erred when he reduced a disciplinary suspension of one week to a written disciplinary warning, because the *language of the contract* vested in the employer the power to determine the penalty. While the court said: "The sole question in this case is whether the arbitrator exceeded his authority in making his award," the court examined the language of the contract and found that the arbitrator had been wrong in his interpretation.

In *Safeway Stores* v. *American Bakery and Confectionary Workers International Union, Local 111,* 390 F. 2d 79, 67 LRRM 2646 (5th Cir., 1968), the court, enunciating the traditional view, said: "The arbiter was chosen to be the Judge. That Judge has spoken. There it ends." However, the court continued that the arbitrator had "put forward a passably plausible . . . analysis of the . . . contractual . . . provisions," but the court assumed, "without here deciding, that if the reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling then the Court can strike down the award."

One nonarbitrator lawyer who read both the Mittenthal and Howlett papers said: "My thought is that both of you are doing the same thing, but you are afraid to admit it." He may be right.

Perhaps the *Esquire* cartoon of several years ago is appropriate: One scientist writes equations on the blackboard; another scientist, with pistol pointed at him, says: "Jones, you've disproved my theory for the last time."

I trust, however, that arbitrators will not emulate Lady Macbeth's doctor who, when he viewed her nocturnal wanderings, concluded, "I think, but dare not speak." [31]

Discussion——

THEODORE J. ST. ANTOINE *

Back in the days before the Green Bay Packers acquired fee simple title to the National Football League championship, I saw a playoff game here at the Cleveland Stadium between the Browns

[31] *Macbeth,* Act V, Scene 1.

* Associate Professor of Law, The University of Michigan, Ann Arbor, Mich.

and the Detroit Lions. My Michigan loyalties have created a mental block as to the final score, but I do have a vivid recollection of one stirring goal-line stand by Detroit. A great, burly Lion tackle stationed himself about a foot from the goal post—and I remember thinking that whatever play the Brown quarterback might call, it certainly wasn't going to be a run over tackle. In facing two such formidable advocates as Dick Mittenthal and Bob Howlett, I feel very much like that Brown quarterback of yesteryear. (I shall refrain, however, from carrying out the analogy so far as to indicate which of these gentlemen reminds me of the tackle, and which of the goal post.) In short, I'd like to avoid as long as possible a direct confrontation with either of them. Therefore, perhaps I should start off by trying an end run.

To begin with, I think we can substantially reduce the area of potential conflict among us. First, I take it we'd all concede that the union and the employer may agree, either through the contract or the submission agreement, that the arbitrator is to rule on statutory as well as contractual issues, or that he is to interpret the contract in the light of relevant statutes as construed by the courts or administrative agencies. What binding effect such agreements by the parties might have on the various public tribunals is beyond the scope of our subject here.[1] But, as far as the parties themselves were concerned, there would be no doubt about the propriety of the arbitrator's considering the effect of statutes.

Second, and probably more important, I assume most of us would not be troubled by an arbitrator's seeking guidance from statutes or decisional sources when dealing with a genuinely ambiguous contractual provision or one which obviously seems intended to reflect statutory standards. For example, if either of two interpretations of a particular clause is entirely reasonable and one is clearly valid under an applicable statute and the other clearly invalid, the arbitrator would have to be senseless not to choose the lawful construction. Similarly, when such protean phrases as "just cause" are at issue, I can see every reason, in the appropriate case, to look for assistance even as far afield as the

[1] The National Labor Relations Board would clearly not be bound regarding matters within its unfair labor practice jurisdiction. See §10(a) of the NLRA. See generally Aaron, "Judicial Intervention in Labor Arbitration," 20 *Stan. L. Rev.* 41, 44–55 (1967); Smith & Jones, "The Supreme Court and Labor Arbitration: The Emerging Federal Law," 63 *Mich. L. Rev.* 751, 801–07 (1965).

criminal law. Finally, there are times, as in the case of union security clauses, when contractual language closely tracks the statutory wording, thus deliberately inviting resort to agency rulings for readings of the contract.

When all the cases are tallied in which the arbitrator may, *consistent* with the contract, take cognizance of statutes or other legal authorities, I suspect we have accounted for the vast bulk of arbitrations in which noncontractual standards may be applicable to the dispute. Now, I don't want to ruin all the fun this issue has provided at the last two meetings of this distinguished body by suggesting that we have nothing here but a tempest in a teapot. But I do think we have to place the problem in perspective. And much as lawyers—and nonlawyers, too—enjoy a juicy jurisdictional wrangle, I must play spoilsport by insisting that the practical importance of our subject can easily be exaggerated and, in all likelihood, has been.

Nonetheless, whatever its exact size, there remains a class of cases in which the arbitrator must ruefully conclude that his reading of the contract inexorably leads him in one direction and his understanding of "the law" in quite another. What is he then to do? At least three different approaches have been taken by Bob Howlett, Dick Mittenthal, and Bernard Meltzer. Howlett would have the arbitrator follow the law. Meltzer would have him follow the contract. Mittenthal would take a "middle position." The arbitrator, he says, "may *permit* conduct forbidden by law but sanctioned by contract," but "should not *require* conduct forbidden by law even though sanctioned by contract." There is considerable practical appeal to the Howlett and Mittenthal views. But I must align myself, in the main, with Meltzer.

I start with the proposition that arbitrators do not, strictly speaking, enforce contracts; courts enforce contracts. The arbitrator is simply the "official reader" designated by the parties to provide definitive interpretations of their agreement. It is his job to tell the parties what they meant by the various provisions—or, more realistically, what they would have meant if they had ever dealt specifically with the problem that has now arisen. An arbitrator is the creature of the contract. It is the source and limit of his authority, and he has no license to look beyond its borders for some external standard by which to nullify or restrict its opera-

tion. The Supreme Court seems in accord with this approach. In *Enterprise Wheel*[2] it flatly declared that an arbitral award is legitimate only if it "draws its essence" from the collective bargaining agreement, and that an arbitrator exceeds the scope of the submission if he bases his decision on his view of the "requirements of enacted legislation."

For the reasons that Dick Mittenthal has fully spelled out, I cannot accept Bob Howlett's thesis that "every agreement incorporates all applicable law." It seems to me, however, that Mittenthal denies the logic of his own position when he draws a distinction between an award *permitting* conduct contrary to law (which he would approve) and an award *requiring* conduct contrary to law (which he would oppose). I think Howlett is right in concluding that both cases must be decided the same way. In each instance the arbitrator must decide whether to give priority to the contract or to the law; and if he has no warrant to lean toward the law in one situation, I don't see where he suddenly acquires it in the other. Under Howlett's "incorporation" theory, of course, the arbitrator always decides in accordance with "the law." Since I reject the incorporation theory, at least as a universal rule, I would have the arbitrator follow the contract, whatever the "legal" consequences.

Mittenthal notes at least two supports for his distinction. One is the "saving" or "separability" clause often found in labor agreements. Now, insofar as an arbitrator could construe a particular saving clause as authorizing him to apply legal as well as contractual norms in resolving a given dispute, I'd have no quarrel with the result. But this, it seems to me, is taking us back to the category of cases, previously discussed, where the parties have empowered the arbitrator to utilize statutory standards. It simply would not present the problem of conflict between contract and law with which we are wrestling here.

This brings me to a couple of practical suggestions I'd like to pass along for your consideration. During the last two meetings the Academy has consumed a good deal of energy examining what clauses in a labor contract might possibly authorize an arbitrator

[2] *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2423 (1960).

to give weight to statute or decisional law. Surely it's time for those who have anything to do with the counseling of clients in collective bargaining to propose a clause which would explicitly define the arbitrator's powers in this regard. Second, if an arbitrator is faced with a contract which says nothing expressly on the point, why shouldn't he come out quite forthrightly and *ask* the parties whether he has the authority to apply the law as well as the contract? Naturally, the parties' responses might vary depending on how they thought they would fare in a given case. But, on the other hand, they might just have enough foresight to realize that, however they might be hurt or helped in the particular dispute before the arbitrator, they ought to take a position that would make the most sense in the generality of cases. At the very least, the arbitrator would have the benefit of the parties' views on the question.

A second argument for Mittenthal's position that an arbitrator should not order action contrary to law is based on the common provision that arbitrators' awards shall be "final and binding." How can an award be "final and binding," Mittenthal asks, if a court would set it aside? This argument appears to be subject to the same criticism I have addressed to the saving-clause argument —it eliminates the conflict between contract and law, and so the problem disappears instead of being solved. Moreover, I think the phrase "final and binding" is too fragile to bear the burden Mittenthal places on it. I'd say the language means no more than that the arbitrator's reading of the contract is to be conclusive on the parties as to their "intent." Obviously, the arbitrator's award is *never* final in the sense that it is beyond all power of review by the courts or administrative agencies.

I don't wish to seem perverse in urging arbitrators to issue awards that may fly in the face of applicable law. But I just can't see any source of arbitral power to exercise a more extended jurisdiction unless the parties themselves have so provided. And apart from this objection as a matter of legal theory, I think there are highly pragmatic reasons why the arbitrator should limit his inquiry to the labor contract and not essay the formidable task of statutory construction. Frequently there is bitter dispute between the parties not only about the legality of a particular interpretation of a contract clause, but also about the intended meaning of

the clause. One party may be prepared to fight the legal question through the courts. But first it wants from the arbitrator a definite ruling on just what the clause in dispute means. I feel that a party to a labor agreement is entitled to this kind of ruling, totally divorced from any conclusion by the arbitrator about the clause's legality. In bargaining for arbitration, it is most likely that the parties bargained for the arbitrator's opinion on the contract and not for his opinion on the law.

As has already been noted, many of our best arbitrators are not lawyers. They are not sought out for their expertise in labor law but for their expertise in industrial relations. There is no reason to think, especially in the close, hard cases, that they will bring any superior insight to the interpretation of statutory and decisional materials. When the law is in a state of flux (a not unusual posture for labor law), the nonlawyer arbitrator will probably be a step or two behind the times. But even if he is the most accomplished of legal scholars, our experience in waiting out Board decisions on novel questions suggests that his tangling with subtle legal issues would add markedly to the length and the expense of the proceedings. And in the difficult, important cases, court review is likely anyway.

What, after all, is this "law" we would have the arbitrator apply? Is it a three-to-two decision of the NLRB? Is it a highly controversial decision of the Board issued just prior to a change in administrations? Is it a decision of the Board supported, or opposed, by the courts of appeals? And even if it is a Supreme Court decision, is it a Supreme Court decision as interpreted by Benjamin Aaron or a Supreme Court decision as interpreted by Russell Smith? These are not fanciful objections, since potential conflicts between contract and law will most often arise at the periphery of established doctrine; few persons deliberately write illegal agreements. If the parties themselves are willing to invite the arbitrator into these borderline controversies, then naturally he is entitled to enter. Otherwise, I submit he should defer to his hosts and stay out.

In my opinion, the remedy for a party aggrieved by an "illegal" award is to seek relief from the Board or to challenge the award in court when enforcement proceedings are brought. Doesn't this mean that the NLRB can no longer respect or "defer" to arbitra-

tion, under its *Spielberg*[3] doctrine, when an unfair labor practice allegation involves a matter that has previously been the subject of an arbitral award? This question pinpoints what I consider an area of fuzzy thinking in the *Spielberg* line of cases. Now, comity between different tribunals always has a good bit of appeal. But it may have prevented a critical inquiry into exactly what it is about the arbitrator's award that the Board defers to in the subsequent unfair labor practice proceeding. Is it the award as a whole? Is it the arbitrator's construction of an applicable statute? Or is it merely his findings of certain facts and his interpretation of certain contractual provisions which happen also to be essential parts of the unfair labor practice case? I would say it is only the last.

The Board in my view has no business abdicating its responsibility for interpreting a statute specially entrusted to its charge. Similarly, it has no business as a public tribunal honoring a private award simply in gross, as it were. On the other hand, where the arbitration has been fair and regular, it seems entirely proper not to allow a party to relitigate disputed facts or disputed contract interpretations that also bear upon the issues before the Board. In most instances this approach would not vary the results reached under the Board's current rationale. But it would have the healthy effect of maintaining a more understandable demarcation line between two tribunals that are in actuality entirely different in their origin and function.

Should it make any difference to the arbitrator if the "law" that may bear upon a particular dispute is a Supreme Court decision enunciating federal contract law under Section 301 of the Taft-Hartley Act rather than, say, the Veterans' Preference Act or a Labor Board ruling under the National Labor Relations Act? Here I'd like to call attention to a distinction drawn by Russell Smith and Dallas Jones. If the Court's decision was merely a determination of contractual intent, they conclude it should not be binding on the arbitrator in a subsequent case. On the other hand, if the Court held that a given clause carried with it certain necessary consequences as a matter of federal substantive law, Smith and Jones suggest that "a different result might well follow."[4] I will go along on the latter point to the extent of

[3] *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955).
[4] Smith & Jones, *supra*, note 1, at 807.

approving a strong presumption that the parties intended to have their agreement interpreted as the law would ultimately require it to be enforced. But, for me, the arbitrator in the usual case remains just the "reader" of the instrument before him. And if, after giving due weight to the presumption of legality, he cannot reconcile the contract and the law, he should render the award compelled by the contract. Nothing, I suppose, would prevent an arbitrator from salving his conscience by including some *obiter dicta* in his opinion to tell the parties how he thinks the contract and the award will fare if they reach the courts.

Although it is beyond the compass of this panel, I'm going to add one word on what the courts should do when asked to enforce or to review an arbitration award allegedly at odds with some legal mandate. Under my approach, the court accepts the arbitrator's award as the definitive exposition of the parties' agreement—absent fraud or capriciousness, of course. Having done that, however, the court is free to enforce or reject the award on the basis of the principles of law (other than rules of contract interpretation) that would have been applicable had the contract come directly to the court without the gloss of arbitration. Ordinarily, that will mean a court should set aside an award which sustains or orders illegal conduct. I might mention, however, that Professor Michael Sovern of Columbia argues forcefully that a court should not consider as a defense to an award the allegation of certain unfair labor practices, such as the enforcement of a minority union contract.[5]

I know the worst of all temptations is the itch to do good, and I know also that the concept of jurisdiction is fast becoming an anachronism in twentieth-century law. So I may be railing against the tides in beseeching arbitrators to abide by the commission the parties have entrusted to them. Nevertheless, this remains my message: Do the job for which you are best fitted—reading and applying contracts—and leave the statutes to the Board and the courts. If you find no other value in my prescription, you can at least treat it as a health measure. Who, after all, has ever heard of an underworked member of this Academy?

[5] See Sovern, "Section 301 and the Primary Jurisdiction of the NLRB," 76 *Harv. L. Rev.* 529, 561–68 (1963), citing *Retail Clerks, Locals 128 and 633* v. *Lion Dry Goods, Inc.*, 369 U.S. 17, 49 LRRM 2670 (1962). But cf. Aaron, *supra*, note 1, at 53.