CHAPTER II

I. THE ROLE OF LAW IN ARBITRATION

RICHARD MITTENTHAL *

Arbitrators tend to be passive, by profession if not by nature. Our job is to settle controversies, not start them. The purpose of this paper, however, is to continue and perhaps enlarge the controversy over the role of law in arbitration. At last year's Academy meeting, Bob Howlett called for a marriage of law and arbitration. He stated that "every agreement incorporates all applicable law" and that arbitrators "should render decisions . . . based on both contract language and law."[1] At the same meeting, Professor Meltzer opposed such a marriage. He stated that arbitrators are "the proctor of the agreement and not of the statutes" and that we, therefore, "should respect the agreement and ignore the law" where the two conflict.[2]

It seems to me that both of these positions are somewhat extreme. I choose to occupy the middle ground between them, a position more in keeping with the diversity of language in collective bargaining agreements and the diversity of disputes in which the role of law may become an issue. My concern here is with what arbitrators should do when asked to consider the law in resolving a grievance dispute.

A. Obvious Cases

Let me begin with the obvious cases where no particular difficulty is presented. Law is often adopted by the parties as a portion

* Member, National Academy of Arbitrators, Detroit, Mich.

[1] Howlett, "The Arbitrator, the NLRB, and the Courts," *The Arbitrator, the NLRB, and the Courts,* Proceedings of the Twentieth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1967), 67, 83, 85.

[2] Meltzer, "Ruminations About Ideology, Law, and Labor Arbitration," *The Arbitrator, the NLRB, and the Courts, supra,* note 1, at 1, 16, 19.

of their contract. An employer may agree, for instance, to give a man returning from military service "such reemployment rights as he shall be entitled to under then existing statutes." [3] The veteran's contract rights are dependent upon his statutory rights. Hence, the arbitrator may properly refer to the relevant legislation. Or another employer may agree broadly that the entire contract "is subject to the terms of such valid statutes, orders and regulations as shall be applicable [t]hereto." [4] Given such authority, the arbitrator could consider the impact of law upon any contract clause.

Law may also serve to implement general contract language. A typical seniority clause provides that length of service governs where the employees involved are relatively equal in "ability" and "physical fitness." Suppose a woman is laid off while a man with less service continues to work on a job which requires heavy physical effort. Suppose further that the case arises in a state whose laws prohibit women from performing strenuous work. Confronted by the woman's grievance, an arbitrator may properly rely on state law to establish that the woman lacked either the "ability" or "physical fitness" to perform the man's job. A contractual standard which is expressed loosely permits the consideration of all relevant circumstances, including any relevant statute.

Law may even be used to resolve ambiguity in contract language. Consider, for instance, an ambiguous clause which is subject to two interpretations. One is compatible with existing legislation and the other is not. The arbitrator should choose that interpretation which will harmonize the contract with the law. For the parties presumably intend a valid contract. "Arbitral interpretation of agreements, like judicial interpretations of statutes, should seek to avoid a construction that would be invalid under a higher law." [5]

B. Areas of Controversy

Let me turn now to the areas of controversy. Howlett's view is based in part on the belief that "all applicable law" is, *by impli-*

[3] See, e.g., Art. xiii, §1 of the September 1, 1965, Republic Steel—Steelworkers Agreement.
[4] See Art. XIX of the September 1, 1965, Crucible Steel—Steelworkers Agreement.
[5] Meltzer, *supra*, note 2, at 15–16.

cation, incorporated in "every agreement."[6] Some courts[7] and some arbitrators[8] have drawn this implication. Indeed, the U. S. Supreme Court said in 1866 that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of [the contract], as if they were expressly referred to or incorporated in its terms."[9] Thus, it can be argued that Howlett's position is supported by the law of contracts.

I find no merit in such an argument. First, the implication is highly artificial. Where courts imply that the law is part of the contract, they must necessarily assume that (1) "everybody knows the law" and (2) "everybody makes his contract with reference to [the law] and adopts its provisions as terms of the agreement."[10] These assumptions involve the piling of one fiction upon another and have nothing to do with people's real intentions.

Second, the implication is unnecessary. Courts can and do apply the law in a contract dispute without indulging in such multiple fictions. A judge has two functions to perform. He must interpret the contract; he must also determine the legal operation of the contract, that is, the legal remedies (if any) for its enforcement. He is, in other words, "concerned not only with the [contract] but also with the law that limits and governs it."[11] It is only in connection with the legal operation of the contract that it is necessary for the judge to refer to any applicable constitution or statute. Realistically, what happens is that he interprets the contract and then imposes upon his interpretation the relevant rules of law. Given this view of judicial decision-making, there is no need to imply that the law is incorporated in the contract.

Third, for these reasons the implication is opposed by eminent authorities on the law of contracts. Williston believes the implication is "too broad to be accepted without qualification."[12]

---

[6] Howlett, *supra,* note 1, at 85.

[7] See, e.g., *Adams* v. *Spillyards,* 61 S.W. 2d 686, 187 Ark. 641 (1933); *Industrial Commission of Colorado* v. *Aetna Life Ins. Co.,* 174 p. 589, 64 Colo. 480 (1918).

[8] See, e.g., *American Optical Co.,* 4 LA 288, 292 (1946).

[9] *Van Huffman* v. *Quincy,* 71 U.S. (4 Wall.) 535, 550, 18 L. Ed. 403.

[10] Williston, *Contracts,* §615 (rev. ed., 1961).

[11] Meltzer, *supra,* note 2, at 19.

[12] Williston, *supra,* note 10.

Corbin believes an implication "in such general terms . . . can not be accepted as correct." [13] Indeed, Corbin flatly asserts that "statutes and rules of law are certainly not incorporated into the contract." [14]

This analysis suggests two conclusions. First, the broad implication is not sound and is not supported by the weight of authority. If this is true of contracts in general, there is no reason why it should not be true of collective bargaining contracts. Second, judges concern themselves with applicable law because they exercise the coercive power of the state and must determine the legal operation of the contract. Arbitrators, unlike judges, are not an arm of the state and do not determine the legal operation of the collective bargaining contract. We determine contract rights and questions of interpretation and application, nothing more. We are the servants of the parties, not the public. We derive our powers from the contract, not from the superior authority of the law. Hence, even if courts had a rational basis for implying that law is part of the contract, arbitrators would have no justification for doing the same.

If, as I have argued, Howlett's implication is not borne out by the law of contracts, is it supported by the contract itself? Arbitrators have the authority to establish implied conditions. The source of this authority is the parties' will, the parties' common understanding. We may find implications which can reasonably be inferred from some provision of the contract or even from the contract as a whole. The implication that all applicable law is incorporated in the contract would be warranted where there was a real or tacit understanding to that effect during negotiations. While such an understanding may exist in some relationships, it is more than doubtful that there is any general understanding among employers and unions as to the role of law during the term of the contract.

The typical contract does mention the law. It is not unusual for the parties to refer to statutory law regarding union security,[15]

---

[13] Corbin, *Contracts*, §551 (rev. ed., 1960).

[14] *Ibid.*

[15] E.g., "the foregoing provisions [union membership] shall be effective in accordance with and consistent with applicable provisions of federal and state law."

checkoff,[16] reemployment of veterans,[17] and supplemental unemployment benefits.[18] Those who draft such provisions are certainly aware of the impact of law upon employee rights. Their limited reference to the law suggests that they intend a limited role for the law. Their failure to state, in these circumstances, that all applicable law is part of the contract must have some significance. Thus, Howlett's implication seems inconsistent with the language found in most contracts.

Finally, even if the implication could somehow hurdle all of these objections, it would be confronted by the arbitration clause. Ordinarily, the arbitrator is confined to the interpretation and application of the agreement and forbidden to add to or modify the terms of the agreement. If he rules that the law is part of the contract, he must read into the parties' contract a new and indeterminate set of rights and duties. By doing so, however, he would be adding to the terms of the contract and thus ignoring the limitations on his authority. The purpose of a narrow arbitration clause is to limit us to questions of private rights which arise out of the contract. That purpose would certainly be defeated if we were to draw an implication which would transform arbitration into a forum for the vindication of not just private rights but public rights as well. In the absence of any evidence that the parties intend such a drastic departure from the normal arbitration system, the implication should be rejected.

For these reasons, I find nothing in the collective bargaining contract to support the implication that the law is incorporated in the contract.

C. Where Contract and Law Conflict

Let me turn now to more specific problems. What should an arbitrator do where the contract and the law conflict, where an award affirming a clear contract obligation would require either party to violate a statutory command?

---

[16] E.g., "the provisions of this [checkoff clause] shall be effective in accordance with and consistent with applicable provisions of federal law."

[17] E.g., "the Company shall accord to each employee who applies for reemployment after conclusion of his military service with the United States such reemployment rights as he shall then be entitled to under then existing statutes."

[18] E.g., "the [SUB] Plan and all rights and duties thereunder, shall be governed, construed and administered in accordance with the laws of the State of Ohio."

Professor Cox gave us an excellent example of this problem at an earlier meeting.[19] He noted that after World War II a conflict developed between the Selective Service Act and contract seniority. This statute was interpreted by the Supreme Court to require employers to give veterans preference over nonveterans in the event of layoffs during the first year after their discharge from the armed forces.[20] The typical contract gave veterans only the seniority they would have had if they had not been drafted. A dispute arose when an employer, in reducing the work force, retained a veteran and laid off a nonveteran even though he had more contract seniority. The nonveteran grieved, relying upon the contract. The employer defended his action, relying upon the law. Who should prevail?

There are two possible points of view. Cox tells us to deny this grievance—that is, to respect the law and ignore the contract.[21]

He argues that:

> ... The parties to collective bargaining cannot avoid negotiating and carrying out their agreement within the existing legal framework. It is either futile or grossly unjust to make an award directing an employer to take action which the law forbids—futile because if the employer challenges the award the union cannot enforce it; unjust because if the employer complies he subjects himself to punishment by civil authority.[22]

Furthermore, such an award demeans the arbitration process by inviting noncompliance, appeals to the courts, and reversal of the award.

Professor Meltzer, on the other hand, tells us to grant the grievance—that is, to respect the contract and ignore the law. His argument includes three main points, each of which deserves some comment.

---

[19] Cox, "The Place of Law in Labor Arbitration," *The Profession of Labor Arbitration*, Selected Papers From the First Seven Annual Meetings of the National Academy of Arbitrators, 1948–1954 (Washington: BNA Books, 1957), 76.

[20] *Fishgold* v. *Sullivan Drydock & Repair Co.*, 328 U.S. 275, 18 LRRM 2075 (1946).

[21] Most arbitrators followed this course and held the statute to be controlling. See, e.g., *International Harvester Co.*, 22 LA 583 (1954); *Dow Chemical Co.*, 1 LA 70 (1945). Another example of this problem would be a situation where the contract requires the employer or the union to discriminate against employees in a manner prohibited by the NLRA.

[22] Cox, *supra*, note 19, at 77–78.

First, Meltzer says:

> There is . . . no reason to credit arbitrators with any competence, let alone any special expertise, with respect to the law, as distinguished from the agreement. A good many arbitrators lack any legal training at all, and even lawyer-arbitrators do not necessarily hold themselves out as knowledgeable about the broad range of statutory and administrative materials that may be relevant in labor arbitrations.[23]

No one can quarrel with this description. Arbitrators are not omniscient. Most of us do not have the time, the energy, or the occasion to become truly knowledgeable about the law. But some of our members—Smith, Aaron, Cox, Meltzer himself, to name but a few—surely possess the necessary expertise. Such men are well equipped to decide grievance disputes which raise both contractual and legal questions. It is not unusual for the parties to fit the arbitrator to the dispute, to choose a man qualified by experience or learning for the particular task involved. An example of this is the use of industrial engineers to arbitrate time-study or incentive issues. There is no reason why the parties, when confronted by a difficult legal question, cannot exercise this same selectivity in finding a man with experience in both the contract and the law.

Second, Meltzer says:

> . . . an analogy to administrative tribunals is instructive. Such agencies consider themselves bound by the statutes entrusted to their administration and leave to the courts challenges to the constitutional validity of such statutes. Arbitrators should in general accord a similar respect to the agreement that is the source of their authority and should leave to the courts or other official tribunals the determination of whether the agreement contravenes a higher law.[24]

This analogy is appealing. But another analogy can be constructed to support a different conclusion. For example, an administrative agency would refuse to enforce the terms of its enabling statute in a given case if enforcement would require conduct that is unlawful under some other statute.[25] An arbitrator should like-

---

[23] Meltzer, *supra*, note 2, at 16.
[24] Meltzer, *supra*, note 2, at 16–17.
[25] E.g., the rulemaking power of administrative agencies does not permit the enactment of regulations which are inconsistent with the underlying intent of statutes other than those under which the regulations are issued. *United States ex. rel. Hirshberg* v. *Cooke*, 336 U.S. 210 (1949); *International R. Co.* v. *Davidson*, 257 U.S. 506 (1922).

wise refuse to enforce a particular contract provision if enforcement would require action forbidden by the law. My point is not that Meltzer's analogy is wrong but rather that his analogy, by itself, is not sufficient reason to adopt his point of view.

Third, Meltzer says that "the parties typically call on an arbitrator to construe and not to destroy their agreement."[26] His position is that an arbitrator is not construing the contract if he defers to the law and ignores the terms of the contract. He would adhere strictly to the contract even where it means requiring one of the parties to act unlawfully.

This is really the crux of the problem. No one would disagree with Meltzer's view that the arbitrator is supposed to construe, rather than destroy, the contract. The question is what exactly is the arbitrator doing when he takes notice of the conflict between the law and the contract and refuses to order the commission of an act required by contract but forbidden by law? Is he destroying the contract by refusing to issue such an order? I do not think so. A strong case can be made for the proposition that the arbitrator, when exercising this kind of restraint, is ordinarily construing the contract.

Consider some of the language in the typical contract. First, it is not unusual to find a "separability" or "saving" clause. Such a clause says that if any contract provision "shall be or become invalid or unenforceable" by reason of the law, "such invalidity or unenforceability shall not affect" the rest of the contract.[27] The parties thus intend to isolate any invalidity so as to preserve the overall integrity of the contract. But they also recognize the fact that a contract provision can be held "invalid" or "unenforceable" because of a state or federal statute. They do not wish to be bound by an invalid provision. The implication seems clear that the arbitrator should not enforce a provision which is clearly unenforceable under the law.

---

[26] Meltzer, *supra*, note 2, at 16.

[27] This clause is commonly found in contracts in the automobile and automobile parts industry. One such clause reads: "In the event that any of the provisions of this Agreement shall be or become invalid or unenforceable by reason of any Federal or State Law or Executive Order now existing or hereafter enacted, such invalidity or unenforceability shall not affect the remainder of the provisions of this Agreement."

Second, it is not unusual to find an arbitration clause which says the arbitrator's awards will be "final and binding" upon the employer, the union, and the employees concerned. If the arbitrator ignores the law and orders the employer to commit an unlawful act, he invites noncompliance[28] and judicial intervention.[29] He knows that his award, under such circumstances, is not going to be "final and binding." Either the employer asks a court to reverse the award, or the employer refuses to comply and the union asks a court to affirm the award. In either event, the dispute continues beyond the grievance procedure. That could hardly be what the parties intended when they adopted arbitration as the final step in the grievance procedure as the means of terminating the dispute. The implication seems clear that the arbitrator must consider the law in this kind of situation if his award is to have the finality which the contract contemplates.[30]

Thus, it may well be that contracts can be construed to justify resort to the law to avoid an award which would require unlawful conduct.

On balance, the relevant considerations support Cox's view. The arbitrator should "look to see whether sustaining the grievance would require conduct the law forbids or would enforce an illegal contract; if so, the arbitrator should not sustain the grievance."[31] This principle, however, should be carefully limited. It does not suggest that "an arbitrator should pass upon all the parties' legal rights and obligations" or that "an arbitrator should refuse to give effect to a contract provision merely because the courts would not enforce it."[32] Thus, although the arbitrator's award may *permit* conduct forbidden by law but sanctioned by contract, it should not *require* conduct forbidden by law even though sanctioned by contract.

---

[28] Noncompliance with the award is itself a contract violation, the parties having agreed to be bound by the arbitrator's award.

[29] A court would certainly set aside such an award. See Smith and Jones, "The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law," 63 *Mich. L. Rev.* 751, 804 (1965).

[30] Note, however, that even if the arbitrator respects the law and refuses to order the employer to commit an unlawful act, the union might ask a court to set aside the award on the ground that the arbitrator exceeded his authority under the contract. No award is "final and binding" in the sense that it precludes parties from going to court and attempting to reverse the award on certain limited grounds.

[31] Cox, *supra*, note 19, at 79.

[32] *Ibid.*

D. Grievance Based on Statutory Obligation

Let me turn now to a more common issue. What should an arbitrator do where a grievance is based on a statutory obligation not found in the contract?

Consider the layoff described earlier, where a choice had to be made between veteran and nonveteran in the period following World War II. Federal law then required that veterans be preferred in case of layoffs during the first year after their discharge from the armed forces. Suppose the employer laid off the veteran and retained the nonveteran because he had more contract seniority. The veteran grieves, relying upon his rights under the Selective Service Act. The employer defends his action, relying upon the contract. Who prevails?

Or consider the problem in connection with the National Labor Relations Act. Suppose the employer, for good business reasons, advances the starting time of the day shift from 9:00 a.m. to 7:00 a.m. without prior discussion with the union. The contract includes a management clause granting the employer "sole jurisdiction over all matters concerning the management of the plant subject only to the terms of the agreement." No other provision of the contract in any way concerns the matter of shift starting times.[33] Nor had the parties discussed this subject during contract negotiations. And the employer had never before found it necessary to change a shift starting time. The union grieves, urging that the employer's unilateral action was a violation of Section 8(a)(5) of the Act[34] and that statutory rights and duties are a part of the contract. The employer defends his action, urging that since his obligations under the Act are not part of the contract, there was no contract violation. Who prevails?

There are several different points of view. Howlett tells us to grant both grievances. He would return the veteran to work if the layoff violated the Selective Service Act; he would return the day shift to a 9:00 a.m starting time if the unilateral change

[33] It might possibly be argued that the recognition clause limited the employer's right to change shift hours unilaterally. A typical recognition clause provides: "The Company recognizes the Union as the exclusive bargaining representative with respect to wages, hours, and other conditions of employment . . ."

[34] §8(a)(5) of the NLRA says it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."

violated the NLRA. His position is that "the law is part of the 'essence [of the] collective bargaining agreement' " and that "each contract includes all applicable law."[35] Hence, in his opinion, arbitrators "should render decisions . . . based on both contract language and the law" and "must be willing to accept the responsibility of . . . deciding issues arising under the National Labor Relations Act."[36]

What exactly are the grounds for Howlett's view? His implication that the law is part of the contract must derive either from the law of contracts or from the collective bargaining contract itself or from national labor policy.

As for the law of contracts, I have already explained that the best authorities question the validity of an implication which would make all applicable law a part of the contract. Courts apply law in a contract dispute. They do so, however, because they exercise the coercive power of the state and because they determine the legal operation of the contract. Arbitrators exercise no such power and make no such determination. There is no basis in the law of contracts to justify the adoption of Howlett's implication.

As for the collective bargaining contract, I have already noted that it usually does mention the law. The very fact that the parties take the trouble to specify the areas in which the law is to affect their relationship suggests that they do not intend to be bound by statutory obligations not mentioned in the contract. The typical narrow arbitration clause also serves to inhibit any importation of the law into the contract. And I doubt that there is any general understanding among employers and unions as to the role of law during the term of the contract. Given these realities, it is difficult to see how the contract itself can support Howlett's implication.[37]

---

[35] Howlett, *supra*, note 1, at 83, 85.
[36] Howlett, *supra*, note 1, at 83, 106.
[37] I said earlier that the arbitrator should consider the law to avoid an award which would require unlawful conduct. One of the reasons for this proposition is that contracts contemplate "final and binding" awards and that an award compelling unlawful conduct cannot really be "final and binding." The dispute over the contract, over the award itself, would continue into the courts. It could be argued that the arbitrator should, for this same reason, enforce statutory obligations because his failure to do so is likely to result in court proceedings. However, this is an entirely different situation. When an arbitrator refuses to enforce a statutory obligation, his award is "final and binding" with respect to the contract. The grievant has no contract question to take to court. He may pursue his statutory rights in the appropriate forum, but such a suit has nothing to do with the contract.

As for national labor policy, Howlett asserts that arbitrators must decide statutory issues in order that "the NLRB, consistent with its announced policy, may avoid a decision on the merits." [38] In other words, the Board will not defer to our awards unless we pass on the statutory issue. This argument assumes *first* that the scope of an arbitrator's powers can be enlarged because of Board policy considerations, and *second* that the Board can and should defer to arbitrators on statutory issues.

The first assumption is incorrect in my opinion. Arbitrators derive their powers from the contract, not from the Board and not from federal law. Even if the Board should ask us to decide statutory issues, that would not give us the power to do so. The parties have not granted us the authority to effectuate NLRB policies. They grant us only the authority to effectuate their own policies, the rules and standards set forth in their own contract. In the absence of any indication in the contract that the parties expect the Board to defer to our awards, there is no justification for the arbitrator to pass on statutory issues.

The second assumption is highly questionable. It can be forcefully argued that the Board should not defer to arbitrators on any statutory issue:

> . . . the responsibility for interpreting the contract belongs to the arbitrator, but the responsibility for interpreting the statute rests on the Board. The national labor policy favors arbitration as a substitute for the courts in giving meaning and content to collective agreements; but Congress has created the Board as a specially competent tribunal and designed a specially adapted procedure for giving meaning and content to the statute. For the Board to covet the court's servant and appropriate that servant to perform its work is a violation of the statutory commandment.[39]

Howlett also asserts that arbitrators must resolve statutory questions in order that "the statutory policy of determining issues through arbitration may be fulfilled." [40] The Labor-Management Relations Act states that arbitration is "the desirable method for settlement of grievance disputes arising over the application or

---

[38] Howlett, *supra*, note 1, at 79.
[39] Summers, "Labor Arbitration: A Private Process with a Public Function," 34 *Rev. Jur. U.P.R.* 477, 494 (1965). For a different point of view, see Samoff, "Arbitration, Not NLRB Intervention," 18 *Labor Law Journal* 602 (1967).
[40] Howlett, *supra*, note 1, at 79.

interpretation of an existing collective bargaining agreement." [41] The Supreme Court views arbitration as "a major factor in achieving industrial peace" and as a means of effectuating the "federal policy . . . [of] promot[ing] industrial stabilization through the collective bargaining agreement." [42] But neither the Act nor the courts grant arbitrators any authority beyond that which is provided by the parties themselves. Mr. Justice Douglas indicated in *Enterprise Wheel* that an arbitrator who bases his award "solely upon . . . the requirements of enacted legislation" would "exceed . . . the scope of the submission" [43] and that such an award would not be legitimate. The statutory policy is to prefer arbitration as a means of settling grievance disputes over *contract* questions, not *statutory* questions. Nowhere does the Act suggest that arbitrators are to decide statutory questions. Were we to assume such authority, we would be performing "the business of the NLRB and the courts, interpreting legislation [and] effecting national rather than private goals as a kind of subordinate tribunal of the Board." [44] That could hardly be what the parties expect from us. The fact that arbitration is a private process with a public function does not invest us with the public responsibility of enforcing statutory rights and duties.

There is nothing in our national labor policy to support the implication that the law is part of the contract. Moreover, because we serve the parties alone and not the public, I doubt that national labor policy could in any event be a sound basis for drawing this implication.

I can find no good reason for arbitrators to enforce statutory obligations not found in the contract. Therefore, I would not consider the statutory issues in the hypothetical cases, and I would deny the grievances if there was no contract violation. Such a ruling would simply mean that the layoff and the change in shift starting time were not contrary to the employer's contractual obligations. Whether these actions were contrary to his statutory obligations is another matter entirely. The complainants could

---

[41] §203(d) of the Labor-Management Relations Act.
[42] *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 588, 46 LRRM 2416 (1960).
[43] *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2432 (1960).
[44] Seitz, "The Limits of Arbitration," 88 *Monthly Labor Review*, 763, 764 (1965).

pursue their rights in another forum, the veteran filing suit in federal court and the union filing charges with the NLRB. Such a ruling would not require the commission of an unlawful act; it would merely permit conduct which may at a later time be held unlawful by the appropriate governmental body.

Meltzer and Cox would reach this same conclusion, viewing the arbitrator as "the proctor of the agreement and not of the statutes." [45] But Cox suggests an important qualification. In his opinion, our authority with respect to statutory issues depends upon the breadth of the arbitration clause. Thus, he would have us ignore the statutory issue if our charter is limited to "disputes involving the interpretation and application of the agreement." But he would have us enforce statutory rights and duties if our charter broadly embraces "any dispute of any nature or character." Given such a wide-open arbitration clause, Cox argues, the arbitrator "should give effect to settled statutory duties" because he "fails to discharge his task if he looks only at what is expressed in the contract or implied by its terms." [46]

Most contracts, however, contain a narrow arbitration clause. Under such circumstances, the arbitrator should not concern himself with legal duties not arising out of the contract. He should interpret and apply the agreement and the agreement alone.[47]

E. Practical Consequences

Let me turn to some of the practical consequences of our attitude toward the law, particularly those principles of contract interpretation developed by the NLRB.

Take the hypothetical case mentioned earlier, involving a unilateral change in shift starting time without prior discussion

---

[45] Meltzer, *supra,* note 2, at 19; Cox, *supra,* note 19, at 79–83.

[46] Cox, *supra,* note 19, at 82. Cox says four considerations support this view: "First, the ultimate outcome of the controversy ought not depend on the breadth of the arbitration clause. Under a narrow clause the union could go to court or the NLRB and obtain a favorable ruling. Second, if statutory duties are to be ignored in arbitration proceedings, the courts and Board are unlikely to give effect to the parties' undertaking to submit to the arbitrator 'Any dispute . . . of any nature or character.' Third, if the dispute were submitted, failure to pass upon the employer's statutory obligation would be an invitation to relitigate the case in a second forum. Fourth—and most important—diversity of approach on such fundamental questions will widen the schism between arbitrators and the National Labor Relations Board . . ."

[47] See, e.g., *Aero Supply Mfg. Co.,* 24 LA 786, 787 (1955); *Allegheny Ludlum Steel Corp.,* 23 LA 606, 607 (1954); *International Harvester Co.,* 17 LA 29, 30 (1951).

with the union. An arbitrator would in all likelihood find no contract violation.[48] He would emphasize the management clause, the absence of any express contractual restriction on changes in shift hours, and the fact that the determination of shift starting times is a customary management function. He would probably subscribe to the idea that management continues to have the rights it customarily possessed and which it has not surrendered through collective bargaining. This is sometimes referred to as the "residual rights" theory.

The Board might well find a violation of Section 8(a)(5) on my assumed set of facts. However, in order to decide the statutory question, the Board would first have to decide the contract question.[49] There can be no unfair labor practice if the union has *waived* its statutory rights to bargain on the matter of shift hours. And the employer in this case would argue that because the contract permits this unilateral action, there must be such a *waiver*. Thus, the contract question before the Board is much the same as the one before the arbitrator.[50] Board decisions reveal that a waiver must be clear and unmistakable and that a waiver will not be found to exist merely because the contract includes a management clause or because the contract is silent on a bargainable subject protected by the Act.[51] Given these principles, I suspect the Board would find no waiver in the hypothetical case and would therefore find the unilateral action to be a violation of 8(a)(5). This is almost the same as saying that the contract does not permit this unilateral action. To be more precise, however, the Board is actually saying that the contract does not permit unilateral action *without prior discussion* unless the employer's

[48] See, e.g., *United States Pipe & Foundry Co.*, 28 LA 467 (1957); *Federal Rice Drug Co.*, 27 LA 123 (1956); *Ingram-Richardson Mfg. Co. of Indiana*, 3 LA 482 (1946); *Merck & Co.*, 1 LA 430 (1946).

[49] The Board need not defer questions of contract interpretation to either the courts or arbitration. See *NLRB* v. *C & C Plywood Corp.* 385 U.S. 421, 64 LRRM 2065 (1967); *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 64 LRRM 2069 (1967).

[50] However, there are differences. The Board expresses its conclusion in terms of whether there has been a waiver of statutory rights; the arbitrator expresses his conclusion in terms of whether there has been a contract violation. The Board, ruling against the employer, decides the unilateral act is improper because there was no prior discussion; the arbitrator, ruling against the employer, decides the unilateral act is improper regardless of whether or not there was any prior discussion.

[51] Ordman, "The Arbitrator and the NLRB," *The Arbitrator, the NLRB, and the Courts,* Proceedings of the Twentieth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1967), 47, 63–67.

right to take such action is clearly and unmistakably spelled out in the contract. In formulating these waiver principles, the Board rejects the so-called "residual rights" theory.[52]

This conflict between arbitrators and the Board is obvious. My purpose here is not to take sides but rather to emphasize the seriousness of the situation.

If arbitrators were to adopt Howlett's thesis and make decisions consistent with Board law, we would inevitably embrace Board principles of contract interpretation. But this would mean the rejection of a method of contract construction which we have helped to develop over the past 25 years and which the parties have accepted by and large. This would mean a real change in bargaining relationships and the imposition of new and unexpected burdens on the bargaining table. For employers would have to negotiate express recognition of rights which they thought they possessed but which were never exercised and never confirmed in writing.

On the other hand, if arbitrators continue on the present course, the division between the arbitrator and the Board is likely to widen. As the Board moves more and more into the regulation of collective bargaining during the contract term, the need for common thinking on questions of contract interpretation increases. Yet the differences in our present points of view seem irreconcilable. Those differences open "the way . . . to forum shopping, second-guessing and uncertainty."[53] The dangers to the arbitration process should be evident.

I have no answer to this dilemma. I do know, however, that the Board's charter is much broader than the arbitrator's and that the Board is in some respects much more flexible than the arbitrator.[54] I also know that the Board has one voice while the arbitrators have many. Hence, I believe that "the evolution of

[52] *Ibid.* See also the Board's brief before the Supreme Court in *NLRB* v. *C & C Plywood Corp.*: "Many arbitrators . . . apply the so called 'residual rights' theory when management takes unilateral action, holding that it is free to act unless the collective agreement expressly provides otherwise . . . Such a doctrine, which bestows upon management all 'residual rights', stands on its head the established rule that a statutory waiver must be express and clear."

[53] Cox, *supra*, note 19, at 83.

[54] The Board, e.g., is far more likely to consider matters of public policy in interpreting the Act than the arbitrator is in interpreting the contract.

basic [contract] principles which command general acceptance" [55] is more likely to be achieved by Board movement toward arbitration concepts than the other way around.

F. Conclusion

My conclusion is that the role of law in arbitration must be carefully circumscribed. Too great a reliance on the law would encourage a kind of rigidity and uniformity which is foreign to our arbitration system. Statutory law may guide the arbitrator on occasion. But the arbitrator must follow the rule of law established by the contract. He is part of a private process for the adjudication of private rights and duties. He should not be asked to assume public responsibilities and to do the work of public agencies. He "has no general charter to administer justice for a community which transcends the parties." [56]

II. THE ROLE OF LAW IN ARBITRATION: REJOINDERS

BERNARD D. MELTZER *

I greatly appreciate the gracious invitation of Richard Mittenthal and Martin Wagner to comment on Mr. Mittenthal's paper despite my inability to attend the Academy's 1968 meeting.

Let me begin by attempting to pinpoint the principal difference between Mr. Mittenthal's position and mine. During last year's Academy meeting, I put forward the following suggestion: Where there appears to be an irrepressible conflict between a labor agreement and the law, an arbitrator whose authority is typically limited to applying or interpreting the agreement should follow the agreement and ignore the law.[1] The arbitrator would thus leave the application of superseding law to courts or to other

---

[55] Cox, *supra*, note 19, at 83.

[56] Shulman, "Reason, Contract and Law in Labor Relations," 68 *Harv. L. Rev.* 999, 1016 (1955).

* Member, National Academy of Arbitrators; Professor of Law, University of Chicago.

[1] Meltzer, "Ruminations About Ideology, Law, and Labor Arbitration," *The Arbitrator, the NLRB, and the Courts,* Proceedings of the Twentieth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1967), 1, 16, 19.