CHAPTER 8

ARBITRATION CLASSICS

PART I. REVISITING THREE "CLASSICS"

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It is of course an honor and a source of immense gratification to have the members of this Academy select three papers I have written as "classics" to be revisited. The term "classic" has, however, a hidden connotation that is not quite so honorific. I refer of course to automobiles that are termed classic, such as the Packard, the Reo, the Auburn, and the one most beloved by me, the Cord. Those were magnificent creations for their time and deserve preservation as symbols of what the automobile industry was able to create in times past. But the denomination of them as classics also implies that, while nice to keep and preserve, they aren't really usable as day-to-day vehicles under today's driving conditions.

I take it that, in asking me to revisit three classics, the preparers of today's program did not want me to extol the virtues of those three papers but rather to explore the extent to which they say anything useful as a road guide in today's world. That is, at least, what I intend to do.

The earliest of the three articles is entitled "A General Theory of the Collective Bargaining Agreement."[1] It was written over a period of years and appeared 20 years ago.

I wish the program planners had reproduced it, rather than the "Golden Age" speech,[2] as part of your program materials. I can

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[1]Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. R. 663 (1973).

[2]Feller, *The Coming End of Arbitration's Golden Age*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), 97.

understand why they did not do so. It is almost 200 pages long and has more than 700 footnotes. It really should have been a book (and might have been more influential if so published). There is too much in it to visit today, let alone revisit. What it attempted to achieve was a comprehensive theory as to the legal rights created by a collective bargaining agreement.

I used a First Circuit case against a union and an employer involving a claimed breach of the duty of fair representation and breach of contract as an exemplar of the problems created by the lack of such a theory and examined the entire history of Supreme Court decisions relating to the enforcement of collective bargaining agreements under both the National Labor Relations Act (NLRA) and the Railway Labor Act (RLA). I then attempted to develop a theory that would provide answers in the individual employee's suit and shed some light on the unresolved problems disclosed by my review of the Supreme Court's decisions concerning collective agreements. I did so by examining in great detail the functions performed by the collective bargaining agreement in industrial society with particular reference to the grievance and arbitration procedure and its remedies. I concluded with what I believed were the principles of law defining the status of collective bargaining agreements and the rights created by them that would conform to, rather than conflict with, the norms of the system as actually practiced except where it was consciously decided that those norms must be disregarded to safeguard otherwise unprotected interests.

The central legal proposition thus derived was that the only legally enforceable contractual rights created by a collective bargaining agreement were those of the union and the employer: In the typical industrial agreement the employer had a contractual right to enforce the no-strike clause against the union, and the union had a contractual right to compel compliance by the employer with the grievance and arbitration procedure and its results. Individual employee rights were not contractual in nature but were based on the union's duty of fair representation under section 9(a) of the NLRA and section 2 of the RLA.

This theoretical model conformed to most of the Supreme Court decisions at the time but under a quite different rationale. The Court's somewhat confused view was that a collective agreement created a contractual relationship between the employer and employee, subject to the employee's obligation to attempt to

exhaust the grievance and arbitration procedure before bringing suit to enforce individual contractual rights. My theory led to one major difference in an employee suit for breach of the duty of fair representation in processing grievances. In my view, the only adjudicable question was whether there was a breach of duty, and the only remedy was to direct the union to arbitrate, with appropriate safeguards for the grievant. Such a remedial scheme, I argued, was essential to preserve the intention of the parties that the rules governing employer and employee conduct contained in the agreement had been negotiated with the understanding that their proper interpretation and application were to be subject to arbitration, not to adjudication by a court or jury. Where issues were excluded from arbitration, there was to be no adjudication in *any* tribunal. Where there was no right to strike over these issues, the employer's decision was final; where there was a right to strike or lockout, the dispute should be resolved only through the use of those weapons.

In revisiting the "General Theory," I must confess that no court has ever accepted it. Some court decisions have conformed in result to those that the theory would require. Others have not. The statute of limitations for suit for breach of the duty of fair representation has been set at the six months period derived from the NLRA, not the contractual statute that had been indicated earlier by the Supreme Court in *Auto Workers v. Hoosier Cardinal*.[3] In 1981 individual wildcat strikers were held to be immune to suits for damages for breach of contract[4]—an issue undecided in 1973 and a result contrary to the notion of an individual contract embodying the collective agreement. The apportionment of back-pay liability between union and employer that I called for in the "General Theory," where breach of duty and the contract violation have been found, was adopted by the Supreme Court in 1983 in *Bowen v. U.S. Postal Service*.[5] On the other hand, the Supreme Court has continued to assert that individual employees have contract rights based on the collective agreement that can be adjudicated once a breach of duty is shown, as *Bowen* disastrously illustrated. And in 1990 in *Groves v. Ring Screw Works*[6] the United Automobile Workers persuaded the Court that individual claims of discharge without

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[3]383 U.S. 696, 61 LRRM 2545 (1966).
[4]*Complete Auto Transit v. Reis*, 451 U.S. 401, 107 LRRM 2145 (1981).
[5]459 U.S. 212, 112 LRRM 2281 (1983).
[6]498 U.S. 168, 135 LRRM 3121 (1990).

just cause could be litigated where the collective agreement provided for a right to strike but not arbitration unless mutually agreed to.

All in all, the "General Theory" was a nice theory and, I believe, a correct one, firmly based on the realities of collective bargaining. The article contains a great deal of sound observation about how the collective bargaining agreement and the arbitration process work. But the theory as a guide to the results reached by the courts is a failure. It is, to revert to my first analogy, not a roadable guide.

Let me now turn to the other two "classics." The first is "The Impact of External Law Upon Labor Arbitration,"[7] one of a series of papers delivered at a Wingspread Conference convened by the American Arbitration Association in November of 1975. The second is a paper I delivered at the 1976 Annual Meeting of the Academy entitled, dolefully, "The Coming End of Arbitration's Golden Age."[8] The Wingspread piece set out the problem; the "Golden Age" piece made a prediction.

The most durable, usable—and used—part of the "External Law" piece is its title. So far as I know public law governing the terms and conditions of employment had never before been described as "external law." I used the term in order to make graphic the distinction between public law and the law of the collective agreement, as interpreted and applied by arbitrators. In the basic steel industry, with which I was most familiar, there was indeed a complete system of internal law at that time, governing the entire industry. The statute was the collective bargaining agreement, which was virtually identical at each company. The decisions interpreting all basic steel collective agreements were sent by the union to an independent reporting firm, Pike & Fischer, which selected the more significant decisions and published them monthly. There was an index-digest of the decisions, and the equivalent of what lawyers would call a "Corpus Juris," entitled "Steelworkers Handbook on Arbitration Decisions" (both done for the union by Pike & Fischer), summarizing the law of the basic steel agreements as it had been developed by the industry's arbitrators. I wanted to contrast that system of internal law with public law, the law imposed from the outside, and hence used the term "external law." It has stuck.

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[7]Feller, *The Impact of External Law Upon Labor Arbitration*, in The Future of Labor Arbitration in America (AAA 1976).

[8]*Supra* note 2.

As to the substance of the piece, some of it is now old hat. I made the obvious, but I thought necessary, statement that the future of labor arbitration was not much different from the role of the collective bargaining agreement as the instrument governing the employment relationship and that, to the extent that the rules governing that relationship are established by public rather than private law, the arbitration process is necessarily diminished. I went on to contrast grievance arbitration and its history with the growth of external law in governing terms and conditions of employment. I listed the then-existing statutes and predicted more resulting from the decline in collective bargaining. All good sound stuff, and accurate. Since then we have added the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Older Workers Benefit Protection Act, the Workers Adjustment and Retraining Notification Act, the Employee Polygraph Protection Act, and the Family and Medical Leave Act. We are about to have a comprehensive health protection act. And we have had the judicial erosion of the employment-at-will doctrine. All deal with matters which in an earlier era were dealt with exclusively by collective bargaining.

The real problem occurs when resolution of a dispute about the propriety of an employer's action involves questions of both the internal law (i.e., the collective agreement) and the ever-expanding external law, whether statutory or judge made. That problem arises whenever the adjudicatory power under one system is confronted with a disputed question as to the proper meaning and application of the law created by the other, that is, when a court or a board created by the external law must resolve a claim involving the meaning of the internal law or, vice versa, when an arbitrator is called upon to resolve a grievance involving the proper meaning or application of the external law.

I focused primarily on the latter case: the role of an arbitrator faced with a contention based on the external law. That can occur in numerous ways: (1) when a grievant makes a claim that the employer has violated the external law; (2) when the agreement expressly incorporates the external law; and (3) when the agreement contains a provision, such as a no-discrimination clause, that, it can be argued, should be construed in accordance with a similar provision in the external law. Contrariwise, an employer may seek to justify action contrary to the collective agreement because compelled to do so by the external law.

I concluded that there was no really satisfactory answer to these problems. The best solution for arbitrators, I urged, was to confine their decisions to their charge: the interpretation and application of the collective agreement. Unless explicitly and unmistakably directed otherwise by the parties, arbitrators should leave to the adjudicatory bodies created by the external law the resolution of any questions as to the proper meaning and application of that law and make it crystal clear that the only thing they are doing is interpreting the collective agreement.

That view, I thought, was confirmed by the decision of the Supreme Court in *Alexander v. Gardner-Denver Co.*,[9] where the Court found that an arbitrator's decision that a discharge did not violate a no-discrimination clause in the collective agreement did not preclude the aggrieved employee from asserting that his discharge violated the no-discrimination provision of Title VII of the Civil Rights Act of 1964. Relying on *Enterprise Wheel*,[10] the third case in the *Steelworkers Trilogy*,[11] the Court said:

> 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". . . . Thus the arbitrator has authority to resolve *only* questions of contractual rights, and this authority remains regardless whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.[12]

To paraphrase what the Court said, Alexander, in bringing suit under Title VII, was not seeking to get two bites of the same apple. He had two apples that looked alike but were different. He was entitled to one bite of each.

My prescription of self-restraint for grievance arbitrators did not, of course, solve the problem. If arbitrators followed it and if the parties refrained from entrusting questions of external law to arbitrators, the result would be a substantial diminution of the role of arbitration. And it had unavoidable costs. It meant that adjudication of claims involving disputes as to both the internal and the external law must be bifurcated. Two forums would be involved, not one. And to the extent that conditions of employment were

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[9] 415 U.S. 36, 7 FEP Cases 81 (1974).

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

[11] *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.*, *supra* note 10.

[12] 415 U.S. at 53–54 (emphasis added) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, *supra* note 10, at 597).

governed more and more by the external law, the notion of an autonomous system of private voluntary settlement of problems involving the employment relationship would necessarily suffer. But the alternatives, I believed, were equally unsatisfactory. If arbitrators, either because parties so directed or because they extended their own reach, attempted to determine the proper meaning and application of external law, the particular expertise they are supposed to have in interpreting collective bargaining agreements could not be assumed to exist. Furthermore, an examination of the cases where arbitrators had decided genuine disputes as to the proper interpretation of the external law showed that none of the special expertise inherent in labor arbitration was required and that labor arbitrators, more often than not, were simply wrong. Even more unsatisfactory was leaving to the adjudicatory bodies established by the external law questions of the proper meaning and application of the collective agreement. There was simply no satisfactory solution to the problem. Only one thing was clear: To the extent that collective bargaining agreements became less and less the exclusive source of the law governing the terms and conditions of employment, the role of traditional grievance arbitration was diminished.

The concatenation of external and internal law questions can be illustrated by two cases, one involving a decision I made and another involving a decision of a federal district court in Puerto Rico. Neither of these is earth shattering or precedent making, but both serve to illustrate the problem. The first case was *Evans Products,*[13] a decision that has made its way into several casebooks. It involved a claim by a union that an employer had violated a collective bargaining provision prohibiting discrimination based on age by refusing to give a job as offloader in a lumber mill to an applicant because he was 17. One issue was whether the age discrimination clause applied to discrimination based on youth, rather than age. That was the internal law question, and I concluded that the clause did apply. The second question was more difficult. The employer had refused to give the position to the applicant because, it alleged, the job required cleaning of the saw and regulations issued by the Department of Labor under the Fair Labor Standards Act prohibited the employment of anyone under the age of 18 in a position requiring the cleaning of a saw. The union argued that all that the job required was a simple hosing

[13]70 LA 526 (1978).

down of the saw and that this was not the kind of cleaning the regulation prohibited. The employer argued to the contrary.

There were thus two issues in this branch of the case: (1) What did the job really require? (2) Did those functions constitute cleaning the saw under the Department of Labor regulations properly interpreted? The union argued that I had no authority to decide the proper interpretation of the Department of Labor regulation because the contract said that I had authority only to interpret and apply the collective bargaining agreement. The company argued that I had no authority to order the employer to fill the position with the applicant if doing so would violate the law. I told the parties, to whom I had communicated my views on this subject beforehand, that I concurred with the union view as to my lack of jurisdiction to interpret the law, but that I was prepared, if the parties agreed, to find the facts as to what the job required, leaving it to the Department of Labor to determine whether this in fact constituted work forbidden to 17-year-olds by the regulations. The union agreed but the employer insisted that I make no such findings unless I was prepared to address the federal regulation question. Absent agreement on my performing that function, I was left with the simple application of the collective bargaining agreement, and I ordered the company to employ the applicant and pay him back pay for the period during which he was denied employment in the position involved. I fully expected that the employer would then take the matter to court. The employer did. The court held that the regulation prohibited the employment of the applicant in the position and set aside my award. The court's decision is not reported.

The second case is recent: *Dorado Beach Hotel Corp. v. Union de Trabajadores de la Industria Gastronomica de Puerto Rico Local 610*,[14] decided in January 1994. It involved two employees who were required to work during their meal periods. The collective bargaining agreement provided that such work should be compensated at double time, as did also Puerto Rico law. The arbitrator ruled that the employees were entitled to the double time. Puerto Rico law also provided, however, that any worker who received lower compensation than that fixed by law was entitled to the unpaid difference *plus* an amount equal to the unpaid amount. The arbitrator ruled that this law applied and that he was entitled to enforce it because the contract stated that his award should be

[14]811 F. Supp. 41, 143 LRRM 2337 (D.P.R. 1993).

final and binding "provided it conforms to law." He therefore doubled the double time. The statute of limitations for the statutory claim was 10 years, and he therefore awarded this quadruple time for the past 10 years. The employer sued to set aside the award. The court concluded that the arbitrator was entitled to incorporate the statutory penalty, but that he was not entitled to award the quadruple time for 10 years but only from the date that the collective bargaining agreement became effective. It therefore set aside that portion of the award covering the period prior to the effective date of the collective agreement.

In my view the arbitrator had no authority to award a penalty provided solely by statute because of a provision limiting the effectiveness of his award to matters that were not unlawful. That, like the typical savings clause in a collective bargaining agreement, is intended to prevent unlawful action, not to incorporate the affirmative requirements of external law into the agreement. But the court approved the importation, although not the external law's statute of limitations. The result is weird, but somehow seems right. Unlike my *Evans Products* case, there was no dispute as to the meaning of the external law. But my narrow view of an arbitrator's authority would have led to a different result, and I am led now to question whether in the end the parties' interests are served by refusal to apply external law, at least where the meaning is undisputed.

The last of the so-called classics is my 1976 "Golden Age" speech.[15] It essentially built upon and elaborated the "External Law" theme, which at that time had not yet been published. Contrary to what is often said about it, my speech did not predict any decline in arbitration or the gold available to arbitrators. The Golden Age of which I spoke was the era of industrial self-governance, the period when the parties to the employment relationship looked to their own machinery, including both arbitration and, where so provided, the strike to resolve their differences. Grievance arbitration was different from other arbitration, I argued. Arbitration under a collective bargaining agreement was not simply an alternative to judicial determination as a method of adjudicating the proper meaning and application of a contract but was an alternative to the strike or lockout for determining the proper meaning and application of a governing statute, the collective bargaining agreement. The deference the courts were sup-

[15] *Supra* note 2.

posed to give to arbitrators' decisions derived from that fact. I even went so far as to analogize a court's role in dealing with an arbitration decision to the required full faith and credit that one state court is constitutionally required to give to the decisions of another state court, even where the second court is convinced that the first court was in error. To the extent that the terms and conditions of employment were increasingly regulated by external law, the status of the autonomous system of governance represented by the collective bargaining agreement and its adjudicatory system, arbitration, was necessarily diminished. To the extent that the parties asked arbitrators to decide questions of external law, or arbitrators, despite my counsel to the contrary, did so on their own, the freedom from review which, I argued, derived from the governmental nature of the collective bargaining agreement would necessarily be undercut. Once arbitrators were regarded as simply alternative adjudicators of the meaning of a contract or of the meaning of a statute, they would not be entitled to the freedom from review which I argued, derived from the implicit recognition by the courts that grievance arbitration was an integral part of a system of autonomous self-governance. *If*—and I emphasized the *if*—it was desirable to maintain the special status arbitration achieved as part of an autonomous sovereign adjudicatory system, arbitrators should resist the temptation to decide questions of external law, and the parties should not require them to do so.

That did not mean, however, that this was the way to go. It was not necessarily in the best interests of the parties. There are, I argued, great advantages to both unions and employers in attempting to resolve their problems at home, even those involving external law, and thereby keeping the grievance and arbitration procedures open to all sorts of claims, even those ultimately subject to final adjudication elsewhere. The result might be diminution of the finality of arbitrators' decisions; the courts would not really give finality to those decisions as to the meaning and application of external law. But that result might be healthier for the parties' ongoing relationships than increasing resort to external tribunals as primary adjudicators. If so, arbitrators would have an expanded, not a restricted, role. But the Golden Age, which I had defined as the age of finality and autonomous self-government, would end.

The "Golden Age" piece was intended to and did stir a lot of controversy. A number of very distinguished persons expressed their disagreement with it. Most of the disagreement was based on

a misunderstanding of what I had meant when I used the term "Golden Age." That was emphatically not the case with Ted St. Antoine. At the next annual meeting of the Academy he essentially dismissed as garbage, although he didn't use that word, the basic underpinning of my Golden Age speech.[16] The finality of the decisions of grievance arbitrators, he argued, had nothing whatsoever to do with recognition of arbitration as the alternative to the strike, but derived simply from the fact that the parties had designated the arbitrator as the final and binding reader of their contract. Grievance arbitration was not different from commercial arbitration. The courts had long recognized that, when the parties say that an arbitrator's decision is "final and binding," a court should not review its merits. That, rather than any implicit recognition of the difference between labor arbitration and other arbitration, was the real basis for *Enterprise Wheel.* He concluded that if the parties so specified, there was no reason for a court not to accept as final and binding a grievance arbitrator's decision as to the meaning or proper application of public law governing the terms and conditions of employment. *Gardner-Denver,* he argued, was based on the Supreme Court's special sensitivity to civil rights and would not be applied where other statutes, such as the Fair Labor Standards Act, were involved, citing the Tenth Circuit decision in *Satterwhite v. United Parcel Service.*[17] In this latter observation he proved to be wrong. In 1981 the Supreme Court in *Barrentine v. Arkansas-Best Freight System*[18] said that an arbitration decision that predriving inspection time by truck drivers was not compensable time did not prevent suit for compensation for that same time under the Fair Labor Standards Act.

Aside from that, however, Ted was right and I was wrong—at least insofar as the lower federal courts are concerned. The implicit recognition of labor arbitration as the capstone of an autonomous system of industrial self-government, which I ascribed to the Supreme Court (based on the concept that I thought I had persuaded the court to adopt in the *Steelworkers Trilogy*) is gone. The lower federal courts treat a collective bargaining agreement as a contract, no more or less, and an arbitrator's decision as to the proper interpretation of that contract is treated no more

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[16]St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny,* in Arbitration—1977, Proceedings of 30th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1978), 29.

[17]496 F.2d 448 (10th Cir. 1974).

[18]450 U.S. 728, 24 WH Cases 1284 (1981).

deferentially, indeed probably less deferentially, than an arbitration decision as to the proper interpretation of a commercial contract. All that was spelled out in greater detail in my presidential address in June 1993 in Denver.[19]

What then about arbitrator's decisions interpreting not the collective bargaining agreement but the external law? Ted argued that if the parties agreed that the arbitrator's decision was final and binding, this was equally applicable where a question of external law was decided. As to commercial cases, he was clearly right. Commercial arbitration cases are fairly clear: A mere error of law, as contrasted with manifest disregard of the law, is not a sufficient basis to set aside an award. In April 1993, the Seventh Circuit put it bluntly in *National Wrecking Co. v. Teamsters Local 731*:[20] "In order for a federal court to vacate an arbitration award for manifest disregard of the law, the party challenging the award must demonstrate that the arbitrator deliberately disregarded what the arbitrator knew to be the law. . . ."[21] The case was a labor case, but the court cited, without distinction, both labor and commercial arbitration cases in support of that proposition.

In *National Wrecking* the issue was whether a truck driver met the requirements for visual acuity set by the Department of Transportation (DOT). The employer argued that the driver's vision, as reported by an ophthalmologist, did not meet the DOT standard. The arbitrator found it did and ordered reinstatement. In doing so, he was interpreting and applying the external law, the DOT regulation, but in a case where the employer relied on that law to defend conduct otherwise violative of the collective bargaining agreement. The arbitrator did so because the parties agreed to submit that question to him. I am not at all sure whether the same affirmance of an arbitrator's decision as to the proper application of the external law would follow where the individual's claim, rather than the employer's defense, was based on the external law and where that law was one designed to protect individual rights. That remains unexplored territory.

My own guess is that the approach suggested by *Gardner-Denver* and *Barrentine* will be the one adopted. Those cases exhibit a predisposition in favor of judicial protection for individuals. Strictly speaking, they are not on point. There is a distinction between the case where the parties agree that an arbitrator can decide an

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[19]Feller, *Presidential Address: Bye Bye* Trilogy, *Hello Arbitration*, in Arbitration 1993: Arbitration and the Changing World of Work, ed. Gruenberg (BNA Books 1994), 1.

[20]990 F.2d 957, 143 LRRM 2046 (7th Cir. 1993).

[21]*Id.*, 143 LRRM at 2049.

external law question and the case where the arbitrator is asked to decide the proper interpretation of a collective bargaining agreement provision that parallels the external law provision. *Gardner-Denver* and *Barrentine* involved only the latter situation, but the Court's emphasis on the congressional intention to protect individual rights leads me to believe that the same result will follow where the parties submit the external law question to an arbitrator.

Gilmer,[22] it is now argued, looks in the opposite direction. The Court there held that an agreement to arbitrate all disputes required a plaintiff to arbitrate his or her statutory claim of violation of the Age Discrimination in Employment Act (ADEA). Surely the ADEA is a statute designed by Congress to protect individual rights. But *Gilmer* only required arbitration. It did not address the question of whether the arbitrator's decision, when made, as to the proper application of the ADEA to Gilmer's claim would be enforced if a court believed it in error. A reviewing court might follow the practice, indicated by the famous footnote 21 of *Gardner-Denver*, of giving great weight to the arbitrator's findings of fact if based on an adequate record, but I doubt that it will accord finality to decisions as to the proper interpretation of the statute.

Where does this leave us as arbitrators? How much of these two papers we're revisiting is valid today? In both I argued that arbitrators should not reach out to decide questions of external law unless directed by the parties to do so. Arbitrators should make it clear that the collective bargaining agreement and only the collective bargaining agreement is what they are applying. They should not, I believed then, and still believe, reach out and use savings clauses to import external law into the agreement, even where the agreement provision parallels a provision of external law, if there is substantial dispute as to that external law. On the other hand, where the parties, either in the collective bargaining agreement or in their submission, agree that the arbitrator should decide a question of external law, or where the courts pursuant to *Gilmer* require it, arbitrators must, of course, do so. The real question is whether, in these cases, the courts will give finality to the arbitral decisions.

Turning away from the external law question, I should like to address now what I currently think is the real Golden Age problem: the increasing willingness of federal courts of appeals to set aside arbitration awards involving strictly the collective bargaining agree-

[22] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).

ment. Whatever may be the case with respect to other arbitration, it seems clear to me that there is a problem, and I should like to make a stab at identifying what I think the source of that problem is. Here I am in basic disagreement with Ted St. Antoine. Putting aside any reliance on fancy notions of autonomous self-government, I still believe that the fact that grievance arbitration is a substitute for the strike, not for litigation, distinguishes it from commercial arbitration. The Supreme Court clearly accepted that distinction in the *Steelworkers Trilogy*. But that difference may indeed be the source of the problem. The shield may have become a sword turning inward.

The courts, I believe, are predisposed to favor any mechanism that will reduce strikes. What has happened since the *Trilogy* is that the likelihood of choosing the strike as the method of resolving grievances has sharply diminished. There was a day when unions seriously considered the use of the strike weapon as an alternative method of resolving disputes as to the proper application of a collective bargaining agreement. But that day has passed.

Some years ago the Steelworkers Union was faced with a strong movement at its convention to eliminate arbitration and substitute the right to strike over grievances. The arbitration system, the leaders of the movement claimed, was slow, cumbersome, and infested with lawyers. Today there is no serious contemplation of such a move. The reason, I suggest, is not so much any improvement in the arbitration mechanism, although there has been some with the institution of expedited arbitration. The reason is that, very simply, the strike weapon has become less attractive. Strikes are being broken. Permanent replacements are being hired. The economic condition of workers makes them less able to afford the loss of pay involved in a strike even in the absence of a real threat that the strike will be broken or replacements hired. This is less true in industries such as steel and auto, where collective bargaining and the continued existence of the union as a partner in the enterprise is not questioned. It is clearly true elsewhere. Strike statistics published by the Bureau of Labor Statistics show a sharp decline in the number of strikes and the number of man-hours lost because of strikes. None of this, of course, shows up in the court opinions dealing with arbitration awards. I do suggest, however, that underlying these decisions is the fact that the courts no longer fear that decisions adverse to arbitration finality will lead unions to

choose the alternative, which they still have, of insisting that the strike rather than arbitration as the ultimate forum for dispute resolution. Therefore, if the strike alternative is not a real alternative, there is no reason to give to labor arbitration awards the finality which, if not given, would lead unions to opt for the strike alternative.

The situation is otherwise with respect to commercial arbitration. The choice there is between agreements that either require arbitration or leave the resolution of disputes under those agreements to be settled in the usual manner by a lawsuit. That is a real choice. To the extent that the courts give finality to arbitrators' decisions where the parties choose the arbitration alternative, there will be a greater incentive to use it and, hence, less likelihood that the parties will opt for judicial adjudication. As a result, the natural tendency of courts, faced with what they regard as an intolerable burden of litigation, will eventually be to give the greatest possible push to the use of arbitration. And making it clear that an arbitrator's decision, once rendered, cannot be successfully litigated in court is an obvious incentive to the use of arbitration and, hence, to a reduction in court dockets. On the other hand, if there is little likelihood that review of labor arbitration awards will lead to choice of the strike alternative, there is less reason to give finality to those awards.

So I conclude my revisiting of these two pieces with a reiteration of my first premise, although in a somewhat different form. The future of labor arbitration, I said at the outset, cannot be separated from the future of collective bargaining. That is true not only in the sense that grievance arbitration can exist only where there are collective bargaining agreements. It is also true in a deeper sense. Collective bargaining as a method of governance of the workplace only thrives when there is a credible possibility of the strike. To the extent that weapon becomes less credible in today's world, there will be a decline not only in the number of collective bargaining agreements but also in the willingness of the courts to accept as final an arbitrator's decision as to the proper meaning and application of these agreements. As I read the advance sheets week after week and observe the number of cases where courts have refused to accept labor arbitration awards as final and binding, I am forced to conclude that, not perhaps precisely for the reasons I set out in my speech, the Golden Age of arbitration is indeed at least losing some of its shine.