C#15697

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration Between UNITED STATES POSTAL SERVICE And NATIONAL ASSOCIATION OF LETTER CARRIERS	GRIEVANT: Class Action M. Hamilton POST OFFICE: Torrance, CA CASE NOS.: Q90N-4F-C 94024977/ 94024038 NALC NO.: 94/002

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Postal Service: Mr. John W. Dockins

For the Union: Mr. Bruce H. Simon

PLACE OF HEARING: Washington, D.C.

DATE OF HEARING: April 2, 1996

POST-HEARING REPLY BRIEFS: July 5, 1996

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Joint Statement on Violence and Behavior in the Workplace constitutes a contractually enforceable agreement between the parties. Accordingly, the Union shall have access to the negotiated grievance procedure set forth in the parties' collective bargaining agreement to resolve disputes arising under the Joint Statement. It is so ordered and awarded.

Date: 8-16-96

Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION BETWEEN UNITED STATES POSTAL SERVICE AND NATIONAL ASSOCIATION OF LETTER CARRIERS (Class Action/M. Hamilton Grievance) (Case Nos. Q90N-4F-C 94024977/94024038) (NALC NO.: 94/002)	ANALYSIS AND AWARD Carlton J. Snow Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from June 12, 1991 through November 20, 1994. A hearing occurred on April 2, 1996 in a conference room of Postal Service headquarters located at 955 L'Enfant Plaza S.W., in Washington, D.C. Mr. John W. Dockins, Labor Relations Specialist, represented the United States Postal Service. Mr. Bruce H. Simon of Cohen, Weiss, & Simon in New York City represented the National Association of Letter Carriers.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The advocates fully and fairly represented their respective parties. A court reporter for Diversified

Reporting Services, Inc. reported the proceeding and submitted a transcript of 180 pages.

The parties stipulated that the matter properly had been submitted to arbitration and that there were no issues of substantive or procedural arbitrability to be resolved. The arbitrator officially closed the hearing on July 5, 1996 after receipt of the final post-hearing reply brief in the matter.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

Does the Joint Statement on Violence and Behavior in the Workplace constitute an enforceable agreement between the parties so that the Union may use the negotiated grievance procedure to resolve disputes rising under the Joint Statement? If so, what is an appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3 MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees.

IV. STATEMENT OF FACTS

In this case, the Union challenged the decision of the Employer to treat the Joint Statement on Violence and Behavior in the Workplace as something other than a contractual commitment between the parties.

The dispute arose as an aftermath of several violent incidents in the workplace and, in particular, the "Royal Oaks" incident in which an employe killed postal supervisors after receiving an unfavorable arbitration award. The two cases before the arbitrator advanced to the national level when two local branches of the National Association of Letter Carriers filed individual grievances alleging harassment of letter carriers by supervisors and requesting that the supervisors not be allowed to direct the work of letter carriers. The parties consolidated the two grievances, and a full hearing occurred at the regional level on April 21, 1995.

The Union contended that the Joint Statement on Violence

and Behavior in the Workplace constituted a contract between the parties which set forth standards of behavior for supervisors. The standards set forth in the Joint Statement on Violence and Behavior in the Workplace allow an arbitrator to deny a supervisor managerial authority over letter carriers, according to the Union. The Employer responded that Article 3 of the parties' agreement established exclusive rights for the Employer "to hire, promote, transfer, assign, and retain employees," and it is the belief of the Employer that those exclusive rights remain unaltered by any other document about which the parties may have held discussion. It is the belief of the Employer that the Joint Statement on Violence and Behavior in the Workplace constitutes a pledge by the Employer to take action that will reduce violence in the workplace. The different perspectives advanced through the parties' grievance procedure to the national level. When the parties were unable to resolve their differences, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Union

The Union states unequivocally that the Joint Statement on Violence and Behavior in the Workplace constitutes a contract between the parties. The Union asserts that, because of violent circumstances that led to drafting the Joint Statement, the parties intended to negotiate an agreement which required both parties to give up something in a mutual effort to obtain a safer working environment. The Union maintains that the Joint Statement was made by the parties in an effort to indicate a clear-cut break from past behavior. The Union believes that language in the Joint Statement clearly and unambiguously represents a contractual promise by both sides to work relentlessly in an effort to end violent behavior in the workplace.

The Union claims that, when its members are disciplined for violent acts, the Joint Statement is often cited in support of the Employer's disciplinary action against workers. In return, the Union asserts the Employer has agreed in the Joint Statement that supervisors who use violent tactics should also be disciplined. The Union contends that the grievance arbitration procedure is the appropriate forum for determining whether a supervisor should be disciplined for violating the Joint Statement.

B. The Employer

The Employer claims that, when management signed the Joint Statement, the parties never intended the document to be contractually binding in the same way as the National Agreement. Instead, the Employer argues that it made a pledge to take more concerted action against violence in the workplace. Management contends that there is no evidence at all of any intent to give away the Employer's exclusive managerial authority under Article 3 of the parties' collective bargaining agreement. The Employer also contends that there were insufficient contractual formalities present to give rise to an enforceable obligation. The Employer maintains that the Joint Statement at no point shows an intent by the parties to be contractually bound. Moreover, management asserts that it received no consideration for a right of the Union to use the grievance procedure in order to prevent a supervisor from managing letter carriers. Accordingly, the Employer concludes that the grievance must be denied.

VI. ANALYSIS

A. Altering a Right of Management

The right of management to manage is fundamental in the collective bargaining relationship. Such authority is crucial if management is to run an efficient organization and is to advance the agency toward a successful accomplishment of its mission. As one observer commented decades ago, "in the business organism there can be only one mind and only one nerve center if the various parts are to be coordinated into a harmonious whole." (See, Chamberlain, The Union Challenge to Management Control, 134 (1948)). Care must be taken not to undermine management's commitment to operate the organization efficiently.

The parties have codified the rights of management in their agreement with each other, and they specifically recognized management's exclusive right "to hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employes." (See, Joint Exhibit No. 1, p. 5). The Employer argued that an asserted right of the Union to use the grievance procedure to remove or suspend supervisors might impinge on exclusive managerial prerogatives. The question is whether or not the parties have amended such managerial rights by entering into the Joint Statement on Violence and Behavior in the Workplace.

It is the position of the Union that the parties have the power to alter their contractual obligations to each

other by using methods that extend beyond the traditional negotiation process typically implemented to bring a labor contract into existence. Relying on U.S. Supreme Court precedents, the Union concluded that binding contractual obligations need not result only from a collective bargaining agreement in order to constitute an enforceable contract. (See, e.g., Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc., 369 U.S. 17 (1962)). The Employer, on the other hand, maintained that there needed to be a specific "negotiated change" to the parties' collective bargaining agreement in order to modify managerial prerogatives. (See, Employer's Post-hearing Brief, 11).

The parties' straightforward problem implicates a fundamental question of gargantuan proportions, namely, what constitutes a contract? Scholars have filled library shelves addressing the question, and students have puzzled over the issue for hundreds of years. While circumstances and the form of a labor contract may be different, no special set of criteria has evolved in the common law protecting the existence of a labor contract. The Restatement (Second) of Contracts, a highly regarded source of guidance for understanding contracts, defines a "contract" as follows:

> A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. (See, § 1, p. 5 (1981)).

The question is whether or not the parties made binding promises to each other in the Joint Statement and whether or not the parties intended to create legal duties to perform

promises to each other. If so, there are enforceable remedies when a promise is broken. By "promise" is meant "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." (See, Restatement (Second) of Contracts, § 2(1) p. 8 (1981)). To test the "manifestation of intention to act," an objective standard is used; and undisclosed intentions receive little or no consideration.

One ordinarily would expect to find a collective bargaining agreement reduced to writing and executed by both parties. This is more an evidentiary issue than anything else. (See, e.g., Georgia Purchasing, Inc., 95 LRRM 1469 (1977); and Diversified Services, Inc., 293 LRRM 1068 (1976)). One also would expect a labor contract to contain promises concerning economic issues or conditions of employment. One would expect the parties to provide guidance in an agreement that helps govern "their day-to-day relations" and a broad "stability to the bargaining relationship." (See, J.T. Sand and Gravel Co., 91 LRRM 1187 (1976)). In evaluating an agreement between parties, the U.S. Supreme Court concluded that:

> 'Contract' in labor law is a term the implications of which must be determined from the connection in which it appeared. It is enough that this is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them. . . . Its terms affect the working conditions of the employees. . . . It resolves a controversy arising out of, and importantly and directly affecting, the employment relationship. (See, Retail Clerk Int'l Ass'n v. Lion Dry Goods, 369 U.S. 17 (1962), emphasis added).

It is clear the U.S. Supreme Court believes that the term "contract" embraces not only traditional collective bargaining agreements but also other documents negotiated between the parties such as "statements of understanding" drafted, for example, as a method of settling a strike.

While recognizing that long established definitions of a "contract" apply to a labor agreement, it also must be recognized that the context and character of a collective bargaining agreement are different from a contract in a typical commercial transaction. The eminent Archibald Cox observed many years ago that:

> It is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. (See, 72 Harv. L. Rev. 1482, 1498 (1959), Emphasis added.

The U.S. Supreme Court later quoted these words of Professor Cox in the Steelworkers' Trilogy. (See, United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)).

There, of course, is an expectation that parties will have followed conventional methods of bargaining in order to create their set of promises to each other. At the same time,

there is an institutional character to a collective bargaining agreement that often makes it difficult to apply judge-made principles of the common law in the way they might be applied to a lease contract or a contract to sell a farm. The nature of a collective bargaining agreement as a system of self-government must not be forgotten, and the ongoing nature of the relationship between the parties may cause them loosely to draw their agreements and to add to or modify them more so than might be the case in a standard commercial transaction. Moreover, contract law itself generally has evolved in ways that makes it easier to modify agreements. For example, a modern approach to contract modification is set forth in Restatement (Second) of Contracts which states:

> A promise modifying a duty under a contract not fully performed on either side is binding if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made. (See, § 89, p. 237 (1981)).

A lack of classical formalities will not be dispositive in a dispute about contract modifications between knowledgeable parties engaged in an ongoing transaction.

B. Meaning of the Joint Statement

The Employer argued that the parties did not intend the Joint Statement on Violence and Behavior in the Workplace to constitute an enforceable contract. As mentioned previously, an objective theory of assent to an agreement is used to determine whether a contractually binding offer has been made and accepted. Through the intellectual force of Judge Learned Hand and Professor Arthur Corbin, an objective assessment of the

parties' intention carried the day, and it is the intention of the parties as judged by external or objective appearance that is used to evaluate whether the parties entered into an agreement. As Judge Hand observed, "a contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent." (See, Hotchkiss v. Nat'l City Bank, 200 F. 287, 293 (1911)). Judged by an objective appearance of intentions, the question is whether parties manifested an intent to agree.

In testing whether promises exchanged by parties constituted a binding promise, a hope, a prediction, or even a pledge, it is appropriate to apply a standard of reasonableness and to ask whether a reasonable person, judging objectively, would conclude that the parties intended their words to constitute a binding promise. Even if one party intended to make a pledge and the other party intended to offer a binding promise, a reasonable person, judging objectively, must ask whether the party offering a binding promise had reason to know of the other parties' undiscussed intention merely to make a pledge. In this context, a "pledge" is used as a nonbinding expression of opinion; but it is recognized that one definition of "pledge" is "a binding promise." There is a famous case in which one farmer thought he was expressing a nonbinding opinion about selling his farm, but the other farmer believed he made a binding promise to buy the farm, and the Court made clear that the undiscussed intention of a party is not

relevant under an objective theory of assent. (See, Lucy v. Zehmer, 196 Va. 493, 84 S.E.2d 516 (1954)).

The problem of a party making what was believed to be a nonbinding proposal but, in reality, was a binding promise is an old one. (See, e.g., Embry v. Hargadine, McKittrick Dry Goods Co., 105 S.W. 777 (1907)). The context, of course, cannot be ignored in determining whether or not a statement constituted a gratuitous "pledge" or a binding promise. As Restatement (Second) observed:

> The meaning given to words or other conduct depends to a varying extent on the context and the prior experience of the parties. Almost never are all the connotations of a bargain exactly identical for both parties; it is enough that there is a core of common meaning sufficient to determine their performances with reasonable certainty or to give a reasonably certain basis for an appropriate legal remedy. (See, § 20, comment b, p. 59 (1981), emphasis added).

As the U.S. Supreme Court has made clear, an arbitrator is a "creature of contract;" and an arbitration award is enforceable "only so long as it draws its essence from the collective bargaining agreement." (See, United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)). Contractual language is the best evidence of the parties' promissory intent. One arbitrator concluded:

> It is a basic and fundamental concept in the arbitration process that an arbitrator's function in interpreting and applying contract language is to first ascertain and then enforce the intention of the parties as reflected by the language of the pertinent provisions involved. As a necessary and essential corollary is the principle that if the language being construed is clear and unambiguous, such language is itself the best evidence of the intention of the parties. And when language

so selected by the parties leaves no doubt as to the intention, this should end the arbitrator's inquiry. (See, Ohio Chemical & Surgical Equipment Company, 49 LA 377, 380-381 (1967), emphasis added).

The Employer asserted that it intended to make a "pledge" in the Joint Statement according to which it pledged itself to help eliminate violent behavior in the workplace. Management did not intend its "pledge" to constitute an enforceable promise because "there was no intent to alter, amend, or modify the National Agreement." (See, Tr. 58). The Union responded that its intent was to enter into an enforceable promise with management.

An examination of the purpose for the Joint Statement, the actual verbiage itself, and dispute resolution processes used by the parties provide objective manifestations of their intent. It is unrebutted that the principle purpose of the parties in publishing the Joint Statement was to lend their mutual weight to an anti-violence campaign in the workplace. Words used by the parties expressed their concern that combating violence in the workplace was such a high priority it was necessary to take an unprecedented step of jointly issuing a credo against violence. To convey the intensity of their commitment to reducing violence in the workplace, the parties stated:

> The United States Postal Service as an institution and all of us who serve that institution must firmly and unequivocally commit to do everything within our power to prevent further incidents of work-related violence.
>
> . . . .
>
> But let there be no mistake that we mean what we say and we will enforce our commitment to a workplace where dignity, respect, and fairness are

> basic human rights, and where those who do not respect those rights are not tolerated. (See, Joint Exhibit No. 4, emphasis added).

A representative of each party signed the document. Without regard to the unexpressed intentions of the parties, the document makes clear that the parties made promises to each other to take action. The parties addressed their statements to every member of the postal organization. They stated that:

> 'Making the numbers' is not an excuse for the abuse of anyone. Those who do not treat others with dignity and respect will not be rewarded or promoted. Those whose unacceptable behavior continues will be removed from their positions. (See, Joint Exhibit No. 4), emphasis added).

On one hand, the Employer argued that management was completely serious about an intent to take action in order to end violence in the workplace. On the other hand, the Employer asserted that it lacked the requisite intent to be contractually bound by the language of the Joint Statement. The Employer contended that, as expressed in the Joint Statement, the parties made a "pledge" of their efforts to accomplish objectives set forth in the document. The reference to the understanding between the parties as a "pledge" indicated to the Employer that the parties merely were communicating their disdain for violence in the workplace and were pledging themselves to end such misconduct. As the Employer viewed it, the Joint Statement definitely was not a contract but, rather, an effort to "send a message to stop the violence." (See, Employer's Post-hearing Brief, 13).

The Employer supported its theory of the case with

testimony from representatives present at discussions that led to the Joint Statement. As Mr. David C. Cybulski, Manager of Management Association Relations, testified:

> Following an exploration, again, of the circumstances leading to the tragedy [at Royal Oaks], the thought developed at the table that we should perhaps communicate what it is that we are doing. We are working collegally. We are trying to jointly approach these issues, as complex as they are.
>
> There has been a recognition here that there is something about the postal culture and perhaps something about the postal climate that we need to address and address in a more universal way than management exclusively issuing a statement or the labor union exclusively issuing a statement. (See, Tr. 90-91, emphasis added).

According to the Employer, it sought, in the aftermath of the "Royal Oaks" incident, to quell anxieties of employes by reaffirming an intent to end violence.

While it might be possible to interpret the word "pledge" in the Joint Statement as a nonpromissory commitment, the Statement must be interpreted as a whole document in order to assess its effect. It is a deeply rooted rule in aid of contract interpretation that a document should be interpreted so that its provisions make sense when read together. As Restatement (Second) observed, "since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous." ((§ 203, comment b, 93 (1981). The objective of reading a whole document is to give significance to each part and an interpretation is preferred that produces such a result.

Words in the last sentence of the Joint Statement such

as "pledge" and "efforts" must be read in conjunction with strong language throughout the prior six paragraphs which referred to "time to take action to show that we mean what we say," or "we will enforce our commitment," and "no tolerance of violence." Such statements indicated that the parties' past efforts had been less than successful and that the "Royal Oaks" tragedy signalled to the parties their need to make a drastic change in postal culture. The Joint Statement marked a departure from the past and pointed the way to organizational change. This was a document that evidenced an intent to take action rather than a mere statement of opinions and predictions. It was a "manifestation of intention to act" which justified a conclusion that a commitment had been made. After making strong promissory statements, the parties signed the document, signaling more than a gratuitous pledge.

The parties' conduct in negotiating the Joint Agreement added support to a justifiable conclusion that they exhibited an objective manifestation to be contractually bound. When approaching management with the idea of issuing a Joint Statement, Mr. Vincent Sombrotto, President of the National Association of Letter Carriers, doubted that the Employer would enter into such an agreement. (See, Tr. 69). In response to Mr. Sombrotto's proposal, the Employer did not flinch but, instead, asserted, "Try me." (See, Tr. 69). Such negotiation behavior exhibited an objective intent of the parties to make legally binding commitments to each other and, if not performed, legally enforceable promises that

could be the basis of a remedy. The language of the Joint Statement itself as well as the objective conduct of the parties evidenced their mutual assent to be legally bound by the Joint Statement.

Since the turn of the twentieth century, contract jurisprudence has recognized that an agreement can be "instinct with an obligation" and, therefore, enforceable as a contract. A relationship between parties is "instinct with an obligation" when it is "infused" or "imbued" or "filled" or "charged" with an obligation. (See, e.g., Wood v. Lucy, Lady Duff-Gordon , 118 N.E. 214 (N.Y. 1917)). The Joint Statement committed the parties to a course of action and created obligations for them. Even if the expression of the parties' intent in the Joint Statement was less than perfect, the language they used was instinct with an obligation which overcame any asserted indefiniteness in the document. The Joint Statement itself was clear in its manifestation of an intent to be bound; but even if one concluded that there was an imperfect expression of the parties' intent, the document was instinct with an obligation which supplied the binding requirement of the transaction. Moreover, courts have found that an agreement may be instinct with an obligation based on principles arising from the relationship of the parties and their course of conduct. (See, Toussaint v. Blue Cross and Blue Shield of Michigan, 292 N.W.2d 880 (1980)). A reasonable person would have viewed the surrounding circumstances of this transaction as contractually obligating the parties to each other.

C. Enforcing the Joint Statement

The Joint Statement did not specify a method concerning how to enforce the agreement. It is logical to presume that the parties intended to use standard enforcement mechanisms for disputes that might arise between the parties, namely, their negotiated grievance procedure set forth in the collective bargaining agreement. Such an interpretation is consistent with the parties' agreement.

Article 15.1 of the parties' agreement makes clear that the negotiated grievance procedure is not limited to disputes under the National Agreement which has been negotiated in the traditional way. The Agreement states that:

> A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement. (See, Joint Exhibit No. 1, p. 75, emphasis added).

The parties agreed that the grievance procedure could be used to resolve "a dispute, difference, or complaint" related to "conditions of employment." Moreover, there is an indication in the parties' agreement that, when they intended to make available some other dispute resolution process in lieu of the negotiated grievance procedure, they expressly said so in the agreement. For example, Article 16.9 makes clear that dispute resolution under the Veteran's Preference Act remains available to relevant employes.

(See, Joint Exhibit No. 1, p. 91). In some cases, there is access to the Merit Systems Protection Board. (See, Joint Exhibit No. 1, p. 89). The parties clearly understood how to draft language into their agreement which expressed their intent that there would be an election of a forum different from the negotiated grievance procedure. (See, e.g., Exhibit No. 1, p. 14, Article 6(f)(1)).

The inference is clear that the collective bargaining agreement is presumed by the parties to be the enforcement mechanism used to resolve their disputes, differences, disagreements, and complaints with regard to conditions of employment. The Joint Statement did not provide an alternative means of enforcement. It is concerned with a condition of employment. Accordingly, it is reasonable to conclude that the Union may use the negotiated grievance procedure to resolve disputes under the Joint Statement on Violence and Behavior in the Workplace.

The Employer argued that using the negotiated grievance procedure is inappropriate because there is no quid pro quo. In other words, the Union allegedly gave up nothing to receive this additional benefit. In effect, the Employer argued that, even if there were a promissory undertaking on the part of the parties, it was an illusory promise based on a lack of consideration. The modern day requirement is that consideration be bargained for. But, except in instances not relevant in this case, courts do not test the economic equivalence of the bargain. As one court concluded:

> The doing of an act by one at the request of another, which may be a detriment or inconvenience, however slight, to the party doing it, or may be a benefit, however slight, to the party at whose request it is performed, is a legal consideration for a promise by such requesting party. The judgment of the purchaser is the best arbiter of whether the thing is of any value, and how great, to him. (See, Hardesty v. Smith, 3 Ind. 39 (1851)).

The rule that courts do not test the economic equivalent of a bargain is long standing. As another court observed, "the rule is almost elementary that where parties get all the consideration they bargained for, they cannot be heard to complain of the want or inadequacy of consideration." (See, Chicago and Atlantic Railways v. Derkes, 3 N.E. 239 (1885)). If there is consideration, there is no requirement of benefit to a party.

What constitutes consideration has bedazzled students for generations. The rule is that, with several exceptions not relevant in this case, "any performance which is bargained for is consideration." (See, Restatement (Second) of Contracts, § 72, p. 177 (1981)). The usual consideration is a return promise, and even that may be an implied promise. The question is whether there was a promise or, possibly, a performance given in exchange for a promise.

The bargain theory of consideration supports a conclusion that the mutual exchange of promises in this case constituted consideration. The mutual exchange of promises involved a commitment from each party "to make the workroom floor a safer, more harmonious, as well as a more productive workplace." (See, Joint Exhibit No. 4). Use of the negotiated grievance procedure

was an incidental result of the promissory exchange between the parties. Moreover, there was unrebutted evidence that the Employer, in fact, has benefited from the exchange between the parties and has used the Joint Statement in regional arbitrations against workers who exhibited behavior inconsistent with the Joint Statement. There, in fact, was consideration in the bargained-for exchange between the parties. The grievance procedure of the National Agreement may be used to enforce the parties' bargain, and arbitrators have available to them the flexibility found in arbitral jurisprudence when it comes to formulating remedies, including removing a supervisor from his or her administrative duties. As the U.S. Supreme Court instructed:

> There [formulating remedies] 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. (See, United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)).

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Joint Statement on Violence and Behavior in the Workplace constitutes a contractually enforceable agreement between the parties. Accordingly, the Union shall have access to the negotiated grievance procedure set forth in the parties' collective bargaining agreement to resolve disputes arising under the Joint Statement. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: 8-16-96