Toothless Wonders--

SOME ARBITRATORS SET DISTURBING PATTERN BY SUSTAINING AWARDS WITHOUT MONETARY REMEDIES

It is understood in arbitration that the parties have given authority to the arbitrator to grant adequate monetary relief if a grievance is found to be meritorious. The arbitrator has the power to award monetary damages for contract violations even though the contract may not specifically provide such remedy. This broad remedial power of arbitrators was endorsed by the U.S. Supreme Court in *United Steelworkers v. Enterprise Wheel and Car Corp.* [1], one of the Steelworkers Trilogy decisions. The Court in this ruling emphasized the arbitrator's need for flexibility in formulating remedies.

Remedies fashioned by arbitrators cover a broad spectrum. from "return the work without money" to "make whole" to "punitive damages", with dozens of variations in between. Those variations sometimes lessen the impact upon the violator of a sustaining award. Take for example the arbitrator who finds that a company has improperly assigned work to outsiders to the agreement. After deciding that the company has violated the collective bargaining agreement, the arbitrator must select one or more forms of relief as justified by the particular grievance. That remedy could be as follows:

1) return of the work, combined with a make whole monetary award to craft members to make restitution for lost earnings; or

(2) a monetary award based on the number of hours of work performed by the outsider, to be distributed to named claimants regardless of whether they were otherwise working; or

(3) a cease and desist directive, without monetary relief because the grievants were fully employed; or

(4) a cease and desist directive, without monetary relief because the union failed to submit evidence on the quantum of work performed by the outsider, allowing the company's claim that the work was *de minimis*[2] to stand unrebutted.

We obviously prefer awards that fall into the first and second categories. But, unfortunately, the latter two findings are showing up more and more in recent arbitration awards. This

[1] *363* U.S. 593 (1960)

[2] *"De minimis non curat lex"*: The law does not concern itself about trifling or very small matters.

article will focus on what we need to do to combat the growing tendency by arbitrators to "split the baby" by sustaining grievances while denying damages.

Let's take a look at recent examples of such decisions.

Third Division Award 30425 upheld TCU's position that the clerical agreement was violated when the carrier allowed two exempt employes to enter data into a computer database. There was no dispute whether the work was *de* minimis--the parties stipulated that 53 hours of work were performed. Yet the referee awarded no damages, saying that the Union had not rebutted the company's claim that the "Claimant was under regular pay and had unlimited overtime opportunities during the Claim period." In reaching his decision to award no damages, the referee approvingly quoted an earlier award, Third Division 29330, where it was written: "In the absence of unusual circumstances . . . the entitlement to a monetary claim is a separate issue requiring independent proof of loss. Loss does not automatically flow from a finding of Agreement violation. No actual loss has been substantiated herein. Therefore, the monetary portion of the Claim is denied."

Third Division Award 30799 involved a dispute over weighing of rail cars. The referee ruled that the agreement was violated when train crews were allowed to perform the work. How long the task took was a matter of dispute. No evidence on this issue was submitted, just allegations. The referee concluded that "the work at issue *is* clearly significant. Therefore, we find that it must be returned to the Organization's members. The evidence, however, does not support the Organization's claim for monetary damages. The burden is on the Organization to establish a claim to damages with specificity. Here, even though the Organization established that its claim is not *de minimis*, the Organization has not established how much work was lost due to the Carrier's violation."

These decisions reflect a tendency among many arbitrators to look for ways to reduce companies' financial liability. As a Union we track arbitrators' decisions, and we try to avoid those who we believe are afraid to make the tough calls which might include awarding large damages. But it is not always simply a question of getting the "wrong" arbitrator. Too often, we focus all our arguments and evidence on winning the issue, and overlook completely our responsibility to produce evidence to support the remedy we request. It is critical that the arbitrator understands that monetary relief is justified.

Arbitrator W. Willard Wirtz noted in one of his decisions that, while arbitrators have authority to award money damages for contract violations even though a contract does not specifically provide such remedy, it is up to the Union to justify such a resolution. Simply put, the Union must be a pathfinder to the Company's wallet -- most arbitrators will not get there left to their own devices.

The question then is how do you do it. The answer is to produce proof (evidence) which indicates monetary harm to the grievants. Unfortunately, that can be easier said than done.

The first step is to strive to have the best possible grievant. Take a situation where the company allows outsiders to do work covered by your agreement. Often, grievances have been filed for the senior working employe, especially if that is the employe who turned in the claim. And often the arbitrator has ruled that since, at the time of the violation the grievant was fully employed, no monies will be awarded. If the grievance had been filed for the senior idle employe entitled to be called under the agreement (which might include extra, furloughed, or unassigned employes), the arbitrator would have been hard pressed not to award monies. We suggest that where there is any doubt as to who the proper claimant should be, you should discuss the issue with your General Chairman.

Identifying the proper grievant is only the first step. Next comes establishing, through evidence, that the monetary remedy sought is justified. This justification begins on the property with the initial grievance wherein we need to show how the grievant was damaged. The record should be as explicit as possible. In a Scope or Classification of Work Rule case involving an outside craft doing your work, you must identify how much time the other craft actually worked, whether the grievants were fully employed, and, if they were, how much potential overtime they lost.

Business records are a common source of proof. Data from original company records will usually be given more weight than estimates or informal records. Records kept by the Union or by the employes themselves can carry great weight, especially if the company has kept none as it applies to damages. Statements from employes in their own words verifying the amount of time each witnessed outsiders doing covered work make excellent evidence.

It is difficult to summarize how much evidence is enough as it applies to monetary relief. A good rule of thumb is “the more the better”, provided it is of good quality. However, the proof need not be redundant. It is not necessary to provide reams of repetitive examples.

The record should also disclose whether or not the company has committed the same offense before. If a prior grievance was progressed to arbitration and a sustaining decision was issued, it should become part of the record for the arbitrator’s review even if there was no monetary remedy. Those decisions will build a history of sustaining awards for identical violations, giving the arbitrator justification for awarding a monetary remedy, thereby breaking the pattern. We would argue that the company was forewarned and still paid no attention; therefore, it is incumbent upon the arbitrator to award monies so that the

company understands the importance of its violation and ceases such action.

For example, in Third Division Award 20020, the railroad continued to have work done by outsiders to the agreement in question. In prior disputes, no monetary relief was provided. In Award 20020 the Board ruled the grievants were entitled to compensation account of the missed work opportunity and the railroad's continued violation of the Agreement. The Board stated:

"Although our policy is to adhere to previously established decisions, we feel that better valor and prudence lies in those cases that assess some damages for violation of this type of agreement. Contracts are not entered into for the purpose of practice in semantics. They seek to establish certain rights of the parties. A violation of a contract, especially if persisted, causes some damages to the injured party. Unless the violator is restrained in some way from breaching the contract by punishment it will continue to do so, thus turning the 'sanctity' of contracts into a mockery."

In the case above, the arbitrator chose the right avenue because the directional signs were properly set forth within the grievance.

One thing in our favor is that strict observance of legal rules is not necessary in the submission of evidence to an arbitrator. In railroad disputes the National Railroad Adjustment Board (NRAB) has consistently stated that it does not require strict adherence to the rules of evidence used by courts. But the NRAB does require that all arguments and exhibits be presented on the property between the parties during the handling of the grievance. It will not consider in its deliberations *de novo* (new) evidence. Therefore, it is incumbent upon the Union to make its case from the get go explaining how the grievants were monetarily harmed.

Another troubling area of arbitral decisions is the *de minimis* principle. In applying this principle the arbitrator decides that the violation involves such a minimal amount of work that it should be viewed as a permissible exception or as not constituting any injury requiring compensation to the grievant. It has been commonly applied to those cases where management employes have done small amounts of craft work where a craft employe was not immediately available or was allegedly busy doing other work.

If the company raises the argument during the handling of a grievance that the work is *de minimis* in nature the Union should address it. The common management argument is that the disputed work took barely any time at all. If the company is wrong that the work is not *de minimis* then it needs to be challenged. If it took 20 minutes to do the work rather than two minutes, we need to correct the record.

If the work did not take much time to do then we need to explain that the time factor may be small, but the principle is large. When the company argues that the work only takes a small

amount of time to perform and reasons that this removal of a small amount of work from the craft should somehow be treated differently than the removal of a large amount of work, we have to emphasize that this kind of flawed logic could lead over time to the removal of significant quantities of work.

If the company's argument is not challenged the arbitrator is left with the inference that the grievance lacks importance. We have to clearly state that the agreement does not allow for the removal of a small amount of work anymore than a large amount. We must also argue that companies should not be allowed to get off with a slap on the hand as it only encourages additional violations. The *de minimis* argument always needs to be met head on and forcefully; otherwise you leave the arbitrator with an escape route for not paying grievants monies.

In summary, it is the Union's responsibility to dissuade arbitrators from inventing solutions which do not award monies in sustaining awards. We can best fight that trend by making sure that the remedy the Union is requesting is clearly spelled out in the statement of claim and that all possible evidence is offered in the record to prove that monetary damages are appropriate. Cl