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Note: Protecting Intangible Expectations Under Collective Bargaining Agreements—Overcoming the Proscription of Arbitral Penalties

The goal of promoting industrial stability provides the touchstone for judicial and legislative determinations of national labor policy. The desire to avoid industrial strife, which underlies most national labor legislation, stems from the far-reaching effects which labor disruptions have on the complex American economy.

"The present federal policy is to promote industrial stabilization through the collective bargaining agreement." Labor and management negotiate the terms of employment with a view to avoiding discord for the duration of the contract. Since these terms are often vague and incomplete, the contractual interpretations of labor and management frequently conflict, threatening to frustrate this objective. National labor policy demands effective resolution of these disputes through protection of legitimate contractual expectations.

Courts and arbitrators, however, are undermining this policy by failing to redress injury to certain contractual expectations.


2. Then Secretary of Labor Arthur Goldberg commented on this matter in a speech reported in the New York Times, Feb. 24, 1962, at 1, col. 2:

   [Goldberg] said the issues in labor-management affairs had become "far too complex, far too potent, and far too influential on the rest of society to be resolved on the old testing ground of clash of selfish interest." . . . [T]he Secretary said: "I have the conviction that the plain fact is that our destiny as a free nation depends as never before in history on achievement of a greater sense of national unity. For the country that is the world's foremost industrial power, the building of a stronger and more durable industrial peace is clearly a precondition of national unity."


4. One portion of the legislative history of the Labor-Management Relations Act, emphasized by the Supreme Court in Textile Workers v. Lincoln Mills, 353 U.S. 448, 454 (1957), states that:

   The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

   S. REP. No. 105, 80th Cong., 1st Sess. 16 (1947).
Collective bargaining agreements affect numerous interests which, though intangible, are nevertheless significant. Such interests include the job security of employees, the reputation of the union which represents the employees, the relative bargaining power of the parties during the term of the agreement and in future negotiations, and such benefits as vacation scheduling. Since the collective bargaining agreement influences these interests, it induces expectations in the parties as to how the interests will fare in the future. Although courts and arbitrators sometimes recognize the significance of these contractual expectations, they commonly refuse to award compensation for injury to intangible interests because the injury defies precise quantification. Courts and arbitrators conclude that any monetary award without a particularized accounting of damage constitutes a "penalty," thought to be proscribed by public policy. This restrictive policy places too much emphasis on traditional contract theory.

In order to effectively defuse industrial tension, the arbitral process must accommodate and remedy injuries to intangible interests. Since the present view of arbitral remedial power stifles the protection of these interests, an alternative must be found.

This Note will consider current court and arbitral disposition of cases involving injury to intangible interests in light of Supreme Court pronouncements on labor contract disputes. The infirmities of the arbitral penalty proscription will be then exposed and an alternative examined.

I.

In Textile Workers v. Lincoln Mills the Supreme Court recognized that national labor policy requires peaceful administration of collective bargaining agreements. In a subsequent group of decisions, commonly known as The Steelworkers Trilogy, the Court acknowledged that private grievance arbitration is the best means for attaining this goal. Several attri-

6. See note 4 supra.
8. "The present federal policy is to promote industrial stabilization through the collective bargaining agreement. . . . A major factor in achieving industrial peace is the inclusion of a provision for arbitration
butes recommend this procedure, including the speed with which arbitrators act,9 and their expertise in applying the contract in light of the ongoing demands of the labor-management relationship.10 In order to maximize these benefits, the Court held inapplicable the inhospitable law governing commercial arbitration11 and granted arbitrators broad discretion in resolving contract grievances.


9. [T]he very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures. This basic purpose is obviously largely undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate.


10. The labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.


11. Thus the run of arbitration cases . . . becomes irrelevant to our problem. . . . In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial contract, the hostility evinced by courts toward arbitration of commercial agreements has no place here.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). The common law policy which was held inapplicable in Warrior Gulf is described in Williston’s treatise:

At common law, a general agreement to arbitrate future disputes in entirety, whether the agreement is contained in a contract involving other matters or in a separate agreement, is voidable at will by either party at any time before an award is made . . . .


The reason for declaring agreements to arbitrate future disputes void and unenforceable is that they were said to be against public policy or that they deprived the courts of their jurisdiction.

Although the common law rule of refusing to enforce agreements to arbitrate future disputes has been questioned even in
The Court further noted that this discretion could be of particular utility 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.12

Despite the emphasis placed on flexibility by the The Steelworkers Trilogy, lower courts and arbitrators generally remain inflexible in their approach to penalty awards. One arbitrator states: "[O]ne thing that is clear in the developing body of arbitration and labor relations law is that arbitrators almost universally will refuse to award any damages which appear to be punitive."13 International Operating Engineers, Local 450 v. Mid-Valley, Inc.14 exemplifies the courts' aversion to arbitral penalties. The employer, Mid-Valley, Inc., breached its collective bargaining agreement by failing to hire additional bargaining unit workers. The court struck down the arbitrator's damage award,15 holding that, since there was no "compensable

states that have not rejected the rule by statute, most courts are unwilling to disturb it unless a statute makes such agreements enforceable.

Id. at 555 (footnotes omitted).


The present arbitral "penalty" proscription encompasses two distinct situations. First, it refers to a monetary award where there is no provable monetary loss. In this situation, although the party has suffered a significant injury, proof of calculable loss is so uncertain as to make a monetary award "impossible."

Second, it refers to those awards constituting "punitive damages" in the true sense: where the injury has been fully compensated and the additional award is intended solely to punish and deter. See, e.g., Publishers' Ass'n of New York City v. Newspaper & Mail Deliverers' Union, 280 App. Div. 500, 114 N.Y.S.2d 401, 18 Lab. Arb. 855 (1st Dep't 1952). Because awards of this type are rare, this Note focuses on the former variety of "penalties."


15. Contracting parties do not normally agree to assess exemplary damages for a breach of contract. Such damages being punitive in nature are rare in contract law. Contractual consent
injury,” the award constituted an unauthorized “penalty” on the employer.16 Though accepting the arbitral finding of breach, the court found no acceptable theory to support the monetary award.17

Scattered decisions, however, have adopted a “compensatory” theory for monetary awards in analogous circumstances. In the leading case, Local 369, Bakery & Confectionery Workers v.
Cotton Baking Co.,\textsuperscript{18} the Fifth Circuit upheld an arbitrator's award of damages based on an employer's use of non-bargaining unit employees to do bargaining unit work. While the employees failed to establish a loss of wages as a result of the breach, the court noted the existence of less quantifiable injuries:

[T]he arbitrator concluded that the company's work assignment policies denied the union members work opportunities to which they were entitled under the contract. Not only were fewer union members drawing salaries from the company because of this arrangement, but the job security of all union members was indirectly effected [sic] because there were fewer jobs to "bump down" to in the event of layoffs.\textsuperscript{19}

This finding that the employees had been "damaged" allowed the court to distinguish Mid-Valley,\textsuperscript{20} which premised its "penalty" characterization of the arbitral award on the absence of damage. The court approved without comment the arbitrator's method of damage measurement: one year's wages at the rate paid to the outside workers for the job performed.\textsuperscript{21}

Moreover, the court's contention that the initial portion of the award did not encourage compliance is questionable. Had the first portion of the award been upheld, the damages accumulating due to the employer's delay in implementing the arbitral decision would supplement an already substantial award. Assuming there is a threshold amount which compels an employer's compliance, that point would be reached more quickly. Further, knowledge that damages will be awarded for breaching activity prior to arbitration would arguably deter future employer breach. Unless damages are awarded for a breach occurring prior to the date of arbitration, the employer would be more likely to knowingly breach the contract again, safe in the knowledge that he would enjoy a period of damage immunity. The court's criterion for implying remedial power thus becomes the degree to which compliance is encouraged rather than the presence or absence of such encouragement. If deterrence-oriented damages are held, as would seem the case here, to derive from the "essence of the collective bargaining agreement," then the court's line-drawing according to degree of effectiveness contravenes the Supreme Court's mandate to give the arbitrator's remedial power wide berth. See text accompanying note 12 supra.

\begin{itemize}
  \item \textsuperscript{18} 514 F.2d 1235 (5th Cir. 1975), cert. denied, 423 U.S. 1055 (1976).
  \item \textsuperscript{19} 514 F.2d at 1238.
  \item \textsuperscript{20} The court reversed a lower court decision which had relied on Mid-Valley. Local 369, Bakery & Confectionery Workers v. Cotton Baking Co., 377 F. Supp. 1172 (W.D. La. 1974), rev'd, 514 F.2d 1235 (5th Cir. 1975), cert. denied, 423 U.S. 1055 (1976). The circuit court's language in making the distinction evinced an uneasiness with the Mid-Valley rationale: "While we render no judgment as to the validity of the Mid-Valley decision, we find its rationale inapplicable to this case, and even if applicable, it is not binding on this court." 514 F.2d at 1238.
  \item \textsuperscript{21} The court did state, however, that the parties to the arbitration had anticipated that any award would be based on the applicable wage rate. 514 F.2d at 1238 n.4.
\end{itemize}
One arbitral decision, Mallinckrodt Chemical Works, suggests that either compensation or deterrence may justify, under facts similar to those in Cotton Baking, a monetary award. Although not relying on a specific theory, the arbitrator recognized that compensation might be appropriate for either injury to union reputation or loss of overtime opportunities caused by the breach. Additionally, the knowing nature of the breach, according to the arbitrator, might justify damages designed to deter further misconduct.

II.

In contrast to Mid-Valley, Cotton Baking and Mallinckrodt correctly acknowledge the need to protect the contractual expectations concerning intangible interests aroused in the parties to a collective bargaining agreement. The labor contract embodies substantial expectations of this type in all three of the major parties: union, employees, and employer. All the parties, for example, are interested in maintaining their bargaining positions for subsequent negotiations. This bargaining strength will rest on such factors as the proportion of the employer's total work force included in the relevant bargaining unit and the importance of the tasks performed by bargaining unit workers—factors clearly affected by interpretation of the collective bar-

23. In Mallinckrodt, the employer assigned bargaining unit work to non-bargaining unit workers. All bargaining unit workers were employed full time; no one was laid off. 50 Lab. Arb. at 937.
24. Id.
25. Id. at 936.
26. Another decision upholding arbitral power to compensate intangible injury, Asbestos Workers, Local 66 v. Leona Lee Corp., 84 L.R.R.M. 2165 (W.D. Tex. 1973), awarded damages for impairment of the Union's reputation, as well as for loss of bargaining power. In Secondary Teachers v. Board of Educ., 92 L.R.R.M. 2059 (App. Div. 1976), the school board violated a contract in its assignment of duties to teachers. The court upheld the arbitrator's award, which was based in part on a desire to deter future school board violations, classifying the award as compensation for the harm—presumably inconvenience—caused by breach.
27. See, e.g., Asbestos Workers, Local 66 v. Leona Lee Corp., 84 L.R.R.M. 2165, 2171 (W.D. Tex. 1973) (emphasizing the importance of bargaining power to the union).
28. The NLRB has recognized that the size of a bargaining unit directly affects its strength and consequently "the interests of all employees in continuing to bargain together in order to maintain their collective strength." Mallinckrodt Chem. Works and IBEW, Local 1, 162 N.L.R.B. 387, 392 (1966). Bargaining strength thus constitutes a major factor in the NLRB's determination of bargaining units for purposes of representation elections.
gaining agreement. Employees are also interested in such intangible factors as job security, working conditions, and vacation schedules. Finally, the union has a survival interest in sustaining its reputation among the employees it represents. The union’s ability to compel employer compliance with the collective bargaining agreement provides a chief source of its popularity. Because collective bargaining agreements greatly affect intangible interests, the signing of such contracts produces expectations as to the future status of these interests. Significant frustration of these expectations would generate industrial tension antithetical to national policy. Yet, absent arbitral awards, there is little reason for a party not to breach a collective bargaining agreement. Strong pragmatic considerations thus demand that available arbitral remedies include the power to award “penalties.”


31. [T]he thrust of this argument is that the vice of an unremedied misassignment of work, at 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...

32. But cf., Sirefman, supra note 13, at 33:

Naturally, unions contend that awards without sanctions and penalties have little value as deterrents. Some arbitrators do not agree. Arbitrator Sam Tatum Davis has said: “There are many situations in the law and the affairs of men where there can be injury without monetary recompense or penalty. In the affairs of men there are times when one must have faith that men of honor will respect their obligations.”

33. It is admittedly impossible to quantify the injury caused by the failure to award “penalties.” The same could be said, however, with regard to any weakness in the arbitral system for enforcing collective bargaining agreements. For example, a party’s refusal to abide by an arbitral award forces the other party to seek court enforcement. This strips arbitration of one of its prime advantages: the expeditious settlement of disputes. See note 9 supra. If unchecked, this practice could undermine the parties’ willingness to rely on arbitration; since arbitration is “the substitute for industrial strife,” United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960), this practice contravenes the national policy of promoting industrial peace recognized in Warrior & Gulf, see note 8 supra. Although it is impossible to quantify this danger, courts have nevertheless responded by awarding an amount to recompense the attorneys’ fees of the party seeking enforcement of
In light of the severe consequences, the argument supporting the refusal to protect intangible interests lacks persuasiveness. It is based upon the familiar requirement of compensatory damage theory that the claimant must establish, with "reasonable certainty," the monetary value of the injury caused by the breach. The arbitrator's decision in a case such as Grain Processing Corp., illustrates the use of this theory. Despite uncontradicted testimony that the employer had repeatedly violated a provision of the collective bargaining agreement requiring consultation with a union steward and the union president prior to entering into "outside contracts, the arbitrator awarded no damages. The breach denied the union the opportunity to persuade the employer to assign the work to employees within the bargaining unit. Moreover, by ignoring the collective bargaining agreement the employer probably undermined the union's prestige. These injuries, however, were "intangible." Proof of job loss specifically attributable to the employer's failure to consult was impossible, since the clause did not preclude the employer from entering into "outside contracts" subsequent to the required consultation. In light of the contract's failure to authorize assessment of a penalty, the arbitrator found it "impossible to pinpoint [a] remedy." Instead, he was reduced to presumably unenforceable pronouncements: "the Company is now on notice that any further breaches will be subject to challenge on behalf of the Union." Other cases follow the

the awards where the other party's refusal to comply is unjustified. See United Steelworkers v. Butler Mfg. Co., 439 F.2d 1110 (8th Cir. 1971); Dist. 50, UMW v. Bowman Transp., Inc., 421 F.2d 934 (5th Cir. 1970); Local No. 149, UAW v. American Brake Shoe Co., 298 F.2d 212 (4th Cir. 1962). This response, according to the American Brake Shoe court, is mandated by the policies underlying national labor legislation. 298 F.2d at 216.

These cases suggest that a party need only demonstrate that his attempted use of the arbitration machinery has been frustrated to evoke a remedial reaction. Because Congress, according to Warrior & Gulf, has made the judgment that arbitration is necessary to industrial peace, evidence that effective arbitration is being frustrated indicates, prima facie, a threat of industrial warfare. The widespread nature of the frustration caused by the "penalty" proscription is indicated by the numerous instances in which parties have sought, but been denied, a remedy for an established breach of contract. See, e.g., decisions cited at note 38 infra. Relief should not be denied because a party is unable to demonstrate empirically how much industrial tension—in terms of slackened productivity or increased strike activity—is specifically attributable to a particular practice.

34. RESTATEMENT OF CONTRACTS § 331(1) (1932).
36. Id. at 434.
37. Id. at 435.
same rationale: the absence of injury cognizable under traditional contract compensation theory leads to the conclusion that any monetary award must constitute a "penalty," held to be beyond the arbitrator's remedial power.

Arbitral power arises from the collective bargaining agreement. While the agreement is normally silent as to the scope of remedial power—providing merely that the arbitrator has authority to resolve "differences over the meaning or interpretation of the contract"—arbitrators invariably imply the power to award traditional contract damages on the theory that the

38. See, e.g., Valley Camp Coal Co., 66 Lab. Arb. 930, 932 (1976) (although the employer's failure to provide adequate hot water for showers was "inexcusable" because the employer's response to a "plethora of complaints over a continuing period of time" had been only an "inadequate" attempt to fix the showers, the arbitrator could find "no basis upon which an award for monetary damages can be based" since the affected employees "suffered no loss in wages as a result of the lack of hot water"); Consolidation Coal Co., 65 Lab. Arb. 1167, 1174-76 (1975) (where employer failure to comply with contractual safety requirements caused employees to refuse to work, an award of wages "for time not worked . . . would constitute an award in the form of punitive damages," a form of relief "not provided for, either by law, or contract" and thus "not within the arbitrator's authority"); Pittsburgh Steel Co., 42 Lab. Arb. 1002, 1008 (1964) (no effective remedy available because employees failed to establish "real injury" stemming from employer manipulation of vacation schedules and because arbitrator may not award "punitive damages"); Walker Mfg. Co., 42 Lab. Arb. 632, 637 (1964) (loss caused by failure of company to grant union official leave of absence to permit him to participate in organizing a campaign was "highly speculative" and not compensable); Green River Steel Corp., 41 Lab. Arb. 132, 136 (1963) (impossible for arbitrator to award compensation "except by way of penalty" for failure of employer to notify union of contracting-out of work); Philip Carey Mfg. Co., 37 Lab. Arb. 134, 136 (1961) (arbitrator should not remedy nonmonetary losses such as inconvenience by awards designed as punitive damages).

39. See note 13 supra and accompanying text.

40. 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. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.


41. Fleming, supra note 13, at 1212; Stutz, Arbitrators and the Remedy Power, in NATIONAL ACADEMY OF ARBITRATORS, LABOR ARBITRATION AND INDUSTRIAL CHANGE 54, 60 (M. Kahn ed. 1963).

42. Fleming, supra note 13, at 1212.

parties do not intend arbitration as an "academic exercise." They refuse, however, to imply contractual power to award penalties.

Collective bargaining agreements do not compel such a restrictive interpretation. Although express provisions prescribing "penalty" awards must, of course, control, most collective bargaining agreements contain no language directly addressing the "penalty" issue. Consequently, other factors must be considered. Significantly, the Supreme Court has indicated that national labor policy may appropriately influence the interpretation of the agreement. This policy, aimed at reducing indus-

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44. Arbitrators have quite uniformly held that the parties were not engaged in an academic exercise in seeking a ruling as to whether the contract had been violated, and that the power to decide the contract violation must therefore carry with it the power to award a remedy. Fleming, supra note 13, at 1212.


46. Cf. Mallinckrodt Chem. Works, 50 Lab. Arb. 933, 938 (1968): [T]he Company asserts there is nothing in the Agreement that authorizes the Arbitrator to award damages absent a showing of monetary loss. This argument is not convincing. It is equally true that there is nothing in the collective agreement authorizing the Arbitrator to award damages where there is a showing of monetary loss, yet the Company concedes the Arbitrator's power to do so. The Agreement simply does not deal with the question of the circumstances under which damages are to be awarded or the principles on which they are to be computed. This is a matter as to which the parties have given the Arbitrator no explicit guidance, but rather have left him with the task of ascertaining their implicit intent. Hence the absence of language in the Agreement explicitly authorizing the Arbitrator to award damages absent a showing of monetary loss is not fatal to his power to do so.

In Sheetmetal Workers, Local 416 v. Helgesteel Corp., 335 F. Supp. 812 (W.D. Wis. 1971), rev'd on other grounds, 507 F.2d 1053 (7th Cir. 1974), the court denied a motion for summary judgment which urged that the arbitrator's award be struck down as "punitive." In doing so, the court seemed willing to assume that the award was punitive and without compensatory basis:

The general rule with respect to the award of an arbitrator or arbitration board is that so long as the award draws its essence from the collective agreement, it is immune from attack. Since the labor agreement at issue contains no specific provisions on the subject of remedies, the arbitrator was free to exercise its discretion. Thus, the question here is not whether the award was "punitive" but rather whether it was reasonable in light of the findings of the arbitration board.

335 F. Supp. at 816.

47. In the clearest example of this, United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960), the Court established a strong presumption in favor of the arbitrability of labor contract disputes because of the public policy favoring arbitration:
trial tension, requires that some remedy be fashioned to protect all interests encompassed by the agreement, even though not compensable under standard contract doctrine.\textsuperscript{48} The very fact that particular interests are encompassed by the collective bargaining agreement indicates that the parties intended them to be respected, necessitating an appropriate remedy when those interests are injured.\textsuperscript{49} The converse suggests that the parties intended to sanction disregard of the contract.\textsuperscript{50}

With regard to arbitral remedies, several lower court decisions subsequent to \textit{Enterprise Wheel} have indorsed a public policy presumption similar to that established for determining arbitrability: only positive contractual declarations of exclusion should restrict arbitral remedial power. Lodge No. 12, Dist. No. 37, IAM v. Cameron Iron Works, Inc., 292 F.2d 112, 119 (5th Cir. 1961). See United Steelworkers v. United States Gypsum Co., 492 F.2d 713 (5th Cir. 1974), cert. denied, 419 U.S. 998 (1974); International Union of Dist. 50, UMV v. Bowman Transp., Inc., 421 F.2d 934 (5th Cir. 1970).

\textsuperscript{48} The fact that collective bargaining agreements are markedly incomplete legitimates, according to Professor Summers, the exercise by arbitrators and courts of a creative function in completing the agreement. It invites inquiry beyond the often futile or artificial search for nonexistent intent and encourages explicit consideration of such factors as the purposes of the parties and the institutional needs of collective bargaining, justice and fairness between the parties, the interests of third parties, and the public interest.


\textsuperscript{49} When a particular situation calls for a certain remedy, it is not at all clear to me that the parties can be said to have a reasonable expectation that the arbitrator will not utilize that remedy, however novel. To the contrary, absent contract language directed to the question of remedies for a breach of contract, I would think that the reasonable expectation of the parties would be that the arbitrator would order a remedy appropriate to the case. Normally this can be expected to be a familiar remedy, but where the familiar remedies are inadequate the arbitrator (or at least some arbitrators) can surely be expected to acquiesce in a more satisfactory remedy requested by one of the parties.


\textsuperscript{50} Some arbitrators contend that the clause found in many collective agreements cautioning arbitrators not to "add to, alter, or supplement" the language of the contract, Fleming, \textit{supra} note 13, at 1212, pro-
The refusal to award arbitral "penalties" is doubtless rooted primarily in a reluctance to grant punitive damages in breach of contract actions rather than solely in a desire to fulfill the intention of the parties. The policies underlying these contract law doctrines, however, are inapplicable in the context of collective bargaining agreements, and thus should not restrain the remedial flexibility of labor arbitration. Two considerations inhibits the award of arbitral penalties. Sirefman, supra note 13, at 32. See, e.g., Green River Steel Corp., 41 Lab. Arb. 132, 137 (1963). This contention seems to rest on the assumption that the penalty proscription, by implication, is a part of the contract which, by virtue of the "no alterations clause," may not be overridden, rather than that the "no alterations clause" in and of itself constitutes such a restriction. It therefore assumes the conclusion here at issue—that the contract contains an implied restriction on arbitral penalty power.


52. The policy against punitive damages was relied on by a court hearing a labor contract dispute without the benefit of an arbitral award (due to absence of an applicable arbitration clause) in Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277 (3d Cir. 1962). A split court in Brooks Shoe Mfg. struck down a district court award of punitive damages in a breach of contract action brought under section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) (1970), which authorizes suits for breach of labor contracts to be brought in federal court. Among the reasons for the reversal, the court cited the award's tension with the "remedial nature" of the Labor Management Relations Act, see Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940) (denying penalty power to the NLRB), from which the courts draw their remedial power under section 301, Textile Workers v. Lincoln Mills, 335 U.S. 448 (1947). This rationale, however, is inapplicable to the arbitration of disputes since arbitrators draw their remedial power from the collective bargaining agreement, see note 40 supra, rather than from any statute.

are normally thought to justify the judicial refusal to grant punitive damages. First, substituted monetary performance, represented by compensatory damages, normally constitutes an “adequate” remedy. 53 Courts award punitive damages in response to “outrageous” torts—such as spitting in a person’s face 54—which arouse individual and community wrath. 55 The award peacefully satiates the desire for revenge, thus stemming resort to private, violent means of vengeance. Breach of contract do not typically threaten such societal disorder. 56 Second, the possibility of punitive damages would create uncertainty repugnant to commercial transactions. 57 Uncertainty hinders a party’s determination of whether or not it would be “profitable” to breach the contract—that is, whether a gain made possible by the breach will exceed its cost. Because a “profitable” breach benefits society by more efficiently allocating resources, 58 the law generally encourages such breach. The unpredictability of jury awards also contributes to the fear of uncertainty. 59

These considerations suggest the contrary result when applied to labor contract altercations. The first consideration assumes that remedies “adequate” in a commercial context can meet the demands of collective bargaining agreement disputes. On the contrary, the social disorder threatened by breach of a collective bargaining agreement is of much greater magnitude than in most breaches of contract. Labor contract breaches threaten “industrial warfare”—with all the calamitous consequences prompting national labor policy. 60 Further, disputes

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[A]lthough the remedies available to vindicate Holodnak’s right are not entirely defined by the Act itself, it is at least true that any judicial enforcement of that right must “look... at the policy of the legislation and fashion a remedy that will effectuate that policy.” 5 [citing Lincoln Mills] . . . [W]here there had been an explicit finding that punitive damages are unnecessary to deter any future contravention, we are of the view that a greater exaction from Avco would not further any policy embodied in the Act.

514 F.2d at 291 (emphasis supplied).

54. See Alcorn v. Mitchell, 63 Ill. 553, 554 (1872).
56. 6 A. CORBIN, supra note 55.
57. Simpson, supra note 53, at 284.
60. While the type of industrial warfare that the national policy is aimed at avoiding is generally assumed to encompass such major disputes as strikes and lockouts, see, e.g., H. WELLINGTON, LABOR AND THE
over labor contracts arise more frequently than do disputes in a commercial context.\textsuperscript{61} The danger of strife is enhanced by the fact that many of the interests reflected in the collective bargaining agreement do not find vindication in the current arsenal of arbitral remedies.

As to the second consideration, "penalty" awards would make the consequences of labor contract breaches more uncertain. It is far from clear, however, that the breaching activity thus inhibited would be "profitable" in terms of benefit to society. The losses caused by industrial strife constitute a factor, not present in the commercial setting, which could more than offset any gains achieved through more efficient resource allocation. Given the likelihood of industrial tension in those situations where injury to intangible interests supposedly protected by the collective bargaining agreement is ignored, it is doubtful that society benefits by application of the punitive damages prescription. Indeed, the converse can be argued: punitive damages, by discouraging breach and reducing the level of industrial confrontation, promote a more efficient economy. Fear of jury capriciousness, of course, is irrelevant in the arbitral setting.\textsuperscript{62}

\textsuperscript{61} Although labor contracts are complex, the bargaining process often requires that many matters remain unresolved. The collective bargaining agreement is thus "only the gateway to resolution of remaining disagreements." Summers, \textit{supra} note 48, at 529. The nature of the union-management relationship governed by collective bargaining agreements also contributes to the likelihood of dispute. The relationship, due to federal labor legislation, is a compelled and continuing one. \textit{Id.} at 530-34. Conversely, in most commercial relationships, a party has the option of "taking his business elsewhere" if he is unhappy with past contractual performance. This "pressure valve" will often act to deter conduct by one party that generates dissatisfaction in the other.

Businessmen who insisted on litigating such matters with customers or suppliers would soon have few of either, but the compulsory quality of the collective bargaining relation binds the parties together regardless of their litigiousness. In many collective bargaining relationships the loss of good will is counted of little consequence and resort to arbitration is considered the normal and acceptable way of conducting affairs.

Summers, \textit{supra} note 48, at 536. \textit{See also} Rubenstein, \textit{supra} note 61, at 704.

\textsuperscript{62} The lack of contractual standards guiding and restricting the amount awarded as a penalty disturbed the court in the Publishers' Ass'n...
Even in the mainstream of contract decisions, courts recognize that the punitive damage prohibition extends only so far as the policies underlying it. Thus, where there is a heightened public interest in the contractual relationship, courts have found punitive damages appropriate. For example, in Brown v. Coates, then Chief Judge Burger, in considering a breach of fiduciary obligations created by a real estate brokerage agreement, stated:

When one is commissioned by, or holds himself out to, the community to perform special services which may be engaged for hire by others in the conduct of their personal or business affairs . . . such persons assume certain fiduciary relationships. The community in turn has a broad public interest, as a matter of public policy, in how such persons conduct their relations with those who place trust in them. In this case we express the broad public policy by the imposition of punitive damages.

While the type of contract in Coates may differ in many respects from collective bargaining agreements, the element of heightened case, discussed at note 13 supra. Any fears of a "runaway award" by an arbitrator, however, seem unfounded. In fact, an arbitrator's desire to be hired in subsequent arbitral proceedings may pressure him to seek to maintain the good will of both parties. Hays, The Future of Labor Arbitration, 74 YALE L.J. 1019, 1035 (1965). Such pressure tends to cause "baby-splitting"—awards which may slight the merits of the dispute in an attempt to placate both the employer and the union.

63. It is sometimes said that breach of contract will not be a basis for punitive awards, and indeed this is often the case. But it is an over-generalization to say contract breach never justifies punitive awards. The test in all these cases is not the plaintiff's theory, or the "form of action," but the nature of the defendant's state of mind and the nature of his conduct.

64. See Note, The Expanding Availability of Punitive Damages in Contract Actions, 8 IND. L. REV. 668 (1975) [hereinafter cited as Note, IND. L. REV.].

65. See 253 F.2d 36 (D.C. Cir. 1958). 253 F.2d at 40. While the tort of deceit was alleged in Brown, the court found it unnecessary to reach that issue in order to uphold the punitive damage award. 253 F.2d at 40-41. Increased public interest sufficient to support punitive damage awards is typically found where a contract is breached by one in a position of "privilege or power." 6 A. CORBIN, supra note 55, at 443-44; Dobbs, supra note 58, at 206. Thus the public interest in deterrence and punishment is recognized where there is bad faith breach of contractual obligations by public utilities, 6 A. CORBIN, supra note 55, at 443; Dobbs, supra note 58, at 206; banks (as to obligations owed their depositors), 6 A. CORBIN, supra note 55, at 444; see Patterson v. Marine Nat'l Bank, 130 Pa. 419, 18 A. 632 (1889); insurance companies, Note, IND. L. REV., supra note 63, at 678-79; Dobbs, supra note 58, at 206; see Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 403, 89 Cal. Rptr. 78, 95 (1970); or fiduciaries, see Brown v. Coates, 253 F.2d 36 (D.C. Cir. 1958). The public interest in these relationships seems to be that of "potential victim" of the oppressive practices represented by the breach. Cf. Fletcher v. Western Nat'l Life Ins. Co., supra at 403, 89 Cal. Rptr. at 95:
public interest is evident in both. This suggests an analogous exception to the punitive damages limitation in the instance of labor contracts.

III.

It has already been shown that injuries to intangible interests warrant protection—protection denied under the "penalty" proscription. The Cotton Baking and Mallinckrodt decisions are commendable for recognizing both the significance of intangible interests and the need for their protection. Neither decision, however, satisfactorily articulates a legal theory which might be utilized by labor arbitrators in determining the occasions appropriate for remedial action.

The development of such a theory initially requires recognition of the twin objectives underlying awards given for breaches of collective bargaining agreements. One goal is to compensate

[7]The special obligations of public utilities and other enterprises affected with the public interest has been noted as significant in the imposition of liability upon such defendants even in the absence of outrageous conduct, apparently on a policy basis of encouraging fair treatment of the public whom the enterprises serve.

66. The public is clearly a potential victim of the economic disruption caused by industrial warfare, see note 2 supra and accompanying text.

67. Cf. Sidney Wanzer & Sons, Inc. v. Milk Drivers Union, Local 753, 249 F. Supp. 664, 671 n.5: "The § 301 suit is distinguishable from the ordinary suit for breach of contract. Strong considerations of public policy, emphasized in Lincoln Mills, suggest that the usual rule barring exemplary damages in a breach of contract suit need not apply."

The public interest in labor relations justified an award of punitive damages in Fittipaldi v. Lagassies, 18 App. Div. 2d 331, 239 N.Y.S.2d 792 (4th Dep't 1963), where a union violated the rights of a member that were guaranteed by the union charter. Such rights are contractual in nature, International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 618-19 (1959). The court in Fittipaldi first noted that fraud "aimed at the public generally" justifies a punitive damage award. The court continued:

Strong reasons of policy promote the use of exemplary damages to deter union officials from conduct designed to suppress the rights of members to a fair and democratic hearing on legitimate disciplinary charges. The very basis for the existence of unionism in our society today is the promise of employment to those who desire to associate freely in order to obtain it. The right of the working man to the benefits of collective bargaining is too essential and valuable to be hindered.

18 App. Div. 2d at 334, 239 N.Y.S.2d at 796. While the finding of public interest in this case might be said to derive specifically from the regulation of union affairs contained in the Landrum-Griffin Act, 29 U.S.C. § 411 (1957), the Act was not mentioned by the court.

68. See notes 34-67 supra and accompanying text.
the injured party by putting him in the same monetary position he would have occupied had the breach not occurred. A second objective is to maintain industrial peace. An arbitral award serves this latter goal in two fashions. First, since any award made in response to a particular action has the effect of deterring future occurrence of that action, it promotes industrial peace by lessening the likelihood of future breaches. Second, an award ensures psychological tranquility by protecting the parties' justified expectations arising under the collective bargaining agreement. Unless the parties perceive the terms of the employment relationship being respected and their positions as equal bargaining powers being maintained, frustration is likely to result, leading to conduct inconsistent with the national goal of a stable and productive economy.

69. The parties expect that [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished.


70. In Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975), the Court noted the deterrent effect of an arbitral award for breach of an anti-discrimination clause in the collective bargaining agreement:

Nor is there any reason to believe that the processing of grievances is inherently limited to the correction of individual cases of discrimination. Quite apart from the essentially contractual question of whether the Union could grieve against a "pattern or practice" it deems inconsistent with the non-discrimination clause of the contract, one would hardly expect an employer to continue in effect an employment practice that routinely results in adverse arbitral decisions.

420 U.S. at 66-67.

71. The Supreme Court emphasized the threat to industrial peace posed by employees' perceptions that an employer's wrongful conduct has gone unremedied in Golden State Bottling Co., Inc. v. NLRB, 414 U.S. 168 (1973). In holding employers liable for the unfair labor practices of their predecessors, the Court stated:

When a new employer . . . has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations, those employees who have been retained will understandably view their job situations as essentially unaltered. Under these circumstances, the employees may well perceive the successor's failure to remedy the predecessor employer's unfair labor practices arising out of an unlawful discharge as a continuation of the predecessor's labor policies. To the extent that the employees' legitimate expectation is that the unfair labor practices will be remedied, a successor's failure to do so may result in labor unrest as the employees engage in collective activity to force remedial action.

414 U.S. at 184.
Where breach of the collective bargaining agreement causes tangible injury, traditional compensatory damage theory satisfactorily serves these objectives. By definition, the injured party is made whole, recovering for any related monetary loss which can be calculated with reasonable certainty. Future occurrences of tension-generating breaches are made less likely through the deterrent effect of the award. Finally, the injured party is psychologically appeased, for he observes the legal system protecting his bargained-for rights and vindicating his position over that of the breaching party.

Where a breach of the collective bargaining agreement causes both tangible and intangible injuries, traditional compensatory damage theory only partially serves the compensation objective, since injured parties receive no distinct award for the intangible loss. The industrial peace objective, however, is achieved by an award which compensates only the tangible injury. The award will deter similar breaches in the future, and the injured parties receive the satisfaction of knowing that the breaching party has paid for his misconduct. In this situation, therefore, the

72. The suggestion that compensatory awards deter future breach should be taken in the form of a rebuttable presumption. The facts of United Elec. Workers, Local 1114 v. Honeywell, Inc., 522 F.2d 1221 (7th Cir. 1975), suggests a situation where an award over and above compensatory amounts might be necessary in order to accomplish deterrence. In Honeywell, the union sought an injunction against the employer's repeated violation of a sub-contracting clause. The union had previously recovered four separate compensatory awards against the employer. Not only were the employer's continuing violations threatening the union's reputation, Brief for Appellant at 10, United Elec. Workers, Local 1114 v. Honeywell, Inc., supra, but arbitration costs were also depleting union resources, id. at 9. The court, nevertheless, denied an injunction. Under the facts alleged by the union, a penalty award by the arbitrator would have better protected the union's contractual expectations.

The problem of arbitration costs, raised by the Honeywell case, is of particular interest. Insofar as the injured party goes uncompensated for these costs, he remains in a position inferior to that enjoyed prior to breach. This imperfection in the compensation system opens the door to abuses, the prevention of which may necessitate a "penalty." Where an employer is of vastly superior economic strength compared to the union, it may choose to bear its portion of the arbitration costs as well as small compensatory awards as part of an economic war of attrition. Cf. Fleming, supra note 13, at 1216-17. The use of penalty awards to prevent such tactics is consistent with traditional uses of punitive damages to reimburse attorneys' fees. See Dobbs, supra note 58, at 221; W. PROSSER, HANDBOOK OF THE LAW OF TORTS 11 (4th ed. 1971).

Courts have recently shown a willingness to strengthen the integrity of arbitral awards by compelling the losing party to pay the opponent's attorneys' fees whenever "unjustified" refusal to comply with an arbitral
use of traditional compensatory damage theory is still acceptable.73

Where only intangible interests are harmed, however, compensatory damage theory is inadequate, for the "certainty of proof of damages" requirement of that theory cannot be met. Nevertheless, in light of the aforementioned purposes behind arbitral awards, the need for an award is equally great. The fact of the injury remains, and some award must be made. As stated in Mallinckrodt:

decision necessitates a court enforcement action. See note 33 supra. This has led some to speculate that an arbitrator has similar power with regard to arbitration costs. Fleming, supra note 13, at 1217. Cf. Wolff, supra note 9, at 191. Because it is restricted to expenses actually incurred, such an award is arguably "compensatory" rather than a penalty. See Litton Sys., Inc. v. Shopmen's Local 552, 90 L.R.R.M. 3176 (S.D. Ohio 1976) (court upholds arbitrator's award "compensating" employer for arbitration costs and attorneys' fees where union made "persistent attempts to frustrate the arbitration" by pursuing a course of "willful delay"). Cf. United Steelworkers v. Butler Mfg. Co., 439 F.2d 1110 (8th Cir. 1971). As the Supreme Court has recently noted, however, "the underlying rationale of 'fee-shifting' is, of course, punitive" since the "essential element in triggering the award of fees is . . . the existence of 'bad faith' on the part of the unsuccessful litigant." Hall v. Cole, 412 U.S. 1, 5 (1973). Moreover, direct compensation of arbitration costs would seem to be precluded by an express contractual allocation of those costs. See Oscar Joseph Stores, Inc., 41 Lab. Arb. 569 (1963). But see Fleming, supra note 13, at 1217; Litton Sys., Inc. v. Shopmen's Local 552, supra at 3180 app. A. Where such an allocation is made, an award aimed at deterring the breach, rather than compensating arbitration costs, is called for.

73. By failing to distinguish such a situation, the Cotton Baking rationale, see text accompanying notes 18-19 supra, while achieving a proper result on the facts of the case, goes too far. The unrefined compensatory theory adopted by the Cotton Baking court would seem to require an arbitrator, whenever he identifies an injury to an intangible interest, to make an award to recompense that interest. Thus even if a tangible injury caused by the breach were compensated, logical consistency would require that an additional award be made specifically for any intangible injuries. Any layoff of employees (due to sub-contracting) violative of the agreement, for example, injures the job security of those remaining on the job in the same fashion as in Cotton Baking, where the employer failed to hire additional bargaining unit workers. In both cases, there are fewer jobs to "bump down" to than if the contract had been obeyed. Yet in the former situation, since back-pay awards will be made to improperly laid-off employees, even courts and arbitrators willing to protect intangible interests will hesitate to also compensate the injury to job security. See Philip Carey Mfg. Co., 37 Lab. Arb. 134, 136 (1961). Absent the egregious consequence of allowing a party to breach the contract and cause intangible injuries without inhibition, as threatened in factual situations similar to Cotton Baking, the policies disfavoring the compensation of intangible injuries because of lack of reasonably certain proof are persuasive.
Where the employer's wrongful act of assigning work in breach of contract may have led to an injury, and the facts are such that neither the union nor the employer can conclusively prove that such an injury will or will not occur, who should suffer from the difficulty of proof? Should it be the wholly innocent employees or the employer whose breach of contract (knowing in the instant case) has created the possibility of injury? Surely a strong argument can be made that under these circumstances, it is the wrongdoer who ought to suffer the consequences of uncertainty. 74

Similarly, as recognized by the Cotton Baking court, an arbitral award will have the effect of bringing "the parties' actions into conformity with the contract." 75 This is clearly desirable, for a damage award for a knowing breach of contract will encourage a good faith effort to abide by the contract—the very least that ought be required of, and indeed may be said to be implicitly agreed to by, both parties to a collective bargaining agreement. 76

Finally, the parties' faith in the collective bargaining and arbitral processes will be maintained by such an award. The arbitrator will not appear impotent in the face of contract violations, and the parties will not be tempted to employ disruptive devices to attain their ends. 77

74. 50 Lab. Arb. 933, 937 (1968). See Five Star Hardware & Elec. Corp., 44 Lab. Arb. 944, 946-47 (1965). The argument that the breaching party should bear the burden of uncertainty of injury is found on occasion in the commercial setting. See, e.g., Locke v. United States, 283 F.2d 521 (Ct. Cl. 1960). Moreover, leniency in proof requirements also characterizes the award of compensatory damages for such intangible injuries as patent and copyright infringement, interference with contracts, and commercial disparagement. Dobbs, supra note 58, at 432.

75. 514 F.2d at 1237.


77. An alternative to any damage award in such a situation might be for the arbitrator to issue a cease and desist order. Cf. United Elec. Workers, Local 1114 v. Honeywell, Inc., 522 F.2d 1221, discussed at note 73 supra. This alternative was considered and rejected by the arbitrator in Mallinckrodt:

I reject . . . the argument that the only appropriate award which an arbitrator may provide for knowing or repeated breaches . . . is an order directing the offending party to cease and desist from the breach involved. An arbitral cease and desist order is meaningless absent judicial enforcement. Once judicial enforcement is obtained, however, future questions as to whether there has been a breach of the relevant contract provisions are apt to be framed in terms of whether or not a contempt of the court's order has occurred and litigated before the court on that ground. . . . It is my opinion that a basic purpose of arbitration is to avoid resort to courts as well as strikes and I am disinclined to include in awards any provisions which might encourage further litigation.

50 Lab. Arb. 933, 940 (1968). This argument is buttressed by the importance which the speed of the arbitral process has in justifying the policy of arbitral deference. See note 9 supra.
Simply because a party suffers intangible injury unaccompanied by a tangible injury, however, does not necessarily mean that a monetary award will contribute to industrial peace. This contribution is assured only if two additional factors are present.

First, an award should be made only if the breaching party should have anticipated that his conduct would result in arbitration. This “knowing-conduct” requirement serves two functions. First, breach can only be avoided when a party has reason to think that his conduct may violate the contract. A course of conduct reasonably pursued without foresight as to its consequences cannot be deterred. By the same token, many breaches and consequent injuries might be avoided if questionable courses of action were arbitrated before they were taken, rather than afterwards. Each party would be encouraged by these monetary awards to make a reasonable effort to anticipate disputes and avoid unnecessary injury. Second, the presence of “knowing conduct” makes the breach appear more egregious, and thus more likely to arouse anger, resentment, and consequent industrial strife. Drawing the “knowing conduct” line will be fraught with difficulty, but it is the type of judgment that an arbitrator’s expertise qualifies him to make.

The second factor which must be present in order to assure that a monetary award will contribute to industrial peace is that the injury in question be “substantial.” Where the injury suffered as a result of contractual breach is trivial, arbitrators should refuse to reward the litigiousness of the grievant. To do otherwise is to encourage labor-management confrontation by inciting the parties to challenge even inconsequential breaches in the hope of receiving a “penalty”—a result incompatible with the objective of easing industrial tension. Arbitrators have long recognized the soundness of requiring that monetary awards be predicated on “substantial” injuries by following the principle of de minimis non curat lex to deny relief where the contractual interests concerned are “trifling.” Arbitrators applying this doctrine, however, must avoid distinguishing significant from insignificant injuries on the basis of the compensatory “provable monetary loss” standard. As suggested throughout this Note, whether or not an injury is “tangible,” and thus susceptible to monetary quantification, has little bearing on whether or not the injury may provoke industrial turmoil. Thus the application

78. Sirefman, supra note 13, at 17–18.
of the *de minimis* principle according to a "provable monetary loss" standard would open a gap in arbitral remedies identical to that created by the "penalty proscription": intangible, but tension-generating breaches would go unremedied. Instead of scrutinizing only the "provable monetary loss" caused by a breach, arbitrators should focus directly on the threat to industrial peace posed by the breach. Arbitrators should include in their assessment of an injury's substantiality the number of people affected by the breach, the extensiveness of the breaching activity, and the impact of the breach on the "psychological tranquility" of the parties. Applied in this manner, the *de minimis* principle will insure that monetary awards in response to intangible injuries support rather than thwart the goal of industrial peace.

IV.

Attaining the national goal of industrial stability requires the peaceful administration of collective bargaining agreements. To this end, the Supreme Court has established private arbitration as the preferred means of protecting the expectations raised by labor contracts, emphasizing the importance of arbitral remedial flexibility in resolving disputes. Where the parties concur with this preference by including a broad arbitration clause in their agreement, they must anticipate that the arbitrator will order whatever remedy is appropriate to the case. The protection of substantial intangible interests affected by the collective bargaining agreement, necessary to industrial peace, requires a divergence from the traditional compensatory remedies associated with commercial contracts. Monetary awards must be made where a knowing breach of contract injures intangible interests, despite the difficulty in calculating such an award, in order to encourage obedience to the contract and maintain injured parties' faith in the collective bargaining agreement.  

award may be justified even though the amount is small); Sirefman, *supra* note 13, at 22:  

Contracting-out can often be a source of friction between union and company. The latter feels that its very existence demands the cutting of costs wherever possible, while the former feels that the integrity of the bargaining unit will be undermined. . . . The possibility of eroding the bargaining unit transcends the relatively insignificant loss in terms of numbers and money.

80. Awards for injury to job security may become crucial in conjunction with developing remedies under the Civil Rights Act of 1964, Title VII, which prohibits employment discrimination. The Supreme
istration of collective bargaining agreements demands no less.

Court has ruled that victims of illegally discriminatory employment practices may be awarded "back seniority." Franks v. Bowman Transp. Inc., 96 S. Ct. 1251 (1976). Such a remedy is unsatisfactory, since the person at whose cost the remedy is extracted is a fellow employee (whose comparative seniority status suffers because of the award), rather than the employer who committed the discrimination. Such "punishment" of innocent employees is counterproductive in terms of facilitating better race (or sex) relations, and may engender sufficient animosity to threaten industrial peace. Cf. Franks v. Bowman Transp. Inc., id. at 1272 (Burger, C.J., dissenting). Rather than controverting these dangers, the Franks majority merely seemed to suggest they are part of the price to be paid in the battle against discrimination. An employee whose seniority rights are denigrated by an award of back seniority to another, however, may not be remediless.

In his Franks dissent, Chief Justice Burger noted the possibility that employees injured by a back seniority award might petition a court for equitable relief. Id. Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 38-39 (1976). In addition, the injured employee might command a remedy in damages because the employer has indirectly breached the seniority provisions of the collective bargaining agreement. Another ground for a claim of employer breach might be based on the "anti-discrimination clause" contained in many collective bargaining agreements. A penalty award in such a case would serve the laudatory goals of easing tensions between employees who receive back seniority awards and those at whose expense the awards are made, as well as shifting the burden of such a remedy to the employer, thus accomplishing the primary goal of Title VII remedies: encouraging employer compliance. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971). Further it would do so without compromising the Title VII goal—making victims of illegal discrimination "whole"—found overriding in Franks.