NATIONAL ACADEMY OF ARBITRATORS
REMEDIES AND RETAINING REMEDIAL JURISDICTION
Saturday, October 27, 2018
1:30-2:30

Panelists:
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Exercising Remedial Discretion
An Unusual Request
Scenario 1

The Grievant (G) works for a government agency. She was recently placed on a Performance Improvement Plan (PIP). Under the terms of the PIP set out in the CBA, her supervisor (S) was to keep confidential the fact that G was on a PIP, closely monitor G's work, and provide her with "positive feedback" in "private conversations," to be held in S's office. One day S went to the G's desk to retrieve a batch of processed forms. G was in the restroom. S noticed that G had made the same, fundamental mistake she had made the week before, requiring that all of the forms be processed again.

Just then, the Grievant returned to her desk. In a loud and angry voice, S said: "I give up any hope that you will ever learn to do your job. You are 'dumber than a freaken' fence post.' If you don't want to listen and learn, you need to quit this job and find and find a job you are capable of performing." Six other employees were working in the area and heard everything S said. G broke into tears and returned to the restroom. The Union filed a grievance on behalf of G.

The grievance asks that the Employer: (1) assign a different supervisor to administer the PIP; (2) reprimand S for her conduct and place a copy in her personnel file; and (3) require S to write an apology to G and read it to G in front of the other six employees.

The Employer granted to the first request only, and the Union appealed the grievance to arbitration. The Employer takes the position that you don't have the authority to grant the additional remedies requested. What additional remedy, if any, would you award?

Exercising Remedial Discretion
Reinstatement
Scenario 2

The Grievant (G), an Apprentice Machinist, is one of 12 Journeymen and Apprentices working in a small machine shop that fabricates parts for local businesses. They are supervised by "Pops," a Master Machinist who is considered indispensable because of his skill in training Apprentices and fabricating parts that meet the strict specifications of the Employer's customer base.

One weekend, G was visiting another community, ran a stop sign and caused a collision. G was injured and the other driver was killed. G recovered from his injuries and wants to return to work. There is only one problem. The man who was killed happened to be Pops' son. G has tried apologized to Pops, but Pops cannot bring himself to even talk to G. Pops has made it clear that he will quit his job if G is allowed to return to work. The Employer terminated G and the Union filed a grievance.

Effect of Outside Law
Concealed Carry Law
Scenario 3

For many years the Employer has had a rule prohibiting employees from possessing firearms on its premises, including its parking lot. It has consistently discharged employees who violate the rule.

The State recently enacted a "Concealed Carry" (CC) law and the Grievant obtained a license to carry a concealed weapon. One day the Employer learned that the Grievant had a practice of leaving a handgun in a case in the center console of his locked car while it was parked in its parking lot. During the investigation the Union produced a copy of the Grievant's CC permit and argued that he had a legal right to store the firearm in his car. The Employer discharged the Grievant.

Under the law, CC permit holders are allowed to carry a concealed weapon on their person or in their car, anywhere in the State. However, the law lists a number of locations where such conduct is prohibited, including private property that has been properly posted. A recent amendment to the law established a "safe harbor" provision that states:

> "Any licensee prohibited from carrying a concealed firearm into the parking area of a prohibited location specified…shall be permitted to carry a firearm or ammunition in a case within a locked vehicle or locked container out of plain view within the vehicle in the parking area…."

The Union argues that the Employer did not have just cause to discharge the Grievant because he had a valid CC license and complied with the law. The Employer contends that you have no

authority to interpret and apply "outside law." Alternatively, it argues that the CC law may give CC license holders the right to store firearms in their locked vehicles while parked in its parking lot (which coincidentally is not posted), but it has no effect on its right to prohibit *employees* from doing so.

How would you rule?

Reducing or Overturning Discipline
Good Conduct Gone Bad
Scenario 4

A route salesman for a food Company has 44 years of discipline free seniority. He acknowledges after being confronted that he failed to deliver $11 worth of ice cream and brought it home for his granddaughter's birthday party. He is discharged for theft.

Do you sustain the discharge?
If not, what penalty do you impose?
Under what circumstances do you excuse admitted theft?

Reducing or Overturning Discipline
Where the Buffalo Roam
Scenario 5

A Company has strict rules against harassment of any kind. The workforce is racially diverse. Supervisors discover a length of rope tied into a noose and left at a work station. They remove it to the office. The next day they find another noose in the same workplace. In other Company locations employees who have made nooses have been discharged. During questioning the grievant admits to having made the nooses and he is discharged.

The grievant is Pilipino and has worked for the Company for 20 years with a discipline --free record. He claims to not know that nooses are a symbol of racial hatred. In the few minutes before quitting time on both days, he found lengths of rope on the floor and tied them into nooses of the kind used to control water buffalo on Pilipino rice farms, something he used and saw used as a young boy.

Do you sustain the discharge?
If not, why not?
What penalty do you impose?

Reducing or Overturning Discipline
Damaged Goods
Scenario 6

The grievant, a warehouse employee working in a noisy area exits on a forklift through an overhead door and damages the door. When asked if he did the damage, he denies it. A Video of the area, viewed by his supervisor shows that the employee damaged the door. Asked again if he did the damage, the grievant again denies it. The cba specifies that dishonesty is cause for termination and the grievant is terminated.

A grievance is filed. At each of the three grievance steps the grievant denies having caused the damage. At none of the steps is the grievant shown the video.

The video is shown at the arbitration. The grievant acknowledges that it appears he was responsible for the damage. He testifies that before seeing the video he did not know, and did not think, he had done the damage.

Do you uphold the discharge for dishonesty?
If not, why not?
What penalty do you impose?

Reducing or Overturning Discipline
Tootsie NO
Scenario 7

Two female factory workers have a dish full of candy for themselves and fellow workers on a table between their machines. A maintenance man with a discipline --free record takes candy from the dish, but they have asked him not to do so with oily or greasy hands, but he has continued to do so. In hopes of discouraging this behavior, the women have filled Tootsie Roll wrappers with cat feces. The maintenance man stops by, takes one, unwraps it, puts it in his mouth and immediately spits it out. He shows his shock and anger by putting one of the women in a choke hold, but does not hurt her.

He is discharged for his physical assaultive act against the employee. Neither female employee is disciplined.

Do you uphold his discharge?
If not, why not?

Make Whole Remedies
Make Whole Remedies in a Discharge Case
Scenario 8

The Grievant was discharged on October 1, 2016 for theft. On June 27, 2017 the parties contact the arbitrator for dates to schedule a hearing. Due to busy schedules for outside counsel representing both parties and the arbitrator's schedule, a date for the hearing could not be found until October 15, 2017. The arbitrator conducted a hearing on October 15, and the Employer did not complete its case in chief.

At the end of the day the Employer noted that as a termination case, this case fell under the CBA's expedited grievance procedure, which states that the "arbitration is to be conducted on consecutive days until it is completed." The Employer insisted that the arbitration continue on the following day. The Union stated that it was not available for hearing on the following day. Neither was the arbitrator. The Employer requested that the arbitrator rule that if the hearing were continued, any backpay period should be tolled, due to the Union's failure to be available to continue the hearing. The arbitrator deferred any ruling.

During the discussions over scheduling the second day, the Union offered to arbitrate on Saturdays and the arbitrator said she could make herself available on two Saturdays in the following six weeks. The Employer stated that it should not have to be available on Saturdays. The next weekday when all the parties were available was December 21, 2015, and the hearing was scheduled for and concluded on that day.

The arbitrator asked for an extension of the normal 7-day limit for the award, due to the holidays, and rendered her award on January 15, 2018, reinstating the Grievant with full backpay.

REMEDY ISSUES:

1. The Employer renews its argument that the backpay period should be tolled beginning on October 15 because the Union was not available to continue the hearing on October 16.

2. An issue arises over interim earnings. The Grievant was out of work for half of the backpay period. During the second half of the backpay period, the Grievant earns a higher wage rate per week than he earned at his regular job. The Employer argues that the Grievant is not eligible at all for backpay for the weeks when he earned more in interim earnings than his regular wages. The Employer also argues that the excess interim earnings over his regular wage-rate for the period he was working should be deducted from the backpay for the period when he was not working.

3. The Employer also argues that the backpay should be reduced because the Grievant has a poor attendance record and therefore would likely not have been available for a full schedule. In making this argument, the Employer relies upon the six weeks of FMLA leave the Grievant had used in 2016, and his 3% absentee rate outside of the FMLA absences

4. The Union argues that the Grievant should also be compensated for overtime work, at the rate he worked in the prior year, not including the time he was off on FMLA leave. The Employer argues that if any credit for overtime is granted, it should be based upon the overtime worked by the Grievant's replacement during the backpay period.

5. The Union requests interest on the backpay award. In support of this request, the Union argues that the arbitrator found that there was very little evidence to support the theft charge, the Grievant was fired because he was an outspoken Union Steward, and the Grievant lost the use of his earnings and had to take a substantial tax penalty for removing 401 K funds early to save his house during the long period he was out of work.

Make Whole Remedies

Make Whole Remedy in a Subcontracting Case
Scenario 9

XYZ Steel USA and its predecessors have labor agreements with the Union going back many years. The Company makes steel I-beam girders for use in construction. The Union discovered after the fact that the Company had produced 4,965 tons of I-beams at a steel mill located in Italy which is owned by XYZ International, which also owns XYZ USA. The Union filed a grievance claiming that the Company had violated the contracting out provisions of the collective bargaining agreement. The I-beams were the same kind as those produced at XYZ and were ordered and sold in the U.S., through XYZ's marketing department. The contract states,

The Guiding Principle is that the Company will use bargaining unit employees to perform any and all work which they are capable (in terms of skill and ability) of performing (Bargaining Unit Work), unless the work meets one of the exceptions outlined below.

None of the exceptions applied in this case.

The Company agreed that the contract was violated and that a remedy is in order. The parties agreed at the final step of the grievance procedure that they "would identify the affected positions and determine the number of employees required to produce the 4,965 tons of I-beams. Lost wages will be paid at the straight time rate." The parties have not been able to agree on a remedy and have convened this arbitration hearing solely to address the proper remedy.

The Company argues that the only employees who are due a remedy are the employees who were laid off at the time the I-beams were produced overseas. Employees who were not laid off were guaranteed 40 hours of pay each week, and they are not due any remedy, because they have not lost any wages, according to the Company.

The Union argues that the remedy should be based upon the total number of hours that it would have taken the bargaining unit to produce 4,965 tons of I-beams. The Union proposes the following remedy:

4,965 tons of I-beams take 57.5 hours and a crew of 27 employees to produce.
7 laid-off employees should receive 57.5 hours of pay each
All other employees in the crew positions split the pay of 20 employees x 57.5 hours

The Company proposes that only the 7 laid-off employees receive 57.5 hours each. To pay the other employees would provide a windfall to them in pay for work they did not perform.

According to the Union, to pay only the laid-off employees does not recognize that this work should have been done by the bargaining unit, and the minimal payment to a few employees will not deter the Company from subcontracting out work in the future.

The Union also argues that the Arbitrator should impose a "special remedy" in this case. Under the contract a special remedy is due,

Where it is found that the Company (a) engaged in conduct which constitutes willful or repeated violations of this Section or (b) violated a cease and desist order previously issued by an arbitrator, the arbitrator shall fashion a remedy or penalty specifically designed to deter the Company's behavior.

With respect to using a subcontractor, where it is found that notice was not provided as required and that such failure was willful or repeated and deprived the Union of a reasonable opportunity to suggest and discuss practicable alternatives… the arbitrator shall fashion a remedy which includes earnings and benefits to Employees who otherwise may have performed the work.

The Union argues that the Company's failure to provide notice before subcontracting was a willful violation of the Agreement, as was their decision to subcontract out the work.

The marketing department is based at XYZ Steel, and the marketing representative testified that his primary role is to place orders for XYZ USA, but that he also places orders for XYZ International. He testified that he knew that there was something in the XYZ USA labor agreement about contracting out, but was not sure what the language said and didn't really think about it when he decided that the order should be placed at XYZ International in Italy.

The marketing representative stated that he was thinking about the welfare of XYZ Steel employees when he placed these orders, however. He testified that the market price of I-beams has dropped significantly in the past year, due to increased competition from both American and foreign competitors. He thought that if he gave these customers a good price on the cheaper-grade I-beams involved in this order, he would have a better chance of obtaining orders later from them for XYZ USA for its more profitable high-grade I-beams, which this customer had ordered in the past. Then when the prices of the lower-grade I-beams stabilized, he hoped to bring more of those orders back to XYZ USA.

REMEDIES AND RETENTION OF JURISDICTION
October 28, 2016

RETAINING JURISDICITON

I.

The Parties Don't Present Evidence on Remedy

Why Don't the Parties Present Evidence on the Appropriate Remedy? There are three main reasons:

1. Efficiency. It will be a waste of time, expense and effort if the grievance is not sustained.

2. Practicality. In many cases, the relevant facts are not yet available.

E.g., In a *termination case*: Has the grievant been working elsewhere? Would the grievant have been subject to layoff if not terminated? How much overtime would he have earned? Did he collect unemployment insurance?

In a *contract interpretation case*: Which employees are entitled to compensation? How much lost compensation is involved? Who could have bumped whom? What is the monetary value of the benefits that were not paid?

3. Posturing. The Employer does not want it to appear less than 100% confident that it will prevail. The Union does not want to make it appear that it is willing to accept less than a clear victory or that the remedy will be difficult or expensive to implement.

II.

Historical Reluctance of Arbitrators

Historically, most arbitrators did not retain jurisdiction over the remedy unless both parties agreed that the arbitrator should do so. [In a 1979 study of 870 cases administered by the Boston and New York AAA offices, the arbitrator retained jurisdiction over the remedy, with no mention of consent, only 5% of the time.]

If there was a request to retain jurisdiction, it was almost always made by the union, sometimes as part of its closing argument.

If the employer agreed, it was usually accompanied by a statement to the effect, "Mr./Ms. Arbitrator, we are confident that you will find that no violation occurred and no remedy will be necessary, but we do not object to the Union's request.

In those few cases where there was an objection, I would normally say that I will only retain jurisdiction if both parties agree, thereby leaving it up to the parties to decide whether to call me back, submit the dispute to a different arbitrator or duke it out in the courts.

I only encountered one case where the Employer insisted that the union present its evidence on remedy at the hearing. The Union was not prepared to do so, and I held that they should present what little evidence they had available that day, with the understanding that it might be necessary to have further hearing before me, a different arbitrator or the courts.

III.

Why Are Arbitrators Reluctant

Three Main Reasons Arbitrators were Reluctant to Retain Jurisdiction Without Agreement.

1. Legal concerns. The award is supposed to be final and binding. Does the arbitrator have the authority to retain jurisdiction?

2. Ethical Concerns. Is the arbitrator improperly seeking additional work?

3. Conflict with voluntariness of the process. If there is a dispute over the implementation of the award, the parties should be free to choose another arbitrator if they wish.

IV.

Overcoming Arbitrator Reluctance

In 1996, Jack Dunsford Wrote an Article debunking these concerns. It Should be Required Reading: "The Case for Retention of Remedial Jurisdiction in Labor Arbitration Awards," *Georgia Law Review*, Volume 31, Number 1 (Fall 1996).

The remedies provided in most awards contain terms that are ambiguous or indefinite. "Make Whole" in various factual circumstances is the classic example.

When the parties resorted to the courts the results were sometimes literal and arbitrary—like back pay with no right to offsets—unless the court referred the issue back to the arbitrator for clarification.

None of the arguments against the retention of jurisdiction withstand Jack Dunsford's close scrutiny. His article is exceedingly thorough and well reasoned. After a Thorough and Exhaustive, 77-Page Analysis of the Various Arguments, Dunsford Concluded: **[Read, only if time permits.]**

> "For a variety of reasons, labor arbitrators have hesitated to retain jurisdiction *sua sponte* over their awards to resolve any disputes about the meaning and application of the remedy, if that should become necessary. Unless the parties expressly make a joint request of them, arbitrators have not normally retained jurisdiction. Preoccupied with the presentation of the merits of a case, parties seldom make such a request. In a number of instances, this forces the parties, after receiving the award, to go to court to litigate the meaning of the remedy. Ironically, the courts then remand the matter to the arbitrator for clarification or completion of the award.
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> "The prevailing arrangement is expensive, time-consuming, and counter-productive. To serve the best interests of the parties and the process, arbitrators should routinely retain remedial jurisdiction—whether the parties request it or not. Such a procedure is legally within an arbitrator's power, ethical and efficient. The conventional reasons offered for failing to do so are no longer valid or convincing."

V.

Two Personal Experiences

Shortly after this article was published, a federal court remanded a case to me, wherein I had ordered the reinstatement of an employee two or three years earlier. The employer had reinstated the employee and promptly fired him the same day alleging that he was unable to perform the job. I disagreed.

I can't say for certain that things would have turned out differently if I had retained jurisdiction. The employer was obviously intent on getting rid of the employee. However, chances are good that the grievant would have been spared years of uncertainty and financial hardship, the parties would have saved a lot of legal expenses and the employer would have saved a lot of money in back pay had I done so.

Since then, I have retained jurisdiction in all cases where there is a remedy that requires action to be taken. I have also noticed that all of the unions I deal with routinely ask me to do so.

In another case that occurred in the '90's, the parties settled an issue based upon my informal prediction that I would sustain the grievance, one of the terms of the settlement was that I would issue a consent award but not retain jurisdiction over the remedy. Afterwards, the employer's attorney suggested that it would have been unethical for me to retain jurisdiction anyhow. I referred him to Jack Dunsford's article.

In 2007, Section 6 E was added to the Code of Professional Responsibility and Grievances to specifically recognize the ethical legitimacy of the practice. See also the entry in Elkouri and Elkouri, *How Arbitration Works*, at Ch 7.5.E.ii.

VI.

Many Arbitrators have Changed their Practice

It seldom happens, that arbitrators make changes that go against the expectations of the parties. I would cite the issue of interest on back pay as an example. While some arbitrators routinely award interest, it is still not a mainstream position.

The prevailing practice has changed in the case of retention of jurisdiction. In my case, that change is the direct result of the persuasive force of Jack Dunsford's article.

TRANSITION TO REMEDIES GENERALLY

VII.

At this point, Steve will address why he changed his practice, and discuss some perennial issues that arise when formulating remedies:

1. Retaining jurisdiction over remedy-related matters.

2. Limiting the retention of jurisdiction.

3. Back pay when the grievant has been off work for an inordinate amount of time.

4. Avoiding remedies that admonish.

5. Exceptions to the "narrowest possible remedy" rule.

5. Returning the troubled grievant to work.

5. When is an award of interest appropriate?

6. Is it appropriate to award front pay in labor cases?

VII.

King Soopers Case

King Soopers, Inc. and Wendy Geaslin, Case 27-CA-129598 (August 24, 2016).

Is the *King Soopers* case the answer to an arcane issue Under the NLRA or an important precedent for arbitrators?

Historically, the NLRB has allowed victims of discriminatory discharge to recoup the reasonable costs associated with searching for work and expenses incurred in connection with interim employment by treating them as an offset against interim earnings. In *King Soopers*, the General Counsel asked the Board to change that practice because it "unfairly forces discriminatees to bear work-related expenses that result directly from a respondent's unlawful action."

The General Counsel proposed that these expenses be calculated and paid to the discriminatee separately from back pay, regardless of whether the discriminatee received any interim earnings. Three of the four board members agreed and adopted the General Counsel's position.

Query: When an arbitrator orders that the employee be "made whole" for a wrongful discharge should the make whole remedy include an obligation to reimburse the employee for the reasonable costs incurred searching for work and reasonable interim employment expenses?

In most cases the parties are able to agree on the amount of back pay due an employee under the rubric of a "make whole" award. That includes any offsets they agree to, such as offsets for interim earnings. Sophisticated parties have established practices they follow in such cases and arbitrators are seldom asked to rule on such questions.

It is reasonable to assume that, if the King Soopers decision is not reversed, some unions may start asking for remedies that include reimbursement for such expenses to help make a wrongfully discharged employee whole.

What about some of the other rules applied by the NLRB when calculating back pay due an employee under the make whole concept? Do you follow them?

The "*Woolworth*" Formula. Use of calendar quarters for calculating gross back pay and then offsetting interim earnings.

Automatically adding interest to any back pay due, according to the method spelled out in *Isis Plumbing and Heating Co*., 138 NLRB 716.