development of a more sophisticated and ultimately compassionate system, where private rules are informed and appropriately tempered by broader societal mandates. But however informed and sophisticated (if that be the impact of external legislation), the system must retain its clearly private identity. It is the arbitrators' and the parties' obligation as trustees of that system to recall that adjudging disciplinary matters is, in all instances, an exercise in the application of just cause.

II. UNION RESPONSE

GEORGE H. COHEN*

To begin, I have one disclaimer and one admission. The disclaimer: I speak today on behalf of no one. I am here only in response to Jim Oldham's irrepressible charm. The admission: Each of us comes to this gathering with his or her own preconceived notions concerning who you "characters" are, what you actually do after the hearing ends, and what respect your awards deserve when you "finally" get around to issuing them.

The baggage I carry is extremely well documented: In 1966, as a young man, I joined a labor law firm that primarily represented the Steelworkers Union. Only six years earlier the Supreme Court had issued the almighty *Steelworkers Trilogy*[1]—three opinions that I am honored to say have David Feller's fingerprints all over them.

During the intervening 34 years, every time I have walked through the Bredhoff & Kaiser library, Vol. 363 U.S. automatically pops open and rekindles my "true believer" mentality. My credo has been and remains today the same credo that you red-blooded Academy members embrace when you pay your annual dues:

1. Arbitration exists as the alternative to industrial strife—the strike—not as the alternative to litigation.
2. Thus, for good reason, there is a very strong presumption in favor of the arbitrability of all workplace disputes.

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

3. Arbitrators bring to the process a specialized knowledge and expertise in handling contract interpretation disputes—an expertise that courts do not possess.
4. In issuing their awards, arbitrators provide the parties with what they bargained for: a final and binding decision. Therefore, it follows that judicial review should be very limited: An award should not be set aside by a reviewing court so long as the award draws its essence from the collective bargaining agreement.
5. And, yes, in fashioning a remedy for a contract violation, the arbitrator's discretion is at its zenith.

Arbitrators, like the Kings of Yesteryear, can do no wrong. Indeed, it is well settled that even if a court in its heart of hearts knows or believes that the arbitrator is wrong—that is immaterial as a matter of law. But, alas, we all know that life is not so simple as these basic principles would suggest.

Let me now turn to the Bloch paper and his accompanying presentation. Bloch is, as we all know, a masterful creature. His skills are such that he has created the "illusion" in my mind that at his advanced age he is still playing ice hockey at 5:00 A.M. every Thursday. True to his multitalented image, he has produced a witty—some may say pithy—paper liberally sprinkled with gems of wisdom.

For my part, I will proceed on the same premise I always invoke when addressing this august body—you need help. Here it goes.

First and foremost: Never lose sight of the fact that the "just cause" requirement exists independently of any external law.

Second, look very carefully at the precise language the parties have agreed upon before determining the exact nature of your charter in each case.

Did the parties merely agree that the employer shall not discriminate against an employee on the basis of race, national origin, sex, age, and so forth, without any express reference to any federal or state law? In that case, the arbitrator may proceed as a reader of the contract without regard to any external law. Or, at the opposite end of the spectrum, did the parties go so far as to agree that the employer would comply with the terms of certain identified federal and/or state laws such as Title VII, the Occupational Health and

Safety Act (OSHA), the Age Discrimination Act, or the Americans with Disabilities Act?[2]

In the latter case, the arbitrator remains the reader of the contract, but the contract has taken on an added dimension. Federal and state statutory rights have now become, by the agreement of the parties, a part of their privately created contractual relationship. And, thus, what the parties bargained for is the arbitrator's "analysis" (interpretation or application) of those provisions of federal and state law, not the public rights set forth in the statutes themselves.

Your eminent colleague Professor Theodore St. Antoine espoused that ingenious formulation in a 1977 article entitled *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*.[3] And most recently two circuit court chief judges have embraced it.

Chief Judge Edwards did so in *dicta* in *Cole v. Burns International Security Servs.*[4] Chief Judge Torruella of the First Circuit stated in *Coastal Oil of New England v. Teamsters*:[5]

> A cursory reading of that statute [the Massachusetts Worker's Compensation Law] leads to the inevitable conclusion that the arbitrator's ruling in this case was not clearly within the powers granted to him in the collective bargaining agreement, it is substantially the remedy that the Massachusetts Superior Court would likely have felt required to grant Joseph Abruzzese given that the appellant is a single, unitary employer, for workman's compensation purpose. As a result, its trinary profile, for labor relations purposes, is presently irrelevant. *We*

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[2]There is anecdotal evidence that more and more frequently unions and employers are agreeing to incorporate provisions of external law into private collective bargaining agreements. From a union's perspective, this is an appealing result because it paves the way for a much more expedited and much less expensive procedure for resolving employment discrimination claims than would be the case were employees left to Equal Employment Opportunity Commission (EEOC) and/or federal court proceedings. And, for their part, employers may have a self-interest not only in informal, less costly arbitration, but, as well, in a desire to avoid jury trials with the prospect of the dreaded big plaintiff verdict.

In any event, arbitrators likely will be the innocent "beneficiaries"—some might say "victims"—of the emerging trend toward incorporating external law into contracts. And one thing is clear, in all likelihood you will have already accepted the assignment from the American Arbitration Association or the Federal Mediation and Conciliation Service long before you become aware that your interpretation of federal law is what the parties have asked of you.

[3]75 Mich. L. Rev. 1137.

[4]105 F.3d 1465, 72 FEP Cases 1775 (D.C. Cir. 1997).

[5]134 F.3d 466, 157 LRRM 2294 (1998).

> *note that our views as to the legal soundness of the arbitrator's conclusions are largely gratuitous, for as previously stated, even an erroneous interpretation of the law by an arbitrator is not subject to judicial review if that authority has been delegated to the arbitrator, as it was in this case.*[6]

But don't get overconfident. My gut tells me that just as there were some judges in the "good old days" who could not resist the temptation to review the merits of arbitration decisions that truly involved only interpretation of contract terms, there are now other judges who will be incapable of restraining themselves when confronted with requests to set aside awards where arbitrators have analyzed and applied federal and state laws, albeit under the umbrella of a private contractual agreement. It should come as no surprise that a lot of judges may feel that the judiciary, rather than labor arbitrators, has the expertise to interpret and apply federal statutes, that the task is "grist for their mills," and that, accordingly, the St. Antoine analysis will not carry the day in their courts. Undoubtedly, the Supreme Court will have to provide the final word.

In any event, for purposes of this discussion, all this counsels very strongly in one direction: To be on the safe side, arbitrators should assume that there will be judicial review of any awards stemming from their analysis, interpretation, and/or application of external law. My strong recommendation is that in preparing an award, you make clear the exact basis of your decision.

For example, assume a safety and health contract provision requiring an employer (1) to furnish employees with a safe and healthful place of employment and (2) to comply with OSHA. Employee Jones is assigned the task of climbing a 20-foot ladder overhanging an open pit filled halfway with a boiling, bubbling tar-like substance. Jones evinces a distinctly negative attitude about carrying out that task and is ultimately directed by his supervisor to do so. Jones then refuses and is summarily dismissed. At arbitration, the employer maintains that Jones's "act of insubordination" constituted just cause for discharge. In support of that position, the employer adduced testimony that five other employees working on other shifts the same day of Jones's discharge carried out that same task—all without incident. The union, on behalf of Jones, maintains that as a matter of past practice when employees have declined to perform other similarly dangerous assignments the

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[6] *Id.* at 470 (emphasis added).

employer took no disciplinary action and found volunteers to complete the tasks. On that basis alone—*i.e.,* the law of the shop—the union maintains that there was no just cause to discharge Jones. Alternatively, the union contends that the provisions of OSHA have been incorporated into the contract and that, under settled OSHA jurisprudence, it is impermissible for an employer to discipline an employee for refusing to perform a task that the employee reasonably believes, on the basis of objective evidence, poses a threat of serious injury or loss of life.

Given this backdrop, I recommend that the arbitrator first should direct the parties to address each of these alternative arguments separately in their opening and closing arguments and/or posthearing briefs, if any. Thereafter, in rendering the award, the arbitrator likewise should dispose of each of those arguments independently. If, for example, the arbitrator determines that there is a binding "past practice" whereby the employer has treated employees differently than its treatment of Jones, or that Jones's assignment was inconsistent with generally accepted industrywide principles concerning what constitutes a safe working condition, then the grievance should be granted on that specific ground(s).

Now assume that instead, the arbitrator would not sustain the grievance on that ground, but on an OSHA-based analysis that Jones had an objective reason (a shaky ladder with no safety net to prevent his falling into the pit) for believing that the assignment posed a serious danger. If that is the basis upon which the grievance is granted, it should be made clear that the union's first argument was rejected. And, of course, if both of the union's arguments were persuasive, the arbitrator should say so. (Yes, it is true that I just can't contemplate any arbitrator rejecting every union argument in any case!)

The more that arbitrators embrace that analytical framework, the less likely it is that courts will set aside their awards. At the very least, they will be increasing the likelihood that decisions vacating their awards will be reversed on appeal.

I end by noting that this subject is just one piece of the big arbitral puzzle that all the parties confront today, including the highly provocative issue concerning what is left of *Gardner-Denver*[7] in light of *Gilmer.*[8]

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[7]*Alexander v. Gardner-Denver,* 415 U.S. 36, 7 FEP Cases 81 (1974).
[8]*Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 55 FEP Cases 1116 (1991).

Don't throw up your hands in despair. What we have been discussing truly represents just another challenge to the arbitral process. And this, too, shall pass.

III. MANAGEMENT RESPONSE

FRAMROZE M. VIRJEE*

Introduction

Although I strongly agree with much of Arbitrator Bloch's paper—especially his opinions regarding the limited role of an arbitrator—I do think that on certain points his paper stirs the water just a bit. For example, although he clearly is correct that an arbitrator must be limited in the scope of review to a consideration of only the relevant contract and its terms, I must disagree with his mixing of judicial and arbitration decisions and standards—equating the "just cause" analysis of discharge under a collective bargaining agreement with the distinct and unrelated statutory analysis that courts are required to perform in discrimination cases. In any case, Arbitrator Bloch's central thesis is well taken. In an arbitration setting, management, union, and neutral representatives can all agree, I hope, that "just cause" must not evolve into an ever-shifting definitional standard dependent upon the degree of the arbitrator's importation of external law. Instead, just cause must remain what it has always been, a standard to be determined and applied in accordance with the bargain of the parties in light of the particular circumstances of the case. As such, it simply is not and cannot be the product of judicial decisions or statutes.

As Arbitrator Bloch correctly notes, the essence of any arbitrator's authority and decision is and must be the parties' agreement. The arbitrator is retained to review the parties' agreement, render an interpretation of the parties' bargain, and then apply that bargain to the given facts to determine whether or not the parties have abided by their respective promises. This is the arbitrator's sole obligation.

As Arbitrator Bloch also correctly notes, different collective bargaining agreements incorporate external law to differing degrees. But one should not lose sight of the fact that, by their own

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