CHAPTER 3

MONETARY ISSUES IN LABOR ARBITRATION AWARDS

I. INTRODUCTION

GEORGE R. FLEISCHLI*

Today's speakers have been asked to address an important but neglected area in our practice of labor arbitration. The subject of remedies is neglected, but some of the most difficult questions arise in that arena. One of the most interesting cases I've ever dealt with involved the question of remedies.

In that case, a host employer refused to allow a reinstated employee onto the premises. I had reinstated the employee of a subcontractor who had facilities on the premises, and the host employer wouldn't let the employee back on. That ended up in federal court and, as you can imagine, it went on for years. It was a very difficult question of, "How do you enforce a remedy?" It had monetary consequences in terms of back pay liability because the subcontracting employer had made a good faith effort to put the employee back to work but was prohibited or denied the opportunity to do so. Eventually the contract was terminated, and that is what resolved the case.

Why is the area of monetary damages, in particular, a neglected area? First, I think the union is generally focused on obtaining reinstatement or obtaining the recall to work of the employees who have incurred the monetary losses. Consequently, the issue of remedies is frequently just passed over as part of their opening statement. The employer has a very strong disincentive to address this subject for fear that their doing so will be misconstrued. Arbitrators, for their part, are hesitant to bring it up because it might appear as though they are tipping their hand somehow, especially if they bring it up during the middle of the hearing, even though no such intent is present.

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*Member, National Academy of Arbitrators, Madison, Wisconsin.

My personal experience is that if the arbitrator does bring it up, the best time to do so is when the parties are attempting to stipulate to the issue. "It's just as a matter of clarification now. There was a layoff here and some people were affected. What exactly are you seeking in the way of a remedy?" That way it comes across as being not predictive of any outcome, but simply a naïve, information-seeking question.

Another way to secure the information is at the conclusion of the union's opening statement. When the union representative states what the union is seeking, the arbitrator can ask a couple of questions for clarification. In that way, the employer will be more comfortable. It's also helpful to make a disclaimer, such as, "I'm only asking this question because I want to be sure I understand your position. It's obvious that I don't know anything about the case as to whether the grievance will be sustained and whether there will be any need for a remedy."

Because of collective reluctance to define the remedy, the parties do not present any evidence on the question, and that's probably just as well. Arguing over the remedy will be a waste of time if the grievance is denied. My experience is that when one side insists on providing evidence about the remedy, it can end up being very confusing because the evidence is premature. The facts aren't fully developed, the other side isn't prepared to address the evidence, the facts are often not known, and the facts often change after the award has been issued. For these reasons it is probably not a good time to go into that evidence.

A serious problem arises when the briefs don't address the issue of remedies. If the arbitrator sustains the grievance, he or she is uncertain about how to word the remedy because of uncertainty about the facts that might be of significance. In many cases, the parties themselves will tell the arbitrator to withhold on the remedy, and if the grievance is sustained, to indicate that it needs to be remedied and to retain jurisdiction. When the issue comes up in a post-award setting, it usually gets resolved through negotiations and sometimes through informal contact with the arbitrator. I've had many conference calls, and I am sure other arbitrators and practitioners have as well, where management says, "Mr. Arbitrator, we have a problem implementing your award. Here's what the union thinks we ought to do. Here's what we think we ought to do. What do you think?" When this happens, the arbitrator can resolve the issue over the phone. At most in these cases the record is a letter from the arbitrator that probably gets lost in the files of both

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

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

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

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

STEPHEN H. JORDAN*

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

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

*Rothman Gordon, P.C., Pittsburgh, Pennsylvania. The author gratefully acknowledges the assistance of Colleen P. Murray, Law Clerk, in the preparation of this article.