CHAPTER 3

ARBITRATION AND RELENTLESS LEGALIZATION IN THE WORKPLACE

I.

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On June 29, 1789, one Zephaniah Turner of Charles County, Maryland, wrote a gloomy letter to President George Washington about the state of society in the newly formed republic. Among other things, Turner observed:

> I have many friends among the Gentlemen of the Bar and mean not to hurt their Interest or feelings, unless a wish for the welfare of my native Land might happen to do this. . . . Our Laws are too Numerous. Is it not possible that an alteration might take place for the benefit of the public? . . . Could it not be possible to curtail the Number of Lawyers in the different States? Suppose each State was to have but Two Lawyers to be paid liberally without fee or reward, except the Salaries paid by each State [and] that where a real dispute subsisted between Plaintiff and Defendant, A reference [to arbitration] should be proposed, and arbitrators [be] indifferently chosen by both parties . . . whose determination shall be final. . . . I would not mean to discourage the Study of Law, but I really find that the multiplicity of Students in that branch, in this State, has been an inconvenience to the Sons of reputable Parents and more so to the Parents themselves.[1]

Now consider how far we have come two centuries later. Writing in *The Washington Post* a few weeks ago, Robert Samuelson gave these statistics: "In 1951, there were 221,000 law-

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[1]Record Group 360, National Archives, Washington, D.C. I am grateful to Maeva Marcus, Editor, The Documentary History of the Supreme Court of the United States, 1789–1800, for bringing this letter to my attention.

yers, or one for every 695 Americans. By 1989, there were 725,000 lawyers, or one for every 343 Americans."[2]

Needless to say, those of us who, like me, earn our living by teaching law students are not in the best position to lament this trend. And even Samuelson states that "there is a perverse logic to this situation"—chief among those causes for the expanding lawyer population, he states, "is the growing complexity of rules that affect everything from taxes to zoning to Medicare." This complexity, in turn, grows out of "the tendency, now decades in the making, to encase everything we do in rules and procedures."

Modern American society is often accused of being alarmingly and unprecedentedly litigious. From historical work that I have done in the common law of prior centuries, I can say flatly that this accusation is unfair. We are certainly no more of a litigious society than was true of many past eras. And, as the letter from Zephaniah Turner and other documents demonstrate, lawyers have been excoriated for centuries as, collectively, a public menace. But as Samuelson observed, what has happened recently to an unprecedented level is that we have become a highly *legislated* society.

As all of us are aware, this tendency has encompassed the workplace. This is the subject of my paper today; specifically, I will deal with the ways in which the tendency to legislate infiltrates the arbitration process.[3]

One hears talk these days of our having entered the postregulatory era. Perhaps this is happening, but there is little evidence of any such trend with regard to laws affecting the workplace. Consider a flier that came across my desk the other day from the Council of State Chambers of Commerce, peddling what is called the "Employers' Survival Guide to the Federal

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[2]*The Washington Post* (Mar. 21, 1990).

[3]I am not addressing the matter of the increased participation of lawyers in the arbitration hearing, a topic recently taken up by Reginald Alleyne in *Delawyerizing Labor Arbitration*, 50 Ohio St. L.J. 93 (1989). I do not fully agree with Alleyne's assertion that the elongation of the hearing process and of arbitration case time is due to the increase in lawyer participation. In my experience this can be, and often is, due to other factors, such as delays in the grievance-step process, in selecting an arbitrator, in scheduling a hearing, all of which occur frequently without lawyers. Nor in my experience has the conduct of the hearing come to resemble the complex federal trial, nor does it seem to me that rules of evidence are used abusively or overzealously, despite what I admit is an increasing emphasis on the rules in the textbooks. But if one's experience corresponds to Alleyne's description of the modern arbitration process as being essentially like a judge-conducted trial, then one will want to pay close attention to Alleyne's careful suggestions about how to wrest cases back to the healthy, original, informal spirit of the process.

Labor Law Jungle." Six of the fourteen chapters of this guide deal with topics familiar to us all: the Fair Labor Standards Act, employee benefit plans and ERISA, workers' compensation, discrimination in employment, OSHA, and the National Labor Relations Act. In addition, there are chapters on substance abuse and AIDS, wrongful discharge, confidentiality in the workplace, regulations of employee exposure to chemicals, the Immigration Reform and Control Act of 1986, and the Worker Adjustment and Retraining Notification Act.

What I want to do from this point forward is to illustrate how these and similar topics have come up in recent, published arbitration cases.[4] In addition to cases taking up aspects of the National Labor Relations Act, there continues to be a steady flow of cases dealing with the four principal areas of statutory regulation of the workplace—wage and hour, safety and health, pension and welfare benefits, and equal employment opportunity. In addition, there is an increasing number of more exotic statutory cases. Here is a sample list of statutes that were construed and applied by arbitrators in the published reports that I examined:[5] a state Disease Prevention and Control Law of 1955;[6] state statutes giving employees the right to have direct deposits of their paychecks into their bank accounts;[7] a state statute prohibiting discrimination based on marital status;[8] a state Industrial Welfare Commission Order dealing with when

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[4]My methodology was to examine, relatively thoroughly, the published reports of arbitration cases for approximately the past eight years. I am aware of the limitations involved in the process of selecting cases for publication. *See* in this connection, Cole, *How Representative Are Published Arbitration Decisions?*, in Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1985). But I have at least examined all three of the principal sources of published opinions—Bureau of National Affairs, Inc. (BNA), Commerce Clearing House (CCH), and the Labor Arbitration Information System (LAIS) of Labor Relations Press (LRP) Publications.

[5]Some of the examples to follow are public sector cases. In the public sector, of course, it is common for arbitrators to be caught up in intricate statutory questions. My paper is predominantly about the increasing legalization in the workplace in the private sector, but I have used some public sector cases when the statutory issue appeared to raise the same type of question as it might in a comparable private sector case. I have included some of the "hybrid" cases—contractors or hospitals doing business with the government or dependent upon federal money, but I have omitted most of the federal government cases in which arbitrators are embroiled in the Federal Personnel Manual and decisions by the Merit Systems Protection Board and the Federal Labor Relations Authority.

[6]*Nursing Home*, 88 LA 681 (Sedwick, 1987) (the question was whether AIDS was a communicable disease under state law).

[7]*Pickands Mather & Co.*, 87 LA 1071 (Garrett, 1986); *Georgia Pac. Corp.*, 13 LAIS 4019 (Gibson, 1986).

[8]*Board of Trustees, Glasgow School Dist. No. 1-1A*, 92 LA 281, 287 (Corbett, 1988).

employees are required to pay for lost tools;[9] state and federal immigration laws;[10] emergency rules for the city of Berkeley;[11] and a state common law contract principle creating a covenant of good faith and fair dealing.[12] In addition, unsurprisingly, there are cases dealing with workers' compensation statutes,[13] regulations of the Department of Transportation[14] and the Department of Energy,[15] the Urban Mass Transit Act,[16] and veterans' rights.[17]

Obviously I do not have time to explore these cases in detail, but I can give selected examples in connection with discussing patterns of incorporation of statutes into collective bargaining contracts. First, however, let me return to the granddaddy of the process of legalization of the workplace, the National Labor Relations Act.

Collyer Cases

The most interesting aspect of the overlap between arbitration and the NLRA is what may be a disturbing trend—the explicit determination by arbitrators of unfair labor practice questions in cases that have been deferred under the *Collyer* doctrine.[18] In *Collyer* the NLRB endorsed an earlier formulation in the *Jos. Schlitz Brewing Co.* case[19] that, where the action taken by the employer is not designed to undermine the union and is based on a substantial claim of contract privilege, "and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue

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[9]*General Tel. Co. of Cal.*, 87-2 ARB §8432 (Cloke, 1987); *General Tel. Co. of Cal.*, 85-2 ARB §8615 (Collins, 1985).

[10]*Bevles Co.*, 84-1 ARB §8097 (Monat, 1983); *Lash Distribs.*, 83-1 ARB §8035 (Jones, 1981).

[11]*City of Berkeley*, 93 LA 1161 (Riker, 1989).

[12]*Press Democrat Publishing Co.*, 93 LA 969 (McKay, 1989).

[13]*See, e.g., Warren City Bd. of Educ.*, 93 LA 1000 (Dworkin, 1989); *Foster Food Prods.*, 88 LA 337 (Riker, 1986); *US Fuel Co.*, 86-1 ARB §8066 (Sass, 1985).

[14]For cases dealing with DOT regulations pertaining to epileptic and alcoholic truck drivers, and to drug testing in physical examinations, *see, e.g., Lone Star Indus.*, 88 LA 879 (Berger, 1987); *Hobart Corp.*, 88 LA 905 (Feldman, 1987); *Trailways Se. Lines*, 83-2 ARB §8519 (Gibson, 1983).

[15]*Mason & Hanger-Silas Mason Co.*, 92 LA 131 (McKee, 1989).

[16]*Lexington-Fayette Urban County Gov't Transit Auth.*, 90 LA 599 (Volz, 1987).

[17]*City of Springfield*, 92 LA 1298 (Yarowsky, 1989) (Veterans' Reemployment Rights Act); *Capital Dist. Transit Sys. No. 1*, 88 LA 353 (La Manna, 1986) (Vietnam Veteran's Readjustment Assistance Act).

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

[19]175 NLRB 141, 70 LRRM 1472, 1475 (1969).

in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties."

Some arbitrators appear to be taking this language as an invitation to *decide* the unfair labor practice issues, not merely to resolve the contract question in the manner that would dispose of both the contract and the NLRA issues. Thus, in *Federal Wholesale Co.*,[20] the company's unilateral elimination of the tractor-trailer driver classification was challenged by the simultaneous filing of a grievance and unfair labor practice charges. The charges before the NLRB were deferred to arbitration, and the last 2 of the 19 printed pages comprising the arbitrator's opinion are devoted squarely to the unfair labor practice issues. After analysis the arbitrator concluded that "the Company violated its duty to bargain in good faith under Sections 8(a)(5) and 8(d)."[21] The job classification was ordered to be restored, other remedies were provided, and the arbitrator retained jurisdiction for any further disagreement.

The *Federal Wholesale* case is unusual in that the arbitrator squarely held that the employer had committed unfair labor practices. In most of the *Collyer*-deferred cases, arbitrators have explicitly addressed unfair labor practice issues and have found that no unfair labor practice was committed. Usually the issue is unilateral action, implicating Section 8(a)(5), but a few involve discrimination questions under Section 8(a)(3).

One issue lately arising that presents the unilateral action problem is the employer's formulation of a drug-testing policy. For example, in *Laidlaw Transit,*[22] the arbitrator concluded that a drug-testing policy is "a dramatic and significant change in terms and conditions of employment, involving particularly safety and disciplinary actions, which should be negotiated in accordance with the Sections 8(a)(5) and 8(d) of the National Labor Relations Act."[23] The company was ordered to cease implementation and enforcement of its current drug-testing program, and "the parties are to negotiate the drug program to a point of agreement or a good faith impasse at which time the testing can be resumed."[24] Again, the arbitrator retained jurisdiction.

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[20]86 LA 945 (Cohen, 1985).
[21]*Id.* at 962.
[22]89 LA 1001 (Allen, 1987) (arbitrator's opinion runs 22 printed pages).
[23]*Id.* at 1018.
[24]*Id.* at 1022. Two years later, in an unrelated case, the NLRB held that drug-testing programs are a mandatory subject of bargaining. *Johnson-Bateman Co.*, 295 NLRB No. 26, 131 LRRM 1393 (1989).

In another recent case, the employer's unilateral imposition of a companywide smoking ban was challenged by the union and was deferred by the NLRB to arbitration.[25] The arbitrator spent over half of his opinion resolving the second issue—"whether or not the Company violated Section 8(a)(1) and Section 8(a)(5) of the National Labor Relations Act."[26] No violation was found because of the arbitrator's conclusion that the company had bargained in good faith to impasse.[27] Similarly, in *National Fuel Gas Distribution Corp.*,[28] the arbitrator divided his opinion into "the contract issue" and "the NLRA issue" and concluded that no NLRA violation had occurred by the company's unilateral change in a period of rotation.[29]

In another case the employer's unilateral installation of time clocks in a newly organized unit of maintenance electricians and mechanics was challenged by the union. After noting that arbitral precedent generally supported the installation of time clocks by employers, the arbitrator wrote: "This seems to be conceded by the Union in this case whose position is not so much that the agreement has been violated, but that the installation of the time clocks constituted a violation of the Labor Management Relations Act."[30] The Union posed two issues: "1. Was the imposition of time clocks a unilateral change in working conditions in violation of Section 8(a)(5)? 2. Was it retaliatory and designed to frustrate further organizing by the Union on the Laboratory site and thus in violation of Section 8(a)(1) of the Act?"[31] The arbitrator found no LMRA violation.

In *Continental Can Co.*,[32] the arbitrator devoted the majority of his opinion to whether the employer's suspension of two union stewards for inspiring or instigating a mass refusal of overtime work constituted a violation of Sections 8(a)(3) and 8(a)(1) of the NLRA. In addition to NLRB cases, the arbitrator discussed Supreme Court cases such as *Metropolitan Edison*,[33] *Great*

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[25]*Dayton Newspapers*, 91 LA 201 (Kindig, 1988).
[26]*Id.* at 211.
[27]*Id.* at 213.
[28]88 LA 737 (Duff, 1987).
[29]*Id.* at 740.
[30]*Fermi Nat'l Accelerator Laboratory*, 88 LA 79, 83 (Wies, 1986).
[31]*Id.* at 84. One would have supposed that the second of these issues should have been directed at §8(a)(3) of the National Labor Relations Act, with §8(a)(1) brought in only derivatively.
[32]86 LA 11 (Hunter, 1985).
[33]*Metropolitan Edison Co. v. NLRB*, 460 US 693, 112 LRRM 3265 (1983).

Dane,[34] and *Mount Healthy.*[35] The arbitrator concluded that neither section of the Act was violated by the suspensions.[36]

Collectively these cases are surprising. One does not imagine that the NLRB in its *Collyer* doctrine anticipated that arbitrators would squarely decide whether or not employers had committed unfair labor practices.[37] This is a very different idea from the language of the Board in the *Jos. Schlitz Brewing Co.* case,[38] endorsed in *Collyer,* that "the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act."

I did, however, locate some cases in which the arbitrators were more carefully sensitive to *Collyer.* In *Stauffer Chemical Co.,*[39] the employer's unilateral implementation of plant rules governing employee behavior was found significantly and substantially to affect working conditions. The company was ordered to meet and to confer with the union upon demand, and the arbitrator retained jurisdiction. With regard to the unfair labor practice allegations, the arbitrator observed that the NLRB's deferral did not grant him any authority that he did not have under the collective bargaining agreement, and he noted that his findings were based on the agreement. But it was evident that his conclusions resolved the issue in a manner compatible with the purposes of the National Labor Relations Act. Similarly, in *Super Market Service Corp.,*[40] the arbitrator concluded: "With respect to the arbitrability of the 'Unfair Labor Practice' charge, the Arbitrator's decision is founded on the fact that a ruling on the underlying grievance will render the charge moot. Consistency

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[34]*NLRB v. Great Dane Trailers,* 388 U.S. 26, 65 LRRM 2465 (1967).

[35]*Mount Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977).

[36]Other cases involving arbitral determinations of unfair labor practice questions after *Collyer* deferrals are: *Trew-Craft Corp.,* 87 LA 1113 (Kanner, 1986) (no unfair labor practice in claim by grievant that he was discharged because of his efforts to enforce collective bargaining agreement); *Dallas Power,* 14 LAIS 3037 (White, 1985) (employer's discontinuance of practice of giving employees free tickets to Texas State Fair found not to violate duty to bargain because union business manager acceded to change); *White Engines,* 10 LAIS 1040 (Graham, 1982) (no violation of §8(a)(1) or §8(a)(3) arising out of suspension of grievant for failure to obey orders).

[37]Of course, since the arbitrator is the servant of the parties, if the parties jointly and specifically request an arbitral determination of unfair labor practice questions (as was apparently the case in *Continental Can Co., supra* note 32), the issues become amenable to arbitral consideration. This point is explored in more detail below.

[38]*Supra* note 19 at 1475.

[39]10 LAIS 1138 (Cohen, 1983).

[40]87-2 ARB §8466 (Di Lauro, 1987).

demands that the grievance and the 'Unfair Labor Practice' charge must stand or fall together."[41]

Legal Questions by Submission of the Parties or by Incorporation in the Contract

Apart from the special case of deferral by the NLRB, there are two principal ways that legal questions pertaining to workplace disputes come before arbitrators in private sector cases. The first is simple and straightforward. The parties jointly request the arbitrator to take up the legal questions,[42] or they present the case in such a way that these questions are unavoidable. Sometimes extremely complicated questions arise out of seemingly simple grievances.

To illustrate I will tell my one and only war story about three similar cases that came before three different arbitrators in the Bethlehem Steel system under its agreement with the Steelworkers. Each case involved claims for coverage under the negotiated health insurance plan. My case involved services performed by a dentist; the second case, services by a psychologist; the third, services by a chiropractor. In all the cases the company determined that the services rendered by these health care providers were not covered by the plan.

In the case before me, the physical condition of the patient was the deterioration of the temporo-mandibular joint in the jaw, which was corrected by an oral appliance prepared and fitted by a dentist. The procedure was much less expensive than the alternative—oral surgery. The company's position was that no benefits were payable because the insurance did not cover dental services. The union argued that the condition being treated was a medical condition, and the corrective work repaired the medical condition just as, for example, a cast is needed for a broken

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[41] *Id.* at 5846. The union had urged the arbitrator to decide the unfair labor practice question, but the company did not agree. The arbitrator concluded that he had no jurisdiction to reach the merits of the union's claim under the NLRA, but he resolved the matter as indicated by his conclusion quoted above. Other cases in which the arbitrator noted the importance of striving for consistency between the arbitral determination and the NLRA are: *Golden W. Broadcasters*, 90-1 ARB §8073 (Jones, 1989); *Bechtel Civil & Minerals*, 87 LA 153 (Beck, 1986). Also, cases in which the arbitrator noted his concurrent jurisdiction with the NLRB are: *Sam Brown Co.*, 88-1 ARB §8120 (Newmark, 1987); *Magic Chef*, 87-2 ARB §8595 (Caraway, 1987).

[42] *See, e.g., Continental Can Co., supra* note 32; *see also Ryan-Walsh Stevedoring Co.*, 15 LAIS 1008 (Baroni, 1987).

arm. Further, the union argued that, had this corrective work been performed by a doctor, it surely would have been covered.

So far so good, but now the fun began. The union presented a state antidiscrimination statute prescribing that any work performed by a variety of professional persons—for example, dentists, psychologists, chiropractors—must be paid for if the health plan would pay for the services had they been performed by a doctor. The company responded by arguing that the state statute was preempted by ERISA. The union responded that insurance plans are excepted from the ERISA preemption provision. The company responded that self-insured plans are exempted from the exception to the ERISA preemption provision. The union responded that the company plan was run by Blue Cross/Blue Shield and did not constitute self-insurance. The company responded that Blue Cross/Blue Shield performed administrative services only and that the Bethlehem plan lacked the risk-dispersion characteristics necessary for it to comprise "insurance" according to applicable definitions under federal law. Ultimately we were constrained to rule in favor of ERISA preemption.[43]

Much more common than direct submission by the parties is the second way in which legal questions come before arbitrators—incorporation. Naturally the phenomenon I have called "relentless legalization in the workplace" will affect grievance arbitration in proportion to the extent to which workplace-regulating laws are incorporated into collective bargaining contracts. This incorporation process can invoke the NLRA, for example, when a contract prohibits discrimination against an employee for engaging in union activities, and this is deemed to incorporate Section 8(a)(3) of the Act.[44] Usually, however, statutes other than the NLRA are incorporated into collective bargaining contracts. The most frequent example is the incorporation of Title VII of the Civil Rights Act of 1964, but one encounters as well the incorporation of ERISA, OSHA, the Fair Labor Standards Act, and other statutes.

For this audience the most useful treatment of the incorporation question is from the standpoint of the contract negotiators. How exactly do statutes or other legal principles get incorpo-

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[43]For those who may be interested, two of these cases are published: *Bethlehem Steel Co.*, 91 LA 777 (Valtin, 1988) and *Bethlehem Steel Co.*, 91 LA 789 (Oldham, 1988).

[44]*See e.g., Star Tribune*, 93 LA 14 (Bognanno, 1989).

rated into collective bargaining contracts? From my examination of published awards, I can illustrate a variety of approaches. Let me give examples of six types. I will call them the surprise, the global, the particular, the deleter, the conformer, and the status quo.

Surprise incorporation occurs when the arbitrator "discovers" that a statute or legal principle was intended by the parties to have been incorporated into the contract by general contract provisions, such as the just cause requirement. In *Press Democrat Publishing Co.*,[45] the just cause provision applied to discharges but not to suspensions. The arbitrator ruled that it would make no sense to impose the just cause standard on discharges and leave the employer free to impose lesser discipline for any reason. He found that under California law all employment contracts contain a covenant of good faith and fair dealing, and this became part of the just cause standard, thereby extending it to all disciplinary actions.

In one case the arbitrator ruled that all of Title VII, including the "reasonable accommodation/undue hardship" formula for religious discrimination (together with interpretative case authorities), was incorporated as an inherent part of the just cause provision.[46] In another case the arbitrator imported Title VII by using language in the contract preamble precluding discrimination, despite the fact that the parties in their submission agreement restricted the arbitrator to interpreting specified provisions of the contract, not including the preamble.[47]

As is probably evident, my terminology here—surprise incorporation—is a bit pejorative. Traditionalist arbitrators, among whom I ordinarily count myself, would resist wholesale incorporation through open-ended language such as just cause. But incorporation may be unavoidable if a contract incorporation provision exists, for example, one that is global in scope.

By *global* incorporation I refer to general contract language obliging the parties to behave in accordance with law. In the *Bevles* case,[48] a contract provision stated that each party agreed not to require the other to perform any act prohibited by law. On the basis of this provision, the arbitrator concluded that the

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[45]93 LA 969 (McKay, 1989).
[46]*Centerville Clinics*, 85 LA 1059 (Talarico, 1985).
[47]*Arkansas Power & Light Co.*, 89 LA 1028 (Woolf, 1987). *See also City of Toledo*, 88 LA 137 (Feldman, 1986).
[48]84-1 ARB §8097 (Monat, 1983).

parties intended external law to apply to the agreement, allowing the employer to defend his discharge of the grievant, a Mexican citizen, with claims of potential liability under state and federal immigration statutes. This has the effect of authorizing the arbitrator to issue an advisory opinion on the law in order to render a live opinion on the case before him.

In *Florida Power Corp.*,[49] the arbitrator noted his reluctance to reach for external law, but he was bound by the fact that "the Agreement itself authorizes and requires the arbitrator to pass upon a legal question by defining a grievance to include an alleged violation of law 'governing the employee-employer relationship' or 'supervisory conduct which unlawfully . . . denies to any employee his job or any benefit arising out of his job.'"[50]Another example is a case in which the state law definition of "teacher" was adopted, even though it was broader than the definition contained in the collective bargaining contract, due to the following provision in the contract: "[A]ll provisions of this Agreement, are subject to the laws of the State of Minnesota, federal laws, rules and regulations of the State Board of Education, and valid rules, regulations, and orders of State and Federal government."[51]

Particular incorporation clauses bring specific statutes or laws into collective bargaining contracts. This can be done by expressly mentioning the statute or law or by repeating in the contract, verbatim or nearly so, the statute's operative language. A common example of the former is the specific incorporation of provisions of the Fair Labor Standards Act.[52] A common example of the latter is the adoption in collective bargaining contracts of the language of Title VII of the Civil Rights Act of 1964 prohibiting discrimination.[53] Another recent example is the incorporation of the language of the "whistleblower" statute protecting federal employees.[54]

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[49]87 LA 957 (Wahl, 1986).

[50]*Id.* at 960.

[51]*Central Lakes Educ. Ass'n*, 85-1 ARB §8085 (Ver Ploeg, 1984). For a contrary case, constrained by a prior arbitration precedent with which the arbitrator was clearly unhappy, *see Los Angeles Community College Dist.*, 87 LA 252 (Kaufman, 1986).

[52]*See, e.g., City of Jacksonville, Fla.*, 92 LA 397 (Baroni, 1989); *Sylvania Township Bd. of Trustees*, 91 LA 575 (Klein, 1988); *City of Sapulpa*, 15 LAIS 2019 (Goodstein, 1987).

[53]*See, e.g., Star Tribune, supra* note 44; *Reynolds Elec. & Eng'g Co.*, 91 LA 1289 (Morris, 1988); *Lucky Stores*, 88 LA 841 (Gentile, 1987); *Commonwealth of Pa.*, 88-1 ARB §8132 (Harris, 1986).

[54]*Pension Benefit Guaranty Corp.*, 92 LA 151, 160 (Hockenberry, 1989).

The form of incorporation clause that I have dubbed the *deleter* provides for the elimination of any part of a contract provision adjudged to be unlawful. An example is found in the case of *Fort Wayne Community Schools*,[55] where the contract contained the following provision: "'C. Should any article or portion thereof be . . . in conflict with any state or federal statute or regulation that has the effect of statute, such article or portion thereof shall be deleted from the contract to the extent it violates the law, but the remainder of the contract shall remain in full force and effect.'"[56]

A variation on this type of incorporation is what I have termed the *conformer*. For example, in *Glasgow School District*,[57] the contract provided that "'[t]he Board shall take all necessary actions to comply with the letter and the spirit of state and federal laws prohibiting discrimination in employment.'"[58] A more general example is found in the contract between the Communications Workers and General Telephone Company of California, which contains the following provision: "2. Should any valid Federal or State law or final determination of any board or court of competent jurisdiction affect any provision of this Agreement, the provision or provisions so affected shall be made to conform to the law or determination and otherwise this Agreement shall continue in full force and effect."[59] A more elaborate example is found in the contract between PPG Industries and the Aluminum Workers, which contains the following saving clause:

> "32(a) if any term or provision of this Agreement is, at any time during the life of this Agreement, in conflict with any applicable valid Federal or State law, such term or provision shall continue in effect only to the extent permitted by such law. If, at any time thereafter, such term or provision is no longer in conflict with any Federal or State law, such term or provision, as originally embodied in this Agreement, shall be restored in full force and effect. If any term or provision of this Agreement is or becomes invalid or unenforceable, such invalidity or unenforceability shall not affect or impair any other term or provision of this Agreement."[60]

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[55]92 LA 1318 (Eagle, 1989).

[56]*Id.* at 1319. For an example of a comparable provision, *see Clarion-Limestone Area School Dist.*, 90 LA 281 (Creo, 1988).

[57]*Board of Trustees, Glasgow School Dist. No. 1-1A*, 92 LA 281, 287 (Corbett, 1988).

[58]*Id.* at 283 n.1 (emphasis deleted).

[59]*General Tel. Co. of Cal.*, 85-2 ARB §8615, 5504 (Collins, 1985); *General Tel. Co. of Cal.*, 87-2 ARB §8432 (Cloke, 1987).

[60]*PPG Indus.*, 87 LA 74, 76 (Duff, 1986).

The final type of incorporation clause I have called the *status quo*. This can be illustrated by an interesting provision in the contract between the Sahara Coal Company and the Progressive Mine Workers. The contract contained specific statutory incorporations, but it also included the following provision: "'This Contract is based upon existing mining laws and neither party to the same shall initiate or encourage the passage of laws pertaining solely to the mining industry that would in any manner affect the obligations of this Contract or abrogate any of the provisions unless such proposed laws be mutually agreed to by the parties hereto.'"[61]

After it is determined that contract language was intended by the parties to incorporate external law, a further question is presented: What gets incorporated? Does a nondiscrimination clause, if taken to embrace Title VII of the Civil Rights Act of 1964, automatically encompass all the rulings and guidelines of the Equal Employment Opportunity Commission? What about guidelines or court decisions issued after the contract language was drafted?

As shown in some of the cases discussed, the parties may anticipate these questions in contract language. An illustration is the case of *Potomac Electric Power Co.*,[62] where the contract provided that "'the provisions of [the] Agreement are in all respects subject to all applicable laws and government regulations now or hereafter in effect and to the lawful rulings and orders of all regulatory commissions now or hereafter having jurisdiction.'" Thus, the arbitrator applied the EEOC guidelines pertaining to the Pregnancy Discrimination Act of 1978.

When the contract language is unclear as to the scope of incorporation, the arbitrator must decide. If the incorporation clause is a global, it may be relatively easy to conclude that all applicable laws, regulations, and rulings are to be encompassed. Short of the global, however, the matter becomes less clear.

Cases dealing with typical nondiscrimination clauses illustrate the point. In *Lucas Western, Inc.*,[63] the contract provided that both parties

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[61]*Sahara Coal Co.*, 89 LA 1257, 1257 (O'Grady, 1987).
[62]87-1 ARB §8147, 3603 (Harkless, 1986).
[63]91 LA 1272 (Alleyne, 1988).

> "will comply with all State and Federal Laws pertaining to Non-Discrimination so as to protect and safeguard the rights and opportunities of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religion, creed, color, ancestry, sex, Vietnam Era Veterans or being physically handicapped."[64]

The company argued that this provision was clear and that it included "'no expression of intent . . . to incorporate the myriad of other non-discrimination or non-retaliation laws, both federal and state, such as Labor Code Section 132a, which are on the books.'"[65] California Labor Code Section 132a prohibited discrimination against workers injured in the course and scope of their employment. The arbitrator concluded that he need not resolve the company's argument because he was authorized under the just cause provision to consider the California workers' compensation statute.

By contrast, in *Fairmont General Hospital,*[66] the incorporation question was not only resolved but was given a reverse twist. The contract provided: "'It is the continuing policy and practice of both the Hospital and the Union not to discriminate against any employee because of race, creed, color, national origin, political belief, sex, age or union activity.'"[67] Nevertheless, the hospital board of directors subsequently issued a memorandum establishing age 70 as the mandatory retirement age. The grievant was caught by this directive, and the union brought the case to arbitration. The arbitrator noted that the Age Discrimination in Employment Act of 1967 prohibited discrimination prior to reaching age 70, after which the protection of the Act ceased. In construing the contract provision, the arbitrator concluded: "It is clear that the parties agreed to the non-discrimination clause long after the law was in existence. The parties thus agreed to a standard different from that set by the law. The agreed standard established no age ceiling."[68] As a result, the age of retirement had been left by the parties for future determination, and this could not be imposed upon the employees unilaterally by the hospital.

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[64]*Id.* at 1273.
[65]*Id.*
[66]87 LA 137 (Bolte, 1986).
[67]*Id.* at 138.
[68]*Id.* at 140.

Although the outcome in the *Fairmont Hospital* case is not unreasonable, it is unexpected. The arbitrator explicitly found that the nondiscrimination clause "was written into the agreement to comply with the Age Discrimination in Employment Act of 1967,"[69] and one would suppose that this would incorporate only the scope of protection contained in the Act.

An analogous question that has come up in arbitration cases is what is meant by the inclusion by the parties in a nondiscrimination clause of religion as a prohibited ground. Typically, the language of the nondiscrimination clause tracks the prohibitory language of Title VII of the Civil Rights Act of 1964, as amended, but goes no further. In a separate provision, however, Title VII defines the term "religion" as including "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."[70] Does a contract provision banning discrimination because of religion encompass the "reasonable accommodation/undue hardship" formula? The sensible answer is yes. This conclusion was reached by the arbitrator in *Lucky Stores*,[71] bringing into play as well interpretations of the reasonable accommodation requirement by the U.S. Supreme Court. But by analogy, the reasoning of cases such as *Fairmont Hospital* suggests an opposite, incorrect result.[72]

Summary and Conclusion

Outside the contexts of deferral by the NLRB, specific requests for statutory interpretation by parties, and incorporation by reference, cases arise in which one party urges a statutory justification for its actions or claims that the other party's behavior violated a statute or legal principle. Most arbitrators continue to take the traditional view that the legal issue cannot be consid-

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[69]*Id.* at 139.

[70]Civil Rights Act of 1964, 42 U.S.C. §2000e-18.

[71]*Supra*, note 53.

[72]Another possibility is given in *JPI Transp. Prods.*, 93 LA 716 (Kindig, 1989). There the arbitrator concluded that he was barred on collateral estoppel grounds from considering the grievant's religious discrimination charges, since the state Civil Rights Commission and the EEOC had dismissed the employee's religious discrimination charges on the ground that the employer had reasonably accommodated the employee's religious beliefs.

ered.[73] But some arbitrators take a different view. In *Hartford Provision Co.*,[74] the arbitrator was faced with a grievance protesting the company's refusal to enroll an outside food salesman in the union under the union-shop clause (the company claimed the salesman was ineligible, as a management trainee). In responding to the external law issue, the arbitrator wrote:

> If I were simply to follow the contract, and order the Employer to take steps to enforce the union security provision, the inevitable result would be that the Employer would challenge my order in some other forum. Thus, enforcing the contract as written will produce not finality, but simply another proceeding in another forum. On the other hand, if I decide the statutory issue, there is a fair chance that the result will be final. The issue does not appear unusually difficult; I have had training and experience in interpreting statutes, including the NLRA; and the issue has been briefed by experienced labor lawyers.[75]

Accordingly, provisions of the NLRA were applied.

This approach was squarely disapproved of by the U.S. Court of Appeals for the Seventh Circuit in *Roadmaster Corp. v. Laborer's Local 504*.[76] There in a contract-renewal situation the arbitrator ruled that the collective bargaining agreement continued in effect because the employer had refused to bargain in violation of Section 8(d)(2) of the NLRA. According to the court:

> The arbitrator cast no doubt upon what he was doing. And he was plainly wrong. He based his decision not upon the parties' bargain, but rather upon his "view of the requirements of enacted legislation."

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[73]Cases in which arbitrators have refused to apply NLRA provisions include: *Gaylord Container Corp.*, 93 LA 465 (Abrams, 1989); *Gerland's Food Fair*, 93 LA 1285 (Helburn, 1989); *Cosmic Distribution*, 92 LA 205 (Prayzich, 1989); *Amgraph Packaging*, 89-2 ARB §8334 (Greenbaum, 1989); *Pratt & Whitney Aircraft Group*, 91 LA 1014 (Chandler, 1988); *Indiana Bell Tel. Co.*, 88 LA 401 (Feldman, 1986); *Stark County Eng'r*, 88 LA 497 (Kates, 1986); *Hunter Eng'g Co.*, 82 LA 483 (Alleyne, 1984); *Mautz & Oren Constr.*, 84-1 ARB §8146 (Roberts, 1984). Representative cases in which arbitrators refused to apply other statutes are: *Juniata County School Dist.*, 17 LAIS 2014 (Zirkel, 1989) (state witness-payment statute); *Grinnell Corp.*, 92 LA 124 (Kilroy, 1989) (state Employment Security Commissioner ruling); *George A. Hormel & Co.*, 90 LA 1246 (Goodman, 1988) (FLSA); *Holly Farms, Inc.*, 90 LA 509 (McDermott, 1987) (handicap discrimination law); *Public Serv. Elec.*, 15 LAIS 3295 (Nicolau, 1987) (law pertaining to drug testing); *County of Koochiching*, 13 LAIS 2132 (Flagler, 1986) (legislation declaring Martin Luther King Day a legal holiday); *Owens Ill.*, 85-1 ARB §8051 (Cantor, 1984) (workers' compensation law); *Las Vegas Bldg. Materials*, 12 LAIS 1016 (Richman, 1984) (federal law prohibiting discharge due to wage garnishment; levy was by IRS against grievant, a tax protestor); *Ashland School Dist.*, 11 LAIS 2115 (Kreles, 1984) (state declaration of legal holiday); *Safeway Stores*, 83-1 ARB §8163 (Ross, 1983) (state law regarding vesting of vacation benefits); *Gelco Courier*, 83-1 ARB §8044 (Gentile, 1982) (state commission wage order).

[74]89 LA 590 (Sacks, 1987).

[75]*Id.* at 592.

[76]851 F.2d 886, 129 LRRM 2449 (7th Cir. 1988).

> . . . Resolution of NLRA disputes must be left to the NLRB and not to an arbitrator. . . . [T]he arbitrator should restrict his consideration to the contract, even if such a decision conflicts with federal statutory law.[77]

Interestingly, the court noted that the arbitrator justified his action by relying upon the *Collyer* case, which the court considered inapposite since in *Collyer* situations the Board retains the power to review arbitrators' decisions.

Despite these views, the ways in which the workplace is regulated by statute and by common law principles continue to increase in number and complexity. Becoming more common are patterns of incorporation by reference, either by contract provisions that mimic statutory language or by explicit reference to statute and decisional law.

This does not appear to be a trend that will abate any time soon. We have, perhaps, a little maneuvering room. We arbitrators can resist reaching for unfair labor practice questions in deferral cases, and we can encourage contract negotiators to think about the full range of questions presented by incorporation language. As we have seen, the choices that are made in drafting the incorporation language can have important consequences. If the incorporation is anything less than global, the parties ideally should consider the extent to which they wish to include not only a particular statute, but also any judicial or administrative interpretations of that statute or regulatory guidelines, and whether they wish to absorb any amendments to the law or new interpretations that may occur during the life of the collective bargaining contract.

The process I have called the legalization in the workplace does indeed seem relentless, and we will have to continue to cope. At present no drastic measures appear to be needed, even if any would be feasible, but about the future who can tell? In a way this process is but a chapter in the "life gets ever more complicated" story. By comparison, in the past two decades the problem of having lay jurors return verdicts in complex civil litigation has been much debated.[78] The judge's instructions can help the jury with the facts of a complex antitrust case or a

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[77]*Id.* at 889, 129 LRRM at 2452, citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974), *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960), and *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 115 LRRM 3646 (1984).

[78]*See, e.g.*, the studies cited in Oldham, *The Origins of the Special Jury*, 50 U. Chi. L. Rev. 137, 138 n.5 (1983).

scientific patent dispute or a complicated white-collar crime case, but in the end the jury is on its own. Expert testimony may be helpful, but the adversarial use of expert testimony brings with it its own set of problems.

What alternatives are there? Juries of experts have been suggested, as have specialty courts. Neither suggestion has met with an outpouring of enthusiasm, and in any case neither idea is new; both have been tried in earlier eras.

Another approach was used centuries ago in the Court of Admiralty in England. When a question arose about whether a sea captain had deviated improperly from his planned voyage, the Court of Admiralty brought in an Assessor. This person would be a respected, retired sea captain, a neutral, expert advisor to the judges about proper sailing practices. He did not give testimony under oath, nor did he represent either party; his role was to assist the court.

Perhaps we can take lessons from the past. The day may come when it will prove worth an experiment to make expert legal advisors available to arbitrators—to both lawyer and nonlawyer arbitrators—as an optional resource. Or, perhaps arbitrator specialization will arrive, as has already been suggested in some contexts. These ideas may not appeal to everyone—perhaps to no one—but neither time nor the lawmakers will stand still.

I conclude where I began by returning briefly to the 18th century. In a pamphlet written in 1764 entitled "Reflections on the Natural and Acquired Endowments Requisite for the Study of the Law and the Means to Be Used in Pursuit of It," the author begins his introduction by stating: "It hath long been a matter of complaint, that the laws . . . are grown so voluminous, that the compass of a man's life will scarce suffice for the bare reading, much less for the apprehending and digesting them."[79] Indeed, he added, "the laws, by their number, their bulk, and their obscurity, are become almost a wilderness to the professors."[80] That is a sentiment with which I can identify.

II. MANAGEMENT VIEWPOINT

ANTHONY T. OLIVER, JR.*

When I was first asked by Professor Anthony Sinicropi to be a panelist on the topic of "Galloping Legalism in Arbitration" at

[79][Simpson], Reflections on the Natural and Acquired Endowments Requisite for the Study of the Law and the Means to Be Used in Pursuit of It, 3rd ed. (London, 1764).
[80]*Id.* at vi.

*Parker, Milliken, Clark, O'Hara & Samuelian, Los Angeles, California.

this Annual Meeting of the Academy, I went home and explained to my wife that I was probably going to be involved in a "lawyer bashing" session and to please remind me not to wear a good suit that day. After giving the matter some further thought, I concluded that if my initial observation was correct, the Academy would not have selected an attorney/arbitrator to deliver the paper to which I was to respond—especially an attorney whose profession is to train other attorneys.

After reading Professor James Oldham's paper, I realized that his primary thrust was relentless legalization in the workplace and that his basic premise was that the increase in legalism in arbitration resulted not from the presence of attorney/advocates in the arbitration process but from factors external to the process itself. It was then that I decided I could probably get away with wearing a good suit after all.

After disposing of my initial concern, I took another, more careful look at the subject or general theme of this 43rd Annual Meeting—New Perspectives on Old Issues. Having attended prior Academy meetings, I knew that the subject of legalism in arbitration had been discussed before, and I decided that a little research on the subject might be of some help.

My indoctrination to labor arbitration as a management attorney/advocate was back in the era when the arbitrator rarely looked beyond "the four corners of the agreement." There were no transcripts, and posthearing briefs were used only when it was apparent that the arbitrator's schedule would preclude the issuance of an award for several months and a brief might be helpful to the arbitrator in interpreting the official notes. Even when posthearing briefs were used, few cases were cited, and the briefs generally concentrated on the pure logic of the party's position.

I also recall that most of my best arbitration-advocacy training came from being thrust into arbitration hearings against union business agents who were experienced, who knew the contract from cover to cover, who were cagey, who knew exactly what the arbitrator wanted to hear, and who usually played the role of the unsophisticated "country bumpkin" against the "lawyer from the big city." I might add, most of the business agents I knew played that role quite well. I might also add that the lessons I learned from those early encounters helped immensely in my development as a labor arbitration advocate.

Obviously there have been significant changes in the last 30 years or so. Unfortunately, as my research into the past indicated, much of the change has been attributed to the increasing use of attorney/advocates in the arbitration process. In 1947 in an address before the annual convention of the International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America (AFL), William M. Leiserson, a former member of the National Labor Relations Board and the National Mediation Board, made it quite clear as to what he thought about lawyers in the arbitration process.[1] In that address he stated: "in proceedings before . . . ordinary arbitration boards, lawyers are better kept out, just as I am sure you have found it is better to keep lawyers out of collective bargaining negotiations."[2]

In 1957 John F. Sembower, in addressing the decennial meeting of this Academy, decried the increasing trend toward technicalities in arbitration.[3] While not directly attributing this trend to any specific group of advocates or arbitrators, Sembower suggested that technicalities such as stipulations, statutes of limitation (time limitations), prehearing discovery, and rules of evidence needed curbing. While not exclusively the province of attorneys, concepts such as these generally come from those trained in the law and clearly suggest that attorney/advocates and attorney/arbitrators are in large part responsible for the trend.

By 1958 the trend had started to "creep" as reported by Sylvester Garrett at the 14th Annual Meeting of the Academy.[4] Sometime after that the creep turned into a "gallop." While I was unable to determine precisely when the gallop was identified or by whom, according to Sylvester Garrett, the term appears to have been first used by the Academy's Benjamin Aaron, an attorney and professor, when he analyzed the term "creeping legalism" as follows:

> Use of that rhetorical device is regrettable because it suggests something stealthy and unwholesome—a condition to be resisted as strongly as "creeping subversion." We would be better advised, I

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[1]Leiserson, *How Unions May Use the Taft-Hartley Act*, 20 LRRM 74 (1947).

[2]*Id.* at 80.

[3]Sembower, *Halting the Trend Toward Technicalities in Arbitration*, in Critical Issues in Labor Arbitration, Proceedings of the 10th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1957), 109.

[4]Garrett, *The Role of Lawyers in Arbitration*, in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 102.

> submit, initially to concentrate on the particular practices or attitudes under attack; after they are identified and evaluated, there will be time enough to determine whether they are creeping, toddling, or galloping.[5]

Most of the early critics of the encroachment of legalism into the arbitration process directed their ire at the introduction of legal concepts and techniques by attorneys. By the 1970s, however, it became clear that much of the legal or technical complexity which the system was experiencing came from external sources and was not necessarily attributable to attorneys operating within the system. Some of these external factors, such as the fear of Title VII, OSHA, and duty-of-fair-representation claims were recognized and discussed at the 32nd Annual Meeting of the Academy.[6]

It was my privilege then, as it is now, to participate in that discussion before this Academy and I repeat what I said then. The use of attorneys as advocates in arbitration proceedings is here to stay, likely will increase, and that is not all bad. Whatever legalism has crept or toddled or galloped into the system is not primarily the fault of the attorneys who have practiced in that arena for years or even the new attorneys who are coming into the system. For the most part the reasons for increasing legalism are external to the system, and the primary culprit is the never-ending increase of legislation at all levels of government regulating the employer-employee relationship. Perhaps the critics of attorneys in the arbitration process would be better served by addressing their complaints to the attorneys and nonattorneys who are responsible for that legislation.

In his paper Oldham addressed the increasing legalization of the workplace by examining published arbitration awards over the past eight years, which have discussed the incorporation of statutes into collective bargaining agreements. He has also coined a new word, "relentless," to replace the now familiar "galloping" when describing the encroachment of legalism in the arbitration process. I would like to examine in greater detail two of the cases cited by Oldham in which the arbitrator, perhaps

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[5]Aaron, *Labor Arbitration and Its Critics*, 10 Lab. L.J. 605, 606 (1959).

[6]Seward, *The Quality of Adversary Presentation in Arbitration: A Critical View*, in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, ed. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1980), 14.

inadvertently, opened the door to incorporation of statutes into arbitral decisions involving the basic concept of just cause.

The first case is *Lucas Western, Inc.*[7] I am somewhat familiar with the case, having represented the employer. In that case the grievant had returned from a medical leave of absence for an industrial injury. He had been cleared by his own physician to return to his former job with a restriction that he not be permitted to raise his arms above shoulder level. He was assigned to perform the least physically demanding duties of his former classification which were within his medical restriction and, by his own admission, he was unable to perform that work. The employer refused to grant any additional leave, and the grievant was terminated.

The issue before the arbitrator was framed in terms of just cause, the employer arguing that since the grievant could no longer perform his work, just cause existed for his termination. The union urged the arbitrator to apply external law, namely, Section 132a of the California Labor Code, which prohibits discrimination against employees injured in the course and scope of their employment, and to find in favor of the grievant. The contract provided that both parties "will comply with all State and Federal Laws pertaining to Non-Discrimination so as to protect and safeguard the rights and opportunities of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religion, creed, color, ancestry, sex, Vietnam Era Veterans or being physically handicapped."[8]

The employer conceded that this provision of the contract might authorize an arbitrator to consider legislation barring discrimination with respect to the specific matters enumerated in the contract but argued that the contract did not include any "expression of intent . . . to incorporate the myriad of other non-discrimination or non-retaliation laws, both federal and state, such as Labor Code Section 132a, which are on the books."[9] The employer urged the arbitrator to interpret the collective bargaining agreement without applying or relying on Workers' Compensation law.

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[7]91 LA 1272 (Alleyne, 1988).
[8]*Id.* at 1273.
[9]*Id.*

The arbitrator concluded that it was not necessary for him to determine whether he was authorized by the contract to consider and apply the statute in question because he "was authorized to consider the California Workers' Compensation statute as an aid in determining the meaning of the 'just cause' clauses in dispute." In this regard the arbitrator stated:

> Just cause is not a plain-meaning term. It is broad in scope and amorphous in content. Within its breadth, and unless so positively provided in the agreement, what the arbitrator might bring to bear on its contextual meaning is not limited by the agreement. The arbitrator may rely on a mixture of such criteria as fairness and equity, practice, precedent in the industry, or what other arbitrators, courts or administrative agencies might do in comparable situations.[10]

The arbitrator then proceeded to consider whether the discharge did in fact violate the Workers' Compensation statute relied upon by the union, citing California court authority in the process. He concluded that the grievant's termination was not in violation of the statute in question and determined that just cause existed for the termination.

In the second case, *Centerville Clinics,*[11] the employer, a dental clinic, determined that in order to best serve its patients, it was necessary to expand its hours of service by adding one evening per week and eight hours on Saturday to its regular eight hours per day, Monday through Friday schedule. The two full-time dental assistants were scheduled to work on alternate Saturdays. A part-time dental assistant was hired to provide backup for vacations, sick days, holidays, and emergencies. The clinic made it clear that at least one dental assistant was required to be on duty at any time the clinic was open. The grievant, one of the two full-time dental assistants, refused to work on Saturdays because of her religious beliefs.

After three months of negotiations the company proposed a revised work schedule which eliminated the need for the grievant to work on Saturdays except in an emergency, which was defined as a situation where neither the other full-time dental assistant nor the part-time dental assistant was able to work. The grievant stated that she would not agree to work on Saturday under any circumstances, and she was terminated.

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[10] *Id.*

[11] 85 LA 1059 (Talarico, 1985).

The contract in this case was unique in that it contained no specific nondiscrimination clause. The contract contained a broad management rights clause, which vested the clinic with the right to schedule hours. The only express limitation on the clinic's right to discharge employees was that it be for just cause.

The clinic's position before the arbitrator was that just cause existed to terminate the grievant for refusing to work her assigned shift. The union urged the arbitrator to consider the guidelines on religious discrimination issued by the EEOC. The arbitrator ruled that in determining whether just cause existed he could, and did, incorporate the religious discrimination provisions of Title VII and the reasonable accommodation/undue hardship principles as enunciated in federal decisions. In fact, the only authorities cited in the award are federal court cases. The arbitrator concluded that under the authorities cited, the clinic had reasonably accommodated the grievant and denied the grievance.

While I am not prepared to state that the arbitrator in either case was wrong in applying or incorporating external law in reaching his decision, it seems to me that in both cases the arbitrator could have reached the same result without doing so. Because of awards such as these, other arbitrators are more likely to adopt the reasoning that any potentially applicable statute may be incorporated into a contract whenever just cause is the issue. The net result is that we may soon have an "eighth test"[12] for just cause, namely, did the discipline or discharge violate any applicable statute?

Any arbitration in which the application of external law is an issue becomes more technical, legalistic, and complex. While an attorney/advocate or an attorney/arbitrator may not experience any particular difficulty in dealing with such issues, I am sure that some nonattorney advocates and arbitrators will. If, under the guise of just cause, an arbitrator may consider and incorporate any applicable statute, advocates must carefully analyze every just cause case to determine if some statute is potentially applicable. This task is more easily undertaken by a lawyer who is uniquely trained for such research.

As Oldham has indicated, the legalization of the workplace appears to be relentless and is not likely to reduce to a creep or

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[12]*Cf.* Koven and Smith, Just Cause, The Seven Tests (San Francisco: Coloracre Publications, 1985).

even a toddle anytime soon. What can be done about it? While Oldham has offered some possible solutions, for the foreseeable future all we can do is cope with the problem.

Does this mean the advent of more attorneys into the arbitration process either as advocates or arbitrators? Possibly, but not necessarily. Despite all the earlier concern about the increasing legalism and use of attorneys in the arbitration process, it is interesting to note in several studies presented at the 41st Annual Meeting of the Academy that in aggregate (management and union advocates combined) about 70 percent of all advocates are not lawyers,[13] while approximately 55.9 percent of arbitrators have law degrees.[14] Perhaps the attorney/arbitrators should share more of the blame for whatever increase in legalism has occurred within the system in which we operate.

Does the relentless legalization of the workplace herald the end of nonattorney advocates and perhaps nonattorney arbitrators in the arbitration arena as we know it? I think not. The cases which have been discussed here today represent only a small percentage of the reported arbitration cases over the past eight years and an even smaller percentage of the total number of labor arbitration awards during that same time period. Cases will continue to be handled by nonattorney union business representatives and nonattorney management personnel in much the same manner as they are now.

In my own experience many clients have in the past used our firm only for those cases where complex legal issues were involved, where the company anticipated subsequent claims by the grievant in other forums, or where the in-house advocates felt they had a good chance of losing and wanted the loss on our record, not theirs. I have not seen any significant changes in patterns of this type. Similarly, arbitrators will still be selected based primarily on their track record for complex cases, not on their status as attorneys or nonattorneys. As noted above, for now all we can do is cope. Perhaps we will have to be more concerned about the problem when "relentless" turns into something worse.

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[13]Berkeley, *Arbitrators and Advocates: The Consumers' Report*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1989), 297.

[14]Bognanno and Smith, *The Demographic and Professional Characteristics of Arbitrators*, in Arbitration 1988: Emerging Issues for the 1990s, *supra* note 13, 270.

III. A UNION VIEWPOINT ON WHAT, HOW, AND WHEN TO ARBITRATE

ROBERT M. DOHRMANN*

I have very much appreciated James Oldham's remarks on how arbitrators have reacted to requests that they apply external law when their authority to act arises from the traditional grievance and arbitration provisions of a collective bargaining agreement. His not quite subliminal message that parties to such agreements should think before they incorporate is sound advice which his illustrations indicate is not always heeded.

I have a mild disagreement with Oldham, however, that either expert legal advisors or arbitrator specialization constitutes the wave of the future. As Oldham's paper demonstrates, in most of the cases he has cited, arbitrators have found their answers to the questions posed either entirely within the collective bargaining agreement or within a properly interpreted, incorporated statute. I have ample confidence that, in the majority of arbitration cases I try, similarly sensible decisions will result.

I agree with Tony Oliver that lawyers' participation in arbitration cases has not produced an ever-expanding number of external law issues. The fact is, as he says, that those who pass the laws are the culprits. For my own part in this arena, I make two disclaimers: First, I am not now, and never have been, a member of the Congress of the United States; second, I am not now, and never have been, a member of the Supreme Court of the United States. I am not responsible for, nor was I even consulted on, the Drug-Free Workplace Act of 1988,[1] the Worker Adjustment and Retraining Notification Act of 1988,[2] or the soon to be enacted Americans With Disabilities Act, to mention just a few not referenced in Oldham's discussion. Yet I have no doubt the provisions of those statutes will find their way into the arbitral hearing entering either in my briefcase or that of my opponent. I shall be delighted to deal with them before you because the alternative forum in which such issues sometimes are litigated, the court system, has suddenly become a more hostile environment than ever before.

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[1]41 U.S.C. §§701–707.
[2]29 U.S.C. §§2101–2109.

When a union determines whether to arbitrate and, if it does, how to present the case, it is obligated to make these decisions fairly, uniformly, and without discrimination. This is its long settled duty of fair representation. We know, however, that it need not be infallible. All federal circuit courts of appeal concur that mere negligence does not constitute breach of this duty.[3] Indeed some courts have gone further: the Seventh Circuit holds that even gross negligence will not constitute a breach.[4] The Ninth Circuit recites that, where arbitrariness is the issue (as it is when it is alleged that the decision not to or how to arbitrate was improper), the duty is breached only if the union has acted in "reckless disregard" of the rights of the employee.[5]

Comforted by the ability in almost all cases to prove a standard of conduct other than "gross negligence," or "reckless disregard," union lawyers have been largely successful in defeating such claims, either on motions to dismiss or by summary adjudication. And prior to March 20, 1990, few plaintiffs' demands for trial by jury were granted by the courts. You will understand why we are so anxious not to replace you as trier of fact with the generally bored, hostile, and captive population provided by our petit jury systems. I have never seen a labor relations specialist on a jury and doubt that I ever will. When a 12-year veteran employee of the Safeway Grocery Company was discharged for taking and consuming a miniature candy bar from a broken package in the stockroom of his store, and his union decided it could not win the case, was there a juror who could understand that the theft of any item, regardless of its value, is a ground for immediate termination in the retail food industry which operates on such a thin margin of profit? In fact, where in the normal population is there a juror who has not on occasion also engaged in the practice known as "grazing"?

This may be a rank digression from Oldham's presentation, but the questions just posed and whether, how, and when to arbitrate have become, in my judgment, vastly more important since March 20, 1990, when the U.S. Supreme Court announced its decision in *Teamsters Local 391 v. Terry*.[6] The

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[3]*E.g., Early v. Eastern Transfer*, 699 F.2d 552, 112 LRRM 3381 (1st Cir. 1983); *Higdon v. Steelworkers*, 706 F.2d 1561, 113 LRRM 2971 (11th Cir. 1983).

[4]*Adams v. Budd Co.*, 846 F.2d 428, 128 LRRM 2387 (7th Cir. 1988), *cert. denied*, 57 USLW 3452, 130 LRRM 2192 (1989).

[5]*Moore v. Bechtel Power Corp.*, 840 F.2d 634, 127 LRRM 3023, 3025 (9th Cir. 1988).

[6]58 USLW 4345, 133 LRRM 2793 (1990).

Court squarely held that a member who charges a union with breach of the duty of fair representation and who seeks compensatory damages (not reinstatement) is entitled to a jury trial. I have little doubt that plaintiffs will happily waive their claims of reinstatement and be content with money damages.

What issues will the jury decide? Presumably all of them. Consider then the issues that may now be submitted to juries by plaintiffs in an effort to maximize the damage award:

1. *Compensatory damages.* The Supreme Court has held that, where a breach of duty occurs, the union owes back pay from the date its conduct caused the grievance process to malfunction.[7] Now juries will determine whether such conduct caused the process to malfunction as well as when.
2. *Attorneys' fees.* Courts generally find attorneys' fees awardable to successful plaintiffs. In one case a court determined that attorneys' fees incurred by an employee attempting to have his grievance heard were recoverable in such an action even though the grievance ultimately was found to lack merit.[8] Presumably a jury may now determine, first, whether the grievance was meritorious and, second, what amount of attorneys' fees is appropriate.
3. *Punitive and emotional distress damages.* The courts have generally held such damages not awardable in a duty of fair representation action.[9] But these are lower court decisions. Emotional distress damages can be practically unlimited, and at least one circuit opinion has held them recoverable if the union's conduct was "outrageous."[10] Who now determines whether a union's conduct sinks to that level?

The three illustrations I have given of awardable damages in litigation are rarely, if ever, found in an arbitrator's award. Rarely is an arbitrator's jurisdiction invoked even to consider such questions as apportionment of back-pay liability, let alone the more onerous potential for an award of attorneys' fees or damages for emotional distress.

Even if successful in the defense of such actions, unions face far greater expenses in such litigation than they would have been exposed to in arbitration. Permit me a brief anecdotal history to illustrate this point: Our firm, with 15 attorneys dedicated to the

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[7]*Bowen v. Postal Serv.*, 459 U.S. 212, 112 LRRM 2281 (1983).
[8]*Zuniga v. United Can Co.*, 812 F.2d 443, 124 LRRM 2888 (9th Cir. 1987).
[9]*E.g., Barnett v. George J. Mott Distrib.*, 113 LRRM 2607 (C.D. Cal. 1983).
[10]*Baskin v. Hawley*, 807 F.2d 1120, 124 LRRM 2152 (2d Cir. 1986).

representation of labor organizations and employee benefit plans, is the second largest such firm in California and probably no lower than tenth throughout the United States. It could be said that we are a big fish in a very small pond or, perhaps more accurately given the monolithic state of law firms today, something on the order of an oversized snail darter.

In any event, our history in the representation of labor organizations in such suits is that we have not lost one yet (although we have never had a client tell us that our representation was inexpensive). We have experienced only three filed lawsuits where lawyers had handled the grievance and/or arbitration phase. All the other cases arose where the union representatives (who were nonlawyers) had handled the entire grievance process. Nevertheless, in that entire history, which now stretches back almost 20 years, only one of those cases has gone to trial before a jury. I was co-counsel in that case for the union accused of unfairly representing its "grazing" stock clerk. The discharge occurred in 1982 but, because of the chronic congestion of the trial court's calendar, did not proceed to trial until over five years had elapsed! Along the way both security guards (who witnessed the alleged theft) disappeared. There were at least four continuances of the trial, generally at the eleventh hour, which meant that preparation of counsel and witnesses to participate in the trial had to be done over and over again. The amount of money spent on that case is appalling and could have funded dozens of arbitrations. Finally, although a defense verdict was reached by the jury because it believed that the union had conducted an adequate investigation, plaintiff appealed an alleged improper instruction proposed by the union and given by the judge. That appeal is still pending in the Court of Appeals for the Ninth Circuit!

Conclusion

Once more I beg your forgiveness for this digression whose purpose is only to make this point: I can conceive of no complexities, whether they be the interjections of external law into contemplations of traditional collectively bargained language or the asserted increased staking out of turf by lawyers,[11] that come

[11] I join Oldham in "not fully agree[ing]" with our moderator Reginald Alleyne's assertions contained in his article, *Delawyerizing Labor Arbitration*, 50 Ohio St. L.J. 93 (1989). But my reasons are too numerous to explicate here and, in any event, beyond the scope of our discussion today.

anywhere close to matching the near chaos that is the current state of our judicial system and the enormous expense it generates.

The labor bar has had a long and generally successful marriage with the arbitral profession. True, we have had quarrels from time to time, but no separations and certainly not any desertions. Whether members of the Academy are lawyers or not, you know the law of the shop and for that reason, if no other, are just as able as I to fathom the will of Congress in its employment-related enactments and have about as much chance as I to comprehend the courts' interpretations of those statutes. With that in mind, with the comprehension that the alternative is hideous to behold and in consideration of our undiminished mutual affection, we must go on resolving disputes together with whatever the tools at hand.