

## FORUM

### The Remedy Power in Grievance Arbitration\*

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*Commentators have offered differing theories of the grievance arbitrator's function in the formulation of remedies. The author argues that an arbitrator serves as a parties' "contract reader," interpreting and applying what the agreement says about remedy. From this principle, the author infers that an arbitrator is implicitly granted the authority to award only specific performance of the provisions of the agreement, not damages, unless the agreement specifies to the contrary.*

The publication of *Remedies in Arbitration* by Martin Hill, Jr. and Anthony V. Sinicropi<sup>1</sup> is perhaps an appropriate occasion to again look at the function which arbitral remedies perform in the system of grievance arbitration. As is noted in the introduction to *Remedies in Arbitration*, there are different views on the subject. The book, unfortunately, does not shed much light on the problem. It is a useful collection of examples of what arbitrators have done in a variety of situations, at least as reflected in the reported cases. But the book makes no attempt to coordinate those examples into a principled pattern or patterns corresponding to the differing theories of the arbitrator's function in the formulation of remedies.<sup>2</sup> It is the purpose of this paper to argue for a particular view of that function and, using some of the decisions cited in *Remedies in Arbitration*, to indicate my disagreement with some of

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1. M. HILL, JR. & A. SINICROPI, *REMEDIES IN ARBITRATION* (1981) [hereinafter cited as *REMEDIES IN ARBITRATION*].

2. This is not to say that *Remedies in Arbitration* does not perform a useful function as a source book for arbitrators and advocates in their search for precedent dealing with particular remedial problems. Its utility for that purpose would be greatly increased by more careful editorial work. For example, some opinions discussed and quoted at length in the text are not included in the table of cases, apparently because the case citations are in a footnote, and the table lists only those cases cited in the text. The citations are inconsistent (some citing BNA and others citing CCH, although some cases are reported in both services), and in several instances, inaccurate. In at least one instance, an opinion is ascribed to the wrong arbitrator. It is to be hoped that these easily remediable errors will be corrected in a second edition.

the more expansive exercises of arbitral power which are reflected in those examples.

The issue is not a new one. It was first addressed in the proceedings of the National Academy of Arbitrators by a paper delivered by Emanuel Stein more than twenty years ago.<sup>3</sup> Since then, the subject has been discussed by, among others, Robben Fleming in the *Virginia Law Review*,<sup>4</sup> and by papers delivered by Robert Stutz,<sup>5</sup> Peter Seitz,<sup>6</sup> Sidney Wolff<sup>7</sup> and Louis Crane,<sup>8</sup> not to speak of the innumerable commentators on their papers, among whom I am numbered, as well as discussion of remedies in papers not specifically addressed to that subject.<sup>9</sup>

# I

Although not specifically and directly involved with the remedy question, then-Dean St. Antoine's 1977 address to the National Academy of Arbitrators<sup>10</sup> furnishes the best take-off point for a re-examination of some of the remedy problems which have been discussed over the years before the Academy and in the literature. St. Antoine said that an arbitrator is essentially the parties' "contract reader." When the arbitrator interprets the agreement as applied to the particular situation he faces, his result should be treated as if it were written *in haec verba* into the agreement. When a court is called upon to enforce the award,

3. Stein, *Remedies in Arbitration*, in NATIONAL ACADEMY OF ARBITRATORS, CHALLENGES TO ARBITRATION 39 (1960).

4. Fleming, *Arbitrators and the Remedy Power*, 48 VA. L. REV. 1199 (1962).

5. Stutz, *Arbitrators and the Remedy Power*, in NATIONAL ACADEMY OF ARBITRATORS, LABOR ARBITRATION AND INDUSTRIAL CHANGE 54 (1963).

6. Seitz, *Problems of the Finality of Awards, or Functus Officio and All That*, in NATIONAL ACADEMY OF ARBITRATORS, LABOR ARBITRATION—PERSPECTIVES AND PROBLEMS 165 (1964).

7. Wolff, *The Power of the Arbitrator to Make Monetary Awards*, in NATIONAL ACADEMY OF ARBITRATORS, LABOR ARBITRATION—PERSPECTIVES AND PROBLEMS 176 (1964).

8. Crane, *The Use and Abuse of Arbitral Power*, in NATIONAL ACADEMY OF ARBITRATORS, LABOR ARBITRATION AT THE QUARTER-CENTURY 66 (1972).

9. See, e.g., Aaron, *Arbitration in the Federal Courts: Aftermath of the Trilogy*, in NATIONAL ACADEMY OF ARBITRATORS, COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE 60, 67-68 (1962); Cox, *Reflections Upon Labor Arbitration in the Light of the Lincoln Mills Case*, in NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION AND THE LAW 24, 38-39 (1959); Fischer, *Implementation of Arbitration Awards*, in NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION AND THE PUBLIC INTEREST 110, 126 (1971).

10. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, in NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION—1977, at 29 (1977), revised and reprinted in 75 MICH. L. REV. 1137 (1977). Dean St. Antoine's address purported to be a refutation of a controversial speech I made to the Academy the year before. Feller, *The Coming End of Arbitration's Golden Age*, in NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION—1976, at 97 (1976). That speech has been widely misinterpreted. It was deliberately put in provocative language for the purpose of arousing controversy and succeeded, at least, in so doing. But that is neither here nor there. What I want to do here is to emphasize my essential agreement with him and to take his thought a bit further.

it is essentially being called upon to enforce what the arbitrator has inserted into the agreement with the consent of the parties.<sup>11</sup>

St. Antoine's statement on the arbitrator's function contrasts sharply with the view Robben Fleming expressed in his 1962 article *Arbitrators and the Remedy Power*. In that article, Fleming described the arbitrator as "in effect, the enforcer of the agreement."<sup>12</sup> He is not. His function, no more and no less, is to say what the agreement means. And—this is my first thesis—this is his function not only in determining whether a violation of the agreement has occurred, but also in determining the remedy. To put the matter affirmatively, it is my view that an arbitrator's sole remedial function is to interpret and apply what the agreement says about remedy. In so doing, the arbitrator performs a function quite different from that of a court in determining what damages should be awarded for breach of contract. The arbitrator's function is not to award damages, although the award may look like damages, particularly when backpay is involved. The function of the arbitrator, as the parties' "contract reader," is to determine and award the remedy provided for by the agreement.<sup>13</sup>

Sometimes, although rarely, the agreement says just that. The Jones & Laughlin agreement with the Steelworkers, for example, provides that: "[t]he decision of the Board will be restricted as to whether a violation of the Agreement as alleged in the written grievance . . . exists and if a violation is found, to specify the remedy provided in this Agreement."<sup>14</sup> Though neither the United States Steel nor the Bethlehem Steel agreements contain the emphasized language, I can say without any hesitation that the arbitrators involved do not consider their functions to be any different because of the absence of those words.

I am referring, of course, specifically and exclusively to grievance arbitration under the so-called "standard form" in this country, a form in which the arbitrator's jurisdiction consists only of resolving disputes over the proper interpretation or application of the agreement. The agreement may add a specific limitation that the arbitrator may not alter, add to or detract from the terms of the agreement, but the result is the same: the arbitrator is limited to reading the contract for the parties

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11. Although purportedly in opposition to my view of the arbitrator's function, this is essentially my position. What I add, and what St. Antoine apparently disagrees with, is that the arbitrator's role as "contract reader" derives from the function of grievance arbitration in the collective bargaining relationship as a substitute for the strike rather than as a substitute for litigation in the courts.

12. Fleming, *supra* note 4, at 1222.

13. See Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 749-51, 778-91 (1973).

14. Agreement between Jones & Laughlin Steel Corp. and United Steelworkers of America § 7A (1980) (emphasis added).

and telling them what it means as applied to the particular factual situation presented.

This is equally true, of course, in a suit for breach of contract. In a suit for breach of a contract of sale, or even in an employee's suit for breach of an individual contract of employment, the court's function is to determine whether in fact the contract, properly read, has been violated. But there the similarity ends.

Courts are created by society to serve society's goals, not the interests of the parties before them except to the extent that society determines that those interests should be served. The procedural rules applied by the courts, such as the statute of limitations and the rules governing pleading and the payment of costs, are not determined by the parties but by external law. This is equally true of the rules governing the remedies to be awarded by courts. These rules are not created by the parties, are external to the agreement, and do not necessarily correspond to the intention of the parties. The question these rules answer, as put by Professor Farnsworth, is what remedies the legal system should provide when men do not keep their promises.<sup>15</sup>

The remedy provided by the legal system may not at all correspond to the intention of the parties. Thus, for example, although the parties may specify a penalty for failure to perform an agreement, modern law, by and large, will not enforce that penalty. As Corbin put it: "it has seemed to [the courts] that, in case of breach of contract, justice requires nothing more than compensation measured by the amount of the harm suffered. Penalties and forfeitures are not so measured."<sup>16</sup>

It was not always thus. Recall Portia's defense in the *Merchant of Venice*. Shylock had specified in his loan to Antonio that upon failure to repay at the stipulated time Antonio should forfeit a pound of flesh. Portia's successful defense was not that the penalty specified bore no relationship to the harm suffered by the failure to perform on time. Nor was it that the sum owed had in fact been tendered, although late. It was assumed by all that upon nonperformance of the contractual obligation the penalty, neither more nor less than one pound of flesh,

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15. Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147 (1970). Professor Farnsworth sets out seven critical choices made by the system of judicial remedies, including the choice between relief to redress breach and compulsion to perform, and the choice between substitutional relief (i.e., damages) and specific performance. These choices, he argues, are influenced by the free-enterprise economy. He concludes that "[a]ll in all, our system of legal remedies for breach of contract, heavily influenced by the economic philosophy of free enterprise, has shown a marked solicitude for men who do not keep their promises." *Id.* at 1215-16.

16. 5 A. CORBIN, CORBIN ON CONTRACTS 334 (1964). See also RESTATEMENT OF CONTRACTS § 339(2) (1932).

and without any blood, became due. Today the defense would be that a penalty—even if measured in dollars—is unenforceable except to the extent of the harm proved to be suffered by reason of the nonperformance of the contract.

Even if the parties attempt to avoid the application of the rule against penalties by specifying the damages which shall be payable in the event of a breach of the agreement, their intentions will not be honored by the courts unless the amount specified is reasonable in light of the loss caused by the breach and the difficulties of proof of loss. The *Restatement of Contracts* states:

Neither the parties' actual intention as to [the] validity [of a term providing for damages] nor their characterization of the term as one for liquidated damages or a penalty is significant in determining whether the term is valid. . . . Although the parties may in good faith contract for alternative performances and fix discounts or valuations, a court will look to the substance of the agreement to determine whether this is the case or whether the parties have attempted to disguise a provision for a penalty that is unenforceable under this Section.<sup>17</sup>

The case with respect to a collective bargaining agreement is entirely different. The procedural machinery for resolving disputes over the proper interpretation and application of the agreement and determining whether there has been a violation is not imposed on the parties but created by them. Unlike commercial arbitration, which was conceived and exists as a method of achieving more quickly and efficiently the same results as would be obtained in a court of law, grievance arbitration was devised, and exists today, as an alternative to the traditional method of resolving industrial disputes: the strike.<sup>18</sup>

What is true of the procedures is equally true of the remedies to be provided if a breach is found. The remedies are not based on any general societal decision as to what should be done to those who break their promises but rather on what the parties have decided should be done. Thus, if the agreement provides specific penalties for violation of its provisions, those penalties should be, and are, routinely awarded by arbitrators without regard to the question of whether they constitute "liquidated damages," or whether there is any damage at all. If the agreement, for example, provides for the award of one day's pay for each individual claim filed against a railroad for a change in scheduling practices, the Adjustment Boards routinely enforce that penalty, although it is not specified as liquidated damages and in fact there is no showing that the aggrieved employees suffered any monetary loss or

17. RESTATEMENT (SECOND) OF CONTRACTS § 356 comment c (1981). See also 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 776 (3d ed. 1961).

18. See *United Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 578 (1960) (dicta); Feller, *supra* note 13, at 745-47.

hardship from the violation of the agreement.<sup>19</sup>

Many of the contractual rules governing employee compensation include penalties and are intentionally negotiated as such. For example, premium pay for hours worked on Saturday and Sunday, or before and after the normally scheduled hours, is often intended to penalize improper scheduling.<sup>20</sup> The punitive character of these compensation rules is evidenced by the magnitude of such weekend and overtime premiums as compared to the much smaller premiums for shift work in the same industry, or by comparing the premiums paid for Sunday work in continuous-process industries where Sunday work is expected with the premiums paid in all other industries.<sup>21</sup>

This distinction is sometimes explicitly made in the agreement, as in the early case of *Public Service Electric & Gas Co.*<sup>22</sup> Walter Gellhorn there offered the following definitions of "premium pay" and "penalty pay," as those terms were used in the contract:

"Premium pay" may be defined as an extra wage granted for special effort; it is earned by that effort as, for example, by working overtime or on seven consecutive days or on a holiday. It is compensatory in purpose and effect. "Penalty pay," on the contrary . . . is, rather, punitive in character, being an impost upon an employer in the nature of a fine for failure to carry out some undertaking.<sup>23</sup>

A more modern example is provided by the agreement in *Ralph's Grocery Co.*<sup>24</sup> In that case, the agreement provided that if bargaining-unit work was performed by employees not members of the bargaining

19. The courts, not recognizing the difference between the remedies provided in a collective agreement and damages provided by statute, at least in the context of the Railway Labor Act, have, I believe mistakenly, refused on occasion to enforce such awards. See, e.g., *Railroad Trainmen v. Denver & R.G.R.R.*, 338 F.2d 407, 409-10 (10th Cir. 1964), cert. denied, 380 U.S. 972 (1965). *Accord* *Retail Clerks Local 234 v. Food Employers Council*, 85 Cal. App. 3d 286, 149 Cal. Rptr. 428 (1978).

20. Such payments are described in S. SLICHTER, J. HEALY & E. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 230 (1960) (hereinafter cited as S. SLICHTER) as "Penalty Payments for Irregular Work Scheduling." In describing the union motive for such provision they say:

Undoubtedly the original union proponents of overtime and special premium payments were sincere in arguing that such payments would have the salutary effect of regularizing the work schedule. . . . A lesser consideration in their campaign was the argument that if such work was necessary, the employee was entitled to special payment for the inconvenience and the irregularity of the hours.

*Id.* at 241-42 (emphasis in original). That the premiums more than compensate the employees for the inconvenience and irregularity of scheduling is shown by the fact, described by the authors, that these payments are viewed by employees as an excellent opportunity to increase their take-home pay. *Id.*

21. The purpose of shift premiums, in contrast to weekend and overtime premiums, is described as "compensation . . . for having to work disagreeable hours." *Id.* at 229. Premiums for Sunday work in continuous-process industries are similarly compensatory.

22. 2 Lab. Arb. (BNA) 2 (1946) (Gellhorn, Arb.).

23. *Id.* at 5.

24. 70 Lab. Arb. (BNA) 1001 (1978) (Roberts, Arb.).

unit (in that case book or advance salesmen), the union would notify the employer in writing. If there was another similar violation within six months, "damages" for such willful violation would be calculated by computing the amount of pay and the fringe benefit costs which would have been incurred by the employer if the work had been done by a bargaining-unit employee. If a second additional violation occurred within the six-month period, the "damages" would be multiplied by two. For each subsequent violation within the six-month period the multiplier would be increased by one. This ascending "damage" calculation obviously bore no relationship to the damage actually caused by the violation and was inserted as a penalty. Yet, I think few, if any, arbitrators would refuse to enforce those provisions. Conversely, as the arbitrator actually held in that case,<sup>25</sup> no award could be given for the first violation other than a declaration that the agreement had been violated. No remedy could be given because the agreement itself specified no remedy except for the second and successive violations within a six-month period.<sup>26</sup>

The examples I have given thus far concern explicit remedy provisions. An arbitrator would not perform his function as "contract reader" if he did not award the remedy specified in the agreement, whether or not a court would deem it an appropriate or even a permissible remedy for breach of contract. The challenge to my theory has perhaps been best expressed by Archibald Cox: "[a]rbitrators frequently fashion remedies for breach of a collective agreement without a shred of contract language to guide them. Although a few agreements prescribe the remedy for an unjust discharge, the majority simply forbid discharge without just cause."<sup>27</sup> How then can it be realistically maintained that an arbitrator merely acts as the parties' "contract reader" when he awards reinstatement with back pay?

The answer, I submit, is that arbitrators frequently find, and should find, obligations and rules implicit in an agreement. To take Cox's discharge case one step further, assume that an agreement contains no provision limiting discharges to situations in which there is "just cause." It is now well established that, at least if the agreement

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25. *Id.* at 1003.

26. The difference between arbitral and judicial remedies is illustrated by the fact that another, apparently unreported, arbitrator's decision under the identical provision was held unenforceable. *Retail Clerks Local 234 v. Food Employers Council*, 85 Cal. App. 3d 286, 149 Cal. Rptr. 428 (1978). In that case, the arbitrator found a third violation within a six-month period and, obedient to the contract, awarded double damages. The California Court of Appeal noted that the arbitrator had correctly characterized the provision as a penalty and concluded that the award was therefore unenforceable insofar as it awarded money damages in excess of those actually suffered. For the reasons already indicated, that decision is plainly correct in its premise but wrong in its conclusion.

27. Cox, *supra* note 9, at 38.

contains a seniority provision, the "just cause" limitation is implicit in the agreement and may be enforced, although there is not a shred of language indicating that there is any such limitation.<sup>28</sup> The arbitrator, in reading a collective bargaining agreement, not only reads the words of that agreement but also incorporates the commonly accepted standards to which the parties are assumed to have agreed. The authority to act as the parties' "contract reader" includes the authority to read into the contract those provisions which the arbitrator reasonably assumes the parties intended even if they fail to signify it by words.

Indeed, one of the characteristics of collective bargaining agreements is that much must necessarily be implied.<sup>29</sup> What parties address in the agreement are primarily the problems or the uncertainties which they recognize as requiring resolution. Those terms assumed to exist are often simply not expressed.

*American Manufacturing Co.*,<sup>30</sup> the first case of the *Steelworkers Trilogy*, is a familiar example. The case involved an employee who was injured on the job and filed a workers' compensation claim. The claim was settled on the basis of a partial permanent disability. The employee then sought to return to work. The employer refused to re-employ him. A grievance was filed and the employer refused to arbitrate.

What is interesting about *American Manufacturing* for present purposes is not the arbitrability question which the Supreme Court decided but the court of appeals decision that no arbitrator could possibly sustain the grievance. The circuit court based its holding on the contract's seniority provision which gave preference in the filling of vacancies to more senior employees only if their abilities were relatively equal. The court assumed that the seniority provision applied to a worker seeking to return to his job after absence due to an injury. The grievant, having settled his partial-permanent disability claim, could not possibly be found, the court said, to have the ability to perform his job as well as an uninjured employee.<sup>31</sup> Obviously, if the agreement had stated that previously injured employees are entitled to return to their jobs if they are able to perform them, it would have been clear

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28. See Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1502 (1959). Cf. Feller, *supra* note 13, at 749, and cases cited therein. *Accord* New Hotel Showboat, Inc., 48 Lab. Arb. (BNA) 240, 241-42, 67-1 Lab. Arb. Awards (CCH) ¶ 8072 (1967) (Jones, Arb.); Allied Chem. Corp., 47 Lab. Arb. (BNA) 686, 689, 66-3 Lab. Arb. Awards (CCH) ¶ 9022 (1966) (Hilbert, Arb.).

29. See, e.g., Evening News Ass'n, 68 Lab. Arb. (BNA) 1314, 1316 (1977) (Volz, Arb.); H.K. Porter Co., 38 Lab. Arb. (BNA) 1031 (1962) (Murphy, Arb.). See also *United Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 579-82 (1960) (dicta); Cox, *supra* note 28, at 1498-99; Mittenenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017, 1033-39 (1961).

30. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

31. *United Steelworkers v. American Mfg. Co.*, 264 F.2d 624, 628 (6th Cir. 1959).



that the seniority provision was irrelevant to the case. The agreement, however, contained no such statement. Indeed, after having looked at what must be hundreds of collective bargaining agreements, I have seen very few which spell out the proposition that employees who leave their positions because of sickness or injury are entitled to return to them if they can perform the work. Almost every arbitrator would, nevertheless, assume that to be the rule, as ultimately did the arbitrator in *American Manufacturing*.<sup>32</sup>

So it is with remedies. Agreements rarely, if ever, specify that if the grievant who was denied a position or a promotion prevails on his seniority claim, he or she is entitled to back pay. Yet, arbitrators routinely award backpay in such cases,<sup>33</sup> as they do overtime pay when an employee is improperly denied the opportunity to work overtime,<sup>34</sup> or straight-time pay when an employee is denied recall rights established by the agreement.<sup>35</sup> It is possible to conceive of such awards as "damages." Or, to put the matter differently, the thesis that the arbitrator should award only those remedies he finds implicit in the agreement does not advance us very far if we posit that the parties normally intend to provide implicitly in their agreement that the arbitrator should have authority to award damages. In the words of one arbitrator, "by necessary implication the parties contracted for arbitration on the implied condition that if a violation were found an arbitrator could frame an appropriate remedy to undo the wrong that has been done."<sup>36</sup> Or, as another arbitrator stated, "it has always been the law that where there is a wrong there must be a remedy; and absent a specific limitation on possible remedies, a court or arbitrator should order a remedy which is based on principles of equity and justice."<sup>37</sup> If a collective agreement can be read as authorizing an arbitrator to "frame an appropriate remedy to undo the wrong that has been done," or to "order a remedy which is based on the principles of equity and justice," then my first

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32. See, e.g., *Marion Power Shovel Co.*, 66 Lab. Arb. (BNA) 647, 654-55 (1976) (Teple, Arb.); *Colgate-Palmolive Co.*, 64 Lab. Arb. (BNA) 293, 299 (1975) (Traynor, Arb.); *E-Systems, Inc.*, 62 Lab. Arb. (BNA) 862 (1974) (Garaway, Arb.).

33. See, e.g., *Douglas Aircraft Co. of Canada*, 72 Lab. Arb. (BNA) 727, 733 (1979) (Brown, Arb.); *Consolidated Natural Gas Serv. Co.*, 64 Lab. Arb. (BNA) 37, 44 (1974) (Sembower, Arb.); *Chromalloy Am. Corp.*, 62 Lab. Arb. (BNA) 84, 90 (1974) (Fox, Arb.); *Honeywell, Inc.*, 61 Lab. Arb. (BNA) 1021, 1025 (1973) (Doppelt, Arb.).

34. See, e.g., *B.F. Goodrich Chem. Co.*, 73 Lab. Arb. (BNA) 603, 604-05 (1979) (Tharp, Arb.); *Sistrunk Co.*, 64 Lab. Arb. (BNA) 261, 265-66 (1975) (Beckman, Arb.); *Weirton Steel Div.*, 64 Lab. Arb. (BNA) 1087, 1088 (1975) (Kates, Arb.); *Nipak, Inc.*, 46 Lab. Arb. (BNA) 229, 233 (1966) (Oppenheim, Arb.).

35. See, e.g., *Edward Kraemer & Sons, Inc.*, 72 Lab. Arb. (BNA) 684, 691 (1979) (Martin, Arb.); *Shamoon Indus.*, 42 Lab. Arb. (BNA) 392, 403 (1963) (Blumrosen, Arb.); *DeAtley Paving & Crushing, Inc.*, 37 Lab. Arb. (BNA) 496, 499 (1961) (Peck, Arb.).

36. *Schott's Bakery*, 69-1 Lab. Arb. Awards (CCH) ¶ 8118 (1968) (Jenkins, Arb.).

37. *Vallejo Times-Herald*, 76-2 Lab. Arb. Awards (CCH) ¶ 8522 (1976) (Walsh, Arb.).

proposition simply changes the locus of the source of the arbitrator's authority.

My second proposition, therefore, is that unless the agreement specifies the contrary, as it sometimes may, the arbitrator is implicitly granted the authority only to award specific performance of the provisions of the agreement. There has been much discussion on the authority of arbitrators to issue injunctions.<sup>38</sup> The argument is foolish, I submit, because that is all an arbitrator ever does, or should do. When an arbitrator orders the company to reinstate a grievant, the arbitrator is issuing an injunction. When an arbitrator orders the company to promote a grievant, or to recall him from layoff, the arbitrator is issuing an injunction. When an arbitrator directs the company to remedy a condition which is unsafe, he or she is issuing an injunction. The company is ordered to take specific action.

In contrast, common law courts had no such power. They were limited to finding that the defendant, because he had breached a contract, was indebted to the plaintiff for a specific sum of money that we today call damages. As Oliver Wendell Holmes wrote in *The Common Law*:

The only universal consequence of a legally binding promise is, that the law makes the promisor [sic] pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.<sup>39</sup>

Thus, at common law, courts focused on the damage suffered by the promisee as a result of the promisor's exercise of his option not to perform but to pay. Complex rules for determining the measure of damages, such as those governing when interest was payable, were developed.

In my view, the usual meaning of a collective bargaining agreement is precisely to the contrary. The parties intend that the employer have an obligation to perform in accordance with the contract, not the option of performing or paying the damages. The remedy power which the parties give to the arbitrator is the authority to order the performance which the contract requires, not the authority to award damages.

There are, indeed, rules in collective agreements governing the payment of money when a violation has occurred. But those rules perform a different function than the judicial rules defining the terms of the promisor's damage option. Their function is to fill a time gap. If it were possible to have an instantaneous grievance and arbitration pro-

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38. See, e.g., Stutz, *supra* note 5, at 65; Wolff, *supra* note 7, at 188. See also, e.g., casenotes on *In Re Ruppert*, 3 N.Y.2d 576, 170 N.Y.S. 2d 816, 148 N.E.2d 129 (1958), in 57 MICH. L. REV. 418 (1959) and 4 N.Y.L.F. 437 (1950).

39. O. HOLMES, *THE COMMON LAW* 301 (1881).

cedure, in which all violations of the rules set forth in the agreement could be instantly grieved and decided, the only remedy power of the arbitrator would be to order the employee to do that which the contract specifies he should do.

The concept of an instantaneous procedure, like the concepts of infinity and a perfect vacuum, is impossible to achieve, but serves to illustrate the underlying principle. There must always be a time gap between the event causing the grievance and the arbitrator's determination that the event constituted a failure by the employer to comply with the rules. The usual function of a money award is precisely to fill that time gap.

The rules included by the parties in collective agreements limiting money awards are almost never phrased in terms of limiting "damages." To the contrary—and I believe the terminology precisely reflects the kind of remedial power the parties envisage—the rules usually speak in terms of "retroactivity." What the parties normally intend is that the arbitrator should have the authority to make his order retroactive to fill the time gap between what actually occurred and the action which the arbitrator finds the agreement required. If the grievant should not have been discharged, the arbitrator orders the employer to reinstate the grievant and to pay the sum he would have paid if it were known at the time of the discharge that it was improper. If the grievant should have been promoted to a vacancy, the arbitrator orders the employer to promote the grievant and to pay him or her retroactively as if the vacancy had been properly filled. Back pay, ordered to fill the time gap between the event and the specific performance ordered, only looks like damages because it involves the payment of money.

If the parties wish to limit the amount payable, they limit the period of "retroactivity." The United States Steel agreement refers to monetary awards as awards "involving the payment of monies for a retroactive period."<sup>40</sup> And it limits the back pay in a seniority case in the following way:

Awards of the Board may or may not be retroactive as the equities of particular cases may demand, but . . . [t]he effective date for adjustment of grievances relating to . . . [s]eniority cases shall be the date of the occurrence or nonoccurrence of the event upon which the grievance is based, but in no event earlier than 30 days prior to the date on which the Complaint Form was initiated . . . .<sup>41</sup>

Where even stricter limitations are intended the agreement then provides, as an exception, that:

If the Company recalls the wrong employee from a layoff to a job

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40. Agreement between United States Steel Corporation and the United Steelworkers of America (Production and Maintenance Employees) § 7(A)(7)(c) (1980).

41. *Id.* § 7(A)(7) - (a)(2).

in a pool, it will not be liable for any retroactive pay to the employee who should have been recalled, with respect to any period prior to 4 days or the beginning of the payroll week, whichever is later, after receipt by the Company of a specific written notice . . .<sup>42</sup>

Again there is a parallel in the development of judicial remedies. When courts of equity filled the gap created by the inability of the common law courts to direct action, they sometimes awarded money. This was not damages, but rather a direction that the defendant perform the obligation to pay money.<sup>43</sup> Usually the arbitrator's back-pay award follows the equity form rather than that of the law courts. "The judgment at law reads that plaintiff recover so much money; the decree in equity, that defendant is ordered to pay the sum."<sup>44</sup>

There is, however, a difference. If its order is to be enforced, a court must issue an order specifying in dollars and cents the amount to be paid. An arbitrator simply orders reinstatement with back pay, leaving to the parties the determination of the amounts which the agreement requires to be paid for the period in which the grievant was not permitted to work, or was not given the position which the seniority provisions require.<sup>45</sup>

This leads to my third proposition: the remedy power which the parties may be assumed to have vested in the arbitrator is ordinarily limited to the payment of sums calculated in terms of the collective bargaining agreement, not by measures external to it.<sup>46</sup>

In many cases, of course, measurements derived from the agreement are available. They may, however, bear little or no relationship to the "damage" caused by the breach of the agreement. Reporting pay is a classic example of an explicit remedy usually included in collective

42. *Id.* § 13(L)(6)(b).

43. [E]quity acts specifically, and not by way of compensation; which embodies a general principle running through the whole system of chancery jurisprudence. This principle is that equity aims at putting parties exactly in the position which they ought to occupy; giving them *in specie* what they are entitled to enjoy . . . Thus, equity decrees the performance of a contract, and does not give damages for its breach.

G. BISPHAM, *THE PRINCIPLES OF EQUITY* 81-82 (McCoy 10th ed. 1925).

[T]he efficiency of the English courts of equity in granting specific relief has been increased by the power conferred upon them of giving damages . . . by virtue of the Statute 21 and 22 Vict., c. 27, commonly known as Sir Hugh Cairn's Act, which provides that the courts may . . . grant that relief, which would otherwise be proper to be granted by another court—i.e., award damages.

Before this act the law had been the other way.

*Id.* at 630.

44. Cook, *Powers of Courts of Equity II*, 15 COLUM. L. REV. 106, 108 (1915).

45. See, e.g., *Pipe Fitters Local 636*, 75 Lab. Arb. (BNA) 449, 454 (1980) (Herman, Arb.); *Edward Kraemer & Sons, Inc.*, 72 Lab. Arb. (BNA) 684, 691 (1979) (Martin, Arb.); *New York Times*, 63 Lab. Arb. (BNA) 1064, 1082-83 (1974) (Benewitz, Arb.).

46. Although the parties generally do not include remedial provisions which require computations or assessments of amounts not based upon the wage or other formulae contained in the agreement, they clearly have the power to do so.

bargaining agreements. Reporting-pay clauses generally provide that where management fails to give notice of the non-availability of work, management must pay employees who show up for work an amount calculated in terms of their hourly rate of pay.<sup>47</sup> Whether the reporting pay be two, four or eight hours, it bears no relationship to the hardship or inconvenience the employee may suffer as a result of the failure of management to give notice.

Where there is no measure internal to the agreement which can be applied it follows that, unless the contrary is stated, there can be no monetary award at all. Assume, for example, a rule in a collective agreement, or a rule authorized by the collective agreement, that an employee shall not smoke in designated areas. An employee smokes. The plant burns down. In that case, if the employer discharged the employee, an arbitrator would find that he had violated the agreement and the discharge would be sustained. But suppose the employer filed a grievance asking for damages in the amount of the value of the burned establishment. Should an arbitrator order the employee to pay damages? I submit he should not. There is nothing in the agreement by which the damage can be measured.

The above example may be too easy, since most agreements do not provide for employer grievances and hence the claim for damages for breach of the no-smoking provision could not be heard at all. Employee grievances, however, should be subject to the same remedial limitation. For example, when an employer violates a contractual safety and health provision the arbitrator would ordinarily order the employer to remedy the unsafe condition.<sup>48</sup> Or, if the case arose as the result of an employee's refusal to work under the unsafe conditions, the question might be whether he was justified in so doing.<sup>49</sup> But suppose

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47. See, e.g., *National Homes Corp.*, 71 Lab. Arb. (BNA) 1106 (1978) (Dobranski, Arb.); *Agreement Between United States Steel Corporation and United Steelworkers of America* § 10(E)(1) (1980), which states in part:

An employee who is scheduled or notified to report and who does report for work shall be provided with and assigned to a minimum of 4 hours of work on the job for which he was scheduled or notified to report or, in the event such work is not available, shall be assigned or reassigned to another job of at least equal job class for which he is qualified. In the event, when he reports for work, no work is available, he shall be released from duty and credited with a reporting allowance of 4 times the standard hourly wage rate of the job . . . for which he was scheduled or notified to report.

48. See, e.g., *Hoboken Bd. of Educ.*, 75 Lab. Arb. (BNA) 988 (1980) (Silver, Arb.); *Bethlehem Steel Corp.*, 54 Lab. Arb. (BNA) 503 (1970) (Strongin, Arb.); *Pennsylvania R.R. Co.*, 49 Lab. Arb. (BNA) 907 (1967) (Seidenberg, Arb.); *Beaunit Fibers*, 49 Lab. Arb. (BNA) 423, 67-2 Lab. Arb. Awards (CCH) ¶ 8588 (1967) (McCoy, Arb.); *Alan Wood Steel Co.*, 35 Lab. Arb. (BNA) 199 (1967) (Valtin, Arb.).

49. See, e.g., *McLung-Logen Equip. Co.*, 71 Lab. Arb. (BNA) 513 (1978) (Wahl, Arb.); *Dayton Power & Light Co.*, 63 Lab. Arb. (BNA) 653, 74-2 Lab. Arb. Awards (CCH) ¶ 8446 (1974) (Ipavec, Arb.); *Bethlehem Steel Corp.*, 62 Lab. Arb. (BNA) 203 (1974) (Reel, Arb.); *American Oil Co.*, 51 Lab. Arb. (BNA) 484 (1968) (Barnhart, Arb.); *FMC Corp.*, 45 Lab. Arb. (BNA) 293 (1965) (McCoy, Arb.).

there is no grievance and the employee works and suffers serious injury as a result of the violation. In that situation there has been, by hypothesis, a violation of the agreement. If a grievance is filed by an employee (or by an employee's spouse if the violation caused death) requesting damages for the harm reasonably foreseeable as a consequence of the violation, should the arbitrator find and award such damages? In the absence of specific enabling language, I submit he should not. Indeed, as I have explained elsewhere, the nonavailability of a damage remedy for violation of a safety-and-health provision was the motivating force behind the employer's successful contention in *Republic Steel v. Maddox* that litigation was not a permissible alternative to the grievance and arbitration procedures.<sup>50</sup>

For another example, suppose that an agreement specifies that employees shall be given a choice of vacation periods and that vacations, once scheduled, shall not be changed except under specified circumstances. Further, suppose that an employer having scheduled an employee for a particular vacation period, then reschedules that vacation to a different time or assigns a plant shutdown period as "vacation" under circumstances not permitted by the agreement. Suppose that as a result of the rescheduling the employee suffers damage of an entirely foreseeable kind: the deposit he paid on a vacation cabin was lost; it became impossible for him to spend his vacation with his children; and he was generally subjected to considerable inconvenience and distress. Should an arbitrator, faced with these facts, assess these entirely foreseeable damages and provide a monetary award to the employee as compensation? I think not. Some agreements do, indeed, provide for specifically reimbursable costs in such cases. But, in the absence of such a provision, an arbitrator should not read the contract as providing for such relief in damages.

This is one of the rare situations in which it is sometimes possible to avoid giving a retroactive remedy. If the employee's grievance can be heard and decided before the effective date of the changed schedule, as is most likely under the expedited procedures provided for vacation scheduling disputes under some agreements,<sup>51</sup> the matter can be set right by an injunctive order requiring the employer to provide a vacation scheduled in accordance with the agreement. Suppose, however,

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50. 379 U.S. 650 (1965); Feller, *supra* note 13, at 791. *Republic Steel* sought to avoid the troublesome consequences of *Tennessee Coal & Iron Co. v. Sizemore*, 258 Ala. 433, 62 So.2d 459 (1952). *Sizemore* and its progeny held that an employee who contracted silicosis was entitled to recover damages in a contract action for breach of a health and safety clause.

51. See, e.g., the special procedures for vacation scheduling grievances in Agreement between United Steelworkers of America and United States Steel Corporation § 12-D (1980); Agreement between United Steelworkers of America and Jones & Laughlin Steel Corporation § 12(4) (1980); Agreement between United Steelworkers of America and Bethlehem Steel Corporation Art. IX, § 5 (1980).

that the employee received an improper vacation before the properly scheduled vacation was due. Some arbitrators, particularly where the violation was willful, will conclude that the employee did not receive the vacation required by the agreement and will order the employer to provide an additional vacation period with pay, in order to comply with the terms of the agreement.<sup>52</sup> Such an award may be of greater value than the damage suffered by the employee but it would be a remedy implicit in the agreement and measured by its terms.

Decisions which refuse to regard willfully mischeduled vacations as the "vacation" specified in the agreement and thus compel the employer to provide, in effect, two paid vacations, or pay in lieu thereof, depart from traditional judicial relief for breach of contract:

The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach. "Willful" breaches have not been distinguished from other breaches, punitive damages have not been awarded for breach of contract, and specific performance has not been granted where compensation in damages is an adequate substitute for the injured party. In general, therefore, a party may find it advantageous to refuse to perform a contract if he will still have a net gain after he has fully compensated the injured party for the resulting loss.<sup>53</sup>

In other words, awarding different remedies for willful as opposed to inadvertent contract violations is as inconsistent with the law of contracts as is refusing to award damages not measurable by terms internal to the agreement. The justification for such "departures" is clearly not to be found in analogizing the arbitrator's function to the courts' remedial goals but in the principle that the arbitrator's function is to compel performance of the agreement rather than to compensate the employee for the loss resulting from breach.

The "foreman working" problem<sup>54</sup> is another illustration of the different functions of the arbitrator and the courts. The appropriate arbitral approach to that problem was colorfully described by Ben

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52. *Bethlehem Steel Corp.*, 37 Lab. Arb. (BNA) 821 (1961) (Valtin, Arb.). One arbitrator came to a similar result on what I believe to be the spurious reasoning that, although there was no specific evidence of loss, it was fair compensation for the inconvenience and other damage which must have been suffered by the affected employees. *Scovill Mfg. Co.*, 31 Lab. Arb. (BNA) 646 (1958) (Jaffee, Arb.). Others in similar situations have concluded as did the arbitrator in *Pittsburgh Steel Co.*, 42 Lab. Arb. (BNA) 1002, 1008, 64-2 Lab. Arb. Awards (CCH) ¶ 8733 (1964) (McDermott, Arb.), that "I cannot find any effective remedy." See, e.g., *ACF Indus., Inc.*, 39 Lab. Arb. (BNA) 1051 (1962) (Williams, Arb.).

53. RESTATEMENT (SECOND) OF CONTRACTS ch. 16, introductory note (1979).

54. Collective bargaining agreements generally provide that employees not covered by the agreement may not perform the tasks assigned by agreement to bargaining-unit employees. For a discussion of the factors which influence the work assignment conflict between bargaining-unit and non-bargaining-unit employees, see generally S. SLICHTER, *supra* note 20, at 244.

Fischer, a learned and experienced advocate, at the 1971 meeting of the National Academy of Arbitrators:

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.<sup>55</sup>

Shortly after Fischer made that statement, the basic steel industry agreements were indeed amended to provide a remedy, and one which bears no necessary relationship to the kind of remedy which a court would provide for breach of contract. The 1971 amendments to the agreements provided that if a supervisor performed work in violation of the agreement and if the employee who otherwise would have performed the work could reasonably be identified, the company would be required to pay such employee wages for two hours, or if greater, for the time which the employee would have worked on the job if the supervisor had not violated the agreement.<sup>56</sup> This penalty, apparently having proven inadequate, was modified in 1974 to provide a minimum of four hours pay.<sup>57</sup> The fact that the identified employee may have been fully paid for the time, and thus would receive double pay for a minimum of four hours, is immaterial. The provision is plainly a pen-

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55. Fischer, *supra* note 9, at 132.

56. See, e.g., Agreement between United States Steel Corporation and United Steelworkers of America § 2-A(3)(1971).

57. See, e.g., Agreement between United States Steel Corporation and United Steelworkers of America § 2-A(3)(1974). This provision has carried over into the 1980 basic steel agreements. See, e.g., *id.* § 2-A(3) (1980).



alty specified by the terms of the agreement and should be enforced by an arbitrator regardless of the absence of damage.<sup>58</sup>

There is an exception to the principle that, unless otherwise specifically provided, the only monetary arbitral remedies should be those measured by computations internal to the agreement. That exception is the deduction of outside earnings from back pay. My thesis that the arbitrator's order simply directs the employer to do, retroactively, what the arbitrator finds he should have done under the agreement, including the payment of money to a grievant who has been discharged wrongly or has been improperly laid off, suggests that there should be no deduction for outside earnings during the period of absence from the workplace.<sup>59</sup> Yet agreements often provide for the deduction of outside earnings and arbitrators almost uniformly provide for such a deduction even where there is no language directing them to do so.<sup>60</sup> The only exception is the case where the remedy is set forth in words in the agreement and does not provide for such a deduction.<sup>61</sup>

Ben Fischer, whom I have already quoted at length, has criticized this practice,<sup>62</sup> but it can be regarded as a fixture of the industrial scene. It clearly does provide that at least one element of a back-pay award shall be measured by computations external to the agreement. But even here I maintain my thesis that the arbitrator is acting as the par-

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58. The penalty quality of such contractual remedies is clearly exemplified in *Roberts & Schafer Co.*, 72 Lab. Arb. (BNA) 624 (1979) (Cantor, Arb.), where, in conformity with the contract, full shift pay was awarded to a grievant who, though having worked and been paid for a full day himself, saw his foreman do only three to eight minutes of unit work.

59. Deductions for periods when the employee was sick or would have been laid off notwithstanding the improper discharge or layoff, are proper under this formulation since the employer would not have paid the employee for those periods even if there had been no violation of the agreement.

60. The basic steel agreements read as follows:

Should it be determined . . . that an employee has been suspended or discharged without proper cause therefor, the Company shall reinstate the employee and make him whole for the period of his suspension or discharge, which shall include providing him such earnings and other benefits as he would have received except for such suspension or discharge, and offsetting such earnings or other amounts as he would not have received except for such suspension or discharge. In suspension and discharge cases only, the Board may, where circumstances warrant, modify or eliminate the offset of such earnings or other amounts as would not have been received except for such suspension or discharge.

Agreement between United States Steel Corporation and United Steelworkers of America § 8(D)(1980).

For examples of arbitration awards offsetting outside earnings even where there is no contract language requiring such offset, see, e.g., *Commercial Warehouse Co.*, 62 Lab. Arb. (BNA) 1015, 1018, 74-1 Lab. Arb. Awards (CCH) ¶ 8172 (1974) (Sater, Arb.); *Universal Producing Co.*, 57 Lab. Arb. (BNA) 1072 (1971) (Sembower, Arb.); *Bethlehem Steel Corp.*, 57 Lab. Arb. (BNA) 536, 538 (1971) (Seward, Arb.).

61. See *United States Steel Corp.*, 40 Lab. Arb. (BNA) 1036 (1963) (McDermott, Arb.). The agreement has since been modified to permit the offset but to also give the arbitrator discretion to modify or eliminate the offset "where circumstances warrant." See *supra* note 60.

62. Fischer, *supra* note 9, at 133.

ties' contract reader, rather than as a court would in assessing damages. Given the existence of provisions for the deduction of outside earnings in many agreements, it is perhaps proper for arbitrators to assume that the parties contemplated such a deduction as an exception to the general rule even though they did not say so explicitly.

In any event, the deduction of outside earnings does not correspond to what a court would do in assessing damages. In court, damages for breach of a contract of employment normally include interest.<sup>63</sup> Arbitrators rarely award it.<sup>64</sup> In court, there is a deduction for the amount the dischargee earned or could have earned in other employment, as well as a counterbalancing addition of any costs which he incurred in seeking other employment, whether or not successful.<sup>65</sup> I have yet to see an arbitrator's decision which enhances the back pay due an employee by an assessment of the costs which he incurred in unsuccessfully attempting to "mitigate damages."

There is, indeed, no duty to "mitigate damages" because the arbitrator does not award damages. There is, or should be, therefore, no requirement that the employee seek other employment, and no deduction from the employee's back pay because of his failure to do so. I concede that arbitrators often speak in terms of the duty to mitigate damages and sometimes do, indeed, refuse to award back pay for periods in which it can be shown that the employee did not seek alternative employment.<sup>66</sup> But the cases in which an employer raises this defense are, at least in my experience, rare, as are the agreements providing for such a duty. That fact indicates to me that the parties do not really regard this as an element to be considered in determining the appropriate arbitral remedy in a discharge case.

The provision for the deduction of outside earnings in an order of reinstatement with back pay can serve as an illustration of the limitations of my thesis. It is my thesis: (1) that the function of grievance arbitrators is not to award damages for breach of contract but to apply the remedial provisions in the agreement; (2) that those remedial provisions include both those set out in words and those which the arbitrator can assume the parties intended because they are common practice in the industrial relations community; (3) that such implicit provisions normally call for specific performance, retroactive if necessary; and (4) that where the retroactive payment of money is involved, the amount of payment is measured by the wage and other formulae found

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63. 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1358 (3d ed. 1968).

64. REMEDIES IN ARBITRATION, *supra* note 1, at 199.

65. S. WILLISTON, *supra* note 63, at § 1359.

66. See, e.g., E.F. Hauserman Co., 64 Lab. Arb. (BNA) 1065 (1975) (Gibson, Arb.), citing judicial precedents in suits for damages. *Contra* Dubuque, Lorenz, Inc., 66 Lab. Arb. (BNA) 1245 (1976) (Sinicropi, Arb.).

in the agreement. The parties may provide otherwise. It is therefore permissible for an arbitrator to assume, in the absence of contract provisions to the contrary, that the parties impliedly agreed to the usual practice to deduct outside earnings. Indeed, it is perfectly possible for an employer and a union to specify in their agreement that if an employee's grievance is sustained the arbitrator shall have authority to award the same damages as a court would in the case of breach of an individual contract of employment. Although it is certainly conceivable that the parties could write such a contract, it is rare<sup>67</sup> and an arbitrator should not assume such power unless it is explicitly vested in him.

There are examples of provisions in which the parties have explicitly given the arbitrator the authority to do more than simply provide a retroactive remedy, strictly defined, for grievances. Consider, for example, the provisions, now fairly common as a consequence of the Supreme Court's *Fibreboard*<sup>68</sup> decision, dealing with the contracting out of work or the removal of a plant. If the provision forbids it, the appropriate remedy is to order return to the status quo and to provide, retroactively, the compensation which would have accrued to the employees if the breach had not occurred. If, on the other hand, the agreement merely requires the employer to enter into discussions with the union before contracting out work, and this is not read as prohibiting the action in the absence of discussions, the remedy to be applied where an arbitrator finds a violation presents obvious difficulties. They were addressed in the 1977 basic steel industry agreements by simply giving the arbitrator broad remedial power. Where the employer fails to give notice of contracting out and such failure deprives the union of a reasonable opportunity to suggest and discuss practicable alternatives, the United States Steel agreement provides that "the Board shall have the authority to fashion a remedy, at its discretion, that it deems appropriate to the circumstances of the particular case."<sup>69</sup> That language is significant not only because of the discretion it vests in the arbitrator but also because of its negative implication. The parties seem to have assumed, correctly in my view, that in the absence of that language the arbitrator might find no remedy implicit in the agreement which would be meaningful.

Finally, there are the analytically distinct cases in which the parties provide for traditional damage remedies for the employer in arbitration, not against the employees, but against the union. In the *Drake*

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67. I have found only one example of that kind of provision. *Northshore Investments, Ltd. v. Directors Guild*, 108 L.R.R.M. (BNA) 3010 (C.D. Cal. 1981).

68. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

69. Agreement between United States Steel Corporation and United Steelworkers of America § 2(c)(5) (1980).

*Bakeries*<sup>70</sup> case, for instance, the Supreme Court ordered arbitration of an employer's claim for damages against a union for an alleged violation of a no-strike clause. My own view is that *Drake Bakeries* was wrongly decided on its facts,<sup>71</sup> but it serves as an exemplar of a collective agreement in which a damage remedy not calculable by provisions internal to the agreement may be awarded. Insofar as an agreement provides for the arbitration of damage claims against the union for breach of the no-strike clause, however, it is really not providing for grievance arbitration in the usual sense. It does not involve adjudication of the rules governing the relationship of employer and employee but rather the quite different matter of the contractual rights between the union and employer. It is not provided as a substitute for the strike but as an alternative form of litigation. Thus, arbitration of employer claims for damages are more properly analogized to commercial arbitration than to grievance arbitration.

What the parties to collective bargaining agreements have done may be likened to the old rule with respect to the bond under seal. Upon failure of the employer to meet the condition set forth in the bond the penalty provided for therein, and only that penalty, had to be paid, whether or not that penalty adequately redressed the injury or indeed much more than adequately compensated for the injury. The problem with that analysis, of course, is that if the matter is taken to court the possible result will be that the court, applying the modern law of contracts, may refuse to enforce the award.<sup>72</sup> That result is, in my view, simply wrong. The relationship between employer and employee under a collective agreement is not the contractual one of promisor and promisee. The collective agreement is a contract, but one between the employer and the union establishing the rules to govern the employer-employee relationship. With respect to the employee, the better analogy is to liken the agreement to a privately enacted statute or set of rules governing the employer-employee relationship. Under that statute the arbitrator is the agency empowered by the parties to interpret and apply those rules, to direct the employer to comply with them and,

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70. *Drake Bakeries, Inc. v. Local 50, Bakery Workers*, 370 U.S. 254 (1962).

71. The Court assumed that because the grievance procedure was open for employer grievances it authorized arbitration of a claim for damages for violation of a no-strike clause. Such a provision is more properly understood as merely permitting the employer to obtain adjudication, in advance, as to the permissibility under the agreement of action it proposes to take with respect to employees and therefore gives an arbitrator no more authority than he possesses when the process is initiated by an employee grievance. The grant of authority to an arbitrator to act as a court would in assessing damages for breach of the unions' contractual obligation not to strike is a far different matter which should not be found in the absence of more explicit language than existed in *Drake Bakeries*.

72. See, e.g., *Operating Eng'rs Local 450 v. Mid-Valley, Inc.*, 347 F. Supp. 1104 (S.D. Tex. 1972); *Retail Clerks Local 324 v. Food Employers Council*, 85 Cal. App. 3d 286, 149 Cal. Rptr. 428 (1978).

if the rules provide for penalties, to direct payment of those penalties. This conception of the collective agreement more accurately describes the relationship of the parties and the remedial authority of the arbitrator than does the contractual analogy and, with few exceptions, corresponds to the results of the judicial decisions with respect to grievance arbitration.<sup>73</sup>

## II

I began this essay with acceptance of the St. Antoine proposition that the arbitrator is the parties' designated "contract reader." To the extent that "contract" connotes a promissory relationship leading to the imposition of damage remedies akin to those available judicially, it should perhaps be amended. A more accurate statement, and one with which I believe St. Antoine would concur, is that the grievance arbitrator is the parties' designated "reader of the rules" whose award, including remedy, should be read as if it were included in the rules.

The question remains, however, why grievance arbitrators should be limited to the role I have described. Is it a function of the nature of the arbitration process or, instead, of the collective bargaining process? The answer is, I believe, a bit of both. Arbitrators could conceivably act the way courts do: hearing testimony on the issue of damage suffered by the grievants and issuing an award in dollars and cents. But at least with respect to grievance arbitration, there are serious limitations on the competence of arbitrators to make such determinations.

Our judicial system is adequate to the task because it has evolved an enormous set of procedures which facilitate the adjudication of questions such as damages. There are, first, discovery procedures which in many cases involve more time and effort than the trial of a case itself. Second, there are provisions governing the allocation of court costs. Third, there are elaborate provisions governing offers of settlement and the consequences to a party that refused an offer of settlement and receives less than the offered amount at trial. All these procedures are meant to facilitate the disposition of claims which will end up in a monetary award in dollars and cents. None of them is available in grievance arbitration.

Why are these tools not available in grievance arbitration? The reason is that the parties do not provide the arbitrator with these tools.

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73. The argument is more fully explained in Feller, *supra* note 13, at 774-805. The no-strike clause exemplifies the distinction. As between employer and employee, the no-strike clause is a rule of conduct violation which subjects the employee to the possibility of discipline. As between union and employer, it is a contract, a promissory arrangement, for breach of which damages may be payable unless the parties provide otherwise, as in those agreements limiting liability if the union takes specified steps to terminate an unauthorized stoppage.

And the reason they do not goes back to the collective bargaining process out of which grievance arbitration arises.

Grievance arbitration was not developed as an alternative to a suit for breach of contract. Historically, and still in many contemporary collective agreements, the remedy for breach of the agreed rules governing employer-employee relations was the strike. Arbitration attained the stature which it has today as a substitute, not for litigation, but for the strike. It became acceptable as such a substitute because the arbitrator was limited to the function of reading the agreement for the parties. The strike is not normally directed toward the payment of damages by the employer but directed toward compelling action by it. Just so, the remedies which an arbitrator has available are remedies directed at action, retroactive in some cases, but limited to actions of the kind called for by the agreement, including the payment of monies measured by the terms of the agreement.<sup>74</sup>

It is perhaps appropriate to insert here a comment on a particular class of cases: the cases in which the National Labor Relations Board defers to arbitration under its *Collyer*<sup>75</sup> doctrine. It is uncertain at this moment where the Board stands with respect to *Collyer*. The last definitive announcement was that it would not defer in cases involving complaints of violation of individual rights, i.e., complaints involving claimed violations of section 8(a)(3)<sup>76</sup> of the Act, but would defer to arbitration in cases involving complaints of violation of the duty to bargain expressed in section 8(a)(5).<sup>77</sup>

When the Board hears and decides a section 8(a)(5) case, it is authorized by statute to order the offending party to cease and desist from the violation "and to take such affirmative action. . . as will effectuate the policies of this Act."<sup>78</sup> The statute specifically provides that "[s]uch order may further require such person to make reports from time to time showing the extent to which it has complied with the order."<sup>79</sup>

74. What I have said here in a sense parallels what I have said on the subject of the application of external law. I have argued that arbitrators, unless specifically authorized to do so by the agreement, should limit their determination as to what action is or is not required by the agreement to the terms of that agreement, including the terms which the arbitrator may find implicit in it, and should ignore the requirements of external law. *Id.* at 787-92, 802.

75. *Collyer Insulated Wire*, 192 N.L.R.B. 837, 77 L.R.R.M. (BNA) 1931 (1971). Under the *Collyer* holding, the Board will refuse to resolve a dispute arising both under the contract and the NLRA if the parties are bound by their contract to arbitrate the dispute. *Id.* at 843, 77 L.R.R.M. (BNA) at 1937-38.

76. *General Am. Transp. Corp.*, 228 N.L.R.B. 808, 94 L.R.R.M. (BNA) 1483 (1977); 29 U.S.C. § 158(a)(3)(1980). This section generally prohibits discrimination in hiring or tenure on the basis of union sentiment or membership.

77. *Roy Robinson, Inc.*, 228 N.L.R.B. 828, 94 L.R.R.M. (BNA) 1474 (1977); 29 U.S.C. § 158(a)(5)(1980).

78. 29 U.S.C. § 160(c)(1980) (Section 10(c) of the Act).

79. *Id.*

The Board has utilized a variety of remedies in order "to effectuate the policies of the Act." It normally requires the parties to bargain.<sup>80</sup> Where the Board finds that an employer's unilateral action constitutes a refusal to bargain, it may order the employer to rescind that action.<sup>81</sup> In *Fibreboard*, the Board ordered the employer to recreate its maintenance department, and to pay back wages to the employees it terminated when it contracted out its maintenance work without first bargaining with the union.<sup>82</sup> The Board routinely orders the posting of notices. Where it finds an egregious violation it may go further and order the employer to assemble the employees and read to them, or permit a Board agent to read to them, the findings of the Board and its order.<sup>83</sup> It may order the employer to give the union access to bulletin boards, or to provide the union with the names and addresses of employees.<sup>84</sup> It may even require the employer to reimburse the union for its excess organizational expenses.<sup>85</sup>

The deferral of such cases to arbitration poses obvious remedial problems. Suppose the parties, under the Board's direction, submit to an arbitrator the question whether an employer has refused to bargain in violation of section 8(a)(5) of the Act. Suppose, in addition, that their contract does not specify what remedy the arbitrator is permitted to award. Should the arbitrator in such a case assume the power to grant the variety of remedies the Board is authorized to grant if the arbitrator finds them appropriate? If the parties stipulate that he may issue such orders as the Board may, the parties may be deemed to have authorized him to engage in a continuing policing role. In the absence of such a stipulation, however, he should not. He has neither the jurisdiction nor the capability to police compliance with such orders. The Board carefully separates the process of deciding whether a violation has occurred and determining the general nature of the remedial order to be issued, on the one hand, and the determination of whatever sums

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80. See, e.g., *Rhodes St. Clair Buick, Inc.*, 242 N.L.R.B. 1320, 1325, 101 L.R.R.M. (BNA) 1448 (1979), *enforced*, 89 Lab. Cas. ¶ 12157 (4th Cir. 1980); *The Shaw College at Detroit, Inc.*, 232 N.L.R.B. 191, 207, 96 L.R.R.M. (BNA) 1473 (1977), *enforced in part*, 623 F.2d 488 (6th Cir. 1980); *Imperial Tile Co.*, 227 N.L.R.B. 1751, 1755, 94 L.R.R.M. (BNA) 1416 (1977).

81. See, e.g., *Portsmouth Lumber Treating, Inc.*, 248 N.L.R.B. 1170, 1176-77, 104 L.R.R.M. (BNA) 1126 (1980); *Imperial Tile Co.*, 227 N.L.R.B. at 1755-56; *Wellman Indus., Inc.*, 222 N.L.R.B. 204, 208-09, 91 L.R.R.M. (BNA) 1320 (1976), *enforced*, 94 L.R.R.M. (BNA) 2947 (D.C. Cir. 1977).

82. 379 U.S. at 208.

83. *J.P. Stevens & Co.*, 239 N.L.R.B. 738, 774-75, 100 L.R.R.M. (BNA) 1052 (1979), *enforced in part*, 623 F.2d 322 (4th Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981). The Board had also ordered the payment of the union's negotiation and litigation expenses. The court remanded that portion of the order to the Board for further explication.

84. *Id.*

85. *J.P. Stevens & Co.*, 244 N.L.R.B. 407, 102 L.R.R.M. (BNA) 1039, *enforced*, 668 F.2d 767 (4th Cir. 1982).

are due and whether the order has been complied with, on the other. The latter function is performed in the regional offices, each of which has an individual designated as the "compliance officer" who ensures compliance with the Board's order after it has been issued.<sup>86</sup> No such facilities are available to arbitrators nor should they assume authority to police compliance with their orders without the parties' approval.

### III

What I have said so far has largely been phrased in normative terms—what arbitrators *should* do. Whether it describes what arbitrators *actually* do is another question. A casual reading of *Remedies in Arbitration*<sup>87</sup> might lead one to the conclusion that there is no distinction in principle between the remedies awarded by courts and the Board and those awarded by arbitrators.<sup>88</sup> It might also suggest that a majority of arbitrators believe they are authorized to award "damages" in much the same way as the courts do in a breach-of-contract action.

Such inferences would, I believe, be false. First, a distinction must be drawn between the remedies available in the arbitration of an employee's grievance claiming a violation of the collective bargaining agreement and in arbitration used as a substitute for litigation in the adjudication of breach-of-contract claims between the union and the employer. I have already indicated that arbitration of employer claims of damages for breach of the no-strike clause is, unlike grievance arbitration, a substitute for litigation. The chapter in *Remedies in Arbitration* dealing with the remedies available in such cases makes it clear that the remedial elements in such cases are quite different from those involved in grievance arbitration.<sup>89</sup> This is equally true, although not noted in the book, of union claims against an employer. An example is *Leona Lee Corp.*,<sup>90</sup> in which damages were sought in a suit at law for violation of an employer's agreement (in return for the dismissal of unfair labor practice charges) to transfer its assets to a successor who would be required to sign a standard union contract. Because the court referred that suit to arbitration, the arbitrator was a substitute for the

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86. See generally R. GORMAN, BASIC TEXT ON LABOR LAW 7-9 (1976).

87. REMEDIES IN ARBITRATION, *supra* note 1.

88. The formulae used by the Board in computing back pay and in awarding interest are cited apparently as models for arbitrators. REMEDIES IN ARBITRATION, *supra* note 1, at 65, 84-85, 197. Indeed, the usual practice of not awarding interest on back pay awards is in part attributed, wrongly I believe, to the pre-1962 Board practice of not awarding interest.

89. *Id.* at 149-65. Listed are such elements as depreciation, freight loss and damage, insurance, interest, loss of goodwill, lost profits, and telephone and telegraph charges.

90. 60 Lab. Arb. 1310 (1972) (Gorsuch, Arb.), quoted in REMEDIES IN ARBITRATION, *supra* note 1, at 121-22. The original suit for damages which was referred to arbitration is reported as *Asbestos Workers v. Leona Lee Corp.*, 76 L.R.R.M. (BNA) 2024 (W.D. Tex. 1969), *aff'd*, 434 F.2d 192 (5th Cir. 1970).



court. His award of damages sheds little light on the authority of an arbitrator to award damages in grievance arbitration.

Second, there is a question of terminology. Many arbitrators refer to their award as "damages" although they in fact award only the remedies either expressly or implicitly provided in the agreement. An early example, not cited in *Remedies in Arbitration*, is a 1960 decision by Carl A. Warns, Jr.:

So Mr. Cook's grievance boils down to this—if the Company had not violated the contract he would have had a free weekend in which he could have enjoyed more leisure time than he received as a result of the Company's breach. Now I fully realize that in courts of law and in jury cases, a jury is authorized to award damages for pain and suffering, but as arbitrator, I believe that I am limited in *awarding damages* to compensation which is measurable in terms of the contract. . . . But where as here the employee actually ended up with as much money as he would have received had the Company properly assigned him but his loss as here was the taking away of free time on a weekend, it is my opinion that for me to attempt to assess in money what the loss amounts to on behalf of the grievant would be to extend the arbitration process beyond that which is normally and customarily contemplated by the parties. . . . [I]t is my conclusion that the arbitrator is limited to those standards of compensation which are expressly or impliedly found in the contract negotiated by the parties.<sup>91</sup>

Finally, and most important, arbitrators come in all shapes and sizes and vary enormously in the degree of expertise and sophistication they bring to the process. Unlike judges, who share a common discipline—the law—which at least attempts to unify underlying principles, some arbitrators see their mission as doing what is right in the particular situation without regard either to law or to contract. Others, trained in the law but oblivious to the very different function which grievance arbitration performs regard themselves simply as substitutes for judges.

The published reports tend to greatly over-represent the decisions of such arbitrators. Only a tiny fraction of arbitration decisions are submitted for publication and only a tiny fraction of those submitted are published. The editors of the reporting agencies understandably choose to publish decisions which add something new or different to those already published. Decisions that are not novel but simply follow well-established norms are usually not published. A book, such as *Remedies in Arbitration*, that collects only published decisions therefore

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91. Kroger Co., 34 Lab. Arb. (BNA) 686, 688 (1960) (Warns, Arb.) (emphasis added). See also, e.g., for use of damage terminology, Mallinckrodt Chem. Works, 50 Lab. Arb. (BNA) 933, 936-40 (1968) (Goldberg, Arb.); Pittsburgh Steel Co., 42 Lab. Arb. (BNA) 1002, 1008 (1964) (McDermott, Arb.).

tends to give too much weight to statistical "outliers."<sup>92</sup>

Despite these qualifications, however, *Remedies in Arbitration*, as well as a sampling of cases not covered in that book, make it plain that my description of what arbitrators should do is not a fair description of what some actually do.

Consider several examples. I have already stated what I believe should be the arbitrator's function when presented with a claim for damages as a result of a violation of a safety-and-health provision. When I last wrote on this subject, in 1973, I could find only a single published decision in which an arbitrator had awarded damages to a grievant suffering loss as a result of a violation of a safety-and-health provision, and in that case the arbitrator specifically relied on the fact that his powers were not limited to interpretation and application of the agreement.<sup>93</sup> I have since found another "outlier." The arbitrator in this case awarded not only back pay for the period in which the grievant was absent because of an injury caused by a violation of the safety-and-health provision of the agreement, but also the cost of the drugs prescribed by his physician and the cost of transportation to his physician.<sup>94</sup> (Presumably he did not order payment of the physician's fees only because that was already covered by workers' compensation.)

*Remedies in Arbitration* contains other extreme examples. It reports, for instance, a number of decisions in which arbitrators, faced with evidence of unduly dilatory tactics, added interest to an award of back pay and, in at least one case, deleted the offset of unemployment compensation.<sup>95</sup> Decisions which award interest on back pay because the employer refused to comply with an earlier decision to reinstate with back pay comport neither with the view here expressed of an arbitrator's remedial authority nor with the judicial norm in suits for breach of contract. In the courts, willfulness is irrelevant; interest is payable—irrespective of state of mind<sup>96</sup>—where the promisor's breach is failure to pay a determinant sum. In arbitration, the arbitrator's function is to determine the remedy explicitly or implicitly specified in the agreement. The agreement should be read as either requiring the

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92. O.J. DUNN & V.A. CLARK, *APPLIED STATISTICS: ANALYSIS OF VARIANCE AND REGRESSION* 338-39 (1974).

93. *Best Mfg. Co.*, 22 Lab. Arb. (BNA) 482 (1954) (Handsaker, Arb.).

94. *Vallejo Times-Herald*, 76-2 Lab. Arb. Awards (CCH) ¶ 8522 (1976) (Walsh, Arb.) (employee suffered nasal inflammation and sinusitis due to acid spill from leaky hose of which employer was aware).

95. *REMEDIES IN ARBITRATION*, *supra* note 1, at 198-99. See *Farmer Bros.*, 66 Lab. Arb. (BNA) 354 (1976) (Jones, Arb.), in which the arbitrator who had first awarded back pay minus unemployment compensation, *Farmer Bros.*, 64 Lab. Arb. (BNA) 901, 906 (1975) (Jones, Arb.), finally, in a third award, after the employer had refused to comply, added ten percent interest from the date of discharge and eliminated the deduction of unemployment compensation.

96. See 47 C.J.S. *Interest* § 3 (1975).

payment of interest (which is rare since interest is not a measure internal to the agreement) or not, but the answer should not change with the arbitrator's frustration over noncompliance.

Perhaps the tendencies of these outlying arbitrators is best exemplified by the decision in *Southwestern Bell*.<sup>97</sup> In that case, the arbitrator found that the employer had a right under the agreement to require employees to work nonscheduled days. But he also found implicit in the agreement an obligation to give due consideration to an employee's personal reasons for refusing to work on such days. In the particular case before him, an employee was required to work on an unscheduled day despite her plea that her attendance at home was required to protect her furniture from an unusual rainstorm. She reported to work as ordered. The arbitrator awarded her \$225 for the rain damage to her Victorian couch! The approach of the arbitrator in that case is best described in his own words:

What the opinion should do for the parties is to allow them to relax and enjoy the feeling of oneness with each other in a common enterprise and to strive to bring a little bit more of the Golden Rule to play in their overtime relations—which I daresay most of the Company officials, Union officials and employees would agree is a pretty good way to seek to balance each other's needs.<sup>98</sup>

There is a story that Judge Learned Hand, departing from one of his meetings with Justice Holmes, said, "Do justice." Holmes is reported to have replied, "My job is not to do justice but to see that the game is played according to the rules." Holmes was not speaking of remedies or of arbitration. But his thought is apt. The function of grievance arbitrators is not to do justice, even with respect to remedies, much less "to allow" the parties "to relax and enjoy the feeling of oneness with each other." Their function is to read the contract, including its provision as to remedies, and to tell the parties what those provisions mean as applied to the particular case. Where the agreement is silent they may find implied in it, as the common practice of the industry, the kind of remedies customarily provided in collective agreements or by arbitrators. Those remedies are almost universally injunctive in nature. They call for specific performance of the provisions of the agreement, either prospectively or retroactively by the payment of money based on calculations interior to the agreement. The remedy in a particular case may be more or less than justice. It is clearly more where the agreement provides that an employee receive a full day's pay because a foreman worked for a few minutes;<sup>99</sup> it is clearly less when an employee is deprived of a weekend off or a vacation when he planned it. But, as the

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97. *Southwestern Bell*, 61 Lab. Arb. (BNA) 202 (1973) (J.W. Murphy, Arb.).

98. *Id.* at 219.

99. *See, e.g.*, *Roberts & Schafer Co.*, 72 Lab. Arb. (BNA) 625 (1979) (Cantor, Arb.).

person designated by the parties to interpret the agreement, the arbitrator's function ends when he or she tells the parties what remedy their agreement either expressly or impliedly provides and directs performance of that remedy.

This is concededly a narrow view of the arbitrator's function. But the institution of grievance arbitration as we know it today has been built upon the assumption that arbitrators are not courts and do not have an implied power of discretion to see that justice and equity are done. They are, and should be, restricted to performing the limited role defined by the parties. In determining the meaning of an ambiguous contractual provision, or in determining what remedy should fairly be read into an agreement, arbitrators should choose the alternative which best corresponds to what they believe the parties intended. That, in turn, may involve an assumption that the parties intended to do the "right thing" as the arbitrator sees it. But where the agreement cannot be interpreted to do justice, the integrity and continuing vitality of the arbitral system requires that the arbitrator exercise the discipline to issue the award contemplated by the parties, even if the award is not a model of fairness.

It takes discipline to issue an award which, as the arbitrator sees it, does not do justice. Indeed, it takes the same kind of discipline that the *Steelworker's Trilogy* imposed upon a court by requiring it to enforce an award interpreting a collective-bargaining agreement despite the court's firm conviction that the award is erroneous and not in accordance with the principles which a court would apply in a breach-of-contract action. Some courts have failed to exercise that discipline, as have some arbitrators. Examples of both kinds of failure are set forth, in detail, in *Remedies in Arbitration*.<sup>100</sup> It is my hope that its publication will encourage neither courts nor arbitrators to regard these deviant examples as the norm.

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100. Undue attention, I believe, is given to decisions of the Fourth and Sixth Circuits overturning arbitrators' awards. As pointed out in Morris, *Twenty Years of Trilogy: A Celebration*, in NATIONAL ACADEMY OF ARBITRATORS, DECISIONAL THINKING OF ARBITRATORS AND JUDGES 331, 367-72 (1981), these circuits are exceptional in their reluctance to give effect to the Supreme Court's admonition that courts should not substitute their judgment for that of arbitrators.