REMEDIES IN ARBITRATION

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Remedies in Arbitration

The ultimate purpose of filing any grievance is to **prove a violation** and obtain a remedy which corrects that violation; or to defend a disciplined employee and obtain an appropriate "make whole" remedy.

The purpose of this handout is to assist you in understanding the principles arbitrators use to formulate remedies-which in turn should assist you in seeking the appropriate remedy for the facts of your case.

Those principles and trends have been firmly established over the years and have appeared in many publications. For this program we have utilized **Remedies In Arbitration** by Hill and Sinicropi as well as "Elkouri and Elkouri's **How Arbitration Works**-which is considered the single most authoritative reference source on the subject of Arbitration.

We have found these sources "pretty much" on target in our combined experience of 40 plus years as National Business Agents presenting the APWU'S case in arbitration.

Yours for a Stronger UNION,

Robert D. Kessler
National Business Agent

In Solidarity,

Carl Casillas
National Business Agent

What Shall Be The Remedy?

It is the function of the arbitrator to provide the answer to this question after a hearing involving the specific facts, circumstances, and arguments, leads to the conclusion that a violation exists.

The remedy formulated depends on a number of factors; including the facts of the case, the contractual provisions involved, the evidence involved, the arguments made, and the remedy sought. In order to address the appropriate remedy to seek the steward should have a general understanding of the arbitration process and how it is enforced:

*Arbitration is the oldest known method of settling disputes

*The development of Labor-Management Arbitration generally has followed the development of Collective Bargaining.

*The National Labor Relations Act of 1935 declared that it was the purpose and policy of the Act to "encourage practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions."

*In the early stages of labor arbitration courts regularly ruled that agreements to arbitrate disputes would not be enforce and either party could arbitrarily revoke them.

*The War Labor Dispute Act in 1943 gave statutory authority for the War Labor Board to settle disputes over the terms of collective bargaining agreements. It was the Board's policy to require the use of clauses providing for arbitration of future disputes over the interpretation or application of the agreement. This policy laid the foundation for today's routine practice of providing arbitration as the final step of the grievance procedure.

*The Labor-Management Relations Act of 1947 included provisions which would eventually resolve the problems of enforcing arbitration provisions contained in collective bargaining agreements.

*On January 20, 1960 the Supreme Court handed down three decisions commonly referred to as the Steelworker Trilogy. These decisions declared that agreements to arbitrate were enforceable in federal courts under Section 301 of the 1947 LMRA and that arbitration awards rendered as a result were also enforceable.

The "Trilogy" decisions uniformly recognize that all facets of arbitral power, including the arbitrator's general remedial power, must either explicitly or implicitly flow from and be established by the collective bargaining agreement. The following are selected &/or highlighted passages from "Remedies In Arbitration" which address the arbitrator's power to formulate remedies:

* "More important, from the standpoint of understanding the remedial power of an arbitrator, an arbitral decision, unlike those of courts, is, in theory, subject to only the most limited form of review. **The decision of the arbitrator, acting within the power granted him by the agreement, is final, and not reviewable on the merits by any court, unless the party attacking the decision can demonstrate fraud, partiality, or misconduct on the part of the arbitrator.** So great is the presumption in favor of the finality and validity of the award that the Court has held that **the finality provision has sufficient force to surmount even instances of mistake."**

* Unlike the executory agreements to arbitrate that were at issue in American Manufacturing and Warrior & Gulf, Enterprise Wheel directly addressed the question of a court's proper role in reviewing an arbitrator's interpretation of a collective bargaining agreement: ***"His award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."*** At the same time, however, the Court realized that labor arbitration must remain flexible in order to function effectively in an industrial relations setting. Accordingly, **the Court concluded that the arbitrator must have wide latitude in formulating remedies:**

> ***When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This 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. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.***

* The same theme of wide remedial power was again stressed by the Court in John Wiley & Sons, Inc. v. Livingston. The "collective bargaining agreement is not an ordinary contract...Central to the peculiar status and function of a collective

bargaining agreement is the fact...that it is not in any real sense the simple product of a consensual relationship. Therefore **the Court directed arbitrators to operate "within the flexible procedures of arbitration" to fashion solutions "which would avoid disturbing labor relations."**

* The basic philosophy of Enterprise Wheel was to elevate the arbitrator to a special status by emphasizing that **there would be no interference with his award simply because a reviewing court differed with him in his interpretation of the contract.** At the same time, as noted by the Third Circuit, the Supreme Court held a "checkerin" on the arbitrator, **confining his zone of action to the "four corners of the collective bargaining agreement."** One problem that has become apparent from the cases that have followed Enterprise is that of formulation a consistent and workable standard to be used by the courts in exercising its function of review.

* The Enterprise Court does note that **in formulating remedies the arbitrator "may look for guidance from many sources."** Moreover, in Warrior & Gulf, the Court further explains that "the labor arbitrator's 'source of law' **is not confined to the express provisions of the contract, since the industrial common law-the practices of the industry and the shop-is equally a part of the collective bargaining agreement although not expressed in it."** The arbitrator, in his task of interpreting the parties' agreement, is entitled to take into account "such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, (and) his judgment whether tensions will be heightened or diminished." Yet, again, **the decision must "draw its essence" from the collective bargaining agreement.**

Arbitrator's Power to Specify Remedies When the Contract is Silent

* While a contract may contain provisions detailing what remedies should be applied to compensate for a particular violation, collective bargaining agreements commonly omit such provisions. With few exceptions, arbitrators and courts nevertheless agree that an arbitral appointment carries with it the inherent power to specify an appropriate remedy.

* Arbitrator William Eaton has observed:

> ***It is often the case in industrial disputes...that the fashioning of a remedy appropriate to a right is required. The necessity for this is founded in the common law maxim that where there is a right, there is a remedy. That maxim, in turn, is derived from the simple realization that where a right is purportedly granted, but where no remedy is awarded when that right is violated, the right itself is meaningless.***

* Arbitrator Emery declared that "the power merely to recite that the Agreement has been violated, without the power to redress the injury, would be futility in the extreme...jurisdiction means the power to grant relief."

* Likewise, Arbitrator Robben Fleming has observed that in most instances an arbitrator's remedy power is implied, rather than specific, since most agreements do not specifically bestow such power upon the arbitrator. Arbitrators have quite uniformly held, writes Fleming, that the parties were not engaging in an academic exercise in seeking a ruling as to whether the contract has been violated, and that the power to decide the contract violation must therefore carry with it the power to award a remedy.

* In **APWU** National Level arbitration case NC-S-5426 Arbitrator Gamser states:

> ***"It is necessary at the outset to dispose of one threshold contention raised by the Employer. It was contended that the agreement provides in Article XV that the arbitrator has no authority to add to, subtract from, or modify the terms of the agreement. So it does. That restriction upon the jurisdiction of the arbitrator must be scrupulously observed.*** *However, to provide for an appropriate remedy for breaches of the terms of an agreement, even where no specific provision defining the nature of such remedy is to be found in the agreement, certainly is found within the inherent powers of the arbitrator. No lengthy citations or discussion of the nature of the dispute resolution process which these parties have*

mutually agreed to is necessary to support such a conclusion.

* Summary-Unless there is clearly restrictive language withdrawing the subject matter or a particular remedy from the jurisdiction of the arbitrator, courts will generally hold that the arbitrator possesses the power to make the award and fashion a remedy even though the agreement is silent on the issue of remedial authority. This is not to say that any remedy the arbitrator formulates will pass muster by the courts. **A remedy ordered by an arbitrator must, pursuant to the Trilogy standard, "draw its essence from the agreement."**

"Cease & Desist" Orders: Rights Without Remedies?

* While it is clear that an arbitrator can appropriately issue an order directing the employer to stop violating the agreement, arbitrators have questioned whether these "remedies" are more shadow than substance as far as arbitration is concerned. In this regard, Arbitrator Louis Crane, addressing the National Academy of Arbitrators, has observed that when a court issues an injunction requiring someone to cease and desist from engaging in a course of conduct, it has the power to issue a contempt citation, either civil or criminal, in order to compel compliance. An arbitrator's remedy power after someone disobeys his order to cease and desist from violating the agreement, in contrast to an equity court, is the same as it was when he issue the cease-and-desist order in the first place. Crane further points out that before an arbitrator can issue a cease-and-desist order, he must first find that the conduct in question violates the agreement. Expanding on this argument, Arbitrator Crane states:

> ***If he lacks the power to do anything about the violation, any relief must of necessity be declaratory. Issuing a cease-and-desist order in these circumstances makes him no less a paper tiger if the offender insists upon following the same course of conduct after the decision is issued. On the other hand, if the arbitrator has the power to redress the violations he finds, is it not a better course to do so then and there instead of issuing a cease-and-desist order?***

Crane expands his thesis to include the situation where an arbitrator, while not immediately granting affirmative relief, may nevertheless want to forewarn the parties that any repetitive violation of the agreement will result in an affirmative remedy:

> ***In a permanent umpire system, the arbitrator can withhold affirmative relief, explain why he is doing so, and tell the parties they may expect different treatment in the future if the situation occurs again. A cease-and-desist order is unnecessary. In an ad hoc situation, such a warning from an arbitrator could very well resolve any question about whether he would be the mutual choice of the parties if the same thing happens again. Besides, he has no assurance that the arbitrator the parties may subsequently choose would arrive at the same conclusion.***
> *Consequently, a cease-and-desist order would be no more effective than the other relief the first arbitrator could have granted.*

* Stuart Bernstein has likewise argued that cease-and-desist orders are generally not useful as a remedy:

> ***The problem with cease-and-desist orders is that they are something like gratuitous advice in the award. They both tend to have impact on future conduct where there may be serious and honest disagreement on whether the future conduct, when it occurs, is really within the framework of the original condition which gave rise to the award.***

* If the parties specifically request a cease-and-desist order or, alternatively, a declaratory judgment that the agreement has been violated, the better weight of authority is to incorporate such a "remedy" into the award if the facts so warrant. It must be recognized that not all violations of a collective bargaining agreement can, or even should, be remedied with a monetary award. In numerous situations, the only viable "remedy" is an order directing the breaching party to honor the agreement. Arbitration awards, similar to orders of administrative agencies, are not self-enforcing, but this factor should not preclude an order directing a union or an employer to cease violating the contract. **Once such an award is issued, if the breaching party continues to ignore the order, the award may be enforced in a subsequent court proceeding.**

Granting a Remedy Not Requested

* While it is generally understood that the arbitration of a substantive issue empowers an arbitrator to issue an appropriate remedy, it is not certain that an arbitrator will order a remedy that has not been requested either in the lower steps of the grievance procedure or at the hearing. This is especially the case where a particular remedy can not be implied from the nature of the grievance..... Thus it should be emphasized that even after the parties have empowered the arbitrator with jurisdiction to decide the substantive issue, they should specifically outline the requested relief, either in the grievance itself or at the hearing, in order to ensure that an appropriate remedy will issue. Failure to do so may result in an award with inappropriate relief, or no relief, being granted.

The **full disclosure** provisions of Article 15. Section 2, Step 2 (d) state in part:

"At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, **and remedy sought**.....

IF YOU DON'T ASK FOR IT- DON'T EXPECT TO GET IT!!

Of course if you do ask for it you still might not get it-and if you ask for the wrong thing it may even be worse.

% INTEREST %

* **In general, it has not been the practice of arbitrators to award interest as a part of the traditional "make whole" package, primarily because (1) the parties rarely request it in the submission, and (2) it is not considered customary in the industrial relations forum.** The absence of awarding interest in arbitration can, in part, be attributed to the one-time and now-abandoned practice of the NLRB of not awarding interest on back-pay awards. Since Board and court actions frequently spill over into the arbitration area, attention is called to the reasoning of the Board when, ***in* 1962, it changed its practice of not awarding interest:**

> ***"Back Pay" granted to an employee under the Act is considered as wages lost by the employee as the result of the respondent's wrong. It is not a fine or penalty imposed on the respondent by the Board. "It is an indebtedness arising out of an obligation imposed by statute-an incident fixed by law to the employer-employee relationship. A liability based on quasi-contract....."***
>
> ***Accordingly, under accepted legal and equitable principles, interest should be added to back pay awards made to employees who have been discriminatorily separated from their employment.***

The above represents the "flexibility" of the arbitration process to adapt to trend changes. The regulations on back pay in Postal Service cases is governed by the provisions of Section 436 of the ELM. Section 436.6 covers interest.

436.61 **Purpose**
This section establishes procedures for paying interest when the Postal Service is obligated by law or **national labor agreement** to pay it. This section is not intended to create any obligation to pay interest that the Postal Service is not otherwise obligated to pay

436.62 **General**
Interest is paid on back pay only when it is **expressly awarded in a settlement agreement or decision.**

Our labor agreement requires **automatic** interest pursuant to the Memo of Understanding currently found on page 313 of the National Agreement:

> **Re: Interest on Back Pay**
> **Where an arbitration award** specifies that an employee is entitled to back pay in a case involving disciplinary suspension or removal, the Employer shall pay interest on such back pay at the Federal Judgment Rate. This shall apply to cases heard in arbitration after the effective date of the 1990 Agreement.

You therefore **do not** have to request interest in your corrective action remedy request related to disciplinary action cases.

HOWEVER, PLEASE NOTE above emphasis and the provisions of 436.62. When entering a settlement agreement short of arbitration-interest will not be awarded unless specifically negotiated as a condition of the settlement.

Interest on monetary issues other than back-pay for wrongful disciplinary actions is another matter.

* In general, the awarding of interest in arbitration has been the exception rather than the rule. When it has occurred it has resulted because it has been requested or because there has been such dilatory action by the employer that the arbitrator has concluded that some penalty in the form of interest was due.

In **APWU** Case # C7V-4L-C 30528 Arbitrator Fletcher states:

> ***"APWU has asked for interest on the monies awarded Mr. Lee. In the circumstances of this case interest would be an inappropriate remedy. In arbitration interest is usually only awarded in those circumstances where-the Agreement specifically provides for interest or when egregious conduct occurred which would warrant imposition of a penalty as a part of a damages remedy. Neither condition is found to be present in this record."***

PUNITIVE REMEDIES

* The generally accepted rule in labor arbitration is that an award of "damages" should be limited to the amount which is necessary to make the injured employee whole. Thus, with few exceptions, arbitrators have ruled that an award of punitive damages, or other penalty-type relief, is inappropriate in the arbitral forum.

* Arbitrator Harry Dworkin has declared.....

> ***Where the contracting parties have solemnly concluded a prior agreement through the process of negotiation, it must necessarily follow that a breach of its terms will require such relief as will reasonably approximate restitution to the injured party. The guiding principle in such cases is that the person deprived of a contract benefit should be made whole for his loss. Such persons are therefore entitled to compensatory "damages" to the extent required, no more, and no less. An award in such form is designed to make the employee whole to the extent practicable, it is not intended as a penalty, or as a deterrent to discourage future violations. The concept of a punitive award is inconsistent with the underlying philosophy of the arbitration process.***

* Arbitrator M.S. Ryder has stated.....

> ***Remedies that are punitive in monetary or exemplary nature should be avoided, on the ground that parties bargaining collectively in a more or less perpetual relationship should not seek that one or the other partner be punished for a mistake. To so seek and to obtain punishment is putting a mortgage on the future happiness of the joint relationship. The trauma and embarrassment of the exposed error should be enough. Engaging in a mistake and acting accordingly should not be in a setting of perilous consequences.***

* In another decision, the Court of Appeals for the Fourth Circuit held that an arbitrator **exceeded his authority** in ordering a clothes manufacturer, who had violated the collective bargaining agreement by failing to obtain the union's consent before subcontracting, to pay the union $80,000 for distribution among a group of employees who had been laid off following a shutdown of the plant. The arbitrator determined that the union had suffered a payroll loss of $80,000 as a result of the improper subcontracting. In vacating the award, the court reasoned:

> *The award of damages in the present case does not draw its essence from the bargaining Agreement, for the Agreement's essence does not contemplate punitive, but only compensatory, awards. Though not*

termed punitive, the award here given can only be such, for there is nothing in the record showing it validly compensatory, and it is manifestly not nominal. In the absence of any provision for punitive awards, and of any substantiating proof of willful or wanton conduct, an arbitrator may not make an award of punitive damages for breach of a collective bargaining agreement.

*** What Is a "Punitive" Remedy?**

While the cases indicate that arbitrators universally refuse to award any remedy that appears to be "punitive" in nature, arbitrators, as well as the courts, are not in agreement as to what constitutes a punitive award. For example, in one case the union requested that the company be directed to pay to other members of the bargaining unit an incentive bonus that the employer improperly paid to one employee. In denying the grievance, the arbitrator stated:

The remedy sought is in the nature of a penalty. It does not seek to make the other employees whole for what they have lost. As a general rule, and in the absence of clear language granting that authority, an arbitrator does not have the power to impose a penalty as distinguished from damages for a loss directly sustained.

* Summary-One problem in this area is the tendency of both arbitrators and courts to characterize remedies as either "punitive" or "compensatory" as a bootstrap to reaching a desired result. Thus, if an arbitrator or a reviewing court finds that a particular remedy is inappropriate, it may be labeled as "punitive" and not fit for arbitral consumption. A **better focus is to consider all theories of liability as they relate to the overall function of the arbitrator as the parties' contract reader. As noted by Arbitrator David Feller, what the grievance arbitrator does is to interpret and apply the agreement and draw an award from the essence of that agreement. His function is to "explicate what is implicit in a collective bargaining agreement." So long as the award draws its essence from the agreement, it is, in theory, immune from attack. Absent a specific directive or mandate in the agreement with respect to remedies, the question, as stated by one court, should not be whether an award is "punitive" but rather whether it was reasonable in light of the findings of the arbitrator.** To use the words of still another court:

"Having chosen arbitration as their forum, the parties must recognize that an award may differ from that expected in a court of law without being subject to attack for that reason alone."

Cases Where Punitive Remedies Have Been Imposed

Despite the strong arbitral sentiment against awarding punitive remedies, some arbitrators, with court approval, have held that punitive-type sanctions may be appropriate in labor arbitration. For example, Arbitrator Elmer Hilpert has declared:

> ***Where repetitive violations of a collective bargaining agreement are shown to have occurred and "damages" were only nominal, there is some arbitral authority for imposing a money "penalty," as a deterrent to recurrent violations, on the theory that a mere arbitral "cease and desist" directive...would be ineffectual.***

Where an employer improperly established a new policy relating to personal leaves, one arbitrator held that a punitive remedy was appropriate. Finding that the company knowingly attempted to "rewrite the leave of absence conditions," the arbitrator reasoned as follows:

> ***I agree with the theory and rationale of the "obey and grieve rule," however, I hasten to observe that employers who put themselves in the position of unilaterally establishing extra contractual, unreasonable, or arbitrary "administrative policies" as substitutes for agreed and settled language or practices and avoid or refuse to bargain with the Union on such matters, leave penalties as the only possible and appropriate pressure on their actions. As in this case, unless some penalty is imposed the employer breaks the bargaining and administration rules and suffers not one whit.***

As "exemplary" damages, the arbitrator directed the employer to pay to each of three grievants the amount of wages that each would have given up had their requested leaves been granted.

In an address before the National Academy of Arbitrators, Arbitrator Sidney Wolff observed that **public policy may frown on punitive awards, but it also frowns on certain aspects of improper labor relations.** Wolff points out that a breach of the labor contract can result in costly industrial instability and warfare. Thus, any tool or process that can help to maintain labor peace is in the public interest, and its use should accordingly be encouraged.

While at one time a punitive award, even if authorized in the parties' agreement, would not be enforced, the better view is that the courts will not consider a punitive award per se unenforceable, especially in the situation where willful and repetitive violations are found.

Even though a party is found to have violated the agreement, the arbitrator may be expected to refuse to award any penalty which would in essence be an award of punitive damages, unless, under the circumstances of the case, punitive damages are clearly justified. While noting that some state and federal courts have disagreed as to the power of arbitrators to award punitive damages, Arbitrator Burton B. Turkus added: "Power to award punitive damages is a heady wine, however, which carries with it an equally potent obligation and abiding responsibility to invoke the remedy with great care and extreme caution in the situations where otherwise the ends of justice would be defeated or unconscionably denied." **Some arbitrators have felt justified in awarding punitive damages where the contractual violation was knowing and repeated, or where it was willful and flagrant.**

In APWU case NOV-1M-C 5023, Arbitrator Kelly states:...

> ***"the consensus of arbitral opinion is that the employees or union are entitled to some award, if for no other reason, than to prevent the employer from knowingly violating the agreement with impunity."***

He then cites **Remedies in Arbitration**, p.p. 129-132 as the support for his award.

In APWU # C0C-4A-C13902-Arbitratror Goldstein, in a case which involved a pattern of similar violations for some period of time, states in part:

> ***"When the National Agreement is not being followed in a particular set of circumstances, such as here, a deterrent beyond a cease and desist order has been found by numerous panel arbitrators to be proper and authorized by the National Agreement. I agree with that conclusion, although I would not routinely or in an overbroad way stretch the award for premium pay to other than extremely limited and compelling situations. I am however convinced I have the authority to grant a monetary remedy along the lines demanded by the Union in the current grievance. I rule specifically that this is just the sort of case where a monetary remedy is necessary and required..."***

Compensatory Damages

* In empowering the arbitrator to resolve their dispute, the parties generally are considered to have clothed him with authority to grant adequate monetary relief where he finds that the grievance has merit. In this regard, Arbitrator W. Willard Wirtz has emphasized that arbitrators have authority to award money damages for contract violations even though the contract does not specifically provide such remedy.

* **Monetary damages in arbitration should "normally correspond to specific monetary losses suffered."** Arbitrator Ralph T. Seward has explained:

> ***"The ordinary rule at common law and in the developing law of labor relations is that an award of damages should be limited to the amount necessary to make the injured 'whole'.*** Unless the agreement provides that some other rule should be followed, this rule must apply"

Thus, for example, where an employer violates the agreement by utilizing junior employees, damages will be due only to those employees whose seniority would have entitled them to the work had the employer acted in accordance with the agreement.

* Arbitrator Maurice S. Trotta has **required a showing of injury to justify damages,** and where the existence of any such injury **was too speculative** he refused to award damages. **Similarly, other arbitrators generally require a party to prove his claim for damages, and they will deny monetary relief where the existence of any injury is too speculative.**

* However, damages will not be denied merely because the amount is difficult to determine. When difficulty is encountered, the simplest fair method available for determining the amount will be used.

* Where no other solution is available, the arbitrator "is bound to resort to his own good sense and judgment, and after considering all the pertinent facts and circumstances make a reasonable approximation."

* In some instances monetary damages have been denied where such damages were not expressly requested in the grievance, but in other instances no such express request was required.

In Postal arbitration it is commonplace for arbitrators to remand the issue of a monetary remedy to the parties-while retaining jurisdiction in the event they are unable to reach agreement.

Payment to the Union

The vast majority of arbitral awards for damages are concerned with payment to individuals. In some cases however, the Union has been compensated .When an individual has been unavailable for payment; or where the Union has suffered damages as a result of the Company's actions, exemplary damages have been awarded.

There are a number of such awards involving **APWU** cases:

In case G90C-4G-C 95010403 arbitrator Plant orders payment to the Alexandria APWU, AFL-CIO local for canceling a job posting and assigning the duties to a limited duty employee.

In case G94C-1G-C 96068981 arbitrator Durham made the Union the recipient of back pay for overtime associated with a detail assignment.

In case G90C-1G-C 95066791 arbitrator Eisenmenger awarded payment to the Union for an improper detail.

In case H94C-4H-C 98066681 arbitrator Lurie directed the Service to pay the Union exemplary damages for bad faith conduct.

In cases G98C-4G-C 99172535 and G98C-4G-C 99183202 arbitrator Armendariz compensated the Union in the absence of a bargaining unit employee where the USPS improperly utilized Postmaster Reliefs (PMR's) instead of assigning that work to a bargaining unit employee.

In case G00C-4G-C 99172531 arbitrator King compensated the Union in the absence of a bargaining unit employee where the USPS improperly utilized Postmaster Reliefs (PMR's) instead of assigning that work to a bargaining unit employee.

In case NOV-1M-C 5023 Arbitrator Kelly ordered payment to the Union of $6,210 ***"in compensatory damages for knowingly misassigning work and knowingly failing to comply with a duly executed arbitration."***

In case C0C-4K-C 11215 Arbitrator Kahn ordered the USPS to comply promptly with Arbitrator Benn's award (C7C-4K-C 8906). If the USPS failed to do so within 30 days, they would pay $2,000.00 to the Des Moines, IA Area APWU Local for its failure to comply with its obligations under Article 13.4.A of the Agreement.

Unjust Enrichment

* The principle of unjust enrichment holds that "one shall not unjustly enrich himself at the expense of another." Arbitrator R. H. Marshall has elaborated:

> ***The general principle of unjust enrichment is that one person should not be permitted to enrich himself unjustly at the expense of another, but the party so enriched should be required to make restitution for property or benefits received, where it is just and equitable, and where such action involves no violation or frustration of the law."***

The USPS's often reliance on an ***out of context*** quote by arbitrator Mittenthal in National Level case H7C-NA-C 36,132,28 to support their argument regarding a monetary payment to the Union being "punitive" and/or "unjust enrichment", is **TOTALLY MISPLACED**- as that award actually supports the Union in this matter!

In that case **the Union** was seeking a monetary remedy under the doctrine of "unjust enrichment". The Postal Service **argued against** that concept as having "little relevance to Postal Labor relations." Arbitrator Mittenthal **rejected** the concept of unjust enrichment **argued by the Union,** but never-the-less provided a monetary remedy by declaring... **"The unjust enrichment theory is more suited to a commercial transaction than to the labor-management relationship."** He then invoked the "damages" principle previously covered:

> ***"It is generally accepted in labor arbitration that a damage award, arising from a violation of the collective bargaining agreement, should be limited to the amount necessary to make the injured employees whole. Those deprived of a contractual benefit are made whole for their loss. They receive compensatory damages to the extent required, no more and no less."***

In spite of the above, the USPS **regularly** argues **"unjust enrichment"** in monetary grievances-especially the **casual** issues.

"Lack of Harm"

A regular defense used by the USPS to avoid monetary compensation for a clear violation of the Agreement is the "lack of harm" argument which flows from the general consensus of arbitral opinion that monetary damages should be limited to the amount necessary to make a **specific** employee or employees whole. Where the Union is unable to identify specific employees that were injured by the violation they raise the "no harm-no foul" argument which is appealing to some arbitrators-but not all.

> * The argument in favor of an award of damages despite the Union's failure to show monetary loss to any employee are three-fold. Initially, it can be argued that unless management is subject to monetary penalty for a knowing breach of the agreement relating to assignment of work, it will be free to ignore those provisions whenever all employees in the disfavored classification are working a full forty hour week. Conversely, a damage award for a knowing breach of the contract will encourage a good faith effort to abide by the contract.
>
> * The vice of an unremedied misassignment of work, at the very least a knowing misassignment, is that it reflects adversely on the Union and injures the Union's standing among the employees. "What good is the Union if the Company can ignore the Union contract whenever it wishes and the Union can't do anything about it?" A typical employee might ask. Arguably the Union is entitled to protection against this type of injury to its reputation, as well as to the monetary injury incurred by it in policing the agreement through the grievance and arbitration procedure, even if it cannot show a loss of wages to any individual employee.
>
> * Finally, the argument can be made (wholly without regard to whether the misassignment of work was knowing or not) that where work is wrongfully assigned to employees in one classification, an award of damages measured by the amount of wages that might have been earned had the work been properly assigned is justified on the theory that even though the union cannot show a loss of earnings by any employee in the disfavored classification, such a loss might well have occurred....

The difference of opinion regarding the appropriate remedy for clear violations where the Union cannot **specifically** identify those that were harmed is **profoundly** brought to light in the cases involving **"Casuals hired in lieu of..."**. As a result we have arbitrators regularly ruling that Article 7.1.B.1 was violated-but the remedies provided are "all over the map."Some arbitrators decline to order compensation on the basis that to do so would be granting an undeserved "windfall". The remedies range from cease and desist with no monetary remedy, to monetary compensation of up to $12 million!

Arbitral Authority- Discipline

Disciplinary issues are also "contractual" issues in that management's right to issue discipline pursuant to Article 3 is "subject to the provisions of this agreement...". In Article 16 discipline is **prohibited**-except for "just cause". Therefore the **issue** in all disciplinary grievances is whether the Postal Service has violated Article 16 in the particular disciplinary action taken, as if so, what should be the remedy?

In the early history of arbitration involving the arbitrator's authority to modify a disciplinary action a body of opinion developed which suggested that an arbitrator had no authority to substitute his judgment for that of management's. That later evolved to a suggestion that he should not substitute his judgement -with certain specific exceptions:

* Where discrimination, unfairness, or capricious and arbitrary action are proved- in other words, when there has been abuse of discretion.

* Where he finds that the penalty is excessive, unreasonable, or that management abused it's discretion.

* Where it was found to be improper or too severe, under all the circumstances of the situation.

In the Postal Service today, their advocates occasionally raise that "substitute judgement" argument, but for the most part it has become, without challenge to their authority to do so, commonplace for arbitrator to modify discipline based on the facts and circumstances of the case.

The specific language of Article 16 declares that **even where discipline is warranted** it must be corrective in nature, rather than punitive. This language **requires** an arbitrator to consider all the facts and circumstances in order to determine whether or not a disciplinary action is corrective rather than punitive, and to modify the action taken where warranted. The question of whether there is "just cause" for **any** discipline period, requires the same review of the facts.

* This has evolved over the years based on arbitral opinion-supported by the Courts:

> Where an employer cited awards alleging that arbitrators should not interfere with discipline assessed by management if the collective bargaining agreement permits management to exercise judgment, Arbitrator Charles Spaulding responded as follows:

> ***Three answers to this line of argument seem appropriate. The first is that arbitrators very frequently do step in and upset the decisions of management. The second is that, if arbitrators could not do so, arbitration would be of little import, since the judgment of management would in so many cases constitute the final verdict. Finally, the more careful statement of the principle would probably run to the effect that where the contract uses such terms as discharge for "cause" or for "good cause" or for "justifiable cause" an arbitrator will not lightly upset a decision reached by competent careful management which acts in the full light of all the facts, and without any evidence of bias, haste, or lack of emotional balance. Even under these conditions, if the decision is such as to shock the sense of justice of ordinary reasonable men, we suspect that arbitrators have a duty to interfere.***

One federal court has endorsed this principle, stating that the **just cause standard is not satisfied unless the penalty bears a reasonable relation to the offense:**

> ***A decision of the company to discharge an employee for misconduct, even if the employee is guilty, may or may not be for just cause. If the offense and the circumstances accompanying it are sufficient to warrant such a penalty, just cause would exist, but it is also true that in many cases such a penalty may be excessive and unwarranted.***

In this same regard, the Eighth Circuit has recently stated that the "just cause" standard of discipline may imply a "procedural" as well as a "substantive" element, and that it was permissible for an arbitrator to find that an employer did not have just cause to discharge an employee where the employer did not give the employee an adequate opportunity to present his side of the story.

The remedy you request, **depending on the nature of the discipline** should include:

Rescind and expunge (Nature of discipline, e.g. 7 day suspension, removal, etc.) with back-pay and all other contractual benefits to which the grievant may be entitled as a means of being "made whole".

Remedies for Procedural Violations

* Arbitrators Robben Fleming has called attention to the problems of procedural irregularities in the administration of the collective bargaining agreement. In the discharge and discipline area, Fleming notes that contracts frequently include provisions that require the employer, prior to imposing disciplinary measures, to provide notice to the union. Other requirements include giving the employee a written statement of the charges and/or **holding a pre-disciplinary hearing** at which the employee and the union representative are given the option of attending. When the employer has not observed contractually mandated procedural requirements, or is found to have otherwise engaged in procedural irregularities inconsistent with a "just cause" standard, arbitrators are faced with the problem of formulating a remedy.

Fleming notes that when there has been a procedural violation in a discharge or discipline case, there are three possible positions that arbitrators may adopt: (1) that unless there is strict compliance with the procedural requirements, the entire action at issue will be nullified; (2) that the requirements are of significance only where the employee can demonstrate that he has been prejudiced by failure to comply therewith; or (3) that the requirements are important and that any failure to comply will be penalized, but that the action taken is not necessarily rendered null and void. Depending upon the particular procedural violation, arbitrators have utilized various remedies.

* The most commonly cited violation of "due process" standards revolves around the investigation of the incident giving rise to the penalty assessed. Where management has failed to make a complete investigation, arbitrators have invalidated discharges and ordered reinstatement of the aggrieved employee. This principle has been expressed by Arbitrator Michael Beck as follows:

> ***An essential element of just cause is a requirement that the Employer, before administering discipline to an employee, particularly where the supreme penalty of discharge is being imposed, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management. This requirement is really no more than what is known in our legal system as procedural due process. Arbitrators generally require that an employee be afforded such due process. Further, the failure of an employer to make reasonable inquiry or investigation before assessing punishment is a factor, and in some cases the only factor, in an arbitrator's refusal to sustain a discharge.***

* Arbitrator Peter Kelliher has likewise noted that the value of a pre-discharge hearing both to the employer and to the grievant is fully recognized "and the purpose cannot be served by an ex post facto determination as to whether the grievant was 'prejudiced' by the lack of 'due process.' "

* Summary- There is no uniform solution or preferred remedy when a procedural violation is found in a discipline or discharge case. As suggested by Arbitrator Robben Fleming, it may be undesirable to rule that the entire action will be voided unless there is strict compliance with all procedural requirements:

> **The procedural irregularity may not have been prejudicial in any sense of the word, the emphasis upon technicalities would be inconsistent with the informal atmosphere of the arbitration process, and the end result could on many occasions be quite ludicrous. If, for instance, an employee gets drunk on the job and starts smashing valuable machinery with a sledge hammer, it would hardly seem appropriate to nullify his discharge on the sole ground that it was in violation of a contractual requirement that the union be given advance notice.**

The second position, notes Fleming, has considerable merit because it focuses on the facts of a particular case. If, in fact, there is a procedural violation and the affected employee can demonstrate prejudice, it may indeed be appropriate to invalidate the discharge. In this regard, it may not be unreasonable to conclude that some procedural defects are, on their face, prejudicial to an employee's case, as the situation where an employee is denied *all* opportunity to explain his side of the story. Under these facts, an arbitrator may appropriately nullify such action based only on procedural infirmities. Still, as pointed out by Fleming, there may be a problem with this approach in that it tends to place a premium on value judgments as to when an action is actually prejudicial to an individual employee. Furthermore, it tends to minimize the importance of the parties' negotiated procedures.

The third approach recognizes that procedural requirements are important and that any failure to comply will be penalized, but will not thereby render the action void. This approach, argues Fleming, has been taken by most arbitrators. In order to encourage future compliance, one remedy is not to reinstate the grievant, but rather to order the employer to pay the grievant back pay from the date of the violation to the date of the award because it failed to follow the procedural requirements of the contract. According to Fleming, the outrage will most likely assure the company's making sure that the contract is followed in the future. Another remedy may be to assess the costs of the proceedings against the party

who has not complied with the procedural mandates of the agreement. In those cases where prejudice is demonstrated, for example, where the grievant has made incriminating statements in an investigatory interview while being denied a union steward, any evidence derived may properly be excluded by an arbitrator.

In the Postal arena, the most common violation involves the failure to conduct a proper investigation, failure to give proper pre-disciplinary hearing (ELM-921), & failure to obtain a proper review/concurrence (Art. 16.8).

The Postal Service being the "discipline factory" that it is, there are a multitude of cases sustained or modified on these and other procedural and /or due process factors available on APWU's **SEARCH** (www.apwu.org) or through your Business Agent's office.

Conclusion-Purpose of a Remedy

After all is said and done the purpose of a remedy is stated most simply by Arbitrator Mittenthall in **APWU** National Case # H1C-NA-C-97:

> ***"...the purpose of a remedy is to place employees...in the position they would have been in had there been no contractual violation. The remedy serves to restore the status quo ante."***

They are given wide latitude and flexibility to formulate whatever remedy is necessary to correct the violation and make injured employees whole to the extent of their losses even when the contract is silent. Their decisions are not confined to the express provisions of the contract but are not to be punitive-unless it is necessary to prevent willful, intentional, flagrant, and or repetitive violations.

The steward's remedy request must be formulated within these principles, keeping in mind that no remedy will be granted unless a violation is proven, and no violation will be proven without sufficient evidence along with the proper arguments in relation to that evidence and the subject of the grievance, to persuade the arbitrator to grant the remedy sought.

SELECTED CONTRACTUAL ISSUES

* Supervisors Performing Bargaining Unit Work

Art. 1.6.A- The proper remedy is payment to the appropriate bargaining unit employee for the time involved at the applicable rate. (Memo of Understanding- March 13, 1979)

Art. 1.6.B- This provision was interpreted by National level arbitration Garrett in case #AC-NAT-5221 on Feb. 6, 1978. That decision is still in effect today-but it is sufficiently vague that **both parties** cite the award to support their own version of its meaning. The USPS has now made it an interpretive issue and it is in the process of being arbitrated. The dispute involves the "daily, regular and routine" performance of bargaining unit work. **The remedy to seek: Cease and desist; return the work to the craft with compensation for the time involved.**

Art. 1.6.B- Also involves an issue **not** in dispute. The parties agree that "Garrett" prevents bargaining unit work being shifted from craft employees to managers solely for budget purposes. (Pre-arbitration decision: 1-11-95) **The remedy to seek: Cease and desist; return the work to the craft with compensation for the time involved.**

In Regional #C7C-4M-C 20888 Arbitrator BENN provided the following remedy: ***... "the status quo shall be restored and greivant shall be entitled to make whole relief...".***

* ARTICLE 5

Past Practice- Certain working conditions or benefits are not specifically spelled out in the contract, yet attain contractual status through "past practice." **The remedy to seek: restoration of the practice with compensation at the appropriate rate for losses (if they arguably occur.)** Example: a number of regional awards address the unilateral elimination of **work breaks.** Arbitrators have restored breaks and provided compensation at the O.T. rate, straight time rate, and without compensation.

Unilateral Action- The remedy to seek: Cease and desist with compensation for the affected employees, at the appropriate rate of pay. (If a monetary effect is involved)

These cases can affect other contractual provisions or handbook regulations:

Example: In case G94C-1G-C 97054002 Arbitrator August granted 2 hours of Administrative leave to all employees that worked on Dec. 24, 1996. The basis for this award was the Arkansas District Manager's decision to unilaterally allow eleven bargaining unit employees working in Finance to go home early in the "spirit" of the holidays.

* ARTICLE 7 ISSUES

7.1.B.1- Hiring casuals in lieu of career employees. **The remedy to seek: Cease and desist. Make the bargaining unit whole by compensating the (craft) bargaining unit for all hours worked by casuals at the appropriate O.T. rate (s) on an ongoing basis until settled.**

7.1.B.2- "every effort" to provide PTF's work before casuals **during the course of a service week.** The remedy to seek: Compensate the grievant(s) for the hours they were available, but not scheduled to work, up to 40 for the week. These grievances are easily documented and settled prior to arbitration however, there are a number of awards on the issue.

7.1.C.2- : "every effort" to provide PTF's work before T.E.'s **during the course of a pay-period.**
The remedy to seek: Compensate the grievant(s) for the hours they were available to work at the straight time but were not scheduled or allowed to work.

7.2- Crossing Crafts-

The remedy to seek: Compensation to the appropriate member of the losing craft at the appropriate rate of pay for the number of hours involved.

A number of regional awards are available on this issue.

Specific Reference:

In S4C-3F-C 36981 Arbitrator Marlatt awards 3,082.05 hours of O.T; citing Arbitrator Grabb who had awarded 1500 hours after stating:

> ***"The arbitrator does not wish to have his award turn into a gross fortuitous windfall for clerks who worked full time and overtime at a negotiated wage, and yet the management at the Waukesha Post Office must be made to realize that it carried on a blatant program of violations of the Agreement for an extended period."***

7.3 Maximization: **The remedy to seek: Conversion of the senior PTF(s) retroactively and make them whole for any loss of hours or benefits, including out of schedule pay, which resulted from not being converted in a timely manner.**

Dozens of regional awards are available on this issue.

Specific References: S4C-3F-C 53812- Arbitrator Bennett.; "Maxi-memo" p.p.283-284.

The remedy to seek: Convert the senior PTF(s) to full-time retroactively and make them whole for any loss of hours or benefits which resulted from not being converted in a timely manner.

NOTE: The requirement to convert to full-time flexible states per the Maxi-memo is not subject to Article 12 withholding. Contact your business agent if they refuse to convert because of "withholding".

* OVERTIME ISSUES

8.5C- Bypass for O.T. given to non-OTDL employee

Remedy: Compensation for the number of hours involved at the appropriate O.T. rate. (Jan 13, 1975 pre-arb)

8.5C- Bypass for O.T. given to another OTDL employee

Remedy: Similar make-up opportunity within 90 days
(Jan 13, 1975 pre-arb)

Failure to provide make-up within 90 days.

Remedy: compensation for the number of hours involved at the Appropriate rate. (Jan 13, 1975 pre-arb)

8.5D- Non-OTDL employee **Forced** to work O.T. when OTDL employee was available and not used.

Remedy: An additional 50% for being required to work at a time when they should not have been required to do so.
Reference: An arbitrator's inherent power to provide an appropriate remedy when the contract is silent: (National Level Arbitration-NC-S-5426-Gamser) ;MOU at page 285; and Case C7C-4K-C 33984-Arbitrator Fletcher.

8.5F-Non-OTDL employee **Forced** to work beyond 8.5F limits while others who were available to work were not utilized on overtime.

Remedy: An additional 50% for being required to work at a time when they should not have been required to do so.
Reference: An arbitrator's inherent power to provide an appropriate remedy when the contract is silent:(National Level Arbitration-NC-S-5426-Gamser); MOU at page 285; and Case C7C-4K-C 33984-Arbitrator Fletcher.

8.5G-Non-OTDL employee Forced to work overtime before the OTDL Employees are "maximized".

Remedy: An additional 50% for being required to work at a time when they should not have been required to do so.
Reference: An arbitrator's inherent power to provide an appropriate remedy. (National Level Arbitration-NC-S-5426-Gamser); MOU at page 285; and Case C7C-4K-C 33984-Fletcher.

8.5.G.2- Employee working beyond 12/60 hour limits.

Remedy: The only remedy available for this violation is penalty pay:

References: National Level H4N-NA-21-Arbitrator Mittenthal
Memo of Understanding dated 10-19-88
National Level A90N-4A-C 94042668-Arbitrator Snow

Arbitrator Snow's award appears to preclude any further challenges on this issue----even under the "continuing violation" (or willful, flagrant, etc.) principle. Referencing the above cited MEMO he states:

> "It is reasonable to conclude that the Union gave up its right to arbitrate for harsher penalties in exchange for a consistent penalty and a reduced need to arbitrate for it. **If a problem with excessive employer violations is emerging, it is an issue about which there is a need to negotiate."(Emphasis added)**

Further references: Regional case J94C-4J-C 98023333 dated 4-2-03 in which Arbitrator Klein defers to "Snow" and cites her lack of authority to fashion a remedy other than what the parties have agreed upon. Klein had previously awarded an additional 50% beyond the 50% provided in the 10/19'88 Memo in regional arbitration on 5'24/96 before the Snow award was issued on Nov. 30. 1998.

* DENIED ANNUAL LEAVE

Adhering to the status quo remedy principle **automatically** creates a situation in which a violation involving the denial of annual cannot possibly be remedied once the date of the requested leave passes.

Remedy: Compliance with the contractual provision involved, approval of the leave, and further that if not settled before the time involved, the grievant be compensated an additional 50% premium for the number of hours involved. Regional awards have granted this remedy.
Specific references:
S7C-3B-C 32276-Arbitrator Sherman
G90C-4G-C 92037550-Arbitrator Durham (brief available)
I94C-1I-C 96082683-Arbitrator Stallworth

* REQUESTS FOR MEDICAL DOCUMENTATION

Elm 513-Improper "blanket" requests"

Remedy: Reimbursement for all costs involved in securing the documentation –to include cost of the doctor visit including any tests ordered, time traveling and waiting for treatment, and mileage.

Reference: Numerous step 4 decisions prohibit "blanket requests"

ELM 513-"for protection of interests of the Postal Service"

Remedy: Assuming a violation exists, is the same as above.

* HOLIDAY SCHEDULING ISSUES

11.6A-Failure to post holiday schedule in accordance with the Agreement.

Remedy: 50% additional pay.

(Elm-434, Holiday Scheduling Premium)

11.6B-Violations of the "pecking order" to avoid penalty overtime.

The remedy is to compensate those improperly forced to work an Additional 50% premium.

The Remedy: For those who should have worked instead is compensation at the rate of pay the employee would have earned had he/she worked on that holiday.

(Memo of Understanding 10/19/88)

11.6B-Full time volunteer not allowed to work for reasons other than to avoid the "pecking order" or penalty overtime.

Remedy: Compensation for 8 hours at the appropriate rate of pay.

11.6B-failure to schedule ptf's to maximum extent possible

Remedy: To compensate the appropriate number of forced full-time Regulars an additional 50% premium for being required to work.

A number of regional awards support this request.

Note: A separate grievance should be filed for the ptf's who should have been

scheduled to work.

Remedy: Would be compensation for the hours the PTF's should have worked but did not.

A number of regional awards support this request.

Specific references: I94C-1I-C 97033648-Arbitrator Larney
I98C-1I-C 99287721-Arbitrator Kessler
Memo of Understanding-10/18/88

11.6B-Arbitrary "overstaffing" to "play it safe".

Remedy: To compensate the <u>forced</u> employees an additional 50%.

GENERAL INAPPROPRIATE REMEDIES

While not totally impossible, obtaining remedies of the following type are usually unsuccessful in arbitration and at other steps of the grievance procedure. It is recommended, except in the most unusual circumstances, that these or similar remedies not be requested as most arbitrators will not grant what they believe to be inappropriate and often will not permit modification of a requested remedy.

- Fire or discipline a supervisor or reassignment of a supervisor.
- Written or verbal apologies.
- Punitive damages such as paying the Union x amount of money for violations.
- Punitive damages to all bargaining unit employees for the violation itself.
- Require management to pay full cost of the arbitration.
- Remedies that are outside the scope of, or contrary to the contract &/or Handbooks.

- When in doubt about the proper remedy, remember to ask other stewards, local officers, or call YOUR National Business Agents. Part of our job is to assist you with your questions.