CHAPTER 5

THE COMING END OF ARBITRATION'S GOLDEN AGE

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Let me say at the outset that today's topic, with its somewhat mysterious overtones of impending doom, does not imply that there is any impending end to the golden age for arbitrators. So far as I can ascertain the gold is continuing to flow in their direction, and I see no evidence of a turn in that tide. Since I am, as they say, bullish on the fortunes of arbitrators, I urge those of you who have come because they expect some prognostication on that subject to leave and repair to the nearest Merrill Lynch office (unless you are one of those who, my television set repeatedly tells me, listen when E. F. Hutton speaks, or gives thanks to Paine Webber).

I have no doubt as to the future of arbitrators. The decline of which my title speaks is not in the fortunes of arbitrators, but in their position. More precisely, I believe that the exalted position that grievance arbitration has achieved in the whole system of industrial relations in this country is bound to suffer a substantial diminution in the years to come. The decline is not, I believe, the fault of the arbitrators, or, indeed, anything that they can do much about. It is the result of a variety of factors which can be influenced only slightly by the profession itself.

So that I will not be charged with the advertiser's sin of describing a product as better or worse without stating what it is better or worse than, let me again begin by specifying precisely what I mean by the current exalted position of grievance arbitration. It is not, though many arbitrators would perhaps like to think that it is, anything which arbitrators had much to do with creating. Nor, indeed, is it a result of any peculiar advantages in the arbitration process, as opposed to the judicial process, as an

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adjudicative mechanism. The familiar virtues of speed and informality which are said to distinguish arbitration favorably when compared with litigation have almost nothing to do with the matter. There are judicial proceedings (small claims court is a simple example) which are much more informal and much faster than arbitration, particularly the more rigidly formal varieties that sometimes exist in the very industries in which arbitration has assumed the greatest importance. I know of few arbitration systems that can even approach the speed with which a court with jurisdiction can proceed on a matter requiring injunctive action —and injunctive relief is, in essence, the only kind of relief that grievance arbitrators award. They do not enter judgments: What they do is direct the parties to do what they find the collective agreement requires, whether it be the payment of money or something else, such as reinstatement or promotion.

Yet it is plainly true that grievance arbitrators have, especially since the *Steelworkers* trilogy, occupied a very special place in our law. Unlike other adjudicators, all doubts are resolved in favor of their jurisdiction. And their decisions, unlike those of those inferior fellows, the trial and intermediate appellate-level judges, are subject to only the most limited form of review.

A recent example provides a striking illustration. A judicial holding, of which there have been several, adverse to the reserve clause in football or to the Rozelle Rule can be appealed, as they say, "all the way to the Supreme Court." And those rulings are being appealed. But Peter Seitz's decision in the Messersmith case, which achieved for the major league baseball players almost the same result they sought unsuccessfully to achieve in the Supreme Court in *Flood* v. *Kuhn*,[1] is, as the owners have quickly discovered, virtually unreviewable.

The reason for this special deference to arbitrators is usually said to be their special competence. They are able, it is said, to understand industrial relations problems as judges are not. They are familiar with "the common law of the shop." I suggest that these explanations are, in many cases, about as accurate as the statement that arbitration is an informal and expeditious procedure. There is a measure of truth in them, but not much. Arbitration can be, and sometimes is, informal and expeditious. At other times it is as formal and time-consuming as litigation. Simi-

[1] 407 U.S. 258 (1972).

larly, some arbitrators do have some special insight into the ways of doing things in an industrial plant, but in many other cases they do not. Clearly, an ad hoc arbitrator, who comes in to decide a grievance in a particular shop that he has never seen before, and may never see again, has no special knowledge of the "common law" of that shop.

It is certainly not true that arbitrators have a competence in their special field that exceeds the competence of other specialized adjudicators in our legal system. We have many such specialized adjudicators, from the members of the National Labor Relations Board to the Tax Court, to the Court of Customs and Patent Appeals, and on to the many specialized agencies which both state and federal law have established to adjudicate disputes arising under particular statutes. There are enormous areas which, as Bernie Meltzer said nine years ago in the speech Rolf Valtin quoted yesterday, are "at least as complex and specialized as labor arbitration," [2] in which we presumably have judges with special expertise and competence. Sometimes the reviewing courts do give, or purport to give, deference to the specialized expertise of these tribunals. But in almost every case—the NLRB is perhaps the classic example—the courts nevertheless insist on performing a reviewing function, ensuring that the specialized adjudicators adhere to the letter and the spirit of the law that they are interpreting. The specialized adjudicators are respected as influential advisers, but they remain advisers. Whatever the terminology, only the real judges in the end do the real judging. But not so with arbitrators' decisions. To put it in Meltzer's words: "In no other area of adjudication are courts asked to exercise their powers while they are denied any responsibility for scrutinizing the results they are to enforce." [3]

Why this special reverence for arbitrators? You will, I think, find only a hint of the reason in what the courts have said; they usually emphasize one or more of the factors which I have already discounted. We must look not so much to the expressed rationale, but to the roots of the basic attitude of at least the U.S. Supreme Court as well as that of those other courts that have been rigorous in their adherence to the doctrines announced by

[2] Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration,* in THE ARBITRATOR, THE NLRB, AND THE COURTS, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 1, 11.

[3] *Ibid.*

that Court. (I do not include among those courts what I regard as the exceptions: the Court of Appeals for the Second Circuit, when Judge Lumbard is writing for it in *Torrington*,[4] or the District Court for the District of Connecticut when the same judge, sitting as a trial judge, tries a case like *Holodnak*.[5])

The basic attitude, excluding these aberrations, is premised on a sometimes unstated but ever-present recognition that arbitration is not a substitute for judicial adjudication, but a method of resolving disputes over matters which, except for the collective agreement and its grievance machinery, would be subject to *no* governing adjudicative principle at all. That is the true meaning of the famous, and not quite accurate, statement in the *Warrior & Gulf* opinion that arbitration is the quid pro quo for the agreement not to strike. A more accurate phrasing would put it that arbitration is a substitute for the strike. That is, of course, not a startling statement, nor is it one which can reasonably be disputed either historically or institutionally. But its implications are, I think, not always fully realized.

It is plain, once you stop to think about it, that the statement implies that grievance arbitration is not quite the same thing as adjudication. The fact that, absent an agreement to the contrary, there would be a right to strike over an issue implies that there is no principle governing its resolution which can be made the basis of adjudication in *any* tribunal. Arbitration, if viewed as a substitute for the strike, without more, would imply decision without reference to agreed-upon standards. But we know that isn't so of grievance arbitration as it has developed in this country, principally since World War II. Grievance arbitration is precisely adjudication against standards: the standards set forth in the collective bargaining agreement. The accepted principle is that the arbitrator has power neither to add to nor detract from, nor to change any of the provisions of, the agreement, but can only determine their proper interpretation and application. Sometimes this restriction is set forth in the agreement; sometimes not. But it makes virtually no difference: That is the accepted rule.

There is a contradiction between that rule and the proposition that arbitration is the substitute for the strike, a contradiction

[4] *Torrington* v. *Metal Prods. Workers*, 362 F.2d 677, 62 LRRM 2495 (2d Cir. 1966).

[5] *Holodnak* v. *Avco Corp.*, 387 F.Supp. 191, 87 LRRM 2337 (D. Conn. 1974), *aff'd in part*, 514 F.2d 285, 88 LRRM 2950 (2d Cir. 1975).

that can be resolved only if we make one critical distinction: Grievance arbitration is an adjudication against standards, but the standards are not those which would be applied by a court charged with adjudicating a contractual dispute. To put the matter in other words, the parties to the collective bargaining process have substituted for the strike, as a method of resolving differences between them as to the proper application and interpretation of their agreement, a system of adjudication against the standards set forth in that agreement; but that system of adjudication, since it is not a substitute for litigation, is not the same, in principle, historical background, or effect, as the system of adjudication used by the courts to resolve controversies over the meaning and application of contracts.

This is just another way of saying what I have written elsewhere at great length: [6] The collective bargaining agreement is not a contract insofar as it establishes the rights of employers and employees, but is, rather, a set of rules governing their relationship—rules which are integral with and cannot be separated from the machinery that the parties have established to resolve disputes as to their meaning. Consider, for example, the provision in the automobile agreements setting forth the principles governing the setting of production standards. That provision is substantively different, *and intended to be so*, from a provision in the same agreement governing seniority or specifying that discharge shall be only for just cause. The difference is that disputes as to the latter provisions are subject to arbitration, while disputes as to the former are intended to be resolved only by the use, or nonuse, of the strike. But *in neither case* are the rules intended to be seen as contractual, that is, adjudicable by the courts.

It is important to emphasize this because Congress, in Section 301 of the Taft-Hartley Act, made the collective agreement enforceable as a contract. What *Lincoln Mills*,[7] *Republic Steel* v. *Maddox*,[8] and the *Steelworkers* trilogy did, in effect, was to establish that the *only* contractual responsibilities enforceable in the courts are that of the employer to comply with, and abide by the results of, the grievance and arbitration machinery and that of the union to abide by the no-strike clause. Both of these contrac-

[6] Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 720 *et seq.* (1973).

[7] *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957).

[8] 379 U.S. 650, 53 LRRM 2003 (1965).

tual obligations are enforceable in court; none of the rules governing the employer-employee relationship are or should be. (I put aside the individual suit for breach of the duty of fair representation and its concomitant, the judicial adjudication of rights under a collective agreement, because it would take me too far afield. I have discussed it elsewhere.[9])

All of this is, of course, simply a restatement in somewhat different terms of the views expressed by the late Harry Shulman way back in 1955 in the Holmes Lecture that appeared in the *Harvard Law Review*.[10] Shulman ended with a plea that the courts should stay out entirely. They did not, as indeed they could not since Congress, by enacting Section 301, mandated their entrance. What they did, however, was essentially to adopt Shulman's view of the nature of the rules being applied in the collective agreement. What I have called the "Golden Age of Arbitration" is the period of the Shulman view.

The Golden Age was not created by the courts. The courts were regarded as a threat to the system. I recall to you not only Harry Shulman's plea that "the law stay out," but also Ben Aaron's devastating attack at our 12th Annual meeting, 15 years ago, on the Supreme Court's decision in the *Lincoln Mills* case.[11] He saw *Lincoln Mills* as an open door to just the kind of judicial intervention that Shulman feared. It turned out, of course, that the federal judicial intervention for which *Lincoln Mills* provided the premise was a protective one. The state courts, which traditionally regarded arbitration as simply another method of adjudicating contractual controversies subject to resolution under the general law of contracts, were intervening; what the Supreme Court did was to use the federal jurisdiction to halt the inroads which the states had been making.

Essential to the Golden Age of Arbitration was the proposition that the rights of employees and employers with respect to the employment relationship are governed by an autonomous, self-contained system of private law. That system consists of a statute, the collective bargaining agreement, and an adjudicatory mechanism, the grievance and arbitration machinery, integral with the

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[9] *See* Feller, *supra* note 6, at 771 *et seq.*

[10] 68 HARV. L. REV. 999 (1955).

[11] Aaron, *On First Looking Into the Lincoln Mills Decision*, in ARBITRATION AND THE LAW, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1959), 1.

statute and providing only the remedial powers granted, expressly or impliedly, in the statute. The statute need not cover every element of the employment relationship. In many cases in the Golden Age, some elements were not covered. Those elements cannot be identified by examining the scope of the arbitration provisions. What must be looked to is the scope of the no-strike clause.

It is entirely consistent with this private system of government to provide that, as to certain issues, the management is free to act and the union is free to strike. As to those issues, arbitration has simply not been substituted for the strike as part of the governmental system, and there still is not, nor should there be, any recourse to the exterior law to obtain an adjudication of the substantive rights of employer and employee. Limitations on the authority of the arbitrator, if not matched by exemptions from the no-strike provision, are not limitations on the scope of the statute. The agreement governs by its silence as well as its words. To the extent that a dispute as to management's right to take action affecting the employment relationship is not subject to arbitration, the agreement, if it does not permit a strike in protest against that action, establishes that management's action is final just as much as if that proposition were spelled out in words.

I emphasize the governmental nature of this arrangement because it is important to draw a sharp distinction between the role of an arbitrator in construing and applying the collective bargaining agreement and that of a court in enforcing a contract. The collective bargaining agreement is not a contract but an instrument of government, and when the Supreme Court says that courts shouldn't review arbitrators' decisions, what it really is saying is that it is improper to judge an arbitrator's performance in adjudicating disputes arising out of this system of government by the standards a court would use in judging a breach-of-contract suit.

Let me make this concrete: Consider any discharge case and assume that what is involved is not a collective agreement but a contract of employment, and that the employee is discharged for failing to perform properly or for violating one of the provisions of that contract. There is a lot of standard learning about employment contracts. If the employee brings suit for breach of the contract, the question is simply whether he has violated the contract, or a rule properly made by the employer under the con-

tract. If he has, he loses the suit. If not, he wins, in which case he is entitled to damages, *not* reinstatement and *not* back pay. Included in those damages are the wages he would have earned during the term of the agreement, suitably discounted, plus compensation for any lost opportunities to learn the trade or acquire a valuable reputation, any expenses he might incur in seeking other employment, and any other losses caused by reasonable attempts to mitigate damages. From that amount there may be subtracted such earnings as he has received up to the time of the trial, or would have received if he had made reasonable efforts to obtain other employment, and such amounts as he may be expected with reasonable diligence to earn during the balance of the term of the contract. And the damages would, of course, be limited to the term of the contract. Indeed, there are some old cases which say that even if the employer offers reinstatement to the discharged employee, that does not relieve the employer of the obligation of paying damages for the balance of the term of the contract, because it would be improper to require the wrongfully discharged plaintiff to go back to work for an employer who had treated him so badly.

As I need not tell this group, the arbitration of a discharge case under a collective bargaining agreement is an entirely different matter. Both the standards applied to determine the propriety of the discharge and the remedies available if it is found to be improper are quite different. The question of whether the employee has violated the agreement or a rule embodied in the agreement is only the first question and, in most cases, the least important one. The next, and most frequently disputed, question is whether the punishment is appropriate to the nature of the offense. The basic question is whether this is appropriate discipline, not whether there has been a breach of contract. And if it is found that the discipline is inappropriate, the remedy is not damages calculated in the way in which a court would calculate them in deciding a suit for breach of contract, but something entirely different: reinstatement with, or without, back pay. And the amount of back pay, assuming it to be payable, is not determined on the traditional contract basis, but is especially limited by the language of the agreement with respect to a concept foreign to a damage litigation—the limit of retroactivity provided by the agreement.

The difference between the function a court performs in adjudicating a breach of contract and the function an arbitrator per-

forms in deciding a grievance is best illustrated by the few cases in which, due to a variety of factors, judges using contractual standards have had to decide what would otherwise be grievances. I remember one employment case from a lower court in Ohio which dealt with the employee of a grocery chain who worked in a warehouse.[12] He was 60-odd years old and eligible to retire but hadn't. He was caught stealing a sausage from one of the stores in the grocery chain and fired. There was no allegation of misconduct in connection with his work at all, but the employer had a rule that there should be no stealing, and the employee was fired for violating that rule. There was no collective bargaining agreement, but there was a pension plan. He brought suit under it claiming a breach of the employment contract and asking that the company allow him to retire on his pension. He lost. The court held that the rule was part of the employment contract. The employee had violated the contract by breaking the rule and the employer therefore had no obligation under the pension plan. I don't hesitate to suggest that, if the employee had been covered by a collective bargaining agreement and had filed a grievance, any arbitrator here would be likely to reach a somewhat different result. Passing the question of whether any discipline was appropriate for conduct totally unrelated to the employee's work, there would be the further question of whether discharge was appropriate discipline for a first-time minor offense by an employee with long and otherwise exemplary service. A suspension, perhaps, but not as the arbitrators say "industrial capital punishment." But the court was trying a breach of contract action and such considerations were therefore irrelevant.

Let me recall to you a railroad case, *Gunther* v. *San Diego & Arizona Eastern Rwy.*,[13] in which an employee was dismissed because he was claimed by the company to be physically unable to perform his job. He filed a grievance and the matter went to the National Railroad Adjustment Board under the Railway Labor Act, which found the claimed disability to be nonexistent and ordered reinstatement. When the railroad refused to comply, the lower court and then the court of appeals refused to enforce the award on the ground that there was nothing in the agreement dealing with terminations for disability. There was, indeed, a provision saying that no one should be discharged except for cause.

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[12] *Taint* v. *Kroger Co.*, 20 Ohio Misc. 29, 247 N.E.2d 794 (C.P. 1967).
[13] 382 U.S. 257, 60 LRRM 2496 (1965).

But discharge was a disciplinary matter. Here, said the court, the employee was not discharged for disciplinary reasons. That being so, there was simply nothing in the contract about the question, the award was thus improper and should therefore not be enforced. Eventually the Supreme Court reversed on the ground that the lower court was "invoking old common law rules for the interpretation of employment contracts."

What these examples show is that an arbitrator, as the adjudicator of rights under the rules established by a collective bargaining agreement, performs quite a different function from a court in construing a contract of employment. There are a whole set of implicit relationships, not spelled out in the agreement and not confined to any particular employer, which an arbitrator assumes to exist. His so-called expertise is not so much expertise as it is knowledge of the fact that the parties have not called upon him to act as a court in adjudicating a breach-of-contract action, but to act as—perhaps there is no better word—an arbitrator.

It is this unique aspect of arbitration, I think, from which the deference of courts to arbitration decisions derives, and this derivation explains why such deference is awarded only when arbitrators remain within their particular area of concern, of jurisdiction if you will—that is, the interpretation and application of the collective agreement. An analogy can be drawn to another circumstance in which, contrary to Bernie Meltzer's now twice-quoted statement about judicial deference, the courts are asked to exercise their enforcement powers while denied any responsibility for scrutinizing the results they are to enforce.

If I get a judgment against you in a California action in which the California court has jurisdiction, I can enforce that judgment against you in New York, for instance, no matter how nutty the New York court may think the California decision to be (and I assure you, there are many nutty California decisions, at least by New York standards). Under the full-faith-and-credit clause of the Constitution, the New York court must enforce the California judgment no matter how much it may disagree with it, no matter how much it might violate the public policy or laws of New York,[14] indeed, even if the California judgment was based on a misconstruction of New York law![15] The California judg-

[14] *See, e.g., Fauntleroy* v. *Lum,* 210 U.S. 230 (1908).
[15] *See, e.g., Roche* v. *McDonald,* 275 U.S. 449, 455 (1927).

ment will be enforced, if it is a final judgment on the merits and if the California court had jurisdiction.[16]

Analogously, courts seem to have sensed that labor arbitration is really a system of government. Indeed, you could say that what the courts have done is to treat that system of government as another jurisdiction, to whose judgments they must give full faith and credit when the tribunals had jurisdiction to enter those judgments, that is, when, as required by the *Steelworkers* trilogy, the judgments derived from the collective agreements. It is irrelevant whether the court would have reached the same conclusion. It is irrelevant whether a particular arbitrator whose award has been questioned had expertise or is a dummy who never decided an arbitration case before and never will again. His award is just as enforceable under the standard law that has existed to this point as if he were an experienced arbitrator, such as a member of the Academy. (I stop here to point out the difference between the "expertise" that is sometimes relied upon to justify this freedom from review and the expertise that was referred to in Footnote 21 of *Gardner-Denver*,[17] in which the Court referred to real expertise, that is, the expertise of the particular arbitrator.)

Thus the very special status that courts have awarded arbitrators has little to do with speed or informality or, indeed, the special expertise of arbitrators. The status derives from a not always explicitly stated recognition that arbitration is not a substitute for judicial adjudication, but a part of a system of industrial self-governance.

The Golden Age of Arbitration, then, is the era of industrial self-governance. It is that period when the parties to the employment relationship look to their own machinery, including both arbitration and, where so provided, the strike, to resolve their problems; when a worker who believes he has been wronged because he has been denied a promotion or the wage he was entitled to, or because he was discharged improperly, would turn exclusively to that private machinery; and when an employer could, equally, assume that his actions with respect to the employment relationship were final unless rectifiable through the arbitration machinery or, when permitted, by the use of economic force. The law enforced by the courts—which I shall hereafter refer to as the

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[16] RESTATEMENT 2D, CONFLICTS §§ 93, 104, 107, 110.

[17] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 60 n.21, 7 FEP Cases 81 (1974).

external law to distinguish it from the negotiated rules governing the employment relationship—was irrelevant to such a system until 1947, when Congress passed Section 301, and Section 301, it turned out, served simply to enforce compliance with it.

I have, deliberately, somewhat overstated the autonomous and self-sufficient nature of the arbitration system. It has never been entirely autonomous. There have always been both state and federal laws regulating the employment relationship. There was always, of course, the National Labor Relations Act. But its essential role was mainly procedural, not substantive: to protect the process by which these governance mechanisms were developed and administered and to prohibit practices which would undermine or defeat it, or which—as in the case of closed-shop or hot-cargo agreements—were regarded as socially undesirable. The Act did not, and does not, except in a peripheral way, govern the substantive conditions of employment. Other laws did, but their importance was minimal because those laws were, and were intended to be, minimal standards. Such governmental regulation as the requirement that overtime be paid for work over 40 hours in a week, or provisions such as the state laws requiring that wages be paid at stated intervals, and in money, had very little impact on the relationships created by collective bargaining.

Hence it could be said, not with 100-percent accuracy but with substantial correctness, that the sole source of law in industries in which the grievance and arbitration machinery was well established was the collective agreement. The principal impact of state and federal legislation was upon those industries in which collective bargaining was not established, or at least not well established, and in which, therefore, the institution of labor arbitration was similarly, and consequentially, not established.

This was, truly, the Golden Age of Arbitration. That age began during or immediately after World War II. The beginning of its end can be dated to the 1960s, when we began to have an increasing quantity of substantive federal regulations of the terms and conditions of employment. In 1963 we had the Equal Pay Act, in 1964 Title VII of the Civil Rights Act, in 1970 the Occupational Safety and Health Act and, as well, Title III of the Consumer Credit Protection Act limiting the right of an employer to discharge because of garnishment. In 1974, we had ERISA, the Employee Retirement and Income Security Act, and the problems created by the interrelationships between that act and collective

bargaining agreements are just beginning to be felt. For a period we had wage controls under the Economic Stabilization Act, and we may have them again. Other statutory regulation will undoubtedly be proposed. The British, in the Industrial Relations Act, in 1971 for the first time provided public-law protection against unjust discharge, and it has seriously been proposed, most recently by Clyde Summers at the American Arbitration Association's Wingspread Conference last November, that we should do the same in this country. At about the same time, we have had a new development under an old law: the *Collyer*[18] doctrine, under which what are essentially public-law decisions are being referred to arbitrators. This last development may appear, on the surface, to enlarge rather than diminish the status of arbitration, but as I shall try to demonstrate, it must in the end have the same effect as the new statutory law. And that effect is, inevitably, to signal the end of arbitration's Golden Age.

The statutory development must do so, in the simple sense, because the introduction of public law as a source of individual employee rights, and the existence of public adjudicative and remedial bodies to vindicate those rights, necessarily undermine the hegemony of the collective bargaining agreement and the unitary —or almost unitary—system of governance under the agreement of which the institution of arbitration and its special status are the products. Arbitration is not an independent force, but a dependent variable, and to the extent that the collective agreement is diminished as a source of employee rights, arbitration is equally diminished.

That is, I think, so obvious as not to need saying. What does need saying is that this is the least of the problems. Far greater is the problem created by two facts. One is that the questions arising under the public, external law and the questions arising under collective bargaining agreements, which it is the function of grievance arbitration to decide, cannot be separated into nicely segmented compartments. The second is that the parties, or one of them, anxious to maintain the hegemony of the collective agreement, may force into the arbitration process questions of adjudication under the public law, sometimes—as in the case of the NLRB—with the active assistance of the public agency charged with enforcement of that law. I perhaps should add a third fac-

[18] *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971).

tor: the tendency of some arbitrators to reach out, without agreement from the parties, to engage in the process of public-law adjudication, a tendency which in the end, I think, can only be fatal to the posture, and the pretensions, of the arbitration profession.

The last-mentioned factor was essentially what was involved in the controversy generated at the 1967 meeting of the Academy by the separate papers of Bernie Meltzer [19] and Bob Howlett [20] and continued by them, and by a distinguished set of arbitrators and academicians, at subsequent meetings.[21] The question to which they addressed themselves was the extent to which arbitrators, in resolving grievances, should implement or follow the rules governing the employment relationship imposed by external law rather than the agreement where the two conflict. The answers ranged from never (Meltzer) to always (Howlett). The others were somewhere in the middle and are best typified by Mittenthal and Sovern. Mittenthal, echoing Cox's earlier view, took the position that an arbitrator should base his decision on the law rather than the agreement where the employer sought to justify action in violation of the agreement on the ground that it was required by law; but he should base his decision on the agreement rather than the law where the employer complied with the agreement but the claim was that he should, rather, have complied with the law.[22] Sovern occupied ground somewhat closer to Meltzer. He would permit arbitral decision based on the law only in some of the cases in which Mittenthal would: those in which

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[19] Meltzer, *supra* note 2.

[20] Howlett, *The Arbitrator, the NLRB, and the Courts*, in THE ARBITRATOR, THE NLRB, AND THE COURTS, *supra* note 2, at 67.

[21] Meltzer, *The Role of Law in Arbitration: Rejoinder*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 58; Howlett, *The Role of Law in Arbitration: A Reprise*, *id.*, at 64; Mittenthal, *The Role of Law in Arbitration*, *id.*, at 42; St. Antoine, *Discussion*, *id.*, at 75; Sovern, *When Should Arbitrators Follow Federal Law?* in ARBITRATION AND THE EXPANDING ROLE OF NEUTRALS, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 29; Jones, *The Role of Arbitration in State and National Labor Policy*, in ARBITRATION AND THE PUBLIC INTEREST, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1971), 42; Morris, *Comment*, *id.*, at 65. *See also*, Platt, *The Relationship Between Arbitration and Title VII of the Civil Rights Act of 1964*, 3 GA. L.R. 398 (1969).

[22] Mittenthal, *supra* note 21.

the arbitrator was competent and in which the courts would not have primary jurisdiction.[23]

If what I have argued so far has any validity, Meltzer was clearly right if—and I emphasize the *if* because I'm not at all sure that in the end that result is either desirable or attainable—arbitration is to continue to maintain its special status. Meltzer was right because to the extent that the arbitrator decides disputed questions of external law, he necessarily relinquishes his right to claim immunity from review by the bodies that external law has established as the ultimate deciders of what that law means and how it is to be applied in particular situations. By applying the external law, the arbitrator ceases to be part of an autonomous adjudicatory system and transposes himself into another kind of adjudicatory system. If you will allow me to push my previous analogy a bit further—his judgments are no longer entitled to "full faith and credit" because, rather than being an adjudicator in a foreign jurisdiction, the arbitrator becomes more like a lower court whose decisions are subject to review by higher courts. Further, it seems probable that once undertaken, review can scarcely be limited to decisions on the issues of external law.

In the days before the trilogy, arbitrators were regarded as something in the nature of special masters appointed by a trial court—low-grade adjudicators, helpful in resolving controversies, who were able to function only on the premise that both their assumption of jurisdiction and their resulting decisions were subject to fairly strict scrutiny by the appointing court. Arbitrators were thus described by Mr. Justice Story, sitting on circuit, as "not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said that the judgment of arbitrators is but *rusticum judicum*." [24]

The trilogy presumably changed that status. It did so, I have argued, basically because of the recognition that arbitration is not a substitute for judicial interpretation and application of contracts, but is the capstone of an entirely different process of industrial self-government. Despite the somewhat extravagant words of the Supreme Court, it remains, and will remain, enormously

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[23] Sovern, *supra* note 21.

[24] *Tobey* v. *County of Bristol*, 23 F.Cas. 1313, 1321 (No. 14,065) (C.C.D. Mass. 1845).

difficult to persuade the average court that a collective agreement is not simply another form of contract, a group of words which, like words in other contracts or in statutes, it is the business of the courts to interpret and apply. Deference to the arbitration process was and is difficult to achieve, as *Torrington* [25] and *Holodnak* [26] demonstrate. It will be impossible to maintain if arbitrators extend themselves and regard arbitration as encompassing anything more than the interpretation and application of the rules which the parties have adopted to govern their particular relationship.[27] It follows that the preservation of the autonomy and freedom from review which arbitration has enjoyed requires the abjuration of any authority to decide any disputed questions of external law.

Having laid down a principle which I think essential to the maintenance of the special status of arbitration, I must now confess that the goal may not be achievable in any case because of the first two factors I mentioned earlier: (1) the interrelated nature of disputed issues under an agreement and the external law, and (2) the desire of the parties to use the arbitration process to dispose of extra-agreement issues.

The difficulty can be illustrated easily in the Title VII area but, since that has already been extensively discussed, let me use two recent Labor Board cases: *Illinois Bell Telephone Co.*[28] and *Trinity Trucking & Materials Corp.*[29] In the telephone case, an employee was discharged because he refused to be interviewed, without the presence of a union representative, by the employer's security representative, who was investigating thefts from the plant. He filed both a grievance and an unfair labor practice charge under Section 8 (a) (1). In arbitration, the union argued (1) that the NLRA protected the employee's right to have union representation when he had reasonable cause to believe that discipline was contemplated and (2) that the discharge was, in any event, not for "just cause" because there was a right under the agreement to be accompanied by a union representative. The arbitrator, unnamed, rejected the first argument because the law was unclear. The Labor Board had, indeed, recently decided that

[25] *Supra* note 4.
[26] *Supra* note 5.
[27] As Meltzer said in his speech nine years ago, "It runs against the grain of judicial tradition." *Supra* note 2.
[28] 221 NLRB No. 159, 91 LRRM 1116 (1975).
[29] 221 NLRB No. 64, 90 LRRM 1499 (1975).

the claimed protection existed, but its decision had been set aside by a court of appeals. The arbitrator, the opinion said, was obliged to give more weight to the decisions of the courts than to those of the NLRB. Turning to the second contention, the arbitrator found that there was, indeed, a right to be accompanied by a union representative, but only when the employee had reasonable grounds to expect to be disciplined. On the record presented, he found as a fact that there were no such reasonable grounds.[30]

That forum having failed to give the employee satisfaction, the Board adjudicatory process began. By this time the court of appeals decision relied on in arbitration had been reversed by the Supreme Court. The Board's decision, substantially similar to the rule that the arbitrator found to be inherent in the collective bargaining agreement, that an employee is entitled to representation in an interview if he reasonably believes the investigation will result in disciplinary action, was reinstated. The administrative law judge, who heard the unfair labor practice case on substantially the same record as had been presented in arbitration, concluded that on the evidence he would have found that the employee had reasonable grounds for believing that disciplinary action might result from the interview and the discharge therefore violated the Act. But, the judge went on, that factual question had been litigated and decided in the arbitration case, and the Board's policy of deferral to arbitration would be undermined if he now passed on the merits of that finding. The Board then reversed the judge, holding that the arbitrator was wrong both on the law, as the Supreme Court had now held, and on the facts. The Board found, looking at the record as a whole, that there was simply no basis for the arbitration finding on the question of reasonable cause, and that the arbitration award was therefore repugnant to the policies of the Act and the employee should be reinstated with back pay.

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[30] Since this paper was presented, I have been advised by the arbitrator, David Dolnick, that the arbitration decision is reported at 63 LA 968. The decision makes clear, as the Board's description of it does not, that there had been no prior *Collyer* deferral and that the arbitrator—although he discussed the Board's change of doctrine and the then refusal of the courts to accede to the new Board view—decided the case solely under the agreement; indeed, that he did so precisely because he found the Board law to be unclear. There exists, he said, a "duplicity of remedy," and in the absence of a definitive body of law binding on the arbitrator, the current Board rulings would be given no consideration. 63 LA 975–976 (1974).

In *Trinity Trucking,* three employees brought suit against their employer, claiming that they had not been paid the wages specified in the collective agreement for six years. They asked for $40,000 in compensatory damages and $200,000 in punitive damages. The employer told them that unless they withdrew the demand for punitive damages, they would be fired. They didn't, and they were. They then filed unfair labor practice charges. The regional director, in accordance with *Collyer,* deferred and the cases went to arbitration.

In this case the arbitrator squarely decided, at least according to the Board, the grievants' rights both under the agreement and under the Act. He decided that they had none under either. The discharges were justified, he held, because the employees had filed a lawsuit rather than a grievance and because they refused to withdraw their claim for punitive damages.

The matter then went to the Board, which refused to defer to the arbitrator's award. The test under the Act, the Board said, was whether the employees acted in good faith. The arbitrator had used a different standard: whether the employees' actions constituted "disloyalty." (Not an impermissible view, I should have thought, in light of the *Jefferson Standard Broadcasting*[31] case.) His award was therefore "repugnant," and the case should go to hearing on the merits before an administrative law judge.

Notice what has happened in these two cases. Both were discharge cases arising under contracts with the standard "just cause" provision. There was no way in which the arbitrator in either case could avoid deciding the "just cause" question. In *Trinity Trucking,* the union also sought to present a claim that the discharges violated the NLRA, but the Board, pursuant to *Collyer,* deferred to the arbitrator. In both cases the Board, after arbitration, decided that the arbitrator was simply wrong—in one case on the law and in the other on both the law and the facts. Because the same issues were presented in both proceedings and because the Board, pursuant to *Collyer,* "deferred" to arbitration, the arbitrator in each case was converted into a low-level adjudicator whose conclusions were to be respected only if in accordance with the law as determined by the Board and the courts and only if found to be supported by substantial evidence.

[31] *NLRB* v. *Local 1229, IBEW,* 346 U.S. 464, 33 LRRM 2183 (1953).

I have picked Board cases to illustrate my thesis because, at first glance, *Collyer* seemed to some, including the panel of arbitrators who discussed it at the 1974 Academy meeting, to be a desirable development. In the other areas I have mentioned, the inevitable diminution of the status of arbitration is much more evident and the difference in the nature of the decision-making process which is required when statutory rights are asserted is much more palpable. I recently had occasion, in connection with the paper to which Bernie Meltzer referred yesterday that I prepared for the American Arbitration Association (which will, I am told, be published in June as part of a volume celebrating the Association's anniversary), to review a very substantial number of arbitration decisions in which, either by force or by choice, arbitrators have undertaken the task of resolving issues of the external law in the course of disposing of grievances. I will not repeat that review here, but simply offer my conclusions.

Arbitrators have decided some questions of the external law for many years. Until recently, however, the decisions were few in number and involved issues not central to the ongoing employment relationship. There are, indeed, a substantial number of cases in which arbitrators mention and discuss both statutes and rules of decision by such agencies as the NLRB, but they do so only by way of analogy as an aid in construing and applying the rules of the collective agreement. An often-forgotten example is Milton Schmidt's decision in *Enterprise Wheel & Car,* which eventually, after the employer refused to comply with his award, turned up as the subject matter of the third case in the *Steelworkers* trilogy. The question there was whether the arbitrator could order reinstatement, with back pay, to wrongfully discharged employees even though by the time the award was made the collective bargaining agreement had expired and was not renewed. Schmidt decided that he had that authority, noting that the NLRB provided such a remedy in similar situations. He did not purport, however, to base his award upon the NLRA and, as we all know, his decision was enforced on the theory that it was a permissible interpretation, not of the NLRA, but of the collective bargaining agreement.

The few early cases explicitly dealing with and deciding questions of the external law arose as a result of what I earlier described as the second of the two factors which would adversely

affect the likelihood that arbitration can maintain its present preferred position: the introduction of external law questions into the arbitration process by agreement of the parties. The classic example is the provision found in the basic steel agreements, and perhaps in others, specifying simply that "the Company shall accord to each employee who applies for reinstatement after conclusion of his military service . . . such reemployment right as he shall be entitled to under the then existing statute." An employee who claims he was not given such rights thus can choose his forum: He can file a grievance or file a lawsuit as provided in the Universal Military Training Service Act. In either case the question to be decided would be the same: the proper interpretation and application of the statute to the particular facts. An arbitrator called upon to decide such a case would be performing the same function as a district judge.

An example of this type of decision is the opinion of Sylvester Garrett in *U.S. Steel Corp.*[32] An employee who had entered military service during his probationary period returned to work two years later and was reemployed as a "new hire." He filed a grievance requesting seniority as of his original hiring date and compensation. The arbitrator gave it to him. The opinion is a lengthy and able one. What is remarkable about it is that it contains nothing but an extensive analysis of the decisions of the federal courts dealing with the statutory exclusion from its benefits of employees who leave a "temporary position." The opinion concludes that the latest decisions of the federal courts "leave no doubt" that a probationary employee would not be treated as one occupying a temporary position.

It is, as I have said, an able decision. But it exhibits none of the characteristics that we have customarily come to associate with labor arbitration. Indeed, the one collective-bargaining-agreement question implicit in the case—whether upon reemployment the grievant would, under the agreement, resume his probationary status until completion of the period of "actual work" specified for the probationary period—was not decided, since by the time the decision was made those hours had in fact been worked.

Provisions explicitly incorporating specific provisions of external law, such as the military service provisions in basic steel, were

[32] 51 LA 1253 (Garrett, 1968).

essentially aberrations, and one has to look far and wide to find similar provisions in agreements antedating the middle sixties. But in recent years, particularly with the enactment of the Civil Rights Act of 1964, the situation has changed. It has become almost standard practice to insert into collective bargaining agreements a no-discrimination provision, of one of three varieties. Those of the first type add essentially nothing to the agreement. Typical are those which provide that the employer shall not discriminate in the application of the provisions of the agreement on any of the forbidden bases. Since discriminatory application of a provision of the agreement would, in any case, be found to be a violation of the agreement, such a provision adds nothing to the agreement but protective coloring. The question presented by a grievance is still whether the employer has fairly applied to the grievant the substantive provision of the agreement involved in the dispute. If he has not, the substantive provision has been violated, and presumably the no-discrimination clause also; if he has, neither the substantive provision nor the no-discrimination clause has been violated.

Of more significance is the second type: a provision that the employer shall not discriminate on any of the forbidden grounds on any matter involving wages, hours, or working conditions. Such a provision obviously does add substance because it is potentially applicable to questions within the scope of the employment relationship that are not dealt with either specifically or impliedly in the agreement and that would, otherwise, be solely within management's discretion. An arbitrator, faced with this type of no-discrimination provision, may look to decisions or guidelines issued by agencies charged with administering antidiscrimination statutes in determining grievances which arise under such a provision and do not implicate any other provisions of the collective agreement. But in so doing, an arbitrator would still be, or could be if he wanted to, acting as the adjudicator of what the parties intended, expressly or impliedly, to be the rule governing their relationships with each other, rather than an expounder of the meaning and application of the external law.

This is not true in the third category, where the parties quite explicitly incorporate into the agreement, much in the manner of the veterans' provision in the steel agreement, the provisions of the external law governing the question of discrimination. An example, taken from a pending case, is the agreement between

Southbridge Plastics Division, W. R. Grace & Co., and the Rubber Workers.[33] That agreement not only forbids race and sex discrimination by the company or the union, but also says that "both parties will abide by and comply with all applicable Federal laws banning discrimination in regard to hiring, promotion and job assignment." For good measure, the same agreement contains what I think many arbitrators have relied on to extrapolate their own jurisdiction to decide external law questions—a typical "savings" clause: "In the event that any provision of this Agreement is found to be in conflict with any State or Federal Law now existing or hereinafter enacted, it is agreed that such laws shall supersede the conflicting provisions without affecting the remainder of these provisions." The first provision clearly (and the second provision doubtfully) incorporates into the agreement the provisions of federal and state antidiscrimination statutes.

The cases involving no-discrimination provisions are numerous indeed, and to them has been added the increasing number of decisions by arbitrators of the Howlett or Mittenthal persuasion. For example, the last completed volume of *Labor Arbitration Reports,* covering the six months between March and September 1975, contains at least 17 cases directly involving claims of violations of Title VII. And each week brings more. I will not attempt to review the cases in detail. It is sufficient to say that a great many of the cases involve questions of external law, pure and simple, and not questions of the kind which are supposed to be within the area of arbitrators' special competence. And the arbitrators have done poorly in interpreting and applying that external law, at least as measured by the developments in the courts. Few, if any, arbitrators anticipated that the courts would hold that state protective laws limiting the jobs which women as a class could hold would be held invalid. Before the Supreme Court's decision in *La Fleur,*[34] few arbitrators anticipated that the Court would hold that provisions for mandatory unpaid maternity leave were invalid. When the court cases on that question were on the way to the Supreme Court, the arbitrators resolved claims under the no-discrimination and savings provisions of collective agreements by looking at the conflicting lower court de-

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[33] *Southbridge Plastics Div., W.R. Grace & Co.* v. *Rubber Workers,* 403 F.Supp. 1183, 11 FEP Cases 703 (N.D. Miss. 1975).

[34] *Cleveland Bd. of Educ.* v. *La Fleur,* 414 U.S. 632, 6 FEP Cases 1253 (1974).

cisions and, in most cases, picking as the more persuasive the side of the question which ultimately proved to be wrong. After that issue was settled, grievances presenting the question of whether employers were required to provide sick leave or sickness and accident benefits in maternity cases arose. Again the arbitration decisions consist mostly of analyses of the pending lower court cases, very often misreading them as having been overruled by the Supreme Court's Fourteenth Amendment decision in *Geduldig* v. *Aiello*,[35] a demonstrably erroneous conclusion whatever the Supreme Court may ultimately decide on the Title VII question in the pending *General Electric* case.[36]

The dilemma posed by these cases is a real one, but it only scratches the surface. Most of them are relatively simple: the propriety of discharging an employee for becoming pregnant, the refusal to permit women to do heavy jobs or jobs requiring overtime, the use of tests for promotion, the question of whether sick leave is payable in maternity cases. These questions yield relatively simple, yes or no, answers. But that is not the limit of what the parties may ask of arbitrators in interpreting and applying no-discrimination provisions.

Let me again refer to the *Southbridge Plastics* case. The agreement there provided for plant-wide seniority on promotions and layoffs and for shift preference based on seniority. The company had hired no women for bargaining unit jobs until 1974. Then, during the course of an economic strike, it hired women for jobs within the bargaining unit. After the strike was settled, there were layoffs, and the company retained the women hired during the strike while laying off male strikers who were senior to them. In addition, the company refused to permit senior employees to exercise their shift preferences if it would result in dislodging women from the shifts on which they were working. Both actions were plainly in violation of specific provisions of the collective bargaining agreement and accomplished the same result as the superseniority-for-strikebreakers gimmick that the Supreme Court held to be unlawful in *Erie Resistor*.[37] Grievances were filed. How should an arbitrator dispose of those grievances if the company's defense is that its actions, although in violation of the spe-

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[35] 417 U.S. 484, 8 FEP Cases 97 (1974).

[36] *Gilbert* v. *General Elec. Co.*, 519 F.2d 661, 10 FEP Cases 1201 (4th Cir. 1975), *cert. granted*, _____U.S._____, 96 S.Ct. 36 (1975).

[37] *NLRB* v. *Erie Resistor Co.*, 373 U.S. 221, 53 LRRM 2121 (1963).

cific provisions of the agreement, were required in order to remedy appropriately the effects of prior discrimination? Should the arbitrator order, as the later-reversed trial court did in *Watkins* v. *Steelworkers*,[38] that separate seniority lists for men and women be established so as to preserve the proportion of men and women in the work force and to approximate the distribution on shifts which would have occurred if women had been hired earlier than 1974?

In the actual case, the question was never put to an arbitrator. The company refused to arbitrate, and, when the question of arbitrability arose in the courts, it entered into a conciliation agreement with the EEOC forbidding the removal of females from their jobs under the shift-preference provision and providing for separate seniority lists from which layoffs would be made in such a manner as to preserve the existing proportion of male and female employees. The company then opposed arbitration on the ground that the collective agreement was superseded by the conciliation agreement. The district court sustained the employer's position, holding that the conciliation agreement was necessary to cure the effect of past hiring discrimination and that no useful purpose would be served by requiring arbitration of the union's grievances because the seniority provisions of the collective bargaining agreement, insofar as they conflicted with the conciliation agreement, were now void.

This is not the place to argue the merits of the district court decision, which is pending on appeal in the Fifth Circuit. What is important here is that the union, in its appeal, does more than argue that the remedy for the presumed past hiring discrimination was inappropriate under Title VII—that is a nice question involving elements of both *Franks* v. *Bowman Transportation Co.*,[39] decided just recently by the Supreme Court, and *Watkins*. It also argues that the question of discrimination and the appropriate remedy should have been submitted to the arbitrator under the no-discrimination and savings provisions which incorporate Title VII law into the collective agreement. This result would not, it is being argued, prejudice the rights of the women because they would "remain as free as before to seek the remedy provided by the conciliation agreement in a suit pursuant to Title VII."

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[38] 369 F.Supp. 1221, 10 FEP Cases 90 (E.D. La. 1974), *rev'd*, 516 F.2d 41, 10 FEP Cases 1297 (5th Cir. 1975).

[39] _____U.S._____, 12 FEP 549 (1976).

Notice what has happened. That particular union contention (others derived directly from the Title VII cases have more merit) would, if successful, refer all of the complicated questions of Title VII remedy and the difficult problems of restructuring seniority systems to the arbitrator, subject always to the right of an individual plaintiff dissatisfied with the arbitrator's decision to have the question litigated anew in a federal district court.

Southbridge Plastics would be an easy case for an arbitrator compared to others that might be put. Consider, for example, the complex seniority arrangements in the basic steel industry dealt with by the federal district court in *United States* v. *U.S. Steel Corp.*[40] One has only to read the decree in that case, with its detailed revision of the seniority regulations and lines of progression, provision for red-circle rights, requirements that locals be merged, and, finally, awards of back pay to be adjudicated on an individual basis, all of which took literally years to formulate, to recognize the enormity of the task faced by the district court in fashioning a Title VII remedy, a task enormously complicated by the propositions that a neutral seniority system violates the statute if it perpetuates past discrimination and that such effects must be remedied both prospectively and with damages. If the steel agreements contained, as they do not, a provision incorporating Title VII, and individual grievants sought in arbitration an adjudication of their rights under that provision, presumably all of those problems would have to be resolved by an arbitrator. And, when he was finished, *Alexander* v. *Gardner-Denver* makes it clear that if the grievants were dissatisfied they could begin again, the arbitrator's decision as to the proper interpretation and application of the external law being given only "such weight as the court deems appropriate." [41] When we add to *Gardner-Denver* the Labor Board's apparent tendency to find repugnant to the policies of the Act decisions of arbitrators on issues subject to resolution under the Act with which the Board does not agree, it becomes clear that if present tendencies continue, the Golden Age of Arbitration will indeed come to an end. Labor arbitrators will become junior adjudicators who should, perhaps, be given a first crack at difficult problems, but whose decisions must always be subject to correction and review by the authorities properly charged with interpreting and applying the law.

[40] 520 F.2d 1043 (5th Cir. 1975), *district court decree reported*, 5 FEP Cases 1253 (N.D. Ala. 1973).

[41] *Supra* note 17, at 60.

If—and again I emphasize the *if*—it is desirable to maintain the special status which arbitration has achieved as part of an autonomous foreign adjudicatory system, arbitrators can try to arrest this trend. To do so they should, insofar as they can, adhere to the Meltzer view and should certainly not volunteer to adjudicate questions of the external law on the Howlett theory that that law is necessarily embodied in the collective agreement. They should not interpret simple savings clauses, most of which were inserted in collective bargaining agreements in light of the Taft-Hartley restriction on the union shop, as vehicles that give them contractual authority to incorporate the external law. Those provisions, like the savings provisions in statutes subject to constitutional attack, are intended to preserve the balance of an agreement if part of it should prove to be unenforceable or void, not to be invitations for arbitral revision. Antidiscrimination clauses can be treated by arbitrators not as incorporating the provisions of Title VII, with all of its complex remedial apparatus and its implicit prohibition of present neutral provisions which perpetuate the effect of past discrimination, but as general principles, subordinate to the specific provisions of the agreement and having substantive force, in addition to the specific provisions, only as to matters not covered by the specific provisions.

For example, an arbitrator faced with provisions specifying that sickness and accident benefits should not be paid in maternity cases and also containing a no-discrimination clause should not regard himself as being charged with the responsibility of determining whether the failure to provide benefits for maternity constitutes discrimination, since the parties plainly did not think it did when they wrote the maternity-leave provision. Nor, in this view, should an arbitrator in the *Southbridge Plastics* situation consider that the antidiscrimination provision gives him authority to revise the agreement's simultaneously executed seniority provisions on the theory that they preserve the effect of prior discrimination in hiring.

Similarly, an arbitrator faced with a grievance implicating questions under the NLRA, which is being heard because the Board has deferred to the arbitrator, can make it clear that he is not deciding any questions under the NLRA but simply determining whether, on the facts presented, it can be said that the employer violated the terms of the collective bargaining agreement. I am not sure that I would go quite as far as Clyde Sum-

mers, who recently held in *Western Massachusetts Electric Co.*[42] that a grievance against the discontinuance of bonus payments was not arbitrable, because the issue was, in essence, whether the employer had violated his duty to bargain by taking unilateral action forbidden by Section 8 (d) of the Act. My own preference would have been to decide that case by concluding, if I so found, that there was no provision in the agreement either expressly or impliedly requiring the continuation of the bonus and making it quite clear that I was not deciding whether, in view of the silence of the agreement on the question, the discontinuance constituted a violation of the NLRA. But, whatever the precise rationale, I would not do what another arbitrator did when faced with the same question in a case reported at the same time—that is, decide both the contractual and the statutory validity of the employer's action.[43]

But adherence by arbitrators to this narrow view of their function will not preserve the Golden Age. Obviously it will not in cases in which the agreement, as is being argued to be the case in *Southbridge Plastics,* mandates a larger role. The parties can, if they want to, make it quite explicit that they want the arbitrator to decide the rights of the parties not only under the agreement, but under the applicable external law. An arbitrator is, after all, the servant of the parties, and if they make it clear that they want what must inevitably be an advisory opinion from him in the hope that, when rendered, it will resolve the dispute and no one will seek to contest in court, he must oblige.

Second, and probably more important, whichever way arbitrators respond when they have a choice, their status is necessarily impaired. That status derived, as I said at the beginning, from the existence of an autonomous system of governance of the employment relationship. The statutory enactments of the past few years, and in particular the enactment of Title VII, have made it clear that society is not satisfied with the results of that autonomous system of governance. It was not satisfied, to pick a minor but apt example, that the question of whether a garnishment should be the occasion for discharge was being satisfactorily handled through the collective bargaining process. As a result we have, and I suspect we increasingly will have, alternate standards to

[42] 65 LA 816 (Summers, 1975).
[43] *Advance Die Casting Co.,* 65 LA 810 (Gundermann, 1975).

govern particular aspects of the employment relationship and alternate forums to adjudicate compliance with those standards. This would create few problems for the arbitration process if the questions posed under these publicly imposed standards were clearly separable and unrelated to questions arising under collective agreements. But it is abundantly clear that the questions are intimately related in a variety of ways. The questions may be duplicative, as in the *Illinois Bell Telephone* case I mentioned earlier. Or the collective agreement may arguably conflict with the standards of the external law, as in the unpaid maternity-leave cases. Or the answer to the question under the collective agreement may provide the essential datum for resolution of the question under the external law, as in *Mastro Plastics*[44] or *C & C Plywood,*[45] cases in which whether an unfair labor practice had occurred depended on whether a question was covered, or a right waived, by the collective agreement.

There are three solutions to the problem created by the existence of two sets of adjudicatory bodies and two sets of standards. One is to have the arbitrator decide all the questions under both standards, with the unfortunate consequences that I have suggested. The second is to bifurcate the litigation and develop a system of law in which the Labor Board or the courts would defer to arbitration whenever issues arise implicating questions under a collective bargaining agreement and then resume, or first accept, jurisdiction over the remaining statutory issues, using the arbitration decision as datum not subject to review. This alternative seems cumbersome, unlikely of achievement, and not even certain to solve the problem.

The third possibility is to have the Board or the court, or whoever decides the external law question, decide also what the collective bargaining agreement means. If arbitrators abjure decision on questions of external law, I think this last alternative is the one most likely to occur, and it can be disastrous for the parties. If I shudder at how arbitrators have handled external law questions, I scarcely can describe to you my reaction on reading Labor Board decisions construing collective bargaining agreements!

The first alternative will inevitably diminish the status of arbitration as a final and virtually unreviewable process. But the sec-

[44] *Mastro Plastics* v. *NLRB,* 350 U.S. 270, 37 LRRM 2587 (1956).
[45] *NLRB* v. *C & C Plywood Corp.,* 385 U.S. 421, 64 LRRM 2065 (1967).

ond and third may be more damaging to the sound development of employment relationships than the diminution of the status of arbitration which will follow from the first.

To sum the matter up, there is simply no satisfactory solution to the problem. The Golden Age of Arbitration was essentially premised on the fact that, for most of the important aspects of the employment relationship, the sole source of authority was the collective bargaining agreement. Insofar as that premise ceases to be correct, the institution of arbitration must suffer in one way or another.

Once that result is accepted as inevitable, it may very well be that the better course is not the abjuration of decision on the external law which I earlier urged as desirable in the interest of preserving arbitration's freedom from review. Arbitration exists to serve the interests of the parties, not the arbitrators. And the fact that the parties sometimes use words in their agreements which require arbitrators to decide external law questions, and the fact that they almost never rewrite their agreements so as to withdraw issues from the scope of arbitration when they become subject to adjudication in other forums, should tell us something. So, too, should the apparent acceptance by some parties of *Collyer,* which results in such arbitral statements as "I have authority to resolve the claim of unfair labor practice in spite of the pending Board proceeding." [46] There may be, and on balance I think there probably are, great advantages to both unions and employers in attempting to resolve their problems at home, even those involving the external law, and, therefore, keeping the grievance and arbitration procedures open to all sorts of claims, even those that ultimately may be subject to final adjudication elsewhere. The necessary result of their doing so may be that arbitrators become primary but not necessarily final adjudicators. But it may also be that, given the alternatives, that result is healthier for their ongoing relationships than the increasing resort to external tribunals as primary adjudicators. After all, a lot of arbitration decisions, even ones that you or I or the courts might regard as erroneous, the parties accept. If they do, their problem is solved. And this channeling of disputes through what Justice Brandeis, quoting Justice Story, referred to as "domestic

[46] *Cities Serv. Co.,* 60 LA 585, 586 (Blackman, 1973).

forums" [47] may have advantages for the ongoing relationship of the parties even if the effect is, in the end, the loss of the insulation from review which arbitrators enjoyed in the Golden Age.

The issue can be crystallized by examining two methods of handling grievances involving the interpretation and application of seniority provisions inserted into a collective agreement as a result of a Title VII decree under which the court retains jurisdiction. One method of handling such grievances is to decide them, even though in the end the court may disagree. That is the method Harry Platt adopted in *Mountain States Telephone and Telegraph Co.*[48] and the one which I gather will be utilized under the basic steel consent decree. The other is typified by William Murphy's decision in *Virginia Electric & Power Co.*[49] The court, he said, has jurisdiction to interpret its own order, and the grievance should therefore go directly to the court. The choice between these two approaches, which is essentially the same choice as is presented in any Title VII case, will ultimately be made by the parties. The arbitrator's discretion exists only when they have not made that choice clear. If, as I suspect, the parties, or, in his discretion, the arbitrator, opt for the Platt approach, there will be more work, and more gold, for arbitrators. Arbitrators will have an expanded role. They may even be used, as was suggested yesterday in the Robinson-Neal paper, as assistants to the courts or to the EEOC, as—if you will—special masters. But although the role of arbitrators will be expanded, their status will be diminished. The golden age for arbitrators will continue, but the Golden Age of Arbitration, which owes its existence to the autonomous nature of the governance system created by collective bargaining, will be ending. We are a long way from that ending. There are still vast areas in which the terms and conditions of employment are untouched by public law. But I see no alternative to the conclusion that we are at its beginning.

[47] *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 121 (1924), quoting *Tobey* v. *County of Bristol, supra* note 24.

[48] 64 LA 316 (Platt, 1974).

[49] 61 LA 844 (Murphy, 1973).

Comment—

THEODORE SACHS*

To a discussant following David Feller, the brilliant advocate who sired the trilogy [1] and virtually "wrote the book" on labor grievance arbitration, the temptation is great simply to say, "Me, too," and sit down. To presume to do otherwise is like telling Christopher Columbus in 1493 to go back to the chartroom to get his bearings. And when another distinguished scholar, Bernard Meltzer, seconds Professor Feller's remarks in advance and inveighs against (arbitral) "expansionism" to make it sound worse than bubonic plague, the temptation is virtually irresistible.

But because my hosts expect more of me, permit me, undaunted and disregarding the better part of discretion, to express the views of a practitioner who frequently tries to lead many of you down the path of righteousness; and succeeding, to uphold your awards; or failing, sometimes to try to set them aside.

While I do not quarrel with many of Professor Feller's central premises, I do not share his apocalyptic view as to the "coming end of arbitration's Golden Age"—at least not for the reasons he posits. To use Mark Twain's phrase, in my view the report of the death of the Golden Age of Arbitration, even of its terminal illness, is greatly exaggerated.

To overstate the matter, my own perspective would be suggested by the story of the couple walking down the street who encountered a man wearing a sandwich board. The board read, "The world is coming to an end in a billion years." The passing man visibly blanched, did a double take and looked at the sandwich board again, and finally regained his color. His wife asked what was wrong. He replied, "When I first read it, I thought it said 'a million years.' "

I really do not mean to suggest that there are only glacial changes impending in the role and status of labor arbitration, nor to blink the fact that significant changes are occurring. Nor do I quarrel with Professor Feller's thesis that the exalted status of ar-

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[1] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

bitration, in his sense of a system of private self-governance immune from review, is diminished both by substantive legislative intrusions into the conditions of employment and by courts and quasi-judicial agencies reviewing arbitrators' awards. It seems to me that that is a truism—at least after Professor Feller's lucid explanation. However, apart from questions about whether such developments are to be lamented or what if anything should be done about them, I *do* question his conclusions that the legislative incursions are so great, or the judicial or quasi-judicial review *for the cited reasons* so novel and hostile, that the special status of arbitration is for those reasons imminently threatened.

For example, as to substantive legislative developments, Professor Feller notes, among others, the enactment of Title VII,[2] OSHA,[3] and ERISA.[4] While concededly each of these laws is of great importance in its respective subject area, and each establishes not only substantive rights but independent, nonarbitral remedies, they deal—with the possible exception of OSHA, on job safety—with subject areas never previously the significant subject matter of grievance arbitration. For example, for reasons good and bad, claims of race or sex discrimination in the administration of the labor contract were rarely the subject of arbitration prior to Title VII, and claims of maladministration of an employee benefit plan—group insurance or pension—virtually never. The very paucity of arbitration on such subjects may reflect the fact, reinforcing Professor Feller's thesis, that Congress was dissatisfied with the way in which the private sector handled such matters—or more accurately, did not handle them—which occasioned the enactment of such legislation in the first place. But I would suggest that the enactment of such legislation, rather than portending a significant erosion of areas theretofore the subject of private self-governance through the grievance and arbitration process, may foster such utilization. For example, ERISA mandates a review procedure for denied claims, and while it is not clear from either the statute [5] or regulations [6] that a hearing is required, much less an arbitration hearing, it may be that such procedure will be encouraged.

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[2] Equal Employment Opportunity Act of 1972, P.L. 92–621, 86 Stat. 103 (1972).
[3] Occupational Health & Safety Act of 1970, P.L. 91–596, 84 Stat. 1590 (1970).
[4] Employee Retirement Income Security Act of 1974, P.L. 93–406, 80 Stat. 829 (1974).
[5] ERISA § 503, 29 U.S.C.A. § 1133 (1975).
[6] 29 C.F.R. § 2560.2–.8 (1975).

Not only do I not share the view that legislative trends signify a marked erosion in the role of grievance arbitration, even in the cited areas, but I would point out that in the sector of public employment the trend is exactly the opposite. Historically, of course, the conditions of employment in the public sector have been minutely regulated by legislation at all levels. The trend in recent years, however, through the auspices of labor relations codes that sanction collective bargaining in the public sector and consequently labor contracts and grievance and arbitration procedures, has been to reduce substantially the significance of such legislation by permitting self-governance between the parties in that sector. Moreover, inasmuch as the role of grievance arbitration in the public sector significantly deals with the harmonizing of contracts with "external" law, grievance arbitrators in the public sector are very much and increasingly involved in the application of such "external" law, without apparent diminution of their "exalted status" as labor arbitrators.

As to the reported reduction in the arbitral status as a consequence of certain judicial or quasi-judicial review, I do not see the *cited* examples as evidence of new threats to arbitral autonomy. For example, while there may be increasing NLRB scrutiny of labor arbitration awards to determine the repugnancy of such awards to the Act's purposes where the Board has deferred under *Collyer,*[7] as reported by Professor Feller, I would note that the Board has always engaged in such a process under the old, and still applicable, *Spielberg*[8] doctrine. Under *Spielberg,* if an NLRB respondent sought to interpose a prior arbitration award in bar of a pending unfair practice charge with respect to a similar matter, the Board would check to determine whether the arbitration procedures appeared to have been fair and regular, whether the parties had agreed to be bound thereby, and whether the resulting award was not clearly inconsistent with the Act.

Moreover, before *Collyer,* if there had been no prior arbitration award, the Board might not have deferred at all and might, therefore, have investigated, heard, and decided substantive matters affecting the employment relationship, to the potential exclusion of the arbitration process altogether. For example, the Board had frequently concluded that the unilateral discontinuance by

[7] *Collyer Insulated Wire Co.,* 192 NLRB 837, 77 LRRM 1931 (1971).
[8] *Spielberg Mfg. Co.,* 117 NLRB 1080, 36 LRRM 1152 (1955).

an employer of the Thanksgiving or Christmas turkey or other bonus violated the Act, without even bothering to inquire whether there was also a violation of the labor contract or whether such violation was remediable under that contract.[9]

Furthermore, contrary to the suggestion that there is a lessening deferral by the Board to arbitral awards, I would point out that the Board in 1974 in the significant *Electronic Reproduction Service Corp.* case [10] held, overruling its own precedents,[11] that it would defer to arbitration awards, at least in discipline or discharge cases, even where the parties or arbitrator had not expressly dealt with the statutory issue. The Board ruled that if such issue could have been presented to the arbitrator, it would find irrelevant whether or not the issue had in fact been presented. The Board's only substantive inquiry was to determine whether the result was repugnant to the purposes of the Act.

I would conclude, then, that rather than deferring less to arbitration awards than before, the Board defers more than ever. Or at least it defers no less than it has always done under *Spielberg*, under which, post-award, it would yield to an arbitration award not repugnant to the Act and otherwise satisyfing *Spielberg* criteria, and pre-award, it would not defer at all; and where under *Electronic Reproduction Service* it currently defers post-award in a discharge or discipline case although the award is silent on the statutory issue. These are indications, it seems to me, not of greater, but of lesser Board intrusion into the arbitral process.

I don't regard even *Alexander* v. *Gardner-Denver* [12] as an unmitigated threat to the continued exalted status of grievance arbitration. I don't wish to appear to be a Pollyanna. I obviously concede that under *Gardner-Denver* there is no *per se* deferral by a court to an arbitration award that holds adversely to the claim of an employee that he has suffered employment discrimination. The rule of the case, to the contrary, is that an aggrieved claim-

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[9] *Progress Bulletin Publishing Co.*, 182 NLRB 904, 74 LRRM 1737 (1970); *Southern Materials Co.*, 181 NLRB 958, 74 LRRM 1046 (1970); *Washington Hardware & Furniture Co.*, 168 NLRB 513 (1967); *Rangaire Corp.*, 157 NLRB 615, 61 LRRM 1479 (1966). However, the Board subsequently deferred to a pending arbitration proceeding, *Dubo Mfg. Corp.*, 142 NLRB 431, 53 LRRM 1070 (1963).

[10] *Electronic Reproduction Serv. Corp.*, 312 NLRB No. 110, 87 LRRM 1211 (1974).

[11] *Raytheon Co.*, 140 NLRB 883, 52 LRRM 1129 (1963); *Airco Indus. Gases*, 195 NLRB 676, 79 LRRM 1467 (1972).

[12] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).

ant, alleging racial or sex discrimination in employment violative of Title VII, may independently pursue his Title VII remedies notwithstanding a prior adverse arbitration award. But I do invoke Footnote 21 of *Gardner-Denver*,[13] which, it seems to me, as a practical matter encourages a resort to the arbitration process, notwithstanding the theoretical possibility that such resort may not be final in the event of a subsequent Title VII suit. I might further add that, contrary to the contemporaneous expectation of observers when it was decided, *Alexander* v. *Gardner-Denver* was not thereafter extended to non-civil-rights areas. See, for example, *Satterwhite* v. *United Parcel Service*,[14] where deferral was extended to an FLSA claim notwithstanding a prior adverse arbitration award. Consider also *Gateway Coal* v. *United Mine Workers*,[15] which essentially reaffirmed expansive concepts of arbitrability under the trilogy, notwithstanding an alleged safety hazard exception, in a matter decided after *Gardner-Denver*.

For all of these reasons, I cannot share the conclusion that either legislative developments, or judicial or quasi-judicial developments of the kind cited, presage the demise of the Golden Age of Arbitration. It seems to me that not only are the posited negative influences on the Golden Age of Arbitration overstated, but that there are also numerous affirmative influences which should be taken into account.

I leave aside in that regard a number of dramatic developments that foster the arbitral role but which are outside of what I take to be the parameters of Professor Feller's focus, namely,

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[13] "We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum." 415 U.S. 60, 39 L.Ed.2d 165.

[14] *Satterwhite* v. *United Parcel Serv., Inc.*, 496 F.2d 448 (10th Cir. 1974), *cert. den.*, 419 U.S. 1079 (1974).

[15] *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 85 LRRM 2049 (1974).

labor grievance arbitration. Such other developments would include, but are not limited to, the burgeoning growth of interest arbitration, particularly in the public-safety sector under the auspices of legislation; medical malpractice arbitration, similarly so sanctioned; and arbitration under insurance policies to compensate for the liability of other, uninsured motorists; not to mention such exotic areas of arbitration as those fixing the compensation and freedom from alleged bondage of professional athletes.

Even apart from such areas, there are a number of significant influences that are likely to extend, rather than diminish, the Golden Age of Arbitration. I have already alluded to the *Collyer* doctrine, which, it seems to me, is occasion for greater rather than lesser deferral to arbitral judgments. I have also mentioned the *Gardner-Denver* decision, Footnote 21, which, despite the strict holding of that case, will give parties practical reasons for proceeding with arbitrations in subject areas that might nevertheless be reexamined later in court. I note as well the influence of the *Boys Markets* [16] decision, under which federal courts are authorized to issue injunctions against strikes in breach of contract in situations involving underlying arbitrable matters. There is plainly an impetus in such situations for employers to resort to and abide by arbitration awards to settle such matters. I have already made reference to the public sector, where, under the auspices of modern legislation, there is dramatically increased resort to the grievance and arbitration procedures heretofore better known in the private sector—and with remarkable focus on the application and interpretation of "external" law, without apparent diminution of the arbitral process.

Finally, I allude to a factor which I think is of great importance in the stimulation and fostering of arbitration, namely, the bargaining agent's duty of fair representation. This duty encourages, and increasingly so, a resort to the grievance and arbitration process. While in theory the rule of *Vaca* v. *Sipes* [17] remains unimpaired, namely, that a union's duty to its bargaining-unit members is not that of a guarantor of the employer's responsibilities or even one of its own due care to assure that such employer responsibilities are fulfilled, but only one to avoid invidious or hos-

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[16] *Boys Markets, Inc.* v. *Retail Clerks Local 770,* 398 U.S. 235, 74 LRRM 2257 (1970).

[17] *Vaca* v. *Sipes,* 386 U.S. 171, 64 LRRM 2369 (1967).

tile discrimination and to refrain from engaging in bad faith, arbitrary action, or fraud, the increasing tendency of the courts appears to be to treat the "arbitrary" element as a discrete factor inclusive of "perfunctory" grievance processing. Whereas unions' motions for summary relief against members' suits for alleged "unfair representation" in the disposition of alleged grievances has heretofore been commonplace, there appears to be an increasing stiffening on the part of the courts against such relief and an increasing likelihood of trial. That being so, there is increased incentive on the part of the bargaining agent to take the borderline grievance to arbitration in the first place, for the pragmatic reason that it may be cheaper and less hazardous for the union to exhaust the contract grievance procedure, including arbitration, even for the unmeritorious grievance, than to have to justify, as a defendant in a federal court proceeding later, its earlier judgment not to go to arbitration. Such influences—for all the wrong, if understandable, reasons—are likely to be supportive of, rather than detrimental to, the "exalted status" of arbitrators.

On the other hand, there are recent developments in the law of fair representation that seem to me to pose a very ominous threat to the future of the arbitration process, and it is in that area rather than in those suggested by Professor Feller that I think there is a grave threat indeed to the Golden Age of Arbitration. I refer particularly to the decision last month of the U.S. Supreme Court in the case of *Hines* v. *Anchor Motor Freight*.[18] That case is quite significant, not for what it says or for its narrow holding, but for what it implies.

Essentially what was involved in that case was the discharge of certain drivers, represented by the Teamsters, for alleged padding of their expense accounts. The employer alleged that the drivers had turned in inflated expense reimbursement chits in connection with overnight lodging at a motel. The drivers denied guilt and, according to the Supreme Court summary that is not otherwise explicated, urged their union representatives to investigate the motel. At a subsequent bipartite hearing (referred to by the Court as an arbitration proceeding, although technically it was not that at all), the panel upheld the discharges on the basis of the employer's proofs that the room rates were less than the expense

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[18] *Hines* v. *Anchor Motor Freight*, ___U.S.____, 47 L.Ed.2d 231, 91 LRRM 2481 (1976).

claims submitted. Subsequently, private counsel for the discharged employees sought to reopen the award, alleging that the real culprit was the motel clerk. Reconsideration was denied.

Suit was subsequently brought by the discharged employees against the employer for alleged breach of the contract for unjust discharge, and against the union for alleged unfair representation in failing adequately to investigate the underlying facts and effectively to present such evidence in arbitration. Specifically, it was developed that the motel clerk was indeed the culprit and that he had apparently altered the charge sheets to pocket the difference.

The U.S. District Court granted motions for summary relief on behalf of both the employer and the union, finding for the employer on the basis of the finality clause of the contract, and for the union on the basis of traditional *Vaca* doctrine that the union's obligations were only of good faith as distinguished from either correct judgment or investigation. The Sixth Circuit Court of Appeals reversed and remanded as to the union but not as to the employer. The discharged employees appealed as to the employer and won a reversal, the U.S. Supreme Court holding essentially that once the union's motion to dismiss on the fair representation claim had been denied, the employer could not claim finality of a grievance procedure that arguably, then, had wrongfully been foreclosed.

I emphasize both the limited holding of the case and its implications. The union did not appeal from the Sixth Circuit holding, and therefore the Supreme Court decision does not pass on that Sixth Circuit holding as such. Moreover, Footnote 4 of the Supreme Court's decision [19] points out the allegations of the complaint that the court of appeals found sufficient to permit trial against the union, and these include express allegations of political hostility by the union against the grievants—a classic kind of unfair representation allegation. But although the Su-

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[19] "As summarized by the Court of Appeals, the allegations relied on were: 'They consist of the motel clerk's admission, made a year after the discharge was upheld in arbitration, that he, not plaintiffs, pocketed the money; the claim of the union's failure to investigate the motel clerk's original story implicating plaintiffs despite their requests; the account of the union officials' assurances to plaintiffs that "they had nothing to worry about" and "that there was no need for them to investigate"; the contention that no exculpatory evidence was presented at the hearing; and the assertion that there existed political antagonism between local union officials and plaintiffs because of a wildcat strike led by some of the plaintiffs and a dispute over the appointment of a steward, resulting in denunciation of plaintiffs as "hillbillies" by Angelo, the union president.' 506 F.2d 1153, 1156 (6th Cir., 1974)." *Hines v. Anchor Motor Freight,* _____U.S._____, 47 L.Ed.2d 231, 91 LRRM 2481.

preme Court notes those allegations and although technically the majority opinion says nothing other than what *Vaca* has already said, there appears to be an implicit equation of "perfunctory" grievance enforcement with ineffective grievance enforcement, so that it is possible that the union is being held to standards of investigation and of arbitral presentation of a demanding nature. If that interpretation is correct, and is applied, then the consequence may be that although no one purports to review an arbitration award as such, such award may be effectively circumvented.

I would suggest that that approach, if hereafter followed, will constitute a grave threat to the system of industrial self-governance, which the Court has heretofore endorsed in the trilogy and in other cases and which Professor Feller notes to be the alternative to strikes in the industrial sector. Moreover, of course, such a result treats the labor contract claim as enforceable civilly like any other, not merely as one enforceable alone by the union and in an extra-judicial forum.

I submit that any contention that union representatives should be held to an "effective representation" standard, as are defense counsel in criminal cases, for example, is entirely unreal, unfair, and detrimental to the arbitral process and to industrial relations generally. In the first place, the actors are not lawyers but are laymen, perhaps straight out of the shop—or as in *Hines,* out of the truck cab. They have neither the training nor the resources to indulge in the kind of investigation or presentation that seems to be expected in the cited case. Ironically, in *Alexander* v. *Gardner-Denver,* one of the reasons the Supreme Court gave for permitting an independent Title VII post-arbitration claim was that the arbitration process simply was not equipped with adequate court mechanisms of discovery or compulsory process, even when lawyers were in the picture.[20] In *Hines,* the implication is that

[20] "Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. *See Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 203, 100 L.Ed. 199, 76 S.Ct. 273 (1956); *Wilko* v. *Swan,* 346 U.S., at 435–37, 98 L.Ed. 168. And as this Court has recognized, '[a]rbitrators have no obligation to the court to give their reasons for an award.' *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.,* 363 U.S., at 598, 4 L.Ed.2d 1424. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means of dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts." *Supra* note 12, at 57, 58.

laymen are to be faulted for not resorting to processes that are not even available to them.

Hopefully, this is an overreading of *Hines*; but if it is not, I suggest that the real threat to the Golden Age of Arbitration will come not only from appellate courts violating the rule of the trilogy by reviewing the merits of awards in the guise of reviewing jurisdiction, but from complete end runs on arbitration awards by members' and courts' efforts to second-guess unions' handling of grievances and arbitrations, with potential vicarious liability of employers. The awards will fail, of course, if the unions' performance is found wanting.

This takes me back to Professor Feller's and Professor Meltzer's arguments for self-restraint and avoidance of resort to "external" law. There surely is no purpose in rehearsing their eloquent arguments on that score. Nor would I suggest that an arbitrator does not take his essential charter from the contract that he is asked to interpret and apply, if for no other reason than that—in addition to Meltzer, Howlett, Mittenthal, St. Antoine, Platt, Sovern, et al. —the U.S. Supreme Court has had its own two cents' worth to say on that subject.

In *Steelworkers* v. *Enterprise Wheel & Car Corp.*, the Court said that while the arbitrator "may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." [21] And the Court added in *Alexander* v. *Gardner-Denver*, citing *Enterprise*, that, "If an arbitral decision is based 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." [22] Those are obviously very real considerations in deterring undue "expansionism," to use Professor Meltzer's term.

On the other hand, I suggest that there are very practical reasons for the "litigants" in arbitration, if I can so describe them, and consequently for the arbitrator, to recognize why, within the process of interpreting and applying the contract, the impact of external law cannot be ignored—in addition to those considerations about which Messrs. Howlett, Mittenthal, and others have spoken and written at length.

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[21] *Supra* note 1, at 597.
[22] *Supra* note 12, at 53.

For the first and most obvious reason, the parties have claims that they wish to win or defend. These claims are not neatly labeled as involving contract or "external" law issues; the two may be inseparably intertwined. A union presenting a grievance, and an employer in defending it, are bound as a practical matter to use all available arguments, including, if need be, reinforcing arguments as to "external" law. And both parties are interested in finality and in the avoidance of bifurcation or trifurcation of claims.

I suggest, moreover, that as a practical matter the typical claim, even an arguable Title VII employment discrimination claim, for example, does not implicate the momentous issues whose management Professor Meltzer and others suggest is beyond the arbitrator's competence. The typical discrimination grievance, for example, does not involve the magnitude of a Big Steel consent decree involving thousands of employees, including allegations of massive discrimination in the hiring process. Typically, the claim won't involve the hiring process at all, for the contract will be applicable only to persons to whom the employment relationship has already attached. Further, the typical claim will involve a single employee, or a few employees at most. While such claim may involve operative facts indistinguishable from a simple Title VII claim as to whether in fact racial discrimination was involved (in the application of discipline or in the denial of a promotion, for example), such claim will rarely come up separated from contractual issues. The claim, in context, typically is not that an employee was discharged merely because of racial discrimination but that, although he arguably was tardy or insubordinate or incompetent, etc., he would not have been discharged but for racial discrimination. The arbitrator is in a better position, perhaps in the only position, to apply the contract claim and to evaluate the discrimination claim in context with each other. Indeed, he may do what a court cannot do: find cause for the employer's action, but mitigate the penalty.

Relatedly, contrary to the apparent assumption by detractors of resort to "external" law or to "expansionism," there is every reasonable prospect that the arbitration process will in fact be successful and/or final. If, for example, the aggrieved employee's claim is successfully pursued in arbitration, that presumably will end the matter (except in the unlikely event that the employer can demonstrate that the arbitrator exceeded his jurisdiction). If the claim is unsuccessfully pursued in arbitration, that result

might still be accepted by the aggrieved employee. And if he does not, but the criteria of Footnote 21 of *Alexander* v. *Gardner-Denver* are adequately applied, it may well be that the federal judge will defer to the award anyway, not as a matter of obligation but of discretion. Indeed, there is more rather than less likelihood that he will do so if the parties and the arbitrator have sensitively and openly dealt with the "external" law issues so that there is greater defensibility of the arbitrator's result.

That is also true in matters which may become subject to afterview by the NLRB, where surely there is more rather than less likelihood of avoiding review on the merits if the Board can be persuaded that there was a conscious, intelligent, and proper application of the Act, rather than of its being ignored or, worse, violated.

Moreover, for reasons discussed earlier, "self-restraint" will not necessarily avoid review under *Spielberg* where, under *Reproduction Services,* the Board will defer anyway, absent a result repugnant to the Act, if the parties could have taken the issue of statutory law to the arbitrator but declined to do so.

I suggest finally that the constraints upon the union, imposed under fair-representation principles (and where applicable under Title VII itself), to use all available arguments to the arbitrator in representing an aggrieved employee virtually force the union to present the strongest possible case, whatever that is conceived to be, including resort to "external" law principles, even if that makes the arbitrator nervous in dealing with issues he'd prefer to avoid. Like federal judges, who are called upon by litigants to make very difficult decisions about vast areas of the social landscape as to which the judges may disclaim or have doubts about their competence, arbitrators don't generally select the issues which come to them; the parties do so.

In the final analysis, that is what the process is all about. The arbitral object is to serve the parties, not to protect the comfort of the arbitrator—or to prolong the Golden Age of Arbitration.

There may well be merit in the proposition that some diminution of their insulation from judicial review or quasi-judicial review may occur as arbitrators deal with matters beyond the scope of the contract and within the jurisdiction of the courts or agencies themselves. On the other hand, I would suggest that it is quite impractical to suppose that that interrelationship can be avoided by the arbitrator any more than the parties themselves,

who press and defend these matters, are free to ignore such considerations.

Moreover, if we may use the anatomical analogy from which we learn that muscles atrophy not from use but from disuse, it would seem that expansive use of the arbitration process to deal with the real issues confronting parties is more rather than less likely if atrophy of the process is to be avoided. At least, it seems to me, there is an equal threat to the diminution of the process if the arbitrators refrain from resolving those questions that the parties have to have resolved and that they are frequently duty bound to have resolved.

I conclude, then, as I began—with respectful disagreement as to the threat to the Golden Age of Arbitration as suggested by the cited legislative developments and cited instances of judicial or agency review. I think in both cases the threat is neither so great nor so novel as suggested, and that, in the face of contrary influences, the Golden Age is likely to be with us for some time to come, even if its form may be modified to cope with the real problems which the parties have and which they therefore expect the arbitrator to resolve. Hopefully, the more ominous threats, through the back door, of "fair representation" attacks on arbitration presentations and court reviews of "arbitral jurisdiction" will not destroy the arbitration process and the underlying socially significant values of self-governance.

Comment—

LEE C. SHAW*

I do not think it is practical to separate the problems involved in the private arbitration of discrimination cases and the future of private labor arbitration. The sheer volume of discrimination claims and the imperative need to resolve them as *expeditiously* as possible require an analysis of what the private arbitrators can do and should do to help solve these critical social as well as labor problems.

The question as to whether or not arbitrators should apply statutory law is far less important than the question: How can ar-

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bitrators assist in the efficient disposition of discrimination claims? By efficient, I mean not only well-thought-out decisions, but decisions in far less time and at greatly reduced cost as contrasted with the course of litigation in the federal courts.

For the reasons just stated, I will confine my remarks to the arbitration of grievances involving claims of discrimination because of race, sex, national origin, and age. In my judgment, discrimination claims are where most of the interaction will be between the arbitrator and the courts.

The regulations of the Office of Federal Contract Compliance Programs require the contractor to "include nondiscrimination clauses in all union agreements, and review all contractual provisions to ensure they are nondiscriminatory." Virtually all business concerns of any appreciable size are covered by the regulations of the OFCCP. In the course of a normal compliance review, the compliance agency will examine the contractual commitment to ensure the provision is coextensive with the Equal Employment Opportunity mandate set forth in Executive Order No. 11246.

The result of these requirements is simply that the labor agreement nondiscrimination language is virtually the same as the nondiscrimination requirements of Title VII, and the arbitrator and the courts will, perforce, be applying the same test to the facts.

Many involved persons question whether in so doing the arbitrator should interpret the applicable regulations and judicial decisions in reaching his or her conclusion as to whether there has been discrimination in violation of the labor agreement.

Before considering the public-policy considerations involved in this question of the arbitrator's role, let me examine some of the very practical considerations under the present state of the law. In the event that the arbitrator finds that there has been discrimination, the employer under the present state of the law has little or no chance of upsetting the award. But if the arbitrator concludes that there has been no discrimination, irrespective of whether he considers the noncontractual law, the grievant subsequently may file his complaint in court and have his second bite of the apple. This second bite of the apple will definitely weaken the institution of private arbitration, which would be most unfortunate.

For a number of reasons, I believe there should be an accommodation between the private arbitration of discrimination griev-

ances and the statutory claims available under Title VII. My suggestion in this respect would not remove the second bite, but it would make that second bite *much smaller* and greatly reduce the delay in the final disposition of these cases. It also would greatly reduce the cost of deciding these claims.

The U.S. Supreme Court in *Alexander* v. *Gardner-Denver* [1] ruled that contractual remedies available pursuant to the arbitration machinery established under a collective bargaining agreement are separate and distinct from statutory claims available under Title VII. The Court ruled that an employee who claims discrimination is entitled to a hearing *de novo* in a federal district court on his statutory claims, despite the fact that an arbitrator may have previously rejected his contractual claims.

Probably the most significant part of the Supreme Court's decision in *Alexande*r is that portion in which the Supreme Court ruled that an arbitral decision may be admitted as evidence in the federal court proceedings and may be accorded such weight as the trial court deems appropriate. In the much discussed Footnote 21 of the *Alexander* decision, the Court identified the relevant factors to be considered by the trial court, including the following: (1) the existence of provisions in the contract conforming substantially with Title VII; (2) the degree of procedural fairness; (3) adequacy of the record with respect to the issue of discrimination; and (4) the special competence of a particular arbitrator. We have had some experience in attempting to have a Title VII case summarily dismissed by a federal court on the theory that the arbitration award complies entirely with the factors identified in Footnote 21. Unfortunately, as yet we have no ruling in our favor on that theory.

One of the many questions raised by the interrelationship between Title VII litigation (on an individual or class basis) and arbitration provisions under a collective bargaining agreement is to what extent, by modifying and improving arbitration procedures, employers may be in a position to argue successfully the binding impact of a favorable arbitration award.

I think we know what the Supreme Court means by contract provisions conforming with Title VII and the special competence of the particular arbitrator. It is not as easy, however, to define the terms "procedural fairness" and "adequacy of the

[1] 415 U.S. 36, 7 FEP Cases 81 (1974).

record." While some commentators have inferred that full availability of federal court discovery procedures and representation by legal counsel are required for procedural fairness, my own belief is that the spirit of the federal court procedure, as opposed to its embodiment, is the critical factor. Specifically, I do not believe that legal representation or availability of written interrogatories, depositions, and requests for admissions are required for an arbitration proceeding to meet the objective of allowing the claimant his fair day in court.

In support of my position, I would refer to the experience of the National Labor Relations Board under its decision in *Spielberg Mfg. Co.*[2] There, the Board announced for the first time that it would give controlling weight to an arbitral award in which, *inter alia*, "the proceedings appear to have been fair and regular." In subsequent decisions, the Board refused to accept specific limitations on the procedural fairness, such as the lack of legal counsel or abnormal witness procedures.[3]

In addition to my legal objection to any requirements of extensive pretrial discovery, I doubt that the use of such pretrial procedures would be practical in the arbitration setting. Practitioners in the field of private labor arbitration have indicated to me their reluctance to engraft court procedures upon the arbitration process. One practitioner explained it as follows:

> "I suggest that modifying arbitration procedures to the extent necessary to convince a federal court to defer discrimination cases to arbitration will be difficult to accomplish. Allowing time consuming discovery in an arbitration contest is not realistic for several reasons. First, it would substantially delay the arbitration process. Second, it would require the arbitrator to rule on preliminary discovery issues. Third, the courts would carefully scrutinize every aspect of the arbitration process with an eye toward complete compliance with footnote 21 of the *Alexander* decision. Moreover, it would appear that, even if the courts were to acknowledge an arbitration bar rule to individual cases, they would most likely not extend such a rule to the class action situation. The adoption of Rule 23 class action procedures in the arbitration process would be wholly unworkable."

Nonetheless, I do believe that the Supreme Court requires more than the elementary due process accepted by the NLRB in the *Spielberg* line of cases. My thoughts on this subject arise from

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[2] 112 NLRB 1080, 36 LRRM 1152 (1955).
[3] *See, e.g., Honolulu Star Bulletin, Ltd.*, 123 NLRB 395, 408 (1959).

the Court's meaning when it referred to the "adequacy of the record" before the arbitrator. Unlike the practice before the NLRB, the Court would probably reject an arbitral award as dispositive of the Title VII issue if neither the record nor the arbitrator's opinion contained those facts that are ordinarily the basis of a court decision.

Specifically, a problem develops in almost every arbitration award that seldom do either the parties or the arbitrator direct their attention to the statistical component of a discrimination case. For example, it is a rare occurrence that an arbitration opinion would discuss the total number of discharges pursuant to a particular plant rule in terms of the race and/or sex of the group. Yet, as the Supreme Court itself noted shortly before its *Alexander* decision, statistical evidence is "helpful" in any determination of the legality of an individual employment action under Title VII.[4] One court of appeals put this more succinctly in holding: "statistics tell much and Courts listen." [5] The omission of such evidence would, I am fearful, lead a reviewing court to find that the record before the arbitrator was inadequate to dispose of the statutory questions.

For this reason, I would recommend that a limited amount of pretrial discovery be allowed in arbitration procedures. Specifically, I can envision the holding of a pretrial conference, at which the parties and the individual claimant would be present, to ascertain specifically what information either party desired before the arbitration hearing commenced. The arbitrator would rule on such requests both at this pretrial conference and during the subsequent hearing itself on the basis of the relevance of the information to the discrimination issues raised by the grievance. I can see that this procedure would somewhat lengthen the time in which the arbitration proceeding would be concluded. This minimal delay, however, in terms of the maximum advantages that an adequate record would offer to all parties seems appropriate.

This is just one possibility; others may spring to mind. What is necessary is that the federal courts, this Academy, the FMCS Arbitration Services, the American Arbitration Association, the EEOC, and whoever else should be involved find a common ground of accommodation that would satisfy what I think the Su-

[4] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 5 FEP Cases 965 (1973).
[5] *Parham* v. *Southwestern Bell Tel. Co.*, 2 FEP Cases 1017, 1021 (5th Cir. 1970).

preme Court had in mind, or should have had in mind, when it decided the *Gardner-Denver* case.

The fact that such accommodation might necessitate new and innovative provisions in the labor contract or some special arbitration agreement should not deter us in the least. The concept of having special procedures available for certain types of cases is not a new one. For a long time some contracts have established special procedures for resolving disputes as to incentive pay and, more recently, the basic steel industry has adopted expedited arbitration procedures for handling routine cases. While the special procedures for discrimination cases would be extended rather than expedited, the underlying idea of tailoring by agreement the procedure to fit the kind of dispute is anything but revolutionary.

The disposition of Title VII discrimination claims in private arbitration would have the following advantages:

First, much faster disposition of discrimination claims. All of us are concerned that the average time from the filing of a grievance to a final decision by an arbitrator has stretched to *eight and one-half months.* By contrast, the experience of practitioners in the field of Title VII indicates that the normal case will reach decision by a federal district judge ordinarily *five years* after the charge was filed. The *Gardner-Denver* case itself indicates the fantastic delays merely in getting a case to trial. There, the Court ordered a trial to be held four and one-half years after the event giving rise to the claim. It is this problem that renders the use of labor arbitration absolutely imperative if the federal courts are going to be able to handle Title VII cases and render effective relief for discrimination. The number of Title VII cases is growing daily and has resulted in overly crowded court dockets. This increase, together with the requirements placed on the courts by the "Speedy Trial Act" for criminal cases, necessarily will result in slower and less complete processing of Title VII matters.

Second, far less cost to litigate. The costs to the defendant-employer, the public, and the plaintiff are staggering under the present litigation procedures.

Third, the obvious superiority of testimony taken six months after an event over testimony taken in a trial court five years thereafter needs no further elucidation.

Fourth, similarly, the advantages of testimony taken before and controlled by an impartial professional arbitrator over even the fastest deposition (where no neutral is present) are obvious.

Fifth, in addition to its speeding-up effect on the trial, such a rule would have the beneficial impact of shortening the time now used (or wasted) in discovery procedures. Federal court practice generally mandates that only one deposition may be taken of any one individual. The reason is obvious. In cases brought under Title VII, it is clear that the general rule is not now in effect, in that the parties not only have the formal deposition taken in advance of trial in the Title VII case, but also have the transcript of the testimony given by the same person in an arbitration hearing as well as notes of the grievance procedure meeting in which informal testimony by the same person was offered. This multiple evidence is not tolerated in other federal court proceedings, nor should it be allowed in Title VII proceedings that are *preceded by arbitration.* In addition, more restrictions should be placed upon the production of documents and requests for admissions, tools now used in the federal discovery process.

Sixth, moreover, to paraphrase the Supreme Court's earlier statements concerning the competence of labor arbitrators, the arbitrator brings to bear experience and understanding in discharge, promotion, and layoff cases that the most competent judge has never received. In light of these two factors—time and experience—the Supreme Court's decision in *Gardner-Denver* could be adapted to utilization of the arbitral proceeding in the subsequent Title VII court proceeding.

There would appear to be no constitutional impediment to a federal district court judge's entering an order to the effect that the party seeking a ruling different from the arbitrator's must show cause by way of preliminary hearing as to why the arbitrator's award should not be presumed correct. To be sure, this would mandate certain changes in present federal practice, but it would obviously not deprive the plaintiff of his right to a trial "before a judge" as mandated by Title VII itself.

Back to the question as to whether the arbitrator should analyze and apply judicial decisions in making his decision: If my accommodation theory actually worked, I suppose the arbitrator inevitably would apply his understanding of the federal law to the issue or issues involved in the arbitration. In any event, I believe there are several good reasons for his so doing under the procedure which I have just discussed:

First, the court would render its decision more quickly, having decided the arbitrator did or did not correctly apply the law. How is the court going to know if the arbitrator knew the law

unless he discussed it in his decision? In his paper, Professor Feller makes the following statement: "And the arbitrators have done poorly in interpreting and applying that external law [Title VII claims], at least as measured by the developments in the courts." The track record of the federal district court judges in these Title VII cases is not all that good either. New sweeping statutory laws normally produce conflicting decisions by federal district courts and often as well in the federal circuit courts of appeals.

Second, the arbitrator would benefit from the comments of the court on the arbitrator's analysis of the public law.

Third, in time the parties will be more inclined to accept the arbitration awards because the arbitrator considered the status of the public law. Conversely, if the arbitrator does not consider the public law, a losing grievant will be more likely to file his complaint in court on the theory that the application of public law will produce a different result.

Fourth, blending arbitration awards with court decisions in these discrimination cases will hasten the day when there is a greater degree of uniformity in the decisions of the arbitrators and the courts, and, therefore, a more universal application of the law involving discrimination.

Conclusion

In capsule form, I am suggesting that the arbitration process may be a workable substitute for the trial of Title VII cases in the federal courts, provided the arbitration proceeding satisfies the spirit of the federal court procedure. For example, the arbitrator could schedule a pretrial arbitration conference to ascertain what information either party desired before the arbitration hearing began. During the hearing, if either party requested additional information, the arbitrator would decide whether it was pertinent and, if so, order it to be provided.

The arbitrator's decision could be appealed by either party to the appropriate federal district court, and the district court judge could enter an order to the effect that the party seeking a ruling different from the arbitrator's must show cause by way of preliminary hearing as to why the arbitrator's award should not be presumed to be correct.

Near the conclusion of his paper, Professor Feller makes the following statement:

> "There may be, and on balance I think there probably are, great advantages to both unions and employers in attempting to resolve their problems at home, even those involving the external law, and, therefore, keeping the grievance and arbitration procedures open to all sorts of claims, even those that ultimately may be subject to final adjudication elsewhere. The necessary result of their doing so may be that arbitrators become primary but not necessarily final adjudicators, but it may also be that, given the alternatives, that result is healthier for their ongoing relationships than the increasing resort to external tribunals as primary adjudicators."

With respect to Title VII cases, I agree with this thought that there are great advantages to all to resolve their problems at home, "even those that . . . may be subject to final adjudication elsewhere."

I have suggested that the courts and the arbitrators should jointly try to find a way to use private arbitration to resolve Title VII disputes. In my judgment, this would result in the disposition of discrimination claims more promptly, at far less cost, and with greater uniformity, all of which would be in the best interest of the public as well as the parties to the labor agreement.

Discussion—

CHAIRMAN CHARLES J. MORRIS: Let's take about 10 minutes for some questions.

PATRICK J. FISHER: I have a footnote with respect to the *Trinity Trucking and Materials* case, which was referred to by Professor Feller. The employee in that case was a truck driver for a company that delivered asphalt material. The principal customer of the employer was a paving company that paid its drivers a higher rate. Let's assume that the employer's contract provided for a rate of $4 and that the rate of the paving company was $6.

The grievant requested a payment of $6 for delivering the material, and the employer declined. A few days later the employer got a telephone call from his principal customer saying, "What's going on? We're sued for $200,000!" Then the employer called the employee in and said, "We've got a problem. We'll give you the $6, but drop this suit for $200,000 against our principal customer." The employee declined. That was why the discharge was upheld.

MR. FELLER: My description of *Trinity Trucking,* and any description of a court or Board decision dealing with an arbitration decision, necessarily sees the arbitration decision through the filter of the description by the Board or the court. The facts in that case, as Pat Fisher tells them, do not appear anywhere in the Board decision; therefore, I have to describe the arbitration decision, sometimes unfavorably, without them because I am describing the decision as the Board described it.

If BNA would undertake, when they report cases in the courts or in the Board that deal with arbitration decisions, to get those written decisions where they exist and then print them in *Labor Arbitration Reports,* we all would be a lot better off.

NEIL N. BERNSTEIN: I'm naturally suspicious of lamentations that the Golden Age is over because it seems to me that every year we look back and say that last year was the Golden Age and it's over. But I take Professor Feller's thesis to be that the Golden Age of Arbitration is over because the Federal Government is getting into regulating the terms and conditions of employment. Does Professor Feller feel that there will be increasing future legislative intrusion in the terms and conditions, or does he feel that the intrusion is so extensive already that it will require a drastic modification in the traditional role of arbitrators just to accommodate where the legislation has gone thus far?

MR. FELLER: Both. I see no indication of a decrease in the trend to remedy by public law what the public finds to be deficiencies in the employment relationship not adequately remedied by collective bargaining, particularly when we have a large section of employment, not covered by collective bargaining, under common law rules under which there is virtually no restriction on what an employer can do. I don't deplore that trend, and I am not suggesting that it should not happen. I think it is happening.

I think I did not properly emphasize the second point, which is this: To the extent that existing or future legislation makes arbitrators the helpful servants to the judicial process which Lee Shaw indicated they should be, rather than independent sources of authority, their decisions obviously are going to be reviewable. I don't think that the reviewing function realistically can be limited to a few issues, because once the courts start treating arbitrators as masters—very well-paid masters sometimes—or as assistants to the Board or the courts, then they are going to go all the way.

Courts are not going to be able neatly to segment the questions that do not involve the external law and those that do, and say that as to the former, arbitrators' decisions are final—we won't look at them at all—but as to the latter, we will review them.

WILLIAM P. MURPHY: Title VII has a provision under which the federal district judge, if he is unable to try the case within 120 days after issue is joined, may appoint a special master. I wonder if there is any future to the possibility that parties to a grievance, who may be unwilling to have this five-year delay that Mr. Shaw mentioned, could combine the arbitration process under the contract with a Title VII lawsuit and then petition the district court for the appointment of a special master. That would accommodate both procedures and would get a quick, definitive result. I guess it goes without saying that we know where we hope the special masters would come from.

Would the panel care to respond to that suggestion?

MR. SHAW: I have suggested that private arbitration could take the place of the trial in a court in these Title VII cases. If either party wanted to appeal to the federal court, that party would move to set aside the arbitrator's award and the court would do so only if the grievant or the employee had not received due process in the judgment of the court. I don't think it would make any difference if the trial *de novo* was before a master or an arbitrator.

But since the institution of private arbitration is so well established, I think that private arbitration is the place where the trial should occur, and the court could simply set aside the award if there was good reason to do so.

HERBERT HAMMERMAN: I have proposed the use of arbitration in Title VII grievances in an article published in the Spring 1975 issue of the *Civil Rights Digest,* and this month digested in the *Monthly Labor Review.* Therefore, I am much more gratified to hear the comments today than I was in yesterday's discussion dealing with arbitration and discrimination. It is interesting to me that the comments were made by nonarbitrators.

I would say this: I am chairing an EEOC task force on the subject of this discussion, and I would like your thoughts later on, in any form, as to how the problem may be resolved. The issue is, as I see it, that you have a specific form of grievance, known as a discrimination grievance, and I don't care whether you call it a charge in Title VII or anything else. It's a grievance. Not only

that, as has been pointed out, it is intertwined with other types of grievances.

Government cannot resolve this issue effectively. I don't care what you do with the EEOC—you can increase EEOC employment to fit the Pentagon, and we'll have as many grievances as will be necessary for the number of employees we have.

If the private sector will not face up to this issue, we will have it falling between the cracks. Therefore, I think we should find some self-regulatory mechanism in which arbitration may play a part—to help people resolve their own problems, their own grievances, in accordance with the law, and specifically, as the last speaker said, in accordance with Footnote 21 of *Gardner-Denver*.

MARK KAHN: I am concerned about the implications in some of the comments we've heard, including Lee Shaw's, for an important aspect of the arbitration process.

Ordinarily and traditionally, if there is a charge that some treatment of an employee was discriminatory, whether or not there is a formal antidiscrimination provision in the contract (but clearly if there is), the parties would come prepared to argue that case before an arbitrator under the contract. The arbitrator should, of course, make some careful findings of fact to indicate the basis for his decision on whether, for example, discrimination was involved in the termination of this employee.

If we create a situation in which the parties are going to have to structure the arbitration so as to satisfy all of the criteria that will mean avoidance later on of a really big second bite of the apple, then we're going to lose the advantage of quick, simple, direct, informal, expeditious, and economical grievance-arbitration hearings. We will move in the direction of each party's preparing its case with eminent counsel and substantial legal research for these hearings, just as they would for the courts.

There is one other aspect of this problem. An arbitrator is supposed to make a decision on the basis of the record before him. There is a dilemma here, it seems to me, if the parties are not thoroughly versed in the legal issues that they expect the arbitrator to decide. I am troubled at the extent to which the arbitrator is then obligated, when the dispute involves the law, to accomplish independent research on the law, thus going above and beyond the record that competent—or perhaps incompetent—parties may have presented to him in the arbitration hearing. I'd like Ted Sachs to comment on that.

MR. SACHS: I grant the dilemma, but I don't think it is any greater than if the arbitrator doesn't deal with the issue, because it's going to come back to haunt the parties and the arbitrator in any event if the claim goes forward in a Title VII proceeding.

There is some greater likelihood of solving the problem if the parties do address it in the arbitration proceeding. Moreover, I don't see that there has to be any material restructuring of the arbitration process. Typically, the facts are going to be intertwined; the just-cause question and the discrimination question are likely to involve the same essential set of facts.

So the factual presentation ought not to be so different, at least in most areas—certainly not in all—and the legal issues would not be significantly dissimilar. So I don't see any radical restructuring of the procedure, and I think there is everything to be gained. If the arbitrator is not sensitive to the legal problems, or if the parties let him down, there obviously would be problems, but no worse than there would otherwise be.

MR. FELLER: I want to express my disagreement with Lee Shaw's approach. It seems to me that almost every grievance can be said to be a discrimination grievance by the ingenious grievant, and if we convert the grievance-arbitration machinery into the preliminary steps of a Title VII lawsuit, we've lost all the virtues of the procedure.

I come down, in the end, to the fact that the arbitrator may be bound to consider questions of external law because the parties want him to. He may do it poorly, and he'll have to take the risk of review. That is why I say there is the coming end of what I have called the Golden Age. But I think we should try to keep the institution that is very important to the parties and not encumber every case with written records, pretrial discovery, and all of that apparatus just because every grievance might become a Title VII lawsuit.