cation on a position that he describes as "extreme" but that I prefer to call "consistent."

A REPRISE

ROBERT G. HOWLETT *

In "The Role of Law in Arbitration," the scholarly and competent Dick Mittenthal serves as mediator between the "orthodox" arbitrators and the minority of "new thinkers." [1]

Meltzer: "An arbitrator is, in general, the proctor of the agreement and not of the statutes." [2]

Howlett: "Arbitrators, as well as judges, are subject to and bound by the law, whether it be the Fourteenth Amendment to the Constitution of the United States, or a city ordinance." [3]

I concur more with Mittenthal than with Meltzer, for Mittenthal's differences with Howlett seem more in emphasis than as disagreement.[4]

Mittenthal recognizes that arbitrators do, and should, apply the law:

> . . . Confronted by the woman's grievance, an arbitrator may properly rely on state law to establish that the woman lacked either the "ability" or "physical fitness" to perform the man's job. . . .
>
> Law may even be used to resolve ambiguity in contract language. . . .
>
> An arbitrator should likewise refuse to enforce a particular contract provision if enforcement would require action forbidden by the law. . . .

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[1] *Labor Trends*, No. 1128, June 3, 1967.

[2] Bernard D. Meltzer, "Ruminations about Ideology, Law, and Labor Arbitration," in *The Arbitrator, the NLRB, and the Courts,* Proceedings of the Twentieth Annual Meeting of the National Academy of Arbitrators (Washington: BNA Books, 1967), 1, 19.

[3] Robert G. Howlett, "The Arbitrator, the NLRB, and the Courts," in *The Arbitrator, the NLRB, and the Courts,* Proceedings of the Twentieth Annual Meeting of the National Academy of Arbitrators, (Washington: BNA Books, 1967), 67, 83.

[4] For another viewpoint, see Hanley, "The NLRB and the Arbitration Process: Conflict or Accommodation?," *Proceedings of Fourteenth Annual Institute on Labor Law of The Southwestern Legal Foundation, 1967* (New York: Matthew Bender, 1968).

> . . . The implication seems clear that the arbitrator should not enforce a provision which is clearly unenforceable under the law. . . .
>
> If the arbitrator ignores the law and orders the employer to commit an unlawful act, he invites noncompliance and judicial intervention. . . .
>
> . . . Statutory law may guide the arbitrator on occasion. . . .

Mittenthal suggests a philosophical difference between the orthodox arbitrators and the new thinkers by citing both Williston and Corbin, who discuss cases where the courts have distinguished, or seemingly departed from, the never-overruled statement of the U. S. Supreme Court in *Van Hoffman* v. *Quincy*, 71 U. S. (4 Wall.) 535, 550, 18 L.Ed. 403 (1866):

> . . . the laws which subsist at the time and the pace of the making of a contract, and where it is to be performed, enter into and form a part of [the contract] as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement.[5]

Both Williston and Corbin discuss opinions where courts, to make certain that justice and equity are found in ultimate decision, distinguish and rationalize to reach a proper result in a contract dispute, as appellate courts employ the doctrines of "proximate cause" and "duty" in tort cases to achieve a conclusion which the court believes is right; or as trial judges apply legal rules and principles in a manner designed to do justice.[6] In the words of Dean Pound:

> [C]ourts . . . take the rules . . . as a general guide, determine what the equities of the cause demand, and contrive to . . . render a judgment accordingly, wrenching the law no more than is necessary.[7]

No rationale can avoid the fact that, in the first and last analysis, a contract is "a promise enforceable at law, directly or

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[5] Williston starts his paragraph on this subject: "It is commonly said that existing laws at the time and place of the making of a contract enter into and form part of the contract as fully as if expressly incorporated therein." *Williston on Contracts* (3rd ed.) (Rochester: Lawyers Coop. Publishing Co., 1967).

[6] Green, *Judge and Jury* (Vernon Law Book Co., 1930), 116, 196, 226; Green, "The Causal Relation Issue in Negligence Law," 60 *Mich. L. Rev.* 543 (1962); Frank, "Say it with Music," 61 *Harv. L. Rev.* 921 (1948).

[7] Pound, *An Introduction to the Philosophy of Law*, 121, 133 (1922), quoted by Frank, *id.*, note 6, at 927.

indirectly. . . ." [8] Agreements between employers and unions are contracts!

I question the validity of a distinction between "public rights" and "private rights" in the collective bargaining area. The legality and public nature of collective bargaining contracts is recognized in the NLRA and state labor relations statutes. Enforceable and effective collective bargaining agreements exist because federal and state policy has declared the right of employees to engage in concerted activities, be represented by an exclusive bargaining agent, and bargain for collective bargaining agreements. This is *public policy.* And the NLRB declares that it enforces public rights.[9]

To the extent, *at least,* that arbitrators are concerned with disputes which involve possible NLRB or state labor relations law violations, they are in the public area whether they like it or not.

Here is the dichotomy only partly recognized in the Mittenthal paper. There are two parts in this area: (1) arbitration cases which involve the application of the NLRA or a state labor relations act; and (2) arbitration cases which involve other statutes, ordinances, or the common law.[10]

Arbitrators have been invited by the NLRB in *Spielberg*[11] and

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[8] Corbin, *Contracts* (St. Paul: West Publishing Co., 1960), §3, at 6. The Michigan Uniform Commercial Code, adopted in 1962, defines contract as: ". . . the total legal obligation in law which results from the parties' agreement as affected by this act and any other applicable rules of law." (Mich. Stat. Ann. §19.1201) There is no reason why a collective bargaining agreement should differ with respect to the concept expressed in the UCC. One must, of course, recognize that the rules of law which are applicable will be different, as the labor contract has "unique characteristic[s]." Cox, "The Legal Nature of Collective Bargaining Contracts," 57 *Mich. L. Rev.* 1, 5. But so do contracts in other relationships. I am, of course, aware of the now largely discarded "treaty" theory of collective bargaining agreements. Gregory, *Labor and the Law* (2d rev. ed.) (New York: W. W. Norton & Co., Inc., 1961), 445; Cummins, *The Labor Law Problems in the United States* (Princeton: D. Van Nostrand Co., Inc., 1936), 465.

[9] *National Licorice Co.* v. *NLRB,* 309 U.S. 350, 362, 6 LRRM 674 (1940), as quoted in *Phelps Dodge Corp* v. *NLRB,* 313 U.S. 177, 193, 8 LRRM 439 (1941), "The Board, we have held very recently, does not exist for the 'adjudication of private rights'; it 'acts in a public capacity to give effect to the declared public policy of the Act to eliminate and' prevent obstructions to interstate commerce by encouraging collective bargaining."

[10] Increasing state recognition of the rights of public employees to engage in concerted activities will enlarge this sphere. See, for example, an arbitration opinion and award where the arbitrator was concerned with constitutional and statutory law. *Warren Consolidated Schools,* 67-1 ARB ¶8228 (Robert G. Howlett, 1967).

[11] *Spielberg Manufacturing Co.,* 112 NLRB 1080, 36 LRRM 1152 (1955).

subsequent cases, and in numerous addresses, including General Counsel Arnold Ordman's presentation in 1967,[12] to decide affirmatively issues arising under Sections 8, 9, and 10 of the NLRA. Now and then, NLRB retrogresses. See, for example, *Producers Grain Corporation,*[13] where a three-member panel, over Member Brown's dissent, refused to defer to arbitration in a dispute where an arbitrator had been named but the hearing had not been held when the charge was filed.[14]

Arbitrators may act with timidity or with courage. If we accept our responsibility, we assist the NLRB and the parties to secure a judgment from a neutral they have selected. We determine a public right, as *authorized* and *requested* by the NLRB, the General Counsel, and the courts. To the extent that arbitrators are fearful of grappling with NLRA issues, they defeat *Spielberg.*

The second type of dispute involves other statutes or the common law. That Mittenthal would apply the law in some instances is apparent from the quotations from his paper listed above. Meltzer is less inclined to do so.[15]

A stronger case (although I disagree with it) may be made by the orthodox school with respect to non-NLRA and state labor relations act issues, on the theory that arbitrators have not been *invited* to apply the law. Mittenthal suggests that "arbitrators are

[12] "Arbitration and the NLRB:—A Second Look," in *The Arbitrator, the NLRB, and the Courts,* Proceedings of the Twentieth Annual Meeting of the National Academy of Arbitrators (Washington: BNA Books, 1967), 47.

[13] 169 NLRB No. 68, 67 LRRM 1247 (1968). And even Board member Gerald Brown has reservations concerning arbitrators' role in representation cases. See 67 LRR 149 (1968). See also, *Eaton, Yale & Towne, Inc.,* 171 NLRB No. 73, 68 LRRM 1129 (1968).

[14] See the recent case of *Clanebach, Inc* v. *Las Vegas Local Joint Executive Board of Culinary Workers,* 388 F.2d 766, 67 LRRM 2489 (9th Cir., 1968), for what this author deems a more rational approach to the NLRB-arbitrators issue. The court ordered arbitration, noting that "the parties are free to seek any appropriate relief before the National Labor Relations Board. . . . [But] [t]o order arbitration is to give due respect to the agreement of the parties and to recognize the importance and usefulness of arbitration in the settlement of industrial disputes."

[15] The quotation from *United Steelworkers of America* v. *Enterprise Wheel & Car Corporation,* 363 U.S. 593, 46 LRRM 2423 (1960), that "[a]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice", does not mean that an arbitrator may not, or should not, apply the law. Quite the contrary! The arbitrator interprets and applies the collective bargaining agreement within the law. He may *believe* that men and women *should* not be equal in pay and other economic benefits, but the law is to the contrary—and ought to be applied regardless of the contract language.

not omniscient." Neither are judges, except, perhaps, the majority of the judges of the U. S. Supreme Court in a specified case. It was once said,

> . . . "the law of a great nation" means "the opinion of a half-a-dozen old gentlemen . . . ." For, "if those half-a-dozen old gentlemen form the highest tribunal of a country, then no rule or principle which they refuse to follow is the Law in that country." [16]

I doubt that "most [arbitrators] do not have the time, the energy, or the occasion to become truly knowledgeable about the law." Indeed, I believe that arbitrators, having some expertise in the area of labor law, are more knowledgeable in the area in which they work than are circuit judges, who are concerned with all subjects, from abortion to workmen's compensation. I am particularly distressed that arbitrators who are lawyers would avoid the determination of legal questions. We are charged with a responsibility to administer the law. This is our duty whether we are "court" or "office" lawyers. To refuse to exercise this function is an abrogation of our high calling.

I do not agree that a difference arises "because [courts] exercise the coercive power of the state and because they determine the legal operation of the contract." Arbitrators also participate in the coercive power of the state, as both federal and state law provide for enforcement of arbitrators' awards by courts of competent jurisdiction.[17]

While arbitration has been called a substitute for the strike,

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[16] Frank, *Law and the Modern Mind* (New York: Coward-McCann, Inc., 1949), 122.

[17] *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 40 LRRM 2113 (1957), held that Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185 *et seq.* (1952), empowered federal courts to enforce agreements to arbitrate. Courts of appeals, then, by "parity of reasoning," found power to enforce arbitrators' awards, *Textile Workers Union of America* v. *Cone Mills Corporation*, 268 F.2d 920, 44 LRRM 2345 (4th Cir., 1959), *cert. denied*, 361 U.S. 886, 45 LRRM 2085 (1959); *A. L. Kornman Company* v. *Amalgamated Clothing Workers of America*, 264 F.2d 733, 43 LRRM 2581 (6th Cir., 1959), *cert. denied*, 361 U.S. 819, 44 LRRM 2983 (1959). This principle was affirmed in *United Steelworkers of America* v. *Enterprise Wheel & Car Co., supra*, n. 15. State courts may also enforce arbitration awards under Section 301. See, for example, *Broadway-Hale Stores, Inc.* v. *Retail Clerks Union, Local No. 428, AFL-CIO*, 14 Cal. Rptr. 821, 49 LRRM 2967 (Cal. Dist. Ct. App., 1961); *Harbison-Walker Refractories Co.* v. *United Brick and Clay Workers of America, AFL-CIO, Local 702*, 339 S. W. 2d 933, 47 LRRM 2077 (Ky. Ct. App., 1960); *In re Minkoff*, 46 LRRM 2372 (N.Y. Sup. Ct., 1960). Under the many state arbitration statutes, enforcement of awards is vested in courts of original jurisdiction. See, for example, Cal. Civ. Pro. Code, Title 9, Ch. 4, Art. 1, §1285; Conn. Gen. Stats., Ann., Title 52, §417; Mass. Gen. Laws, Ch. 150C, §10 *et seq.*; Mich. Stat. Ann. §17.454(10.3).

it is also "a substitute for the courts."[18] As a substitute for the courts, we apply the law as well as the language of a document being construed or interpreted. That we "derive our power from the contract—not from the superior authority of the law" is a dubious assumption, if solely from the contract is the intended meaning. The NLRA and the laws of most states enunciate a policy favoring arbitration;[19] and the NLRB and courts have enforced this policy.

It is encouraging to find, during the past year, "new thinkers" who have not hesitated to apply "the law."

Montgomery Ward & Company, 49 LA 271 (1967), involves the definition of "supervisor." Arbitrator Clarence M. Updegraff, citing *Raley's, Inc.,* 143 NLRB 256, 53 LRRM 1347 (1963), and *Carey* v. *Westinghouse Corporation,* 375 U.S. 261, 55 LRRM 2042 (1964), said:

> This fact [whether an employee is a supervisor] can just as readily and properly be ascertained by an Arbitrator as by the National Labor Relations Board . . . . it is the present policy of the National Labor Relations Board to encourage and support intelligent arbitration as one of the presently indispensable methods of settling the great volume of labor disputes which arise in our time. This clearly extends to representation, i.e., unit determination questions: . . . (p. 274)[20]

In *Dwyer Products Corporation,* 48 LA 1031 (1967), John Day Larkin, considering "the law" as enunciated in *United Electrical Workers* v. *Star Expansion Industries, Inc.,* 246 F. Supp. 400, 56 LRRM 2286 (S.D.N.Y., 1964), held that, as a decertified union has power to process grievances which arose under a contract in effect

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[18] Summers, "Labor Arbitration: A Private Process with a Public Function," 34 *Rev. Jur. U.P.R.* 477, 494 (1965) (quoted in Mittenthal's paper at note 38).

[19] Section 203 (d) of the Labor-Management Relations Act, 29 U.S.C. §173 (d) (1952). The policy of this section has been enunciated by the Supreme Court in *United Steelworkers of America* v. *American Manufacturing Company,* 363 U.S. 564, 46 LRRM 2414 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 46 LRRM 2416 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corporation, supra,* note 15; *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, 55 LRRM 2769 (1964). State endorsement of arbitration is demonstrated by the fact that 46 states have arbitration statutes, and many have both labor and general arbitration statues. See, for example, Ohio Rev. Code, §4129. 01 *et seq.* (labor), and §2711.01, *et seq.* (general); Mich. Stat. Ann. §17.454 (10.3), *et seq.* (labor), and Mich. Stat. Ann. §27A.5001–5035 and Rule 769 of Michigan General Court Rules (general).

[20] The same issue is involved in *Montgomery Ward & Company,* 48 LA 1171 (Clarence M. Updegraff, 1967).

when that union was exclusive bargaining representative, a *new* union had the same power when the former union "neglected that duty and responsibility." [21]

At *Clark Equipment Company,* 50 LA 39 (1967), Arbitrator Burton B. Turkus held that a new plant constituted an accretion to a union's bargaining unit, notwithstanding that NLRB also had jurisdiction. Citing *Raley's Supermarket,* 143 NLRB 256, 53 LRRM 1347 (1963), to sustain his view that *Spielberg* extends to representation issues, Turkus applied the tests of NLRB. In his opinion, he said:

> The fact that the National Labor Relations Board has jurisdiction over the instant controversy concerning the scope of the bargaining unit . . . does not preclude equal jurisdiction in the arbitrator to render a binding and conclusive arbitral determination of the issue under the terms of the said collective bargaining agreement . . . provided that the arbitrator follows, applies and adheres to the policy rules and decisions of the National Labor Relations Board in similar cases in rendering an award. (p. 41)

A number of cases involved federal or state civil rights statutes.

The contract construed in *Alsco, Inc.,* 48 LA 1244, 1248 (1967), was inconsistent with the Ohio civil rights statute. Arbitrator David C. Altrock said:

> As of this date the legality of Chapter 4107 (Ohio Revised Code) remains unimpaired and is the law of the land insofar as these parties are concerned. True, the contract does not adopt or endorse it explicitly. True, also, that this arbitration case is a private adversary proceeding to which neither the Federal nor the State governments are parties at this time. Nonetheless, all applicable law must be considered as implicitly and inferentially a part of a compact between entities existing and doing business within and under the dominion and sovereignty of a State—here Ohio. Consider the following deliberately overdrawn and hyperbolic examples: The Labor Agreement might contain a provision that the minimum hourly wage rate will be 73¢. Surely no one would contend that the statutory mini-

[21] This was legal interpretation, although it may be dicta, as the arbitrator pointed out that the previous union had obtained from the employer "as a condition precedent to the signing of their first agreement, a promise that all pending grievances would be properly processed to completion." (p. 1033) In *International Paper Company,* 67–2 ARB ¶8539 (Arthur A. Malinowski), an arbitrator took a contrary view in a case involving a claim that a grievant had been suspended because of union activity. He held his "authority . . . limited to the question of the alleged contract violation" and refused to concern himself with the NLRA.

> mum is a dead letter because in conflict with the will of the contracting parties. Or the Labor Agreement might state that Ohio laws with respect to felonies and misdemeanors in the plant will not apply, such matters being reserved exclusively for the grievance procedure decreed in the contract. It is redundant to pursue the matter further.[22]

In *City of Bridgeport,* 49 LA 519 (Conn. St. Bd. of Mediation and Arbitration: Daniel F. Johnson, 1967), the arbitrator considered the charter provisions and ordinances of a city in determining whether a city-employer could change the work hours of its employees.

In *Lockheed-California Company,* 49 LA 981 (1967), Arbitrator Francis E. Jones interpreted the California Arbitration Act, C.C.P. §1280 *et seq.,* and discussed the procedural aspects of *John Wiley & Sons* v. *Livingston, supra,* note 19, and Rules 18, 19, 20, and 24 of the Federal Rules of Civil Procedure in determining whether he could order trilateral arbitration between one company and two unions.

Arbitrator Morton Singer, in *Pinehaven Sanitarium, Inc.,* 49 LA 991 (1967), was required to consider the general contract law to determine whether a contract between a union and an employer was still in effect.

In *Northwest General Hospital,* 68–1 ARB ¶8236, p. 3826 (1968), Arbitrator Edward B. Krinsky determined whether an employee was in a "confidential" classification, noting, ". . . to be effective, the arbitrator's Award must conform to the law governing the determination of the appropriate bargaining unit, as interpreted by the [Wisconsin Employment Relations Commission]."

In *Weirton Steel Company,* 68–1 ARB ¶8249 (1968), Arbitrator Samuel S. Kates, in a theft case, discussed *Escobedo*[23] and *Miranda,*[24] holding that they did not apply in the absence of a suspected employee's request for representation; confessions under the criminal law; circumstantial evidence; the definition of petit larceny under West Virginia law; and the statute of limitations. While the arbitrator (apparently of the orthodox school) sought

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[22] See also *General Fireproofing Company,* 48 LA 819 (Edwin R. Teple, 1967), and *McCall Corporation,* 49 LA 183 (Robert G. McIntosh, 1967).
[23] *Escobedo* v. *State of Illinois,* 378 U.S. 478 (1964).
[24] *Miranda* v. *State of Arizona,* 384 U.S. 436 (1966).

to avoid deciding the case on either statutory or common-law principles, the case illustrates the impossibility of avoiding consideration of "the law" if a just and correct decision is to be reached.

The referees in the stewardess cases are not of one mind on this subject.

In *Allegheny Airlines, Inc.,* 48 LA 734 (System Board of Adjustment: Peter M. Kelliher, Referee, 1967), the Board noted that it "derives its authority under the contract" and, therefore, limits its discussion to its jurisdiction under it but then appeals to the common law that "[u]nreasonable restrictions upon marriage are against public policy."

In *Braniff Airways, Inc.,* 48 LA 769, 770 (System Board of Adjustment, Walter L. Gray, Referee, 1965) the Board was impressed with the language of the Civil Rights Act which ". . . expressed, on a wider basis, the modern trend of thought concerning discrimination based upon sex." And then, interpreting statutory labor law, noted that: ". . . if Braniff . . . wanted to reach a valid employment understanding it would have been necessary for them to do so with a certified bargaining agent . . . and not with the individual."

In *United Air Lines, Inc.,* 48 LA 727 (System Board of Adjustment: Mark L. Kahn, Referee, 1967), the Board, in denying a grievance, attacked the "no-married-stewardess policy," but enunciated the "orthodox" position that, "The jurisdiction of this System Board does not extend to interpreting and applying the Civil Rights Act."

Finally, in *American Airlines, Inc.,* 48 LA 705 (System Board of Adjustment: Peter Seitz, Referee, 1967), a neutral referee cited by Mittenthal as a disciple of orthodoxy who opposes the performance by arbitrators of the "business of the NLRB and the courts," looked to the equity side of the law when he found that it is "appropriate for the Union to invoke the doctrine of equitable estoppel."

And I am delighted that a distinguished arbitrator, Richard Mittenthal, in *U. S. Steel Corp.,* 48 LA 1114 (1967), substituted himself for a criminal judge, determining, in a theft case: state

of mind, intention to commit theft, admissions by the accused, and weight of the evidence. But, of course, the arbitrator had to concern himself with these elements of the law in order to reach an intelligent decision.[25]

Concern has been expressed by some arbitrators that if arbitrators apply the law they will be subject of judicial review beyond the traditional grounds of jurisdiction and fraud or corruption.

There is a trend in this direction. *Should we deplore it?* Indeed, since *Lincoln Mills*[26] and the *Steelworkers* trilogy,[27] a change in the "hands-off" policy of the courts *vis-a-vis* arbitration has been inevitable. It is not consistent with Anglo-American jurisprudence to endow arbitrators with the power vested in them, whether they apply "the law" or confine themselves to contract language, and eschew review by a higher tribunal except on the limited traditional grounds.

And is there more reason why an arbitrator's decision should not be subject to scrutiny than that of a judge of the United States District Court? We may have more expertise in our particular area than a judge, who is required to handle the entire range of legal problems, but arbitrators do make mistakes. Is it maladministration of justice for an arbitrator who is "too far off the beam" to be second-guessed by a court?[28]

During the last year, there have been cases where the federal courts have considered the merits of arbitrators' opinions and awards.

The Torrington Co. v. *Metal Products Workers Union, Local 1645, United Automobile, Aerospace and Agricultural Implement Workers, AFL-CIO,* 362 F. 2d 677, 62 LRRM 2495 (2nd

[25] See *Wyandotte Chemical Corp.,* 39 LA 65 (Richard Mittenthal, 1962), where the arbitrator employs a contract-law analysis of a union's argument, rejects it, and decides the case under the management-rights clause. In *Dana Corp.,* 33 LA 537 (Richard Mittenthal, 1959), the arbitrator left the enforcement of factory safety and health laws for the agency administering these statutes, but found, as a matter of fact, that there was no unsafe condition.

[26] *Textile Workers Union of America* v. *Lincoln Mills of Alabama, supra,* note 17.

[27] *United Steelworkers of America* v. *American Manufacturing Company, supra,* note 19; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co., supra,* note 19; *United Steelworkers of America* v. *Enterprise Wheel & Car Corporation, supra,* note 15.

[28] Hopefully, the courts will not review on the merits unless the error is substantial, but substantial errors do occur.

Cir., 1966), involved an arbitrator's opinion and award which determined that "past practice" authorized time off with pay on election day for employees. The court of appeals, affirming the district court, which vacated the award, discussed the rationale used by the arbitrator in reaching his decision:

> We cannot accept this interpretation of negotiations. . . .
> Far from having the disruptive effect upon the finality of labor arbitration which results when courts review the "merits" of a particular remedy devised by an arbitrator, we think that the limited review exercised here will stimulate voluntary resort to labor arbitration and thereby strengthen this important aspect of labor-management relations by guaranteeing to the parties to a collective bargaining agreement that they will find in the arbitrator not a "philosopher king" but one who will resolve their disputes within the framework of the agreement which they negotiated. (p. 681) [29]

The dissenting judge opined:

> Whether the arbitrator's conclusion was correct is irrelevant because the parties agreed to abide by it, right or wrong. Nevertheless, the majority has carried the inquiry further and concerned itself with a minute examination of the merits of the award, which we are enjoined not to do. (p. 683)

In *Ludwig Honold Manufacturing Company* v. *Fletcher and United Automobile Workers, Local 416,* 275 F. Supp. 776, 66 LRRM 2458 (E.D. Pa., 1967), the district court, granting an employer's motion for summary judgment, reversed an arbitrator's decision that held that a grievant had been wrongfully refused a "new" job of sheet metal leader. The court, *examining the language of the contract,* found that it "clearly rendered [grievant] ineligible" for the job; the arbitrator's award shed "no light upon the reason for his decision"; and "the award appears to be in clear violation of the express language of the contract." [30]

In *Local 217, International Union of Electrical, Radio & Machine Workers* v. *Holtzer-Cabot Corporation,* 277 F. Supp. 704, 67 LRRM 2244 (D. Mass., 1967), the court held, in an action by a union to enforce an arbitrator's award, that the arbitrator had

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[29] It might be urged that this court is opposed to the concept that arbitrators are concerned with anything except contract language.

[30] See, also, *Local 342 United Automobile, Aerospace & Agricultural Implement Workers of America* v. *T.R.W., Inc.,* 65 LRRM 2597 (M.D. Tenn., 1967); *Local Union No. 721, United Packing House, Food and Allied Workers* v. *Needham Packing Company,* 151 N.W. 2d 540, 65 LRRM 2498 (Iowa Sup. Ct., 1967).

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

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

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

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

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

Discussion——

THEODORE J. ST. ANTOINE *

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

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

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