

III. MONETARY ISSUES IN LABOR ARBITRATION AWARDS: MANAGEMENT PERSPECTIVE

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The U.S. Supreme Court, in its landmark decision of *Steelworkers v. Enterprise Wheel & Car Corp.*,¹ noted that arbitrators are given wide latitude in the choice of remedies for breaches of labor agreements. According to one authority, an arbitrator is clothed with equitable remedial authority.² However, when assessing money damages for breach of a collective bargaining agreement (CBA), this authority does not go without limitation. When assessing back pay obligations, arbitrators have consistently recognized the legal obligation of a “duty to mitigate,” as well as the offsetting of collateral benefits against the amount of the back pay award.

Unemployment Compensation and Wages

Arbitrators are split on the issue of whether to deduct unemployment compensation from back pay awards. Although it generates income to a discharged employee, unemployment compensation is neither wholly collateral nor entirely like wages. However, unlike wages, the receipt of unemployment compensation is not an unmitigated gain to an employee. Employees exhaust weeks of eligibility and lose weeks of work for purposes of calculating future unemployment compensation. Similarly, payment of unemployment compensation is not an unmitigated loss to an employer. Depending on overall claims experience, unemployment compensation may increase employer premiums.

The policy of the National Labor Relations Board (NLRB) is instructive, but not determinative, on the issue of deducting unemployment compensation from back pay awards in arbitration. The current policy of the NLRB is to ignore unemployment compensation in calculating back pay awards. As the U.S. Supreme Court recognized in approving current NLRB policy, employees do not receive unemployment compensation pursuant to any

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¹36 U.S. 593 (1960).

²Hill & Sinicropi, *Remedies in Arbitration* (BNA Books 1981), at 20-21.

liability or obligation of their employer. Instead, they receive such benefits to carry out state policies.³

However, many arbitrators have taken the stance that payments received by employees, whether by way of paycheck or unemployment compensation, represent money in their pockets. Thus, as noted by Arbitrator Ted T. Tsukiyama, “the classification of Unemployment Compensation payment as being ‘collateral’, rather than a direct benefit appears too fine and esoteric a distinction to make in deciding this controversy, particularly when the controlling test or criteria in attempting to make an employee ‘whole’ is to make him ‘financially whole.’”⁴

But Arbitrator Luella E. Nelson stressed the different standards in state law that govern the granting of unemployment compensation benefits as a reason for denying credit for unemployment compensation benefits granted.⁵

From a management perspective, permitting the employee to retain unemployment compensation benefits and receive full back pay and wages smacks of “double dipping.” By permitting the retention of unemployment compensation benefits, arbitrators condone double dipping while creating a form of “punitive damages” by permitting the employee to retain more monies than he or she would have made if they had still been working for the employer.

Arbitrators have consistently reduced the amount of back pay awards by the amount of wages that a grievant may have earned from other employers during the period after an improper termination or suspension.⁶ One arbitrator even reduced the amount of a back pay award because of the employee’s poor attendance record. In *United States Can Co.*,⁷ the arbitrator reduced the amount of the back pay award to 35 percent of what the employee’s full-time earnings would have been had she remained in the company’s employment from the date of termination, where before the discharge the employee had a poor attendance record of only working 35 percent of the time on average.

³*NLRB v. Gullet Gin Co.*, 340 U.S. 361, 27 LRRM 2230 (1951).

⁴*Hawaiian Tel. Co.*, 65-2 ARB §8695 (Tsukiyama 1965).

⁵*Safeway, Inc.*, 104 LA 102 (Nelson 1994).

⁶*See, e.g., Cleveland Pneumatic Co.*, 89 LA 1071 (Sharpe 1987); *Air Treads of Atlanta*, 85 LA 155 (Yancy 1985).

⁷104 LA 863 (Briggs 1995).

Interest, Attorneys' Fees, and Other Payments

Arbitrators have disagreed over whether interest should be assessed as a matter of course in back pay awards. A majority does not grant interest unless a showing is made "that the Company has acted in bad faith or with undue delay either in regard to the processing of the matter to arbitration, or in regard to payment of back wages and benefits due to the grievant under the Award."⁸ The minority view is perhaps best expressed by Arbitrator Nolan when he noted in a decision that, "[i]n virtually all other forums—Court and administrative agencies—a prevailing party routinely receives interest on delayed payments. That is a matter of simple justice: getting a sum a year late does not make the recipient whole. Interest is the normal way to compensate the injured party for delayed payment."⁹

Even though arbitrators rarely award interest, they assess attorneys' fees as part of an award even less frequently. As noted by Elkouri and Elkouri, "it appears clear that it is not customary practice to award attorney fees against the offending party in arbitration."¹⁰ This majority view of arbitrators who deny attorneys' fees also runs contrary to the concept in employment discrimination cases of "prevailing party attorneys' fees," which are awarded as a matter of course pursuant to Title VII of the Civil Rights Act of 1964, as amended.

Although arbitrators are reluctant to generally award interest and attorneys' fees, in recent decisions they have been more willing to include collateral payments as part of a back pay award. For example, arbitrators have found that overtime is generally granted in a back pay remedy provided there is evidence "that the employee most likely would have worked the overtime and that his doing so is not a matter of speculation."¹¹ In at least one case, back pay for a wrongfully discharged employee who was reinstated included an attendance bonus, even though it was impossible to know whether the employee would have been eligible for the bonus had he worked during the relevant period.¹²

⁸*West Co.*, 103 LA 452 (Murphy 1994).

⁹*Atlantic Southeast Airlines*, 101 LA 515, 525 (Nolan 1993 (citing Hill & Sinicropi, *Remedies in Arbitration*, 2d ed. (BNA Books 1991), at 450).

¹⁰Volz & Goggin, eds., Elkouri & Elkouri, *How Arbitration Works*, 5th ed. (BNA Books 1997), at 592.

¹¹*West Co.*, 103 LA 452 (Murphy 1994).

¹²*Vision-Ease*, 102 LA 1106 (Mathews 1994).

Arbitrators have also shown a willingness to award monetary damages in nondisciplinary cases. For example, Arbitrator Walter J. Gershenfeld ordered an employee-applicant in a school district to receive \$500 in a school district dispute over what might be termed as bidding rights, despite the fact that the disappointed bidder was not as qualified as the person hired. The award was based on the school district's technical violation of the CBA by not interviewing internal candidates for vacancies before interviewing external ones.¹³

Arbitrators similarly have awarded monetary damages where a supervisor improperly performed bargaining unit work,¹⁴ and even where an employer improperly failed to offer an employee an overtime opportunity.¹⁵ And when an employer violates a subcontracting provision of a CBA, arbitrators consistently order the payment of lost wages to the general group of workers who would have been entitled to the work; arbitrators generally place the burden on the employer to determine who would have performed the improperly contracted-out work.¹⁶

The Management Perspective

From a management perspective, the only protection against the award of excessive monetary awards is the inclusion of language in a CBA to limit damages. For example, an employer can address the mitigation of damages issue by including language in the CBA to provide, for example:

In rendering a decision or award where the arbitrator finds that the evidence does not support the offense alleged by the company and the employee is reinstated, any award of back wages shall be limited to the amount of wages the employee would otherwise have earned from his or her employment, less any compensation the employee received from personal services he or she may have received or be entitled to receive from any source during such period. Any employee who is terminated by the company and files a grievance has the obligation to seek other employment and to mitigate his or her damages during the time his or her grievance is being processed. The burden is on the grievant to establish that the grievant has sought other reasonable employment and has sought to mitigate his or her damages.

¹³*Neshaminy Sch. Dist.*, 22 Pa. Sch. Bds. Ass'n Public Sector Arb. Awards No. 15 (1995) (Gershenfeld 1995).

¹⁴*Conoco, Inc.*, 104 LA 1057 (Neigh 1995).

¹⁵*Id.*

¹⁶*In re United States Steel & Steelworkers Local 1014*, 115 LA 1473 (Petersen 2001).

An employer may also protect being assessed interest and attorneys' fees by providing in the CBA that "under no circumstances shall interest or attorneys' fees be awarded on any award." The issue of unemployment compensation credits can be addressed by language in a CBA that provides, for example:

In the event of any back pay award by the arbitrator, the arbitrator shall credit against the back pay award any and all unemployment compensation benefits received by the grievant up to the date of the award.

Another monetary issue that is part of labor arbitration awards is the clause that addresses the arbitrator's fees. Although most agreements provide for the fee and expenses of the arbitrator to be equally split by the parties, management advocates have increasingly sought provisions in CBAs that hold the losing party to the arbitration responsible for the arbitrator's fee and expenses. Although arbitrators typically disdain such provisions, this type of provision is the greatest protection to management in providing a disincentive for frivolous arbitrations.

Although arbitrators regularly note that it is difficult in many cases to determine who is the losing party, such a determination of the fee is no different from other ancillary determinations in any other monetary award in arbitration. Such a provision in a CBA mirrors the British system of justice in providing for the loser paying fees and costs, which has been shown to control frivolous filings.