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Awarding Interest In Labor Arbitration Cases

By JAMES E. YOUNGDAHL*

I. INTRODUCTION

The arbitration of disputes over application of collective bargaining agreements is a rapidly expanding field of private law¹ During 1966, there will be over 10,000 awards issued by arbitrators for labor-management relationships in the United States.²

Growing pains of rapid expansion and sui generis features of the process have created many challenges of comparison and contrast with analogous legal doctrines. It is clear that some principles of ordinary contract law, for example, cannot be super-imposed rigidly on collective bargaining agreements.³ But the reluctance of labor arbitrators to apply other standard legal concepts is more questionable.

Awards which require the payment of money, usually by an employer to designated employees, occur in significant propor-

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¹ From origins in the nineteenth century, the practice has grown most rapidly since World War II. Committee on Labor Arbitration Law, Report of ABA Section of Labor Relations Law 70 (1959).

² During 1964, about 5,000 cases were processed by the Federal Mediation and Conciliation Service and about 4,000 by the American Arbitration Association. 17 FMCS Ann. Rep. 54 (1965); Coulson, *Spring Check-up on Labor Arbitration Procedure*, 16 Lab. L.J. 259 (1965). Neither figure includes the cases submitted through private selection of arbitrators. See, *e.g.*, Alexander, *Impartial Umpireships: The General Motors—UAW Experience*, in *Arbitration and the Law* 108 (1959). It may be estimated that there are over 500 labor-management contracts in Kentucky which provide for arbitration. See 2 Dept. Lab., Reg. Rep. Lab. Orgs. 20-25 (1964) (921 Kentucky labor unions file reports with the Secretary of Labor); 2 Coll. Barg. Neg. & Con. 51:6 (1966) (ninety-six percent of union contracts provide for arbitration).

³ *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); Committee on Labor Arbitration and the Law of Collective Bargaining Agreements, Report of ABA Section of Labor Relations Law 254, 297-320 (1965). Compare *International Union, United Automobile Workers v. Hoosier Cardinal Corp.*, 86 Sup. Ct. 1107 (1966).

tions.⁴ Generally, "in civilized legal systems the element of loss caused by the passage of time during which the funds have been wrongfully detained is remedied by the award of interest on the principal sum which measures the value of the actual loss."⁵ Yet,

⁵ Brief for General Counsel, p. 2, *Isis Plumbing Co.*, 138 NLRB 716 (1962). Arbitrators traditionally decline to include interest on awards of money arising out of violation of collective bargaining agreements. The purpose of this article is to examine the rationale for such tradition.

II. THE POWER TO AWARD INTEREST

The controlling legal delineation for the remedy power of labor arbitrators is *United Steelworkers of America v. Enterprise Wheel Corp.*⁶ decided by the Supreme Court in 1960. In *Enterprise* and two companion cases⁷ the Court instructed inferior tribunals that in view of the national labor policy favoring arbitration, they were not to substitute their judgment for that of the arbitrators.⁸ A conclusion that arbitrators need broad power, the Court reasoned,

is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.⁹

The private procedure that is arbitration remains consensual; the Court warned that an arbitrator "does not sit to dispense his own brand of industrial justice." But as long as the award "draws its essence from the collective bargaining agreement," courts may not refuse enforcement.

⁴ In the most comprehensive labor arbitration reporting service (to which this survey principally is confined), 268 labor-management awards are included in a recent volume. 44 Lab. Arb. (1966). Of these, 86 required payment of money. Most of the rest involved denial of the employee or union grievance and others granted relief exclusive of money damages. See also Fleming, *Arbitrators and the Remedy Power*, 44 Va. L. Rev. 1199, 1202 (1962).

⁶ 363 U.S. 593 (1960).

⁷ *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

⁸ For a general summary of the development of federal labor arbitration law, see Katz, *Arbitration-Favored Child of Pre-emption*, N.Y.U. 17th Ann. Conf. Lab. Law 27 (1964).

⁹ 363 U.S. 574, at 597.

Collective bargaining contracts deal in detail with aspects of a damage remedy on rare occasions. The current agreement between General Motors and the Auto Workers specifically limits back pay to "the amount of wages the employee would otherwise have earned from his employment with the Corporation," less particular deductions.¹⁰ On the other hand, mature relationships in the ladies' garment industry include broad remedy power; an award, "in addition to granting such damages or other relief as [the arbitrator] may deem proper, may contain provisions commanding or restraining acts and conduct of the parties."¹¹

Far more typical are contract expressions from which little of the remedial intent of the parties can be inferred. The usual arbitrator must create the scope of his award guided only by language such as the following:

In the event it is necessary to submit a suspension or discharge case to arbitration and the Board of Arbitration finds that the employee had been suspended or discharged unjustly, the Board of Arbitration shall have the right to determine the extent to which the employee shall be compensated for time lost.¹²

[The] arbitration board shall decide the grievance submitted to it. . . . In case the Union thinks a man has been unjustly discharged the matter may be referred to the grievance procedure.¹³

[T]he term "Grievance" means any dispute between the Company and the Union, or between the Company and any employee, covered by this Agreement, concerning the effect, interpretation, application, claim or breach of violation of this agreement. . . . Each Board of Arbitration shall deal only with the matter which occasioned its appointment. . . .¹⁴

¹⁰ Para. 50, contract between General Motors Corporation and International Union, United Automobile, Aero-space and Agricultural Implement Workers of America (UAW), AFL-CIO, October 5, 1965, applicable nation-wide. 1 Coll. Bar. Neg. & Con. 20:299 (1966). See also *Truck Drivers Local 784 v. Ulry-Talbert Co.*, 330 F. 2d 562 (8th Cir. 1964).

¹¹ Art. XXVIII, contract between Climactic of Clinton, Inc. and International Ladies' Garment Workers' Union, AFL-CIO, May 4, 1964, Clinton, Arkansas. Most parties enjoin the arbitrator from adding to, subtracting from, or modifying contract language.

¹² Para. 99, contract between Kroehler Mfg. Co. and International Woodworkers of America, AFL-CIO, March 1, 1966, Louisville, Kentucky.

¹³ Arts. VII, XIII, contract between Monsanto Company and International Union of Operating Engineers, AFL-CIO, July 16, 1965, El Dorado, Arkansas.

¹⁴ Art. 5, contract between Aluminum Foils, Inc. and International Association of Machinists, AFL-CIO, March 1, 1960, Jackson, Tennessee.

Excluding those situations in which contract language withholds power to award interest, the conclusion that arbitrators have that authority is well established. A professed "conservative" in the field of arbitration remedies observes:

So far as *power* is concerned, it seems to me that the arbitrator should have the same powers as an equity court in fixing remedies. We are definitely committed to the notion, in discharge cases, that an arbitrator should have the right to order reinstatement with or without back pay. Apart from this, the arbitrator ought to be empowered to direct whatever is necessary, in his judgment, to right the situation.¹⁵

The power to award interest under contracts which command the arbitrator merely to "compensate the employee," "decide the grievance," or "deal with the matter" seems clearly within the broad grant of *Enterprise*. More difficult is the discretionary or policy aspect of the problem:¹⁶ *should* a labor arbitrator grant interest on monetary awards?

III. REASONS FOR DENYING INTEREST

Awards which deal with the interest question usually do not demonstrate the flexibility which the Supreme Court attributes to labor arbitrators.

Prior to 1962, a request for interest was rare. In *Isis Plumbing Co.*,¹⁷ however, the National Labor Relations Board reversed a long-standing policy, and began granting interest in cases in notably receptive to new NLRB theories, have enforced the interest decisions without exception.¹⁸

¹⁵ Stein, *Remedies in Labor Arbitration*, in *Challenges to Arbitration* 39, 45-46 (1960).

¹⁶ The power-policy dichotomy is the usual framework for discussion of the scope of arbitral remedies. Wolff, *The Power of the Arbitrator to Make Monetary Awards*, in *Labor Arbitration—Perspectives and Problems* 176, 191 (1964); Fleming, *supra* note 4, at 1201.

¹⁷ 133 NLRB 716 (1962), *rev. on other grounds*, NLRB v. *Isis Plumbing Co.*, 322 F.2d 913 (9th Cir. 1963).

¹⁸ *Reserve Supply Co. v. NLRB*, 317 F.2d 785 (2d Cir. 1963); *International Bro. of Operative Potters v. NLRB*, 320 F.2d 757 (D.C. Cir. 1963); *NLRB v. Globe Products Corp.*, 322 F.2d 694 (5th Cir. 1963); *Marshfield Steel Co. v. NLRB*, 324 F.2d 333 (8th Cir. 1964); *NLRB v. Central Ill. Pub. Serv. Co.*, 324 F.2d 916 (7th Cir. 1963); *Philip Carey Mfg. Co. v. NLRB*, 331 F.2d 720 (6th Cir. 1964). *Cf.* enforcement statistics generally in 29 NLRB Ann. Rep. 202 (1965) (during fiscal 1964, only fifty-five percent of NLRB orders were affirmed in full).

The *Isis* development stimulated interest demands in arbitration situations.¹⁹ An employee who was discharged for one kind of forbidden discrimination, the argument runs, is as entitled to interest as one discharged for another. Although there have been occasional recent breaches in the solid front of arbitral opposition, most requests for interest have been rejected with as little analysis since *Isis* as they were before.²⁰

The most common reason given for denying interest is that it is unusual. In his 1956 decision in *Intermountain Operators League*,²¹ arbitrator Sanford H. Kadish opined:

The important point is that it is not customary in arbitrations for the arbitrator to grant interest on claims which he finds owing In view . . . of the almost unanimous practice on the part of arbitrators not to grant interest, and the failure of the parties to authorize the arbitrator to do so here, I would think it highly inappropriate to do so.²²

This unwillingness to plough new ground is characteristic of interest rejections. Typically, the "arbitrator finds no persuasive basis in arbitration practice or precedent to justify the granting of such a request."²³

The most defensible aspect of this rationale is that if interest is totally unknown to the parties, its inclusion in an award cannot "draw its essence" from the contract in the sense of *Enterprise*.²⁴ In interpreting general language, or even altering surface meaning, arbitrators frequently rely on what they believe must have been within the contemplation of the parties during negotiations.²⁵

But if centuries of legal practice were not sufficient to bring the issue to the minds of the negotiators, surely the *Isis* ramifications should have been. It is becoming reasonable to conclude

¹⁹ Fleming, *The Labor Arbitration Process*, in *Labor Arbitration—Perspectives and Problems* 33, 50 (1964) ("And, as one would expect, it was not possible to seal off Board or court actions to avoid spillover into another area. . . . The same thing was true of the National Labor Relations Board's ruling adding 6 percent interest to back pay awards.").

²⁰ There is some difficulty in surveying the cases because the editors of the Bureau of National Affairs reports did not insert a digest reference to interest until after *Isis*. 39 Lab. Arb. (1963).

²¹ 26 Lab. Arb. 149 (Kadish 1956).

²² *Id.* at 154.

²³ Hampton Corp., 39 Lab. Arb. 177, 179 (Davis 1962). See also Diamond Nat'l Corp., 41 Lab. Arb. 1310 (Koven 1963).

²⁴ See Case No. 21, in Stone, *Labor Grievances and Decisions* 67 (1965).

²⁵ *E.g.*, Tri-Cities Newspapers, Inc., 43 Lab. Arb. 570, 572 (Holly 1964).

that if the parties had wished to avoid interest they would so specifically have provided in the contract.²⁶ Arbitrators have, moreover, included other unusual elements of damages in their awards.²⁷

The leading²⁸ *Inter Mountain Operators* decision refers to the failure of the contract or submission agreement expressly to authorize the arbitrator to grant interest. This argument has been rejected by tribunals in many other contexts. In *Billings v. United States*,²⁹ the Supreme Court found a legislative failure to mention interest almost irrelevant to a determination of its award. Many statutory interpretation cases rely on analogy to contract obligations;³⁰ the same reasoning should be available for contract obligations themselves.

As *Enterprise* recognized, and as all arbitration practitioners know well, few remedial aspects expressly are mentioned by the contracting parties. Reference to back wages themselves often is omitted, but the propriety of remedying unjust discharge, by awarding a sum equal to the wage loss, is assumed.³¹

The fact that interest is not common or not specified by the contract should not, standing alone, be reason for its denial. Arbitrators, like the NLRB, have "the right to draw on 'enlightenment gained from experience' in fashioning remedies to undo the effect of violations"³² within their jurisdiction.

On at least one occasion an arbitrator rejected an interest on *de minimis* grounds.³³ Such reasoning cuts both ways. The

²⁶ This is the rule applicable to non-labor arbitration. American Arb. Ass'n, Lawyer's Arb. Letter No. 18, May 15, 1964.

²⁷ E.g., *Northland Greyhound Lines, Inc.*, 23 Lab. Arb. 277 (Levinson 1954) (transportation costs for grievant and her mother); *Braniff Airways, Inc.*, 31 Lab. Arb. 1018 (Schedler 1958) (costs for personal travel during discharge period).

²⁸ Elkouri & Elkouri, *How Arbitration Works* 238 (rev. ed. 1960).

²⁹ 232 U.S. 261, 284-88 (1914). See also *Rodgers v. United States*, 332 U.S. 371 (1947).

³⁰ *United States v. United Drill Co.*, 183 F.2d 998, 999 (D.C. Cir. 1950); *Wilson v. Doehler-Jarvis Div.*, 358 Mich. 510, 100 N.W.2d 226 (1960). Compare *Philadelphia Joint Bd. v. United States*, 106 F. Supp. 534, 535 (E.D. Pa. 1952) ("Discussion of the precise nature of interest on money due after breach of an obligation is unprofitable").

³¹ Cox, *Reflections on Labor Arbitration*, 72 Harv. L. Rev. 1482, 1494 (1959).

³² *Isis Plumbing Co.*, *supra* note 17 at 720. See also *International Bro. of Operative Potters v. NLRB*, *supra* note 18; *Marshfield Steel Co. v. NLRB*, *supra* note 18.

³³ *Diamond Nat'l Corp.*, *supra* note 23 at 1314 (controversies over such small amounts "could lead only to a further and most undesirable disharmony (Continued on next page)

NLRB pointed out in *Isis* that the "relatively minimal burden"³⁴ of the interest militated against any punitive repugnance in the remedy. Interest seldom will be an important factor to an employer, as the usual discharge case involves the withholding of a few hundred dollars for a few months,³⁵ but it may have great importance to an employee and his family who have been without work and without income for those months.³⁶

Some arbitrators have found procedural problems in the timing of the interest demand.³⁷ Others, even well after *Isis*, have denied interest requests without comment.³⁸ Rare, at best, has been an opinion which analyzed the applicability of the *Isis* reasoning in an arbitration context.

IV. REASONS FOR AWARDING INTEREST

Interest has been awarded in occasional arbitration cases since *Isis*, probably generated more by increased urging of the point by unions than persuasiveness of the NLRB development. In general, interest awards are supported by discussion no more extensive than interest denials.

A late 1962 departure from the tradition occurred in *General Electric Co.*³⁹ Arbitrator Elmer R. Hilpert was called upon by the International Union of Electrical Workers to remedy a discharge at the Louisville, Kentucky, plant of the employer. The incident giving rise to the discharge was a fight between two employees which occurred after working hours and off company premises. The arbitrator found that it was a "nasty, ugly affair," but that the employer had discharged the wrong combatant.

The *General Electric* opinion evidences strong arbitral disap-

(Footnote continued from preceding page)

between the parties"). Elements of disharmony seem already present, however, in the usual reinstatement with back pay order.

³⁴ 138 NLRB at 720.

³⁵ There are exceptions. Needham Packing Co., 44 Lab. Arb. 1101 (Davey 1965) (three and one-half years back pay for 183 employees); Tenneco Oil Co., 44 Lab. Arb. 1121 (Merrill 1965) (\$7.92).

³⁶ See *Philip Carey Mfg. Co. v. NLRB*, *supra* note 18; *Wilson v. Doehler-Jarvis Div.*, *supra* note 30, 100 N.W.2d at 229. The opinion in *American Chain Co.*, 40 Lab. Arb. 312 (McDermott 1963), notes as a reason for rejecting interest that back pay already recompenses employees for time they did not actually work. But the duty to mitigate damages is increasingly available as an employer response to back pay claims. Elkouri & Elkouri, *op. cit. supra* note 28, at 239.

³⁷ *Caterpillar Tractor Co.*, 39 Lab. Arb. 910 (Larkin 1962).

³⁸ *American Steamship Co.*, 44 Lab. Arb. 530 (Keefe 1965).

³⁹ 39 Lab. Arb. 897 (Hilpert 1962).

proval of the testimony of the fighter who was not discharged, and of employer representatives who refused to respond to that testimony. Noting that the company witness was caught in inconsistencies of crucial significance, "the Arbitrator fully expected the Company Counsel to drop the Company's charge against" the grievant. The employer did not recede, and, in fact, the arbitrator was "astonished" to read in the employer's brief a contention that it was the grievant, not the other employee, whose testimony was not worthy of belief.

As to remedy, the arbitrator refused to order the discharge of the other employee or to award back pay to the grievant without diminution of other earnings. In response to the interest request, however, the impact of the employer's conduct in the case was inferentially evident.

The Union's request that [the grievant] receive interest on each pay period "installment" of his "back pay" award, computed from the pay day for each such pay period to the date of his reinstatement, stands on solid ground and is granted. Interest at the "legal" rate is awarded on amounts recovered in breach of contract actions, where the amount is "liquidated," or may be "liquidated," as here, by computation.⁴⁰

In another recent decision awarding interest, *All States Trailer Co.*,⁴¹ the Auto Workers requested reinstatement of an Arkansas employee discharged for a garnishment. Arbitrator Robert A. Leflar reviewed the justification for a rule against garnishments and the need for its reasonable application. His summary of reported arbitration cases in the area revealed no other decision which upheld discharge on the basis urged by the employer—a single garnishment for a \$16.96 debt which the employee immediately removed.

There was evidence in *All States* of extensive financial damage to the grievant, "heavily burdened with other expenses due to illness in his family at the same time." Although the arbitrator declined to grant the request of the union relief in connection with other unusual financial losses, his back pay award has been

⁴⁰ 39 Lab. Arb. at 906. On the liquidation issue, see *In re Paramount Publix Corp.*, 85 F.2d 42, 45 (2d Cir. 1936).

⁴¹ 44 Lab. Arb. 104 (Leflar 1965).

called "a completely stated remedy for management's error"⁴² and included interest.

Interest at an annual rate of six percent is to be added to the sum paid, to be calculated from the date that each paycheck would normally have been issued, on the amount thereof minus any amount earned by him during the period covered by the paycheck.⁴³

Neither *General Electric* nor *All States* appears to be the close case more typical of arbitration proceedings. In both, management showed unusual recalcitrance in the face of clear evidence or unanimous arbitration precedent. In both, there were emotional factors which accentuated the "injustice" which the discharges embodied. In both, the union made several unusual remedy requests, the remainder of which were rejected. And, it may be of more than passing significance to note that in both cases the arbitrators were law professors.⁴⁴

Cases awarding interest are not the only indications of increasing flexibility in this remedial aspect. In the 1963 decision in *American Chain Co.*,⁴⁵ for example, arbitrator Thomas J. McDermott reasoned:

The demand for payment of interest on the monies due is one that is only occasionally raised in arbitration cases which involve damages. It is, however, a demand that can only be granted under very special circumstances. As an example, if it can be shown that a Company acted in a very arbitrary fashion in its handling of a case, so that a logical conclusion could be drawn that the Company was deliberately trying to injure the affected employees, an arbitrator might find cause for inclusion of interest as a part of the damage remedy. In the instant case, I find no evidence of a lack of good faith.⁴⁶

This observation seems consistent with the apparent, but unstated, factors underlying the *General Electric* and *All States* awards.⁴⁷

⁴² UAW Arbitration Service News Notes, Vol. I, No. 2, Feb., 1965.

⁴³ 44 Lab. Arb. at 107.

⁴⁴ Of the identifiable arbitrators who have denied interest, most do not possess law degrees. See, generally, Directory of Arbitrators, Lab. Arb. Rep. (1946-66). Perhaps the concept of interest is less of an innovation to an arbitrator schooled in legal tradition.

⁴⁵ American Chain Co., 40 Lab. Arb. 312 (McDermott 1963).

⁴⁶ 40 Lab. Arb. at 315.

⁴⁷ See also Wolff, *supra* note 16. The historic legal interest obligation probably is unrelated either to the culpability of the debtor or the need of the creditor.

V. CONCLUSION

The blend of ordinary legal tradition, *Enterprise*, *Isis*, and continued nonspecificity of collective bargaining language has produced a minority trend toward flexibility on the issue of interest on arbitration awards. Such a trend should be encouraged.

There is much to oppose automatic inclusion of interest in these situations. Even unions, the usual beneficiaries of monetary awards, do not advocate rigidity of this kind any more than rigidity of rejection.⁴⁸ In spite of some similarities, there are factors of law and policy which distinguish labor arbitration from court, NLRB, or other arbitration proceedings. The flexibility described by *Enterprise* is important in a continuing relationship in which the *process* of arbitration has value exceeding, at times, the quantum of relief.⁴⁹

But, equally, the automatic rejection of interest which dominated earlier arbitration opinions is not responsive to the fundamentals of the process. When factors such as a timely demand and unusual employer recalcitrance or unusual employee hardship are established as the result of a labor contract violation, interest should be added to other monetary damages.

⁴⁸ See Feller, *Discussion on the Power of Arbitrators to Make Monetary Awards*, in *Labor Arbitration—Perspectives and Problems* 193, 198 (1964).

⁴⁹ *United Steelworkers of America v. American Mfg. Co.*, *supra* note 7 at 568.

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