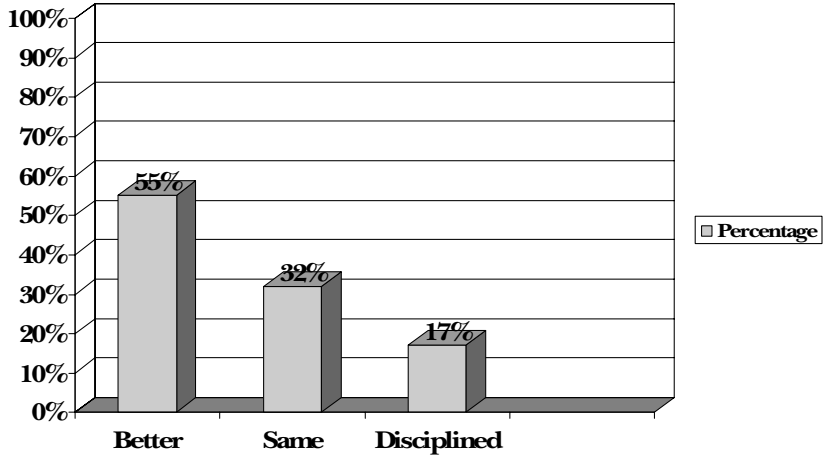


Figure 2: Disciplinary Records of Reinstated Employees—One Year After



even those discharged employees who had the most reason to be dissatisfied—those whom the union could not get back to work—the unions were seen as providing satisfactory representation.

In addition to the question about the number of discharge arbitrations, I also asked about the number of suspensions of five or more days that had gone to arbitration. There were only half as many suspension arbitrations as discharge arbitrations (1,113 compared with 2,080). I do not know whether this is because there are fewer such suspensions than discharges, or because a smaller proportion of the suspensions are taken to arbitration, or some combination of the two factors. The arbitrators upheld the suspensions even more frequently than terminations—72 percent of the suspensions were upheld, compared with 63 percent of the terminations.

I asked the surveyed employers about the post-arbitration work record of suspended employees, just as I did of reinstated employees, but ran into the problem that the largest employers with the most suspensions did not respond to this question, leading to a rather small sample size. As depicted in Figure 3, of the 83 suspended employees on whom I do have information, the employers reported that the disciplinary records of about 80 percent were the same or better (40 percent better, 39 percent same) after arbitration than before.[7]

Only 5 percent (40/775) of the cases resulted in disputes about the interpretation or application of the arbitrator's award.[8] Although the parties negotiated a resolution of that dispute in about a third (12/40) of the cases, the remainder required returning to the arbitrator who had issued the award. This was done considerably more often when the arbitrator had retained jurisdiction than when the arbitrator had not—48 percent of post-arbitration disputes were brought back to an arbitrator who had retained jurisdiction compared with 10 percent being brought back to an arbitrator who had not done so. The retention of jurisdiction, which took place in approximately 40 percent of the cases, thus appears to encourage returning to the arbitrator for the resolution of disputes arising out of the award.

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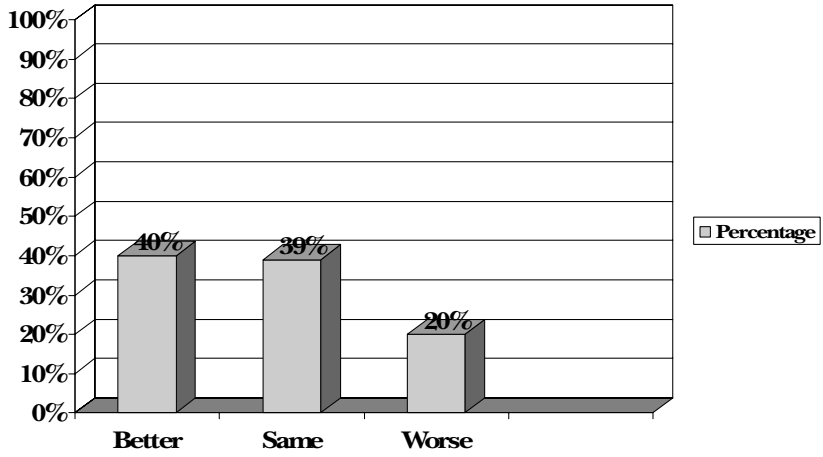
[7]This includes both those cases in which the suspension was sustained and those in which it was overturned, as there were too few of the latter (20) to analyze them separately and including them did not have a substantial effect on the statistics.

[8]The sample size here is comparatively small because data on post-arbitration disputes were not conveniently available to the large employers who had the most arbitrations, hence were not reported.

Figure 3: Disciplinary Records of Suspended Employees—One Year After



Approximately 25 percent of the employers reported that arbitration had a negative effect on workplace relationships. Generally, the negative effect was stated simply as "low morale," but some employers were more specific in describing what they saw as the negative effects of arbitration:

- Co-workers become angry with each other.
- There is harassment of company witnesses.
- Reinstated employees are bitter against the company.
- Overturning of discipline undermines supervisory authority.

These are unwelcome fallouts of the arbitration process, but there is not much that arbitrators can do about these problems. The existence of these problems does, however, underscore what sophisticated employers and unions already know—there are apt to be relational costs in proceeding to arbitration, and those costs should play a substantial role in the parties' decision whether to arbitrate or to search a bit harder for a mutually acceptable settlement that will avoid arbitration.[9]

[9] *See* Goldberg, *Grievance Mediation: The Coal Industry Experiment, in Arbitration—Promise and Performance,* Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1984), at 128; Goldberg, *How Interest-Based Grievance Mediation Performs over the Long Term,* 59 Disp. Resol. J. 8 (Nov. 2004 – Jan. 2005).

III. Panel Discussion

Skratek: Thank you, Steve. Our first respondent will be Gail Lopez-Henriquez.

Lopez-Henriquez: Thank you. From the union perspective, I find it very difficult to draw generalized conclusions from this data. In my opinion, what happens after the arbitrator's award is very much affected by both the culture of the particular employer as well as the reasons for the specific discharge at issue. Another reason that I think the empirical approach has its limitations is that it lumps together both the difficult employees with disciplinary records and the innocent accused who are fully vindicated by the arbitration process. I've had experiences with employees who were terminated based upon a single incident, did not have past disciplinary records, were cleared of any wrong-doing, and subsequently became good long-term employees. But I also have had experiences with repeat offenders, people who I've had to represent again and again, sometimes at more than one employer. So I'm not sure how much we can learn by reducing these very different experiences to statistics. That said, I don't think that the data, the numbers, would be any different if they were obtained from unions. And I am certainly glad to see that the numbers show that the vast majority of employees who have been reinstated are still employed a year later, and that the vast majority had records that were better or at least no worse than before. I certainly would not want to see data that would discourage arbitrators from reinstating grievants.

I was not aware that arbitrators were under the contrary impression that reinstatement had an element of futility to it. I hope that this study dispels any feeling of that sort on the part of arbitrators. Although, I can certainly understand how in specific cases they may still have reason to feel that way.

I don't think that you can generalize about the impact of a potential duty of fair representation (DFR) claim in explaining why cases are taken to arbitration. This is something that the panel members had discussed in preparing for this. In my experience, the extent to which unions consider the threat of a DFR suit varies from union to union. And a union's selectivity concerning the cases that it takes to arbitration varies based upon the culture of the union as well. The unions that I've primarily represented in arbitration make their decisions based on the likelihood of success and give very little weight to the DFR threat. I think it's very important that the arbitrators not come with preconceived as-

sumptions that unions take most cases to arbitration because they don't want to get sued. In the long run, that would be a very expensive strategy for unions to pursue. For the same reasons, in my opinion, the arbitrator should not push a financial buy-out before the arbitration is completed unless the union indicates an interest in exploring that option. If a settlement has not occurred yet, it's likely because either the union or the grievant or both are insisting on reinstatement. If the union believes in the case, reinstatement is very important. Reinstatement is the most important result that can come from a discharge case, and the option of an employee walking away with a pot of money and never returning to the workplace does not in any way meet the legitimate objectives of the union. The statistics in Professor Goldberg's study should dispel any impression by arbitrators that reinstatement is futile, and arbitrators should not feel that getting the employer to come up with some money is the best result.

Now, of course, if both parties tell the arbitrator that they are interested in discussing a financial buy-out, then that is a different situation. I'm just saying that the impetus should not come from the arbitrator. And, in more than 20 years of doing this work, I have never seen a buy-out after the union successfully obtains reinstatement, so I'm not surprised by Professor Goldberg's statistics in that regard.

Another message that I would like to send to arbitrators is that they should retain jurisdiction. I strongly disagree that retaining jurisdiction encourages the parties to continuously return to the arbitrator for the resolution of disputes. It's the *only* way to return to the arbitrator to resolve disputes because, unless jurisdiction has been retained, both parties have to agree to go back to the arbitrator. The employer usually will not agree to that because it then leaves the union with the choice of either accepting whatever it is that the employer has laid down as its last position or spending the money to start all over again. And only in the rare case will a union be willing to do that or be able to do that, and so, in my opinion, it's important to retain jurisdiction. But the parties really don't want to go back to the arbitrator, and they will do so only when they can't resolve any loose ends about the remedy themselves. So I don't think that you should get the impression that retaining jurisdiction encourages repeat visits.

The last thing I would like to say is about the incidence of DFR suits or charges that arise after an award. The vast majority of DFR claims are filed over a union's refusal to take the case to arbitra-

tion. Professor Goldberg's conclusion that the very low incidence of DFR suits after the award is because employees generally are satisfied with union representation is, I think, overly broad. I think that the real reason is that it is virtually impossible to succeed in a DFR case after there has been an arbitration award. Although I certainly would be very happy to think that even in those cases that I lose the grievant was so impressed with me that he or she wouldn't think of suing the union, I think it really has more do with the legal standards that apply.

Thank you.

Skratek: Thank you, Gail. And from the employer perspective, Mr. Joffie Pittman.

Pittman: Good afternoon. I would agree with most of Gail's comments, perhaps surprisingly as we're supposed to be adversaries up here. But I would agree with a lot of what she said.

I would like to give you just a brief introduction to Philadelphia Gas Works (PGW). PGW consists of approximately 1,700 employees, 1,400 of whom are union. The number of cases that the union takes to arbitration is rather high. For the remainder of 2006, we have approximately 20 cases scheduled for arbitration. Of the 20 scheduled, only 4 pertain to discipline, and of these, only 1 is a termination. In the past six months, we have settled approximately 7 arbitrations; and I predict that we will settle probably half of the 20 for the remainder of the year.

After reviewing Professor Goldberg's findings, it would appear that PGW is somewhat of an anomaly. In the seven years that I've been at PGW, we've had approximately seven terminations go through the complete arbitration process. In fact, other than terminations for violations of our drug and alcohol policy, our union takes approximately 95 percent of terminations to arbitration. In fact, they even took a termination grievance fully through arbitration after the grievant had died. Of the terminations that went to arbitration, the arbitrators reinstated the grievant in each and every one of them, which is a stark contrast to Professor Goldberg's findings.

Recently, though, PGW and the union have settled a lot of termination arbitrations on the day of the arbitration hearing. For some reason, the presence of the arbitrator seems to bring a sense of clarity to both sides. From the company's perspective, the company usually has an interest in settling a lot of these cases before they go to arbitration because it sometimes takes so long for a case to actually get to arbitration that the company risks being hit

with a huge back pay award if it were to lose. Some of these awards could be in excess of $100,000. When an employee is reinstated and awarded a substantial back pay award, that tends to result in a feeling of major defeat for the terminating manager or supervisor. It basically amounts to a slap in the face and sometimes will result in the same manager or supervisor being somewhat gun-shy the next time he or she is faced with terminating an employee under similar circumstances.

One case I remember in particular involved a grievant who was terminated and was out of work about a year-and-a-half before his case went to arbitration. Long story short, the grievant was reinstated and awarded almost $100,000 in back pay. About a week after the grievant had been reinstated, the manager who terminated the grievant was parked in his car and the grievant pulled up to him in a brand new Hummer. Whether the grievant bought the Hummer after receiving his back pay award is unknown. However, in the manager's mind, that is where the money came from; and basically, he felt that the grievant got a year-and-a-half paid vacation out of the process.

From the grievant's perspective, if the grievant has been out of work for a substantial amount of time, the grievant is more willing to take his or her job back with a reduced back pay award, or no back pay at all, just to get back into the workplace. They, too, realize that going to arbitration is not a guarantee for them getting their jobs back.

We have been successful lately in negotiating last-chance agreements with the help of the arbitrators in cases where the grievant was reinstated with an understanding that if the grievant commits a similar or more serious infraction after reinstatement, then he or she will be terminated immediately without recourse to the grievance or arbitration process. In about three cases, we negotiated a buy-out with the grievant; in each of those cases both the union and the company felt that it was in the best interest of both parties that the grievant not return. However, once a grievant has been ordered reinstated by an arbitrator, we have not had too many issues surrounding the employee's reinstatement. Unlike some contract interpretation awards, most reinstatement awards are for the most part clear: Either reinstate with or without seniority or back pay. Therefore, we have never had any issues surrounding the grievance reinstatement. We have appealed only one arbitrator's order of reinstatement. The decision to appeal that particular award was motivated by pure political reasons rather than any

animus against the grievant. In fact, the grievant in that case now is in management and is doing very well.

Most of the grievants who have been ordered reinstated never face discipline again. There is always the fear that a grievant who has been reinstated will return with an "S" on his or her chest and be more of a problem than before the termination. However, I have found that not to be the case at PGW. For most employees who have been at PGW for all their lives, PGW is all they know. Therefore, if an employee loses his or her job and is forced to find employment out in the "real world," then he or she tends to get a taste of understanding and realizes how good he or she had it and doesn't want to lose it again. Therefore, I suspect that most employees who get reinstated act on their best behavior afterwards.

Lastly, in most of our cases we do not ask the arbitrator to retain jurisdiction. Out of all the arbitrations that I have been involved in during my seven years at PGW, the parties have had to go back to the arbitrator only once to resolve a back pay dispute after a reinstatement award.

Thank you.

Skratek: Thanks, Joffie. From the arbitrators' perspective, Tim Bornstein.

Bornstein: Well, my take on this is a little bit different than Gail's or Joff's. I believe that this very limited study that Steve Goldberg has done may be one of the most important in years. And although it's limited to 80 employers, I'm not aware of any other study that has examined what goes into the black hole and can flash a bright light on the black hole of tens of thousands of arbitration decisions. Most arbitration research, including most of the papers on the Academy meetings over the last 50-plus years, have focused on doctrines, on procedures, on what happens before the award, and the formulation of the award. And with very, very few exceptions, we've rarely dealt with what happens after the award. The truth of the matter is that as arbitrators we rarely know what happens to our awards except by accident. Sometimes that's a good thing. I can think of a recent case in which I learned a month or so after I sustained the discharge of a mentally dysfunctional employee that he committed suicide. I wish I hadn't heard that. But, I've also heard good stories. But those are purely anecdotal. By and large, we don't know what happens after an arbitration award is issued. Steve's study begins to pull back the curtain on the mystery of what happens after the award.

We assume that most parties like arbitration. The basis for that assumption is that for more than 50 years, 95 percent or more of collective bargaining contracts have contained some form of final, binding arbitration provisions. That assumption, however, rests on pretty shaky grounds. We don't know what the alternatives are. We don't know how satisfied or dissatisfied the parties are with the process. And it seems to me that as those who care about the process, we have some obligation to look into the dark hole, to pull back the curtain, and to find out whether the process really is satisfactory. I propose that if we were to ask the right questions, we might get some startling answers.

Here's the question that ought to be asked. I suggest we ask 1,000 employers—public sector, private sector, large and small, carefully defined—and 1,000 unions—internationals, locals, carefully defined in a variety of industries, public and private sector—this question: Do you agree or disagree that in most cases arbitrators have decided the issues before them fairly and correctly under the terms of your collective bargaining agreement?

I think that we would assume that the answer would be, "Of course!" Arbitrators are wise, fair, and usually correct. But we don't really know, that's only an assumption. I would guess that most parties would answer affirmatively to the question about whether we decide issues fairly and correctly. But just suppose for purposes of this intimate conversation that 50 percent of the parties disagreed with that statement. Suppose 50 percent had serious reservations about the fairness of the procedures and the outcomes. What do we do then? What kind of soul searching should we undertake? Now, it is no secret in the confines of this room that the arbitration process has long been the subject of sharp criticism and not only by the courts. Some 40 years ago, Judge Paul Hays criticized that research into arbitration decisions has been front-end loaded, with a lot of examination of our own decisions. We look at each other, we admire our work, we bring the parties to tell us how good we are. Occasionally, we hold a program in which we say, "Tell us what you would like us to do." The attendees at these sessions are very deferential, and as George Cohen would say, they do a lot of patronizing. But in hard substantive terms, we don't have the slightest idea whether they are truly satisfied with our work. And finding out may not be very easy. Indeed, I suspect it would be an enormous task and one that the Academy's education and research foundation probably should consider sponsoring.

What I like about Steve's study is that it goes to the heart of darkness. It goes into questioning whether the outcomes—not the procedures, not the charm of arbitration, not the substantive doctrines—but whether the outcomes are good outcomes, and whether the parties are satisfied. Now, it's not an easy question to ask or to answer because the parties, after all, create their own procedures. If they don't like arbitrator A, then they can choose arbitrator B. If they want an expedited system, then they can have an expedited system. But I would like to see the Academy to go further and find out whether the system truly works. And the way to find out is not by looking at the front end—the procedures, the doctrines, the parties' anecdotal responses to our work—but rather to get a genuine overview of whether the system is satisfying and performing as it should.

Of course, that is not an easy task, and it is unlikely to happen. Steve's study focuses primarily on discharges and discipline. That, I think, is an easier approach because discharges and discipline are a very discrete category. But suppose we were to break it down into a number of areas. Suppose we were to ask the parties how they feel about arbitral review of managerial rights issues, subcontracting, job assignments, and lay-offs. I suspect that the results might not be as satisfying as we may think. In any event, Steve is to be congratulated for beginning to look at a more substantive, solid, and reliable way of evaluating our work. And I hope that it is just a prelude to a much more thorough effort to understand the outcomes of our work, as well as the procedures that we follow.

Thanks.

Skratek: Thank you, Tim. We do have a few moments if there are any questions or comments from the audience.

Goldberg: Sylvia, can I make just one comment? I think Tim's idea is terrific. And I will volunteer to analyze the data if Tim will figure out how to get 10,000 employers and unions to participate. I mean, you have no idea what I had to go through to get 85 employers to respond to these questions. But once Tim brings me the data from 10,000, I'll be happy to do the analysis. Thank you, Tim.

Bornstein: I've never invoked the Fifth Amendment before, but this may be the first.

Skratek: Please identify yourself. Let's go to the back microphone.

Schneider Denenberg: Tia Schneider Denenberg, Jackson Corners, New York. I have two questions. First, for my colleague, Steve

Goldberg, one of my biding interests has been in the reinstatement of employees involved in alcohol and other drug offenses. And so I wonder if you had any impression of how employees in this category fare following reinstatement.

I'll then ask the second question of Mr. Pittman. I take very seriously the notion of how difficult it is to reintroduce an employee into the workplace. Sometimes it's really not the arbitrator's business. But I wonder if the model of victim/offender mediation holds any promise for you because, I imagine, it is a slap in the face to a supervisor to get someone back. You're publicly embarrassed, while at the same time, the employee may well feel very self-conscious. There is very little attention paid to how you reintroduce the employee to the workforce, and the employee to the same or other supervisors.

Goldberg: Tina, I did not do that research. As you know, there has been some research done on the effect of the reason for termination, the kind of thing that Gail spoke about, on the employee's success on the job thereafter. But I did not go there.

Let me just respond and then Joffie can address your other question about victim/offender mediation as a way to reintroduce the employee into the workforce. This, of course, is what we try to accomplish with grievance mediation in lieu of arbitration.

Schneider Denenberg: But I think what happens is that they don't have the benefit of your wise counsel, and they go to arbitration. Oftentimes, the biggest damage to the relationship is in the testimony. It can be very hurtful.

Pittman: I would agree. I mean, we haven't really had too much negative fallout at PGW. A supervisor's or manager's feelings may be hurt for about a week, but at the end of the day they have to realize that this person is back, and that they are going to have to deal with this person. Because of the track record of the people coming back and being excellent employees upon reinstatement, there really hasn't been too much of a negative effect. Where mediation has been helpful is prior to arbitration, when we bring both sides together. And I think the wisdom of the mediator in explaining positions to both parties sort of eases that pain if somebody has to come back or we agree to bring somebody back. So I think mediation on the front end is a lot more beneficial than it is on the back end.

Winograd: Barry Winograd, Oakland, California. I suppose this is for Professor Goldberg, for your reaction or comment: In reading the paper and listening, one thing that I was struck by is

the dramatic contrast between our expectations in the labor field, where there is a presumption of reinstatement as part and parcel of the discharge case, and how 180 degrees it is reversed of federal antidiscrimination civil rights laws where the federal judiciary, essentially, has adopted a presumption against reinstatement even though that equitable remedy is available in that area of litigation. There is a constraint perhaps because some plaintiffs' lawyers might be more interested in the financial aspect of the recovery; but more importantly, the rationale as I understand it from the courts is a hesitation about reintroducing troublemakers into the workplace and the fear of further retaliation. And I know you do mediation as well, and you probably hear that refrain. But I'm wondering if a study of this nature could have a beneficial effect in the antidiscrimination area.

Goldberg: I think a key distinction between the two areas is that in the labor arbitration context there is a union in place to protect the employee who is reinstated. As a result, there's much more willingness to put back that employee. Compare that with reinstatement orders under the National Labor Relations Act (NLRA), where the data show that many reinstated employees do not stay on the job. In this situation, usually there is not a union in place, as the discharges are typically related to the union organizing campaign, and the people who are reinstated tend not to stay.

Winograd: What I'm getting at, however, is the judicially imposed presumption. The presumption under the NLRA is for reinstatement as well, that's written right into Section 10. And what has occurred now in the discrimination area is the adoption of a contrary presumption not to bother with reinstatement because it's too disruptive and too problematic. I say to those who are union advocates as well that I think they have a stake in the outcome in that area of litigation.

Goldberg: What we'd have to do—and this would be another tough study on which to collect data—is find the cases in which employees in discrimination cases have been reinstated by the courts and see how they do after a year. Are they still there? Are they in trouble? And so on and so forth. Tough to get at the data. But that's the thing to find out.

Harkless: Jim Harkless. Steve, my question is relatively simple. What I've found missing is more information on the demographics of the participants. What areas did they come from geographically? What industries? Can you give us any more information?

Goldberg: In terms of industries, I can say there's everything, and in terms of geography, it was nationwide. Let me reemphasize how difficult it is to get busy employers—and I'm sure it would be the same with unions—to sit down and respond to data collection requests. I would love to have more and richer data. But I was troubled in constructing this questionnaire; how long can I get people to sit still and respond? That's the constraint. I would love to have the answers to all the questions that Jim asks, and to be able to say, "No, this is not a limited study, it covers everything." But there are practical problems.

Skratek: Please join me in thanking our panel for an excellent presentation.

Appendix 7.A.

What Happens After the Arbitrator Issues an Award? Questionnaire

Your name: _____

The name of the company or organization for which you are completing the questionnaire: _____

Your title or position:_____

Your e-mail address (so that we can send you a copy of the survey results):_____

****

EMPLOYEE DISCHARGE CASES

1. How many employee discharge cases has the Company/organization arbitrated to an award since January 1, 2004?_____ (If none, skip to Question 4.)
2. In how many cases did the arbitrator order that the discharged employee be reinstated? _____ (If none, skip to Question 3.)
   - 2a. In how many cases did the reinstated employee accept a sum of money in lieu of reinstatement? _____
   - 2b. In how many cases did the reinstated employee actually return to work? _____ (If none, skip to Question 3.)
   - 2c. In how many cases was the reinstated employee discharged again within one year of his/her reinstatement? _____
   - 2d. In how many cases did the reinstated employee resign within one year of his/her reinstatement? _____
   - 2e. In how many cases was the reinstated employee the subject of discipline other than discharge within one year of his/her reinstatement? _____
   - 2f. In how many cases was the reinstated employee's disciplinary record better after reinstatement than before his /her termination? _____

2g. In how many cases was the reinstated employee's disciplinary record worse after reinstatement than before his/her termination?_____

3. In how many cases did the arbitrator sustain the discharge? _____ (If none, skip to Question 4.)

3a. In how many of the cases in which the arbitrator sustained the discharge did the discharged employee file a claim alleging that the Union had breached its duty of fair representation?_____ (If none, skip to Question 3b.

3a(1). In how many of those cases was the claim sustained?____

3b. In how many of the cases in which the arbitrator sustained the discharge did the discharged employee file charges under Title VII (race or sex discrimination)?_____ (If none, skip to Question 4.)

3b(1). In how many of those cases was the claim sustained?____

EMPLOYEE DISCIPLINE CASES

4. How many cases involving significant employee discipline (suspension of five (5) or more days, but not discharge) has the Company/organization arbitrated to an award since January 1, 2004? _____ (If none, skip to Question 6.)

4a. In how many cases was the discipline sustained by the arbitrator? ____ (If none, skip to Question 5.)

4b. In how many of those cases did the employee's disciplinary record improve after the discipline was sustained? _____ Become worse?____ Stay about the same?____

5. In how many cases was the discipline not sustained by the arbitrator? _____

5a. In how many of those cases did the employee's disciplinary record improve after the discipline was not sustained? _____ Become worse?____ Stay about the same?____

CONTRACT INTERPRETATION CASES

6. How many contract interpretation cases has the Company/organization arbitrated to an award since January 1, 2004?_____ (If none, skip to Question 8.)

7a. In how many of those cases did the parties reject or modify the arbitrator's interpretation of the contract in favor of their mutually agreed-upon interpretation?_____

7b. In how many of those cases did the parties amend the subsequent collective bargaining agreement to incorporate the arbitrator's interpretation?____ To reject or modify the arbitrator's interpretation?_____

INTERPRETATION AND APPLICATION OF THE ARBITRATION AWARD

8. What is the total number of cases that the Company/organization has arbitrated to an award since January 1, 2004? _____

9. In how many of those cases did the arbitrator retain jurisdiction of the case after the award was issued? _____

10 In how many of those cases was there a dispute about the interpretation or application of the arbitrator's award? _____ (If none, skip to Question 11.)

10a. How many of those disputes were resolved:

1) By negotiation between the parties_____
2) By returning to the arbitrator who had retained jurisdiction to resolve post-award disputes_____
3) By returning to the arbitrator, even though he/she had not retained jurisdiction to resolve post-award disputes_____
4) By arbitrating the dispute before a different arbitrator_____

NLRB REVIEW OF ARBITRATION AWARDS

(If your company/organization is not subject to the jurisdiction of the National Labor Relations Board, skip to Question 12.)

11. As you know, the National Labor Relations Board, under its Collyer doctrine, will delay ruling on an unfair labor practice charge that raises both NLRA issues and contract interpretation issues until the arbitrator has ruled on the contract interpretation issues. (Cases in which the Board defers a rul-

ing under this doctrine are referred to as having been "Collyerized".) How many cases has the Company/organization arbitrated to an award since January 1, 2004 that had been Collyerized?_____ (If none, skip to Question 12.)

11a. In how many of those cases did one of the parties seek NLRB review of the arbitrator's award?_____ (If none, skip to Question 12.)

11b. In how many cases in which NLRB review was sought did the NLRB rule differently than had the arbitrator? _____

EFFECTS OF ARBITRATION IN THE WORKPLACE

12. In how many of the cases that the Company/organization has arbitrated has the arbitration hearing (testimony, arguments) subsequently had a negative effect on workplace relationships?_____ (If none, skip to Question 13.)

12a. What was that negative effect _____

13. In how many cases has the arbitration hearing or award led to negative consequences for a supervisor or manager involved in the action that led to the arbitration? _____ (If none, skip to Question 14.)

13a. Please explain:_____

_____

_____

_____

14. In how many cases has the arbitration hearing or award led to operational changes in the employer's business?_____ (If none, skip to Question 15.)

14a. Please explain._____

_____

_____

_____

15. In how many cases has the arbitration hearing or award led to negative consequences for the person who represented the employer in the arbitration?_____ (If none, END QUESTIONNAIRE)

15a. Please explain_____

_____

_____

_____

END QUESTIONNAIRE

Thank you for your cooperation!

If you have filled out the questionnaire in paper form, please fax it to Professor Stephen Goldberg at 312-503-0149, or mail it to Professor Goldberg at Northwestern University Law School, 357 E. Chicago Avenue, Chicago, IL 60611.