

CHAPTER V

IMPLEMENTATION OF ARBITRATION AWARDS

LAURENCE E. SEIBEL, CHAIRMAN *

RAYMOND E. SHETTERLY **

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CHAIRMAN LAURENCE E. SEIBEL: It seems to me rather curious that the problem of this morning's meeting has never been the subject of a program or workshop of the Academy. Some years ago there was a discussion of seniority and promotion cases, but that dealt primarily with the correctness of the arbitrator's reversal and his decision to promote younger men.

Today's program is not primarily concerned with the correctness of the arbitrator's decision in altering or overturning the action taken by one of the parties, generally the company. Rather, it is concerned with what flows from that decision. Unfortunately, neither in law nor in arbitration is an affirmative decision generally self-enforcing. The affirmative decision that one of the parties shall do so-and-so must be implemented. Theoretically, in a perfectly presented case, correctly decided, there should be no doubt as to what should be done. But is this true?

Even under such a theoretical model rather significant problems may arise when the award is implemented. But the millennium has not yet arrived, and we know that cases are not always perfectly presented nor are the conclusions of the arbitrator al-

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ways clearly set forth, with due regard as to how that conclusion should be implemented.

I have made no survey, nor do I know of a grievance with respect to the implementation of awards. We can look forward today to having these matters developed and commented upon by our speakers.

The UAW View

MR. RAYMOND E. SHETTERLY: Voluntary grievance arbitration is an escape by the contesting parties from the consequences of their own failure to settle their differences. Common law courts have been found to be a costly and dilatory proceeding. Likewise, the resort to strike action over failure to settle such differences has not met with universal appeal. The parties have chosen the route of the "power of logic" over the route of the "logic of power" as the most sensible final step to grievance determination in the majority of our labor contracts. The process, being entirely voluntary in nature, is still on trial, and the major factor which will dictate its continued use is the confidence which the parties place in it. This implies not only an obligation on the parties to carefully investigate, evaluate, and prepare their cases, but it also implies a willingness of the parties to give dignity and meaning to the process by accepting the award in good faith, whether they agree with the award or not. The future, then, of labor arbitration depends on the competence and integrity of the advocates of the two parties as well as on the methods and techniques used by the arbitrator in his opinion to "sell" his award to the "losing" party and, of course, to insure that he has a "salable product."

Unquestionably, the arbitrators cannot be held responsible for most shortcomings in the practices of the various arbitration advocates, but they can be held accountable for the acceptability of their own awards. We are not unmindful of the fact that the advocate who loses an arbitration case is inclined to feel that the arbitrator has, under the guise of interpretation, engaged in "judicial legislation," but this is not the real problem when deciding acceptability. Most experienced arbitrators are as insulated against such excoriation as the football referee is to the criticisms he receives from the fans in attendance at the game. But where objective and significant censure now is ap-

pearing, it seems that this reproof must be taken into account if the institution is to retain its usefulness and/or acceptability.

What, then, needs examination? What are the areas of legitimate censure?

1. *Awards are too costly.* In this day of accelerated inflation, who can say what is too costly? I think the criticism goes not to the daily per diem, but rather to the number of days for which the arbitrator charges. Sometimes it defies credulity to accept as justifiable the number of days the arbitrator studies and prepares.

2. *Grievance arbitration is too time-consuming.* Here the complaint is justified, but the parties themselves in most instances are the major culprits.

3. *Availability of acceptable arbitrators.* Something should be worked out to permit so-called apprentice arbitrators to break in on cases that would, by agreement, be non-precedent-setting.

4. In writing an award, if the arbitrator sets forth in any degree of detail the position of one party, it would seem to us that he should be bound to set forth the position of the other party to the proceeding. Otherwise, it would surely appear to be an ex parte hearing.

5. Finally, to the subject of our particular problem, *the implementation of the award once it is received.* First, of course, the parties should both read the award with understanding and then accept its directive. The adverse influence on the general relationship of the parties which results from any attempt to circumvent or tamper with that award should, of course, lead to the obvious conclusion that the parties must take the award to be inviolate.

But what are the actual facts?

Item. In one case, an illustrious member of this Academy reinstated a discharged employee without back pay. The company contended that the arbitrator misstated one fact and it refused to comply with the award. For some unexplained reason, that employee is still discharged. I might add that the misstated fact alluded to by the company dealt with the question of whether a letter of suspension pending a decision was in fact a

letter of discharge since the writer of that letter admitted under cross-examination that when he wrote the letter of suspension, he had already decided to convert the suspension to discharge after the "five day cooling-off period" imposed by the contract.

In discussing this item, it is almost unbelievable that the company would refuse to reinstate the grievant on the flimsy technicality raised by its legal department, but nevertheless it did. Apparently, if the arbitrator had placed quotation marks around the word "discharge" in referring to the disputed letter, or if he had referred to the letter as a suspension, the company would have viewed the matter differently. It is our judgment that the company's legal department established the "straw man" to justify the company's real position: that is, a blatant refusal to comply with the clear language of the reinstatement award. Our conclusion, then, must be that awards should be written with extreme care by the arbitrators to make sure that no technical flaw can be developed by either side to the arbitration proceedings.

Item. In another case, after an award on a subcontracting dispute upholding the union had been received, the company contended that a particular statement by the arbitrator, in his discussion but not in his award, about notification had somehow granted unusual rights for the future. It required another hearing with the arbitrator to straighten out that problem.

In discussing this item, it is our judgment that again the company placed a severe strain on credibility in order to make a case of an objective contention that the arbitrator somehow intended to change for them their negotiated obligations concerning notification to the union of anticipated subcontracting arrangements. They seized upon some observation in the body of the opinion, but not repeated in the award, and contended that this remark somehow made a meaningful distinction between a letter of notification and a letter of intent. Again we point out the necessity of examining opinions critically prior to their being mailed to the parties in order to eliminate any possibility of confusion and/or giving comfort to the losing party in the arbitration proceeding by some inadvertent reference that seemed logical at the time of writing but which could be seized upon by that losing party to try to make some

“bricks” for the future out of the “straws of his losing efforts” in that particular proceeding.

Item. In still another case the arbitrator told the company that the failure to pay a Christmas bonus after years of past practice was in fact a bargainable issue and that the bonus could not be discontinued unilaterally. He remanded the matter to the parties with instructions to both sides to bargain the amount since in the past it had depended on a formula developed by the company according to its profit picture. The company then took the position that the award only obligated it to bargain—not to reach an agreement. A subsequent award by the same arbitrator ordered the company to use the last formula, since it refused even to discuss the profit picture with the union. The company completely ignored this last award.

In discussing this item, we can only suggest that the award in the first instance should have made clear that a failure to reach a negotiated agreement after the issue was clarified and remanded back to the parties would result in a second award upon the request of either party. The arbitrator did make it clear that the matter was bargainable and arbitrable in the first award, but he did not make it clear that the failure of the parties to negotiate a settlement would result in a final and binding arbitration award on the amount of the Christmas bonus. The arbitrator also made it clear in his second award that the failure of the company to provide the necessary data with which to negotiate the Christmas bonus formula used previously by the company was the cause of the breakdown in negotiations ordered by his first award, and in fact left him in the position of having no objective criteria upon which to establish a proper bonus in the dispute before him. Therefore he was forced, through necessity, to order the company to figure the disputed bonus based upon the same formula used in the most recent bonus prior to the Christmas period then in dispute. In spite of all this logic, however, the company based its refusal to carry out the second award on the specious claim that the arbitrator lost his authority simultaneously with the signing and mailing of the first award.

Item. In yet another case, an employee who was discharged for suspected but not proven theft was reinstated with full back pay, less, of course, the usual offset of earnings since the date

of discharge. However, because of his lack of seniority standing in the company which paid these earnings, he was forced to work a night shift and all overtime that the senior employees declined. As a result, his total pay over the eight-week period, when measured against 14 weeks of lost wages as a result of his improper discharge, left him only \$90.00 short. For the six weeks that he was without a job, the company was required to pay him only the \$90.00, according to its interpretation of the award.

In discussing this item, we get into an area of not only mixed emotions but, we feel sure, mixed opinions as far as the arbitrators themselves are concerned. We are speaking now of the problem of lost earnings opportunity as a result of the imposition of an improper penalty. It is our judgment that in considering this area of the award, the arbitrators ought to address themselves only to the question of whether the discipline imposed by the company was proper, and not whether some form of discipline was called for. We understand the well-reasoned criteria on the one side of the coin that suggests caution as far as the correction of an improper penalty resulting in a so-called windfall to the employee; but we also call attention to the inequity created by the arbitrator when he goes overboard in his desire to prevent such so-called windfalls. The whole purpose, as we understand it, behind the process of voluntary arbitration is to search for the solution to a problem. In doing so, it seems to us that the award ought to nudge the parties themselves toward searching for their own solution in future cases of like nature. In the case of discipline, since management is the moving party, it would seem that it ought to be encouraged to make the proper disciplinary decision in the first place. If managements were thus faced a few times with awards containing this doctrine, it is our judgment that they would use more objective criteria, or practice a great deal more restraint, when imposing the original penalties. In many instances, if the company had imposed a more reasonable penalty or at least something less than discharge, the union might have accepted that penalty as being for just cause, thus saving the wear and tear on both the process of arbitration and the union treasury. When the company imposes discharge and it is determined by the arbitrator not to have been for just cause, it seems to us perfectly reasonable to question any offset in

earnings during the period of the unreasonable discharge. We recognize immediately that this might create a problem with some arbitrators in those areas where the grievant's case is close to that line of demarcation between a discharge for just cause and one that is not for just cause and swing the scales against the grievant; but if we examine what is really at issue, we feel certain that this should create no particular problem. In other words, in discipline cases, one of the primary objectives as far as the future is concerned is to instill in management a desire to issue discipline fairly. That desire can best be instilled in managements, in our opinion, by giving them the necessary incentive to issue the proper discipline in the first place. If the members of this organization find our suggestions in this area unacceptable, then please consider the alternative: When writing your awards dealing with an offset in wages, make the offset on an hour-for-hour basis. Surely you must agree that if an employee loses a month's work as a result of an improper discharge, he should be paid for that month regardless of how much he earns after he acquires subsequent employment. We agree that the make-whole principle would apply to all fringe benefits, but as far as lost earnings are concerned, we believe that the usual damage principle does not apply. Rather, the contractual-relationship principle should apply in dealing with the matter of lost earnings.

Item. Finally, in a case involving the return of a number of foremen to the bargaining unit, the company permitted these ex-foremen to exercise bumping rights and displace unit employees from the higher priced unit jobs. When an award was handed down to the effect that the company violated the rights of the grievant employees, the company chose this time to raise numerous questions regarding the future before it would place the clear language of the award into effect.

In discussing this item, the arbitrator cannot be faulted in any manner. Our only point in raising it in this paper is to show that the companies, too, are mindful of the position in which the union is placed when a company flatly refuses to implement an award. It is our judgment that only because of this knowledge did the company in our item contend that it would not apply the award as the union stated it should be ap-

plied unless it received certain concessions for the future in return.

I hope our comments have not sounded too much like technical fault-finding with the arbitration process. They are not so intended. But you must be aware, we feel sure, that arbitration is the *quid pro quo* for the right to strike and, as such, in many instances was arrived at reluctantly as far as the union is concerned—reluctance mostly because of fears of inadequacy on our part and of management's so-called sovereignty. When these fears are sharpened and magnified by company refusal to properly implement an award, then the "venture of faith and hope" embarked upon by the union will eventually be regarded as a failure, and therefore it will request a return to direct confrontations including only the two parties.

We believe this would be a tragic error, but the fact remains that the process of arbitration will "self-destruct" unless an answer can be found to insure the proper implementation of the award, once it is issued. The reasons are manifest. The employees have voluntarily given up the right to settle grievances against the employer in a manner that they understood and where they had complete control of the end result. They have accepted, in return, a different way—one which they have been assured will be more beneficial as far as logic and cost in terms of man-hours lost are concerned. When they see management blithely accepting the results of grievances lost by the union and then arrogantly refusing to abide by the results of grievances won by the union, the conclusion is reached that they are the victims of the "Heads I win, tails you lose" attitude. We believe, then, that an arrangement should be insisted upon by all arbitrators that would commit both parties of an arbitration proceeding to be bound by the award unless they are able to have the award set aside through proper court action. When the union dislikes an award, it must either accept it or sue to vacate it; when the company dislikes an award, it simply fails and/or refuses to implement it. We hasten to make clear that this does not include the majority of companies, but it does include enough to make the problem burdensome. Generally speaking, the permanent umpireships, such as General Motors, accept the results of the awards in good faith, but far too many ad hoc relationships seek to avoid such good-faith

acceptance. We hope that this body, with its vast capacity to evaluate and provide the answers to problems, can find an answer to this problem: that is, this abortion of justice taking place in certain areas in the name of impartial arbitration.

The Ford Experience

MR. ALEXANDER C. MEKULA: When Program Chairman Dick Mittenenthal extended his gracious invitation to appear here today, we briefly discussed the subject of my paper. He was somewhat surprised to learn that the implementation of arbitration awards has been a relatively minor problem at Ford for a good number of years. And this is so despite the fact that the company has over 27 years of arbitration experience dealing with some 16 unions and involving thousands of decisions.

I should emphasize that there is a marked difference between the problems resulting from technical implementation and the problems sometimes resulting from the psychological trauma that an arbitration advocate, a labor relations administrator, or a plant manager experiences in first swallowing, then digesting, then implementing the "essential justice" provided by the arbitrator. While we have relatively little trouble with the former, the latter phenomenon is something else again. I should like to suggest that the disordered psychic state which accompanies the implementation of certain arbitration awards presents a tantalizing subject for a future Academy meeting. As a matter of fact, several of my colleagues have already expressed their willingness to undertake such a paper, provided that the meeting will be held in Hawaii, Pago Pago, or Puerto Rico revisited.

Not only has Ford Motor Co. implemented thousands of arbitration decisions dealing with some 16 unions, but I should also point out that these decisions were the product of 30 or so arbitrators. These numbers are cited here for two reasons:

First, I am well aware of the perils associated with generalizing from specific situations in the labor relations field. The great differences between the various industries and between employees and employers in a given industry with respect to such matters as nature of the service or product, operating conditions, union organizational background, and even personalities

of the arbitrators, tend to make an industry's problems unique. While I will deal essentially with the Ford experience, I believe that the figures I have cited give me greater license to slip in a few generalizations.

Second—and this may come as a bit of a shock to some of our arbitrator hosts today—many arbitration advocates (especially management advocates) are by nature kind, sensitive, warm people who also view as an important part of their job the dispensing of “essential justice.” Of course, advocates are also known to be pragmatic. Therefore, by referring to some 30-odd arbitrators, I can protect the guilty from unnecessary embarrassment which might—through some subliminal process—make the implementation of some future award more or less of a problem.

The first part of my paper, which can be subtitled “Incongruous Decisions Made by Some of the 30 Arbitrators That I Have Known,” will deal with some specific instances where the implementation of the award caused management extracurricular problems. The second part of my paper deals with that naughty five-letter word which has caused many a management advocate to emote for periods ranging from ad nauseum to ad infinitum—*dicta*. That part of my paper received a ready-made subtitle from the Program Chairman when he suggested that I might address myself to “What Difficulties Are Presented by Dicta in the Arbitrator's Opinion.”

One of the worst implementation problems that Ford has faced over the years is one which placed it in an operational dilemma. The company was confronted with two arbitration awards ordering that certain work be assigned to two different skilled trades, each represented by a different union. As a matter of convenience, I'll refer to the unions as A and B and the arbitrators responsible for the awards as 1 and 2. I should point out that these designations are purely symbolic and are not intended as an indication of my opinion as to the relative merit of those involved.

Union A protested work being assigned to members of Union B. The company continued to assign the work to members of Union B pursuant to the award given by Arbitrator 1. Union A proceeded to arbitration and then to the federal dis-

strict court, seeking enforcement of the award it received from Arbitrator 2. Union B moved to intervene and its motion was granted. Later, it was stipulated by the parties that the court should take no action until a decision was rendered under the AFL-CIO internal disputes plan. Since the decision under the union's internal procedures resulted in an award against it, Union A finally stipulated to the dismissal of its action in federal court.

In this particular case the company had no objection to the resolution of the conflict under the union's internal procedures system. However, this should be viewed as the exception rather than the rule. In this case it did not make very much difference which trade was assigned to the work; in many other cases it does.

While the case represents a single instance at Ford, the generalization which I seek to draw from it is also applicable to a number of arbitration awards in industries other than auto. Too often there is a tendency among arbitrators to view jurisdictional disputes confronting industrial employers as solely interunion or intra-union problems, with management having no interest in the final result other than to see that the job is covered. To be sure, there are instances where this may be true, but more often than not, management's interest is totally separate from and paramount to that of the disputing unions.

Arbitrators should give far more serious consideration to the third possibility—that neither contending trade has an exclusive right to the work. Most of us here would undoubtedly agree that unjustifiable or artificial lines of demarcation between classifications of employees can lead to gross inefficiency and featherbedding. Absent any clear language in the parties' agreement to the contrary, the arbitrator should recognize that it is probably in everybody's best interest to resist any encroachment on management's right to assign work in the most efficient manner with full utilization of available skills.

Ford has experienced a far more common problem with respect to the implementation of arbitration decisions. It occurs when arbitrators decide to dispose of cases before them by laying down certain ground rules presumably calculated to resolve a particular grievance or grievances, and then remanding

the cases back to the parties to develop their factual determinations in line with the general conclusion of the award.

Remanded cases are sometimes accompanied by a thought-provoking phrase such as, "The parties should reexamine their earlier positions and attempt to adjust the grievances." Still another favorite interim disposition is: "The parties agree in principle, but strongly dispute the facts. The case must be remanded to the parties for investigation and determination of facts and settlement of the matter in accordance with undisputed principle." Then the arbitrator probably breathes a sigh of relief as he advises the parties, with a tone of solemn paternalism, "I will retain jurisdiction of these cases until I am notified as to the outcome of the parties' negotiations." As you may recall, in his address to this distinguished Academy several years ago, Peter Seitz strongly supported the use of the interim decision by arbitrators.¹

I, for one, am opposed generally to the partial or temporary resolutions of arbitration cases. My feelings in this regard are more akin to those expressed by the late Jesse Frieden in his appearance before the Academy in 1964 when he said:

"... what the parties expect and what they ask an arbitrator to provide is a final resolution of their grievance, of their difference; not a temporary one, not a partial one, not an interim one, but a final one; and I submit to you that this finality is itself a quality of worth, for it accomplishes a most useful purpose—it brings a difference to an end—the very purpose that the parties intended the arbitration procedure to provide."²

It has been our experience at Ford that interim decisions, in nearly every instance, prove unsatisfactory to the parties and foster discord between them. The very things in issue, most often factual disputes, remain unresolved, and the parties merely find themselves where they started—haggling over the facts. The consequence is usually a prolongation of the dispute and further friction between the parties. There is a great temptation for the parties, in desperation, to engage in mere horse-trading

¹ Seitz, "Problems of the Finality of Awards, or Functus Officio and All That," in *Labor Arbitration—Perspectives and Problems*, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1964), 165.

² Frieden, "Remedies in Arbitration: Discussion," in *Labor Arbitration—Perspectives and Problems* at 203.

with the hope that the same problem will not arise in the foreseeable future.

From management's point of view these interim arbitration decisions are particularly disconcerting because in all but discipline cases, the burden of proof rests with the union. If the grievance has not been proved, it should be denied; it's as simple as that. All too often the interim award encourages trial grievances and provides the other party with an opportunity to rehabilitate a weak position or a losing case. In short, such decisions frustrate the state of finality which arbitration was designed to provide the parties.

As a backdrop for my discussion *re dicta*, I should like to point out to you that it is known by other names as well. In fact, one of my union friends, and I won't quote him exactly, likens it to a common barnyard commodity. His colorful reference to dicta also provides us with some insight into what he and others in the union may think of dicta in an arbitration award.

At Ford we employ a fast rule in the implementation of arbitration decisions with respect to dicta. We simply instruct personnel who are responsible for the administration of our labor agreement to ignore it. However, although this measure is generally adhered to, the problems which do emanate from dicta are not so easily dismissed.

The one type of problem which the parties in general have experienced with respect to dicta involves the generation of grievances by the dicta that frequently appear in arbitration decisions. It is frustrating, to say the least, to find yourself grappling with grievances arising out of decisions which were assumed to have laid to rest a particular issue. This problem is relatively common in labor relations; almost any time an arbitrator flavors his decision with dicta, he's sowing the seeds for new grievances. However, with my allotted time growing short, I will not dwell on the point, important as it may be.

The aspect of dicta I would like to discuss with you in a little more detail is the impact dicta can and do have on the parties' contract negotiations.

Consider this simple fact situation involving a provision that

Ford has in its agreements with several unions. Under our agreements, an employee who absents himself from work for five scheduled working days may be terminated after another five days upon being sent a registered letter to report—unless, of course, it is not possible for him to respond. In one particular case an employee who was absent from work for the aforementioned number of days was sent a registered letter. Upon his failure to report, he was terminated. Subsequently, he filed a grievance in which he invoked a defense that is most commonly used by the union or an employee. He contended that he did, in fact, respond to the company's letter by telephone within the required five-day period. At arbitration, the company substantiated the fact that a registered letter was sent to the aggrieved's last known address. Also, the company produced its logs of incoming hourly employee telephone calls covering the period in question. These were accepted as proof that no telephone call was received from the aggrieved. The aggrieved employee volunteered that he may have placed a call beyond the time allowed by the contractual provision and that it was made to the wrong company representative. On the basis of all the evidence, the arbitrator issued a decision denying the employee's grievance. It would appear that no company should encounter the slightest difficulty in implementing such a favorable decision or have any other problem with it. Right? Wrong! Unfortunately, the arbitrator who decided that case felt compelled to offer what we may refer to as a few "pearls of wisdom." Pearl No. 1: "It seems most unfortunate that this relatively slight degree of negligence should place in peril the job equity the aggrieved has established over 16 years." Pearl No. 2: "Alternatively it is for the parties to devise some improvement in the administrative procedure that will eliminate the contention that a call was or was not made. For example, a tape of phone calls such as this."

Of course, the company did not introduce the fact that the employee in question had a deplorable disciplinary record and was a habitual absentee who had a short time earlier placed himself in the position of being the recipient of similar termination notices on three different occasions. In these instances, however, he had conveniently responded on the very last day permissible.

Actually, the import of that decision went far beyond the mere implementation of the arbitrator's award. The aforementioned dicta gave birth to a cause célèbre and became the basis for a serious demand by the union at the national negotiating table concerning the long-established quit provision. The company was charged with invoking technicalities to rid itself of high-seniority employees. In addition, the union demanded that a system of taping phone calls suggested by the arbitrator should be instituted for the protection of the employees.

After a countless number of valuable hours at the negotiating table, the union was finally convinced that the provision (already one of the most liberal in the industry) was not employed in a harsh fashion. An example cited by the union of a high-seniority employee's being terminated was found to be the exception. The record was replete with instances of high-seniority employees' being reinstated following their terminations under the contractual provision in question. Moreover, the union was advised of the fact that the taping of telephone calls was not only an expensive proposition, but was also unduly burdensome. When one considers that an employee had five days within which to place such a call, it is not unlikely that a labor relations representative could spend some 100 hours listening to tapes in order to determine whether an alleged call was, in fact, made by a particular employee. I'm sure most of you know that the labor relations field is not so barren that it is unable to provide the parties with a surfeit of difficult problems. Additional problems induced by an arbitrator's advice are wholly unappreciated.

I have come to the conclusion that the parties and the arbitrator should strongly resist any tendency that would give the arbitrator pivotal importance in their relationship. In my judgment, the examples I have submitted for your consideration indicate that some arbitrators—deliberately or otherwise—place themselves in such a position. All too often this leads to the arbitrator's effecting some significant changes in the parties' relationship either by suggesting or telling the parties what their agreement *should* provide or by laying down extremely broad dicta heavily laden with his own notions of the parties' commitments.

Personally, I am convinced that no third party can con-

struct good agreements for a company and a union. No arbitrator, regardless of how familiar he might be with the parties and their problems, is really close enough to make their agreements for them. No arrogance is intended by this statement, but I might add that I do subscribe to the concept that arbitration is vital in labor relations.

Of course, for my part, I admire the arbitrator who has either the humility or wisdom, or a touch of both, to respect the positions of the parties and refrain from supplying unwanted observations. It is, unfortunately, naive to expect that in every instance the arbitrator will listen to the evidence and arguments of both parties and base his award only on these items. All too often the arbitrator fashions his own theories for the basis of his award, and these theories frequently collide with principles long established between the parties, or they generate new issues for future arbitrations. Probably the best defense in the long run against an arbitrator's intrusion and inventiveness is an alert, perceptive, and thoroughly knowledgeable advocate who is prepared to meet all possible theories in a case.

It is essential, of course, that the answer the parties seek can be arrived at from the facts and on the theories presented at the hearing. And the arbitrator must understand that the parties are seeking an answer in a specific fact situation, and any dicta or advice beyond the scope of that situation would be best received over a martini after the decision is rendered.

On reflection, one of the reasons I think the implementation of awards has remained a relatively minor problem at Ford is because Ford and the unions with which it deals have met the test stated by Harry Shulman when he wrote:

"The important question is not whether the parties agree with the award but rather whether they accept it, not resentfully, but cordially and willingly. Again, it is not to be expected that each decision will be accepted with the same degree of cordiality. But general acceptance and satisfaction is an attainable ideal."³

This test certainly assumes that the arbitrator's final judgment is the product of reason applied on the basis of the standards and the authority the parties entrusted to him. To the extent

³ Shulman, "Reason, Contract, and Law in Labor Relations," 68 *Harv. L. Rev.* 1019 (1955).

that we at Ford have been able to have the arbitrators understand this view, we have been able to minimize the problems discussed today. The Ford arbitrators generally have responded positively to the views expressed by both company and union spokesmen concerning the parties' desire for finality in arbitration. They have used their remand authority sparingly and they have, for the most part, refrained from fattening their opinions with that starchiest of all food for thought—*obiter dicta*.

The Steelworker's View

MR. BEN FISCHER: The subject which we have been asked to discuss is a little complicated and so elusive that the best I can do is to make some interim remarks and remand it back for some future resolution.

I am really tempted, faced with this distinguished group of arbitrators as well as leaders of management and labor, to talk about what's wrong with arbitrators, how inexpert they are, and how often they goof. But I hesitate to do this because for many years I have dreaded the day when the Academy would be so rude as to schedule a session on how inexpert labor and management are in their negotiations, and how extensively they goof in developing their collective bargaining agreements which we then impose upon arbitrators to interpret very strictly. So I'm going to try to be kind today, even though many of you may think it's out of character.

The arbitration process is a part of the labor-management relationship. It will rise or fall on the basis of the performance of labor and management, both in collective bargaining and in contract administration. Arbitrators can help; arbitrators should help; arbitrators can sometimes make things more difficult. But the essential responsibility, I am afraid, rests with the representatives of labor and with the members of management, and this we cannot evade.

The arbitration process as it has grown up, and as we know it, has run into some difficulty. Some people call it trouble; some people call it distress. Whatever it is, there is reason to be concerned.

Arbitration is costly, as is everything else, including this hotel.

I hope Alcoa takes some of the results of these enormous prices and puts them on the bargaining table a few months from now.

There is difficulty—very real difficulty—because of delay, and delay is not uncommon. There is delay within management in the decision-making process; there is delay within the union and its decision-making process. There is delay in the court system; there's delay in the legislative system in our country, in our states, and in our communities. Perhaps because of the tremendous complexity of modern organization and modern relationships, delay is being built into almost all portions of our life. There's even delay in getting from one place to another because of traffic and scheduling difficulties. But delay in the arbitration process is placing very great strains on that process, and delay in implementation of arbitration awards is increasing that strain.

To some extent the arbitration process is in trouble because it tends to become removed from the everyday shop problems. We're getting arbitrators who are experts; we're getting labor people who are experts and management people who are experts—and as they gain more expertise, they become more removed from the real problem as it is understood by the worker and as it is understood by foremen.

There is an alienation, not only between the average union member and the arbitration process, but between the average supervisor, who has to run a plant or some portion thereof, and the arbitration process.

Many people take it for granted that the labor-management contract establishes justice—what is right and what is wrong. I submit that it doesn't do so at all. There's nothing right about paying time and a half for overtime; it's just the rate that's provided in the contracts. There's nothing right in saying that if you're absent for five days or three days or two hours, you'll be penalized. That's just a rule, established one way or another, and everybody has his own essentially self-serving concept of what he would like justice to be.

Thus, since it is the arbitration process that dramatically portrays what the contract really does provide, the arbitration process bears much of the burden for the inevitable shortcomings

of the labor-management collective bargaining process and what the resultant contract inevitably creates.

So the parties have a very real problem.

I don't know how much we're going to solve the problem of cost. A local union that brings 18 representatives to an arbitration case where two would do well or better should hardly complain about the fee of the arbitrator. And there are other phases of cost.

Some arbitrators charge too much money. But that depends on how one defines too much money—a difficult concept for us as we are in the first of a series of collective bargaining negotiations with major industries. I suppose that too much money is the amount of money you pay, and too little money is the amount of money you receive.

The parties and the arbitrators, and the arbitration community, can do a great deal about delay. They must do a great deal about delay, and they're not going to do it just by making speeches about it or by doing things the way we've always done them. I think we have to be innovative, imaginative, and bolder, but that's not the subject of this morning's discussion.

We can do something about moving the arbitration process closer to the people, and it is something we should bear in mind. But again, that's not quite the subject of this morning's discussion.

The fact that people, faced with a problem that affects them, be they management people or union people, invariably seek some kind of justice as they see it, is something that is just going to continue. In no instance can man possibly establish standards of justice to govern arbitration that will be acceptable to everybody at all times. It is with this in mind that it seems to me that you ought to do what you can to mitigate the strain and distress inherent in the arbitration process.

Insofar as the implementation of arbitration awards is concerned, it should not contribute to delay; it should not contribute to the real cost to the parties and to the grievant and to their distress. To the extent that implementation problems help to create confusion and a lack of understanding of what the process is all about, and to the extent that implementation contributes still further to the frustration of the whole process of grievance

handling, we have a problem, and we ought to try to improve our performance.

I don't know whether I'm right or not (I'm kind of like an arbitrator; they never know whether they're right or not, but I assume they do the best they can), but I have the feeling that despite many remarks made here, the present permanent umpire system works pretty well. That's not where we run into our problem. More problems arise in the ad hoc field, which creates the essential climate in the labor-management community.

I suspect it is of very great importance that if one thinks in terms of how to improve the thousands of individual ad hoc contract situations, in industry after industry, involving many, many unions and many, many companies, it is well to start with what kind of tone and leadership is provided by the major situations where there are usually permanent umpire setups. It is in that context that I speak, and that's one reason I'm not doing much castigating of arbitrators.

Arbitrators can help to fashion the process of implementation by the nature of the award that they issue—by the way in which they compose and organize it. It should not be necessary to have second awards. But we do have interim awards and awards that remand back to the parties. We also have second arbitrations where the award may be clear, but one party or the other doesn't understand it the way the arbitrator does, or the way the other one thinks it ought to be understood.

It seems to me that arbitrators can make a contribution. They can do so by being fairly emphatic; they can do so in the conduct of their hearings by trying to make sure that they have before them the kind of facts and the kind of information, the kind of guidance from the parties, that will enable them to finally dispose of the issue at hand.

But I recognize that the extent to which an arbitrator can do that is limited. I know that in one major corporation, an arbitrator sitting here in the audience today started asking the attorney for the corporation too many questions. There was a recess because this attorney didn't know anything about the case; he was just reading from notes that had been furnished to him, and he was most embarrassed by any effort of the arbitrator to probe his mind—because his mind was not probeable. He had

come well prepared, not to answer the arbitrator's questions, but to say only what he had been told to say.

That's an extreme case, but in many situations an arbitrator can get only limited help, and he has to decide at some point that there's no point in going much further in his probing because he isn't going to get anywhere anyway. Nevertheless, somehow he must figure out this case or do a job not quite as precise and expert as he should like to do.

The essential responsibility, in my judgment, for proper implementation of arbitration awards rests with the companies and the unions. It rests in the first place with the collective bargaining process, and it rests in the second place with their attitude toward the process and toward what you do with it once you do get the award.

In the collective bargaining process, it seems to me, it is the obligation of the company and the union to set the kinds of standards and the kinds of guidance that are going to minimize the perplexities and the difficulties of implementation. This is not always easy, and it's getting to be pretty rough. Union leadership in collective bargaining, and even management leadership, is not very easy, and is not going to get any easier. This does lead to some temptation to slough things off, and this is something we're going to have to resist increasingly.

I don't know whether I should say this here, but I think most of the arbitrators know some of our secrets. We not only have the situation to which we always refer where arbitrators slough things off and say, "I'm not going to solve this problem because I don't know how"; labor and management have this problem, too. We kind of slough things off, and we remand to the arbitrators. We do it on a wholesale basis. We don't describe, in most of our agreements, what is just cause for discharge. We could, but for lots of reasons we don't generally do it. And when we don't do it, what we're really saying is that through our administrative procedures we will try to develop the skin and the sinews around this bare bone of just cause or proper cause—but if worse comes to worst we've got some arbitrators, and gradually, over a period of 5, 10, or 15 years and a few hundred thousand dollars' worth of fees, they'll let us know what this means.

That's just a dramatic example. I can take you through any steel, can, or aluminum agreement, on issue after issue, and show the precise degree to which the parties—these expert negotiators who know all the answers because they're close to the picture; they're on top of everything—will say, "The hell with it; it's getting late. Let's put some gobbledygook words in there and somehow something will happen some day, but meanwhile we'll have an agreement and we'll be able to go to sleep."

So it's not only arbitrators who engage in remanding. The parties do, too, but we do it in a much more refined and sophisticated and expert fashion. I think we have to resist this. We're not going to avoid it entirely because there does come a time when you've got to make an agreement. There's one advantage arbitrators have; they never have to make decisions. They can put them off day after day and week after week.

That's one luxury we don't enjoy. There comes a time when we've got to make a decision or else those plants are going to shut down or they're not going to reopen, whichever the case may be. It's a costly kind of delay. So in many respects we're even more tempted than the arbitrator to resort to this remanding device.

I think that arbitrators, on the other hand, can do a good deal more to ease this process of implementation. They can do so by the nature of their awards, or the way in which they address the parties and deal with them, perhaps by anticipating and trying to avoid trouble. I'm not sure how much of that can be done in any meaningful, useful way. The arbitrator has the tools that are given him. He has the contract; he didn't write it. And with all due respect, I don't know of any arbitration dicta that have influenced us or the fellows we deal with in collective bargaining, but unbeknownst to me they may have. We have our share of dicta from arbitrators—and if you pick Peter Seitz as your arbitrator, you not only get dicta, you're going to get poetry along with it!

I want to deal very briefly with a few areas in which implementation has developed into a very real problem, as I see it. One is the notion that a company can violate a contract and get slapped on the wrist, and if it violates the contract a second time, it will be slapped, presumably, on the other wrist. I

don't know what the arbitrator does with the third violation; he runs out of wrists, so he can, perhaps, slap them elsewhere.

I don't know to what extent this is the fault of the arbitrator. I suspect it is more specifically the fault of the collective bargaining process, and this peculiar device whereby management agrees to something but agrees in such a way that if they don't do what they agree to, nothing is likely to happen. There are several outstanding contract areas in which this kind of thing happens.

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

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

I don't know that this is the arbitrator's problem; I think it is the parties' problem. It seems to me that in responsible collective bargaining at this late date, if you're going to say that there is a rule, then you ought to say that there should be some penalty for its violation. When a member of the union violates a rule, there's a penalty; there's not much of a problem involved in that. When management violates a rule, there ought to be a penalty, and it is not primarily—in my judgment—the responsibility of the arbitrator to fashion such a remedy. If he can do so, God bless him—and I'll help him if I can—but I'm not going to lose sight of the fact that it is the contract itself that really fashions the remedy.

This is not just a moral problem. It is a very practical problem because this sort of thing will alienate the worker from

the arbitration process—and even to some extent from the collective bargaining process itself.

If you want to develop that kind of alienation, this is one good way to help do it. Set up the rule and provide no remedy that is meaningful. And this is the source, in my experience, of very great concern. As the work force becomes more sophisticated, more knowledgeable, and where more and more of our members get to be lawyers without portfolio—and we surely have a lot of them and I'm one—this becomes more and more the problem. So in terms of the validity of the process we're talking about—its acceptability and its durability—it seems to me very important that management understands that rules that are violated must lead to some kind of penalty.

Then we have this growing monstrosity: You make whole the employee who was fired improperly or was suspended for a long period of time. And how do you do that? You pay him what he would have received from the company less what he did get from other unrelated employment. This is a hum-dinger. How it all came about I don't know; all I know is that it's here, and I don't want, at this late date, to waste your time by attributing blame.

This has become an intolerable circumstance. Let me give you just some of the reasons. One is that it puts a premium on the guy who can find some way to make money in a manner that is not recorded. Then you have the question: "What are the outside earnings?" And what do you do about the moonlighter? We've had such problems. One distinguished arbitrator here had precisely this problem—"I always had two jobs." As a matter of fact, the man got fired because he had two jobs, and the arbitrator put him back to work. Now what do you deduct?

Then what about the fellow who doesn't have two jobs; he has only one and a quarter jobs. What do you deduct? What about the fellow who runs a gas station or owns a little grocery store or has other means of earning money? Just what is it that you're deducting? So you have very practical problems.

And then you have another very real problem. You don't make him whole. You never make a discharged employee whole by putting him back to work. In this day and age, when work-

ers are developing dignity and status in the community and in their family, and you operate almost in an industrial goldfish 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?

I don't think you can tolerate this kind of thing any longer. You're not dealing with the working man of 30 years ago, who lived in a little hut or hovel and perhaps had one Sunday suit. You're dealing with a different breed of people. You're dealing, if you will, with a relatively affluent society, and a society in which the worker today treasures his dignity and his peace of mind. And why not?

The time has come to correct this horrible inequity contractually, through collective bargaining—and I don't plead here with the arbitrators to save our necks. I hope we don't need you for this, and if we needed you, you wouldn't be available anyway. Labor has to face up to the fact that it must extract from management a termination of this "less deductions" baloney. You can't really make the wrongfully penalized employee whole, no matter what you do, so at least give him the few pennies or the few dollars that are involved instead of adding insult to injury.

And then, I think parties must have the proper respect for arbitration awards. I'll tell you what I mean by that. We're all pretty smart; the fellows we deal with are pretty smart. We know how to chisel; we know how to evade; we know how to create all kinds of gimmicks. If this whole process is to be wholesome and healthy in its development and strengthening, and consistent with our whole democratic system, parties have to accept an arbitration award in fact and in full. They ought to put their minds to work, now that the arbitrator (that nut!) did this ridiculous thing, as to how to abide by his award by really restoring the situation to what it was before, instead of devising some new gimmicks to add oil to this fire. And it's being done.

Every time you hire a nice, young, well-educated fellow who wants to become vice president in four years instead of 40, he's going to put his mind to work on that. These men are well trained; I have respect for our educational process. It surely teaches young people how to be chiselers! And it surely teaches young people how to be "wise guys." It's up to responsible management, and in some cases responsible labor leadership—it's not all one-sided—to see to it that arbitration awards are accepted in good faith and in good grace, without putting to work a whole chain of: "How are we going to get around this one?"

That doesn't mean—and I don't want to be misunderstood—that management or labor doesn't have the right to say, "Well, that's the award, but we may try this same case again." I don't advocate trying cases over and over again, but sometimes you *do* try a case again. Of course, when it gets to be again, and again, and again, and again, it gets to be kind of irritating. But under reasonable circumstances a second crack, when you perhaps put a little more steam behind it and a little more expertise, may be in order.

The "sore loser" kind of thing is not doing any of us any good. It's having a very unfortunate effect, and it is one of the reasons for disenchantment with the arbitration process. I daresay if you could somehow dig deeply enough, it's one reason why we hear that the workers are rebellious and don't accept contracts, and so on. I think these things mesh together. It is a total situation of no faith in what is going on. The good-faith efforts of all of us are urgently needed.

Finally, I want to talk about the computer. If there is one thing that's screwing up the arbitration process, it's the computer. I don't know of any computers that can implement arbitration awards, and more and more companies have fired everybody except the computer. As a consequence, when they have to make some manual calculations, there's just nobody around any more to make them. We therefore find that months and months go by and the workers don't get what the arbitrators said they should get. Nobody is arguing about the facts, but somebody has got to make the damned calculation and there's nobody working at it any more, except the few who run computers.

Somehow we have to resolve this; I don't know how. I don't think you're going to abandon the computers and you're not going to make them that much smarter. So we have to find some simplified methods of paying off promptly—maybe not with the same precision that ordinarily we have been accustomed to call for—or some other device. Maybe every company will have to have someone in charge of doing what the computer can't do, so that he's available with these ancient instruments like pencils, pens, paper, and things of that sort, to carry out arbitration awards.

This is a matter of very great distress to us, and I don't know what an arbitrator can do. You can go back to him and say, "They didn't pay us," and the company will say, "That's right, we haven't." The arbitrator says, "Pay!" but that's what he said in the first place, so he isn't really adding anything to it. He can say, "Pay immediately!" But, still, who is around to make the calculations?

Finally, may I close on this note. This whole arbitration process, its implementation, and various things I've been referring to, are the responsibility in part of the arbitration community. I think you have to take them seriously. You must address yourselves to them as individuals and as groups.

I think these things are the responsibility of the management community. But I have no illusions. The essential responsibility is the responsibility of labor leadership.

There is a new myth that's grown up in this country among a lot of people that somehow arbitration was created either by arbitrators or by management which wanted to take away the workers' right to strike. That has not been my experience.

Arbitration is something that was developed as a result of the struggles, the strikes, and the insistence of great and powerful unions. It was imposed upon management, and then, one way or another, some people created this profession of arbitration which, in turn, produced this Academy.

The revitalization of the arbitration process is essentially going to have to come from labor. I say this not only because this is where the necessity arises, but also because I'd rather have it that way. I don't trust management, not because they're not

nice fellows, but because they're not in the business of making labor-management relationships work in the interests of the workers. That just isn't their business. That's the business of unions and union leadership. If this revitalization and a program to remove much of the source of current alienation are to be successful, in a manner which is compatible with the interests of the workers and the progress of unionism and of labor in this country, then that leadership is going to have to come from labor, including the top leadership of American labor.

It's time that the leadership of American labor understands that this is a matter of very high priority and not just some offshoot, technical problem that does not require all of the imaginativeness and all of the initiative and all of the militancy and power of the labor movement. Some of the things I'm talking about, and many things I haven't talked about, aren't going to be solved merely by intellectual persuasion. They're going to be solved mostly in the same way problems have been solved over the years—with the strength and ingenuity, the intelligence and determination of organized labor.

Personal Observations on Implementation Problems

MR. GEORGE A. MOORE, JR.: Last May, when I learned of this opportunity to speak on the implementation of arbitration awards before this body consisting of the nation's renowned arbitrators, I undertook the assignment with relish. I did so because after nearly two decades of representing the managements of companies as diverse as the Bethlehem Steel Corp. and the Pennsylvania Railroad, I was, I thought, the possessor of not just a few wounds inflicted by various Academy members in the form of adverse awards with subsequent implementation problems. As a consequence, this occasion appeared to provide an excellent opportunity for me to turn the tables and experience the pleasure derived from that old Biblical exhortation best stated as, "It's better to give than to receive." I was also sure, with respect to this subject at least, of the inapplicability of the universal excuse of arbitrators; that is, the fault of the decision does not lie with the arbitrator but with the parties, all represented by able counsel, who were responsible for the poorly drafted and highly ambiguous contract provision in dispute.

In initially sorting my thoughts on past arbitration awards, I must admit that I somewhat hastily concluded that difficulties in implementing arbitration awards occurred frequently and, furthermore, that these difficulties were generally attributable to less than judicious work by the arbitrator involved. Further investigation revealed that this initial judgment was less than circumspect and resulted from certain rather vividly remembered experiences requiring extremely imaginative efforts on my part to comply with what, at the time, appeared to be exceedingly abstract or obtuse decisions. As a result of that initial thinking, I was quite unprepared to discover, after a review of the more than 4,700 grievances which have been arbitrated by Bethlehem Steel Corp. and its union associates since 1942, how infrequently situations have arisen where the company has had actual difficulty in implementing a particular arbitration award. Of course, this newly formed opinion may have been unduly influenced by the fact that at least 75 percent of the awards rendered were, without question, clear, concise, and unambiguous—that is, they all concluded with the phrase, “This grievance is denied.”

As an aside, I might note that even with respect to at least a few of those denied grievances, our victory has been somewhat bittersweet. This irony has occurred because of an occasional penchant by the arbitrator to burden his decision with unnecessary grievance-generating dicta. A good illustration of this point was a recent Bethlehem arbitration award involving a claim by an employee that he should have been assigned to work on a particular day when his job had been left vacant. The issue, as presented at the hearing to the arbitrator, was a rather narrow one, namely, whether the seniority provisions in the agreement supported the employee's claim that the job had to be filled. The arbitrator, in denying the grievance, found that there had not been any violation of the seniority provisions by management's refusal to fill the job. This, of course, was a very acceptable conclusion from the company's standpoint. Unfortunately, the umpire, in his conclusion, continued on in a rather gratuitous vein and noted that if the grievant had raised a past-practice claim under another provision in the agreement, the outcome of the arbitration decision might have been different. Without belaboring the point, this sort of unasked-for dicta is, of course, quite disturbing to the management in the light of the already proven ability of our union associates and employees to generate

substantial grievance litigation without assistance. In fact, such speculation on the part of the arbitrator is quite harmful to the successful disposition of a problem.

A An examination of those remaining cases which had resulted in decisions adverse to the company's announced position at hearing also quickly revealed that, with but few exceptions, implementation problems were minimal. This latter discovery has prompted me to conclude and suggest here that Bethlehem has indeed been fortunate because it has been graced by an honor roll of arbitrators who have, with but rare lapses, done a magnificent job in examining those controversies presented to them for consideration and then issued decisions which, although calling in some instances for remedial or affirmative actions, have taken into consideration the practical aspects of the day-to-day working relationship of the parties. I also believe that some credit for this record must also go to enlightened union and management leadership with a mutual goal of solving problems and not creating more.

This is not to say, however, that we have had a total absence of problems when implementing arbitration awards. Thus, I am able, in spite of our fine past record, to touch briefly upon several of the implementation difficulties that Bethlehem has experienced over the years, even with decisions rendered by men of such stature and capability as Ralph Seward, Irving Bernstein, Ben Aaron, Lewis Gill, Bill Simkin, Rolf Valtin, and the late Scotty Crawford.

Before reviewing those award-implementation problems, I think it would be helpful initially to note for background purposes that Bethlehem has, for years, utilized a permanent umpire arbitration system as provided for in our principal collective bargaining agreements covering shipbuilding and steelmaking operations. Under these agreements, the authority of our various arbitrators has generally been expressed in rather broad terms; that is, they have been given wide latitude to apply and interpret the provisions of our agreements as long as these provisions are not altered. Furthermore, the scope of our arbitrators' authority runs the entire range of the agreement with respect to subject matter and, as a consequence, covers such varied topics as crew sizes, contracting, incentives, safety, and vacation scheduling. Thus, the subjects susceptible to arbitration in the Bethlehem

agreements are far more numerous than, for example, those arbitral subjects found in the electrical industry agreements of General Electric or Westinghouse.

Having given you this brief background résumé with respect to Bethlehem's arbitration history and experience, I will now review several problems which we have had in award implementation.

The first of our award-implementation trouble spots—and probably the most universally faced from an employer's standpoint—occurs when the suspension or discharge of an employee is overturned and the company is directed to reinstate the suspended employee and to make him whole. Representative of questions that can arise where the arbitrator's award and the contract are silent as to what constitutes making a grievant whole are the following:

1. Should earnings from other sources of employment during the suspension period be used to reduce back-pay liability?
2. Should unemployment compensation be used as an offset?
3. Should a poor past history of absenteeism be projected forward into the suspension period to mitigate the employer's liability? If so, how?
4. Should "make whole pay" include missed overtime earnings, loss of incentive performance payments, and other similar somewhat speculative earnings opportunities?

At least one of these questions recently proved to be very troublesome at Bethlehem even though we have developed extensive arbitral *stare decisis* in this area. Illustrative of this is a discharge case which was arbitrated at one of our West Coast plants. The grievant had been discharged for excessive absenteeism. Subsequently the arbitrator set the discharge aside—not on the merits of the case but on the basis of a procedural misadventure by the plant management. The award, when rendered 15 months after the discharge, directed plant management to reinstate the grievant and make him whole for any loss of earnings.

As might be expected, the union demanded that back pay for the grievant should be calculated on the basis of a full 40-hour

week for each week during the 15-month period, subtracting from that amount only earnings from other employers. On that basis, the management's liability would have amounted to several thousand dollars.

In formulating its position with respect to the implementation of the award, however, the management believed that it was entitled to take into account not only the grievant's earnings from other employment, but also his perfectly horrible attendance record which had been the basis for this discharge. Projecting that attendance record forward to the 15-month period in question to establish the number of days it could reasonably be estimated that he would have worked resulted in a situation whereby the grievant would not be entitled to any back pay. On balance, he earned more money from his other employment than he would have earned from us, based on his past attendance track record. Countering that position, the union retorted that if we were to project the grievant's attendance forward to determine what he would have earned had he continued to work for us, then we must, in fairness, project the record against his actual outside employment during that period, thereby reducing our offsetting figure attributable to outside earnings during that period with the result that we would owe the grievant money. In spite of the fact that this decision was rendered on March 30, 1970, the parties are still discussing the monies due the grievant.

A second and more significant problem area for Bethlehem in the award-implementation area arises from those occasional decisions which are vague in their requirements as to what action should be taken by the management to resolve a violation of the agreement as determined by the arbitrator. A recent illustration of this problem from Bethlehem's standpoint is a contracting-out issue which was decided at one of our eastern plants in September 1969. In his holding the umpire concluded that three out of four phases of a continuing multifaceted job involving disposal of slag debris from a newly opened basic oxygen furnace facility had been assigned to an outside contractor improperly when, in fact, the members of the plant work force should have been given the work. The umpire, after reviewing the case and arriving at this conclusion, merely summarized his decision by noting that the grievance was "in part sustained and in part denied." Thereafter, in subsequent discussions with the union

during an eight-month period, arrangements were made to train plant employees to perform the work in question and then to replace the outside contractor's employees with the trained plant employees. Since there was an absence of any mention of retro-active monetary liability for affected plant employees by the umpire, this request, when raised by the union, received a negative response from plant management and, in addition, the management referred the union representatives to the umpire's decision. Plant management was, of course, of the opinion that back pay was not required by the umpire's decision because it had not been specifically directed to take such remedial action. This conclusion found further support in the dicta of previous arbitration cases which had indicated that back pay would not necessarily follow in adverse contracting-out decisions. As a consequence of the diametrically opposed positions taken by local management and the union on back pay, the matter was again placed before the umpire almost a year later—in September 1970. On this occasion the umpire's lack of specificity in the award with respect to remedy was partially clarified when he orally advised the parties that a back-pay remedy had been intended with respect to those plant employees who, except for the contracting out, would have worked the jobs in question. Unfortunately, this belated clarification of the riddle created by the initial award has now been followed by additional conflict over the amount of liability due each affected employee. As a result, the remedy, after more than a year and a half, remains in contention.

A third problem which we at Bethlehem on more than one occasion have jointly faced with the union is the less-than-timely implementation of an adverse award even when the remedy called for is clear and unambiguous. To illustrate this implementation difficulty, I might note that our collective bargaining agreement with the Steelworkers has a number of rather complex and, in certain respects, amorphous incentive provisions which specify, among other things, that the management, when establishing a new incentive for work which has not previously been incentive rated or when replacing an existing incentive, must create a plan that provides equitable compensation. The answer to the question of whether any given new or revised incentive plan provides equitable compensation is, on occasion, a very nebulous one and, as a consequence, grievances are

frequently filed alleging that a specific incentive plan does not meet the contractual standard. Upon the issuance of arbitration awards in this area, we, unfortunately, find from time to time that the disputed incentive plan has not met the standard of equitable compensation. In such a situation, the company normally is directed to adjust the plan in accordance with the decision and to compute and pay retroactively the monies due under the revised plan to the employees who have been covered by the plan during the period since the filing of a grievance. Because the passage of time in some of these incentive cases amounts to years instead of months and because some of these incentive plans cover large numbers of employees (several hundred in a few instances) and because considerable employee movement occurs into and out of jobs covered by the disputed plan, it has taken months and even years after the award has been issued before a precise retroactive pay calculation can be made. This, of course, is a most unsatisfactory end result because both parties are frustrated in their desire to dispose of the problem as finally decided at arbitration. The employees, on the one hand, cannot enjoy the fruits of their victory in terms of obtaining monies due, and the management continues to be saddled with a problem that in all likelihood affects employee morale and hence productivity, not to mention the burden of horrendous accounting costs.

Still another award-implementation problem of a recurring nature is probably best depicted by an arbitration decision at our Johnstown plant dealing with a crew-size question. Several years ago the management at this plant eliminated the job of powerhouse assistant engineer. The eliminated job was, for pay purposes and for upward and downward movement into other positions, located at about the midpoint in an established seniority unit. As a result of the abolition of the assistant engineer job, a general downward job reassignment occurred. Disgruntled over the job elimination and their resultant downgrading, the displaced assistant engineers filed a grievance claiming a violation of the past-practice provisions of the contract by the management. In his decision, the arbitrator sustained the claim and directed that the assistant engineers be restored to their former jobs and be made whole for any difference in earnings. After the issuance of the decision, the union, on behalf of a number of other employees in the seniority unit—nongrievants

who had been displaced by the incumbents of the eliminated assistant engineer's job when they had been bumped back—also requested to be made whole. Being made whole, they say, includes not only the payment of wages lost because of being in the lower-rated jobs but also compensation for lost opportunities to have filled temporary vacancies in higher-rated jobs which would have been open to them had they not been bumped out of their jobs, lost overtime opportunities, and so on *ad infinitum*. In response, local management took the tack that only the original grievants were to be reimbursed. A dispute delaying implementation of the award ensued. Of course this problem also arises in a simpler way when only some of an affected class file a grievance. The issue arises where the grievance is sustained: Should the company, in the interest of equity, apply the relief granted by the arbitrator to all in the class regardless of whether they had filed a grievance and even though the arbitrator did not have authority to make such an application?

As another implementation problem, I cite a case which arose in 1966 at one of our large eastern plants when a number of employees objected to the scheduling of their 1966 vacations during various weeks other than those weeks which they had designated as their choice when canvassed during the scheduling period. Unfortunately, the preferred vacation periods designated by the grievants were unavailable because employees with greater lengths of service (a contractual criterion in assigning vacation weeks) had filled the established quotas for the weeks in question. When the vacation scheduling complaints of certain junior service employees could not be resolved, a rash of grievances was filed, claiming that the company had not complied with the contractual requirements that called for the notification of employees as to their vacation schedules for the year by January 1, 1966. The arbitrator, in deciding the grievances, concluded that the management's failure to notify employees of their vacation schedules by January 1 violated the agreement. As a consequence of this conclusion, the arbitrator directed that the grieving employees be granted their original vacation preference requests or paid in lieu of vacation time off. Unhappily, the first directive conflicted with the contractual right of more senior length-of-service employees to be given superior preference for certain of the weeks in question, while the second directive—which provided the grievants with the option of taking pay in

lieu of vacation time off—was specifically precluded by the contract.

A final example of an arbitration-implementation problem is one in which the implementation thereof results in the parties' breaking virgin territory. This arose at a Bethlehem operation where the agreement establishing the seniority units provided that nonscheduling for up to a period of two weeks would not be considered a seniority event. The union, several years after the agreement was consummated, challenged the company's right to nonschedule employees for up to two weeks rather than to reshuffle the employees to give the oldest employees the work available. The umpire reviewed the history of the agreement and found that the *quid pro quo* for the company's agreement to the seniority units was the local union's agreement to permit nonscheduling for a period of two weeks. He found that this latter provision violated the basic terms of the labor agreement and, therefore, the entire seniority agreement had to fall. This left the parties without any seniority agreement or, at best, one forged through the practices that had been followed prior to the creation of the invalid seniority unit agreement. The parties found that their ill adventure to arbitration resulted not in a resolution of one problem but the creation of hundreds of problems.

There are, of course, other award-implementation examples which have arisen at Bethlehem. These six situations, however, are sufficient to indicate that difficulties can and do occur when applying vague, impractical, or contractually ill-conceived awards. Invariably, when this happens, it results in delay as to the final disposition of the problem. Fortunately, this is an infrequent occurrence for Bethlehem.

Nonetheless, I think that all of you would agree that even on an infrequent basis delay in award implementation and the resultant animosity which it inevitably generates result in an unsatisfactory conclusion to arbitration. Admittedly, part of the blame in several of our specific illustrations could be laid at the feet of the advocates themselves for possibly not bending every effort to arrive at a satisfactory solution either before arbitration or in implementing the arbitrator's decision. I believe, however, that the greater responsibility must rest with the arbitrator who, for example, fails to specify any remedy as in the contracting-out

case referred to earlier, apparently adopting an approach which is espoused by many in this profession; that is, that the arbitrator's chief and possibly sole function is to determine whether or not the collective bargaining agreement has been violated—the remedy aspect of the grievance being of no concern or, at best, only of secondary importance.

In contrast, many of us who are in an advocate's role are of the opinion that it would be most helpful initially to have more thorough consideration given to the question of an appropriate remedy in a given award. This is true even when the parties have a mature collective bargaining and grievance handling relationship. Frankly, an award which provides only the vaguest of guidelines to the parties for resolving what has been held to be a contract violation ignores the practical reality of arbitration, namely, that at least with respect to the particular problem presented to the arbitrator, the parties were unwilling bed-mates. Consequently, it would appear that lack of specificity in the award frequently continues the strife which existed prior to arbitration—a very unsatisfactory result.

In contrast, a salutary side effect occurs, we have discovered, when an arbitrator has given more than cursory consideration to the remedy in that the decision is more tightly written because of a greater awareness which he acquires of the problems which can result during implementation from loosely worded decisions—a fact that tempers the tone of the decision in a significant way so that arbitral justice and equity are more delicately honed.

There are, of course, a number of specific corrective measures which might also be introduced by the advocates or the arbitrator to reduce implementation controversies and insure a greater clarity in awards. Illustrative of specific corrective measures that might be introduced are the following: First, pre-arbitration stipulations might be developed setting forth each party's position with respect to the appropriate remedy with differences in position, if any, being argued before the arbitrator. Second, absent a prehearing stipulation on the appropriate remedy, the arbitrator might well want to establish a practice of seeking the respective position of each party at the hearing on possible award approaches. Third, the arbitrator might arrange, in the absence of prehearing stipulations or in the absence

of sufficient evidence on remedy being presented at the hearing, to discuss approaches to an award prior to issuing a decision. Fourth, as a broader and less practical alternative, the parties might, in certain instances, consider the negotiation of specific contract provisions dealing with award-implementation problem areas. Which of these courses of action, if any, are appropriate will vary and depend primarily upon the established collective bargaining relationship of the parties and the arbitrator's past experience. For example, under a permanent umpire system it is less likely that the arbitrator will feel compelled to go into the remedy aspect of recurring but similar disciplinary cases if the parties have a proven past record for successful dealings on questions of this type. In contrast, the opposite tack clearly might be appropriate when the arbitrator is presiding over an ad hoc hearing.

From a negative standpoint, one might also argue that the adoption of contract provisions specifying the boundaries for awards in a given situation is at best of limited value because of the impossibility of covering more than a narrow range of circumstances. It might also be urged that the extension of all hearings to allow for sufficient development of information going to the remedy is impractical in terms of cost and/or time. Likewise, post-hearing conferences could also be criticized. This is not to say, however, that each approach may not be useful in certain circumstances. In the vacation case referred to earlier, for example, the parties subsequently negotiated language which provided that not only must the vacation schedule be firmed up prior to the beginning of the vacation year, but also grievances dealing with vacation preferences must be arbitrated and a decision rendered prior to the commencement of the vacation period.

In closing, I would like to take the liberty of broadly paraphrasing a comment made by Irving Bernstein nearly a decade ago when he noted before this body that arbitration decisions, like Caesar's Gaul and its three parts, may be divided into three groups: First, there are those decisions involving only conclusions of contract. Second, there are those decisions involving conclusions of contract and equity. Third, there are those decisions which I don't understand. It could well be that some of the Bethlehem implementation problems have arisen from this latter group.
