Journal of Dispute Resolution

Volume 1991 | Issue 1 Article 15

1991

Book Review

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BOOK REVIEW

REMEDIES IN ARBITRATION*

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As the use of arbitration as a dispute resolution mechanism continues to increase not only in the area of labor relations but also in other fields as well, the authority of arbitrators to issue remedies has likewise become a more important topic. The breadth of this power was established early on in labor-management arbitrations in the *Steelworkers Trilogy*.[1] There the Supreme Court concluded that by entering into an arbitration agreement, a company and union could commission the arbitrator to bring an informed judgment to bear in reaching a fair resolution. The Court stated: "This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations."[2] Although the remedial authority of a labor arbitrator is broad, its bounds are not always certain.

REMEDIES IN ARBITRATION explores numerous issues on this subject in an in-depth and comprehensive fashion. This second edition is a fine addition to existing literature in the labor arbitration field. Like the standard texts by the Elkouris[3] and Fairweather,[4] Professors Hill and Sinicropi have written this book in a fashion which will be of great assistance to practitioners, students and scholars.

Both the content and format of REMEDIES IN ARBITRATION have changed substantially in this second edition. The authors have reorganized the book into three major parts: "I. Sources of Remedial Authority,"[5] "II. Remedies in Discharge and Disciplinary Cases,"[6] and "III. Remedies in Nondisciplinary Cases."[7] They have also increased the number of chapters from fourteen to twenty-two. These changes combined with the expanded table of contents make it easier for the reader to find particular topics. These topics are then more

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* M. HILL & A. SINICROPI, REMEDIES IN ARBITRATION (2d ed. 1991) [hereinafter REMEDIES].

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1. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

2. *American Mfg.*, 363 U.S. at 596.

3. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS (4th ed. 1985).

4. O. FAIRWEATHER, LABOR ARBITRATION: PRACTICE & PROCEDURE (2d ed. 1984).

5. REMEDIES, *supra* note 1, at 9.

6. *Id.* at 135.

7. *Id.* at 327.

exhaustively covered in the text. For instance, "I. Sources of Remedial Authority[8]" provides an excellent background, tracing the historical and legal development of the authority of labor arbitrators. The authors have expanded the discussion to include sections involving specific cases such as *W. R. Grace & Co. v. Rubber Workers Local 759*,[9] involving the interaction between an arbitration provision of a collective bargaining agreement and an affirmative action plan, and *Alexander v. Gardner-Denver*,[10] involving the effect of an arbitration decision on an employee's statutory rights under Title VII of the 1964 Civil Rights Act. This section also includes such recent and important decisions as *United Paper Workers v. Misco, Inc.*,[11] where the Supreme Court reaffirmed the *Trilogy* doctrine as to the finality of arbitral awards in a situation involving a review on public policy grounds. The treatment of these and other cases firmly establishes the legal framework for the remedial authority of labor arbitrators.

Moreover, the authors do not duck difficult issues in arbitration jurisprudence, such as the conflict between various arbitrators and scholars as to the use of external law when there is a difference between external law and a collective bargaining provision. The authors note the traditional position by scholars, such as Professor Bernard Meltzer, that the arbitrator's duty is only to interpret the agreement and should ignore outside law.[12] The authors then trace the contrary view taken by others, such as Arbitrator Robert Howlett, that an arbitrator must apply substantive law in contract enforcement proceedings.[13] The position of numerous other arbitrators and scholars refining this issue and proposing resolutions are also succinctly put forth.[14] While the authors do not give their own conclusion on the particular topic, they do establish the areas of disagreement and factors which should be considered when external law conflicts with a labor agreement in an understandable and well-written manner.

Another example of how the authors come to grips with a complex issue in "II. Remedies in Discharge and Disciplinary Cases" is where an arbitrator concludes that an employee has been wrongfully terminated but subsequently the individual's job has been properly eliminated.[15] In one case, the arbitrator had ordered reinstatement of the grievant to his prior position, which the parties had eliminated in a subsequent bargaining agreement. The Second Circuit Court of Appeals in interpreting the arbitral award concluded that since the job was now no longer in existence, the employee need not be reinstated to this position.[16] The court determined that the award of reinstatement was not a guarantee of job

8. *Id.* at 9.
9. 461 U.S. 757 (1983) *cited at* REMEDIES, *supra* note 1, at 101.
10. 415 U.S. 36 (1974) *cited at* REMEDIES, *supra* note 1, at 103.
11. 484 U.S. 29 (1987).
12. REMEDIES, *supra* note 1, at 79
13. *Id.* at 80
14. *See generally* REMEDIES, *supra* note 1, at 81-84.
15. *Id.* at 176.
16. Chemical Workers Local 227 v. BASF Wyandotte Corp., 774 F.2d 43 (2d Cir. 1985).

security but simply restored the grievant to a particular job, which the company had legitimately terminated. In another case, an arbitrator required that an employee be returned "to work." The Seventh Circuit Court of Appeals in reviewing this award held that the grievant must be re-employed even though his specific job might have been eliminated.[17] This section is most instructive both to arbitrators and practitioners. It is to be expected that an employer, even though ordered to do so by an arbitrator, will have little enthusiasm to return to work an individual whom the employer has concluded should be discharged. There is certainly an incentive for an employer to eliminate or reclassify a job if the result would be that the employee need not be reinstated. Thus, if a change in job conditions is a possibility, it is incumbent upon the attorney or representative for the union to bring this to the arbitrator's attention. Similarly, the arbitrator must carefully draft an order to reinstate the employee to either the same or a similar position or to retain jurisdiction until the award is carried out.

Another interesting topic in this section concerns whether a labor arbitrator can issue an injunction.[18] Arbitrators do not have the jurisdiction to render self-enforcing orders or to hold parties in contempt for noncompliance. Nevertheless, arbitrators often issue awards which require a party to take or refrain from certain actions, which the authors refer to as "injunctive-type relief."[19] The authors assert that such authority to require specific performance should inure to a labor arbitrator. Unlike the common law theory of contracts, where the accepted remedy for breach is monetary damages, parties to a collective bargaining agreement have a different expectation.[20] Under a labor agreement, a union or company assumes that the other will perform according to their obligations. If the parties fail to do so, they will normally be ordered to make good on their promises. They do not enter into a labor contract with the intent of allowing the breaching party the option to avoid performance by paying money damages. Such would undermine the basis of the continuing nature of the labor agreement. Thus, an arbitrator should have authority to order a company to reinstate an employee who has been wrongfully terminated or to order the union to cease violation of a no-strike clause, i.e., to issue mandatory, affirmative relief.

The issue of punitive remedies explored in "III. Remedies in Non-Disciplinary Cases,"[21] has been a constant source of disagreement among arbitrators and various courts. The authors note the general rule that punitive damages are inappropriate in labor arbitration because of the common law principle that punitive damages are unavailable in breach of contract actions.[22] This common law notion prohibiting punitive damages has also been applied often in the arbitral context because courts have disallowed them under most federal labor statutes, and

17. Newspaper Guild of Chicago v. Field Enters., 747 F.2d 1153 (7th Cir. 1984).
18. REMEDIES, *supra* note 1, at 309.
19. *Id.* at 309.
20. *Id.* at 326.
21. *Id.* at 436.
22. *Id.*

because such awards are not part of traditional "make-whole" relief. However, the authors point out that whether an award is considered punitive in nature is often disputed.[23] Sometimes a labor arbitrator may issue a monetary award when a breach of contract has occurred but it is difficult to calculate a financial loss, e.g., the erroneous distribution of overtime by an employer or an employer's violation of a provision regarding the scheduling of vacations. In such instances a remedy simply ordering a readjustment of overtime or vacation schedules may be adequate. In other instances, however, this becomes almost impossible due to the rippling effect caused by scheduling changes on other employees. The authors note that courts will probably find a monetary award in such situations to be impermissible as punitive if there is no causal connection between the award and the conduct of the employer.[24] On the other hand, they caution against requiring too much mathematical precision in calculating awards where some monetary loss might be appropriate.[25] This section of the book also includes a review of cases allowing monetary damages as a deterrent for willful and repetitive violations of labor agreements.[26] The authors soundly contend that such punitive relief should not be considered unenforceable *per se* since the remedy may be necessary to maintain the integrity of the parties' labor agreement.[27]

Chapter 21, which includes a number of new subjects, deals entirely with certain problem areas in arbitral remedies.[28] Although many of the issues covered in this chapter do not arise in typical arbitration cases, when they do this section is an excellent source of material for arbitrators and practitioners. A good example is that involving "immunity" to witnesses. Sometimes employees face a dilemma when they must testify against other employees. An issue in such a situation might be whether an arbitrator has the power to grant immunity to protect a witness. The authors note one case where an arbitrator concluded that the power to grant immunity did not exist because the arbitrator could not directly enforce such immunity.[29] However, reprisals against a witness by an employer, union or other employees for testifying at an arbitration hearing might very well be grounds for a violation of the contract itself. Similarly, where the employer takes action against an employee for testifying in an arbitration proceeding, the authors note that such action should be a violation of section 8(a)(4) of the National Labor Relations Act.[30]

The authors' approach of raising issues, pointing to relevant arbitration, court or NLRB cases or laws, and often giving their own conclusions, is a very instructive methodology. For instance, this writer was surprised to see one of his

23. *Id.* at 438-39.
24. *Id.* at 443.
25. *Id.* at 443-44.
26. *See id.* at 444-47.
27. *Id.* at 447.
28. *See id.* at 480.
29. *Id.* at 500.
30. *Id.* at 501.

own arbitration opinions[31] cited as an illustration of an arbitrator ordering the conditional reinstatement of an employee suffering from a physical or mental defect. The case involved an employee with diabetes who was improperly dismissed as a safety risk. The employee was reinstated but with both a condition precedent and a condition subsequent. The condition precedent was to obtain a medical release from his physician and, if the company desired, from a physician of its own choosing. The condition subsequent was to submit medical verification on a quarterly basis for a period of one year past the date of reinstatement. This method of analysis underscores the different and often difficult remedial issues which arise in arbitration cases, how arbitrators have resolved these issues in specific cases, and the principles underlying the resolution.

The research of the authors in REMEDIES IN ARBITRATION is considerable and detailed; their organization is logical and easy to follow, and the presentation of their material is made in a discerning fashion. Their book will be a valuable resource tool for those who practice and study in the field of labor-management arbitration. Professors Hill and Sinicropi have made a major contribution by their updating and revising REMEDIES IN ARBITRATION. At the outset of their book they note two maxims: (a) Olson's Law: Every time you buy something the manufacturer comes out with an improved model for less money, and (b) Sturgeon's Law: Ninety percent of everything is junk.[32] In their book, they have accomplished their goal "to avoid the net of both laws by offering arbitrators, labor-management practitioners, and law students a better text for more money."[33]

31. *Mead Corp.*, 81 LA 1000 (Heinsz, 1983) *cited at* REMEDIES, *supra* note 1, at 153.

32. REMEDIES, *supra* note 1, at vii.

33. *Id.*