CHAPTER II

WHEN SHOULD ARBITRATORS FOLLOW FEDERAL LAW?

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I. The Previous Discussions

The question put by the title of my talk has been ably explored by distinguished members of the Academy at two of our last three meetings.[1] To understate the matter, no consensus has emerged. Some would have us ignore federal law; others would have us apply it; still others would apply it in some cases but not in others. Given that range of opinion, I was surprised to discover that I disagreed in important ways with *all* of the positions advanced.

In a moment I shall briefly recapitulate the high points of this dialog. Than I shall try to add something to it. But first let me be as explicit as I can about what is and what is not at issue.

The debate focuses on cases in which an arbitrator is asked to base his decision on a statute or other source of law instead of or in addition to the contract. Among the many examples considered at previous meetings were: a claim for travel time not supported by the collective agreement but allegedly required by the Fair Labor Standards Act; a dismissal required by a collective agreement but apparently unlawful under Section 8 (a) (3) of the National Labor Relations Act; and a unilateral change in

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[1] Meltzer, "Ruminations About Ideology, Law, and Labor Arbitration," in *The Arbitrator, the NLRB, and the Courts,* Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 1, 14-19; Mittenthal, "The Role of Law in Arbitration," in *Developments in American and Foreign Arbitration,* Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 42; Meltzer, "A Rejoinder," *Id.* at 58; Howlett, "A Reprise," *Id.* at 64; St. Antoine, "Discussion," *Id.* at 75. In addition to the main papers at the 20th Annual Meeting, four workshops devoted to "The Arbitrator and the NLRB," *The Arbitrator, the NLRB, and the Courts* at 111-228, spent significant portions of their time on our subject. Some of the questions and comments following Professor Meltzer's papers are also relevant. See "Discussion," *Id.* at 20 et seq.

working conditions claimed to violate Section 8 (a) (5) of the NLRA rather than any particular provision of the parties' contract.

No one argues that arbitrators should ignore federal law when it is helpful in resolving a question of contract interpretation. For example, in deciding whether an employee has been dismissed for "just cause," an arbitrator can properly consider whether federal law protects the conduct asserted as the reason for discharge. Thus, an arbitrator's decision holding that an employer lacked "just cause" to dismiss an employee for distributing union leaflets in the company parking lot would be firmly based on the contract even though enlightened by the NLRB's decisions.

All seem to be agreed too that an arbitrator may rest his decision squarely on federal law if the parties have expressly authorized him to do so.

These cases, then, are not our concern. We shall ask: When should an arbitrator follow federal law *rather than* the contract that called him into being?

We begin with Bernard Meltzer's paper of three years ago, in which he concluded that arbitrators should respect "the agreement that is the source of their authority and should leave to the courts or other official tribunals the determination of whether the agreement contravenes a higher law. Otherwise, arbitrators would be deciding issues that go beyond not only the submission agreement but also arbitral competence." [2]

This brief passage epitomizes Meltzer's two main arguments. I think of them alliteratively—consent and competence. The parties have consented only to the arbitrator's construing their contract, not to his conforming it to applicable law. And arbitrators are not competent—in the sense of qualified—to rule on questions of federal law.

Robert Howlett, in a paper delivered at the same meeting of the Academy, was equally categorical, but flatly contra to Meltzer. He said:

"There is a responsibility of arbitrators, corollary to that of the General Counsel and the NLRB, to decide, where relevant, a statu-

[2] *The Arbitrator, the NLRB, and the Courts* at 17.

> tory issue, in order that the NLRB, consistent with its announced policy, may avoid a decision on the merits, and the statutory policy of determining issues through arbitration may be fulfilled."[3]

According to Howlett, "[E]ach contract includes all applicable laws." [4] He infers that an arbitrator charged with construing a contract is also authorized to interpret the applicable law.

Howlett did concede, however, that on occasion the arbitrator does better to stay his hand. Thus,

> "When an arbitrator meets one of those cases which might better be determined by the NLRB or EEOC (or some other agency), he may determine the General Counsel or the Commission, with its power of investigation, is in a better position to secure evidence than is an under- or non-represented employee whose dispute has been submitted to arbitration. He should so advise the parties and withdraw."[5]

In the workshops that followed Howlett's paper, labor and management attorneys chose up sides largely without regard to the identity of their clients. That is to say, some who represented labor and some who represented management preferred Howlett while others lined up with Meltzer. This nonpartisan division of opinion as to the role of the arbitrator casts some doubt on the proposition that the parties have bargained solely for contract interpretation. At least some sophisticated practitioners of our discipline conscientiously believe they have contracted for more when they settle on a standard arbitration clause. I shall return to this point.

A year went by and Richard Mittenthal, true to our craft, tried "to occupy the middle ground" [6] between Meltzer and Howlett. He convincingly rebutted Howlett's sweeping assertion that all relevant law is incorporated in the collective agreement, then turned to face Meltzer. On the matter of competence, he pointed out that "[S]ome of our members—Smith, Aaron, Cox, Meltzer himself, to name but a few—surely possess the necessary expertise. Such men are well equipped to decide grievance disputes which raise both contractual and legal questions." [7]

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[3] *Id.* at 78-79.
[4] *Id.* at 83.
[5] *Id.* at 92-93.
[6] *Developments in American and Foreign Arbitration* at 42.
[7] *Id.* at 48.

Mittenthal went on to suggest that parties are free to pick such a man when their case involves a difficult question of law.

On the matter of consent, Mittenthal offered two contract arguments. He noted first that many contracts contain "separability" clauses—provisions which prevent the illegality of a single contract clause from invalidating the entire agreement. This recognition that a portion of their contract may be illegal suggested to Mittenthal that the parties "do not wish to be bound by an invalid provision. The implication seems clear that the arbitrator should not enforce a provision which is clearly unenforceable under the law." [8]

Mittenthal's other contract argument drew on the "final and binding" language of many agreements. The parties' commitment to finality could be frustrated by an arbitral award ordering compliance with an illegal provision because a court may set that award aside. Since the parties desired finality, Mittenthal maintained, the arbitrator should try to give it to them by considering any law that might render his award illegal.[9]

Mittenthal's contract arguments led him to that middle ground between Meltzer and Howlett:

> "The arbitrator should 'look to see whether sustaining the grievance would require conduct the law forbids or would enforce an illegal contract; if so, the arbitrator should not sustain the grievance.' This principle, however, should be carefully limited. It does not suggest that 'an arbitrator should pass upon all the parties' legal rights and obligations.' . . . Thus, although the arbitrator's award may *permit* conduct forbidden by law but sanctioned by contract, it should not *require* conduct forbidden by law even though sanctioned by contract." [10]

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[8] *Id.* at 49.

[9] I find Mittenthal's two contract arguments unpersuasive. The separability-clause theory is a non sequitur: The fact that the parties to an agreement do not wish their whole agreement to be held invalid if some portion of it turns out to be illegal does not imply that they want any part of it held illegal. A separability clause cannot, in other words, support Mittenthal's inference that the parties "do not wish to be bound by an invalid provision."

Mittenthal's "final and binding" theory founders on its claim that the arbitrator gives the parties greater finality by deciding the disputed legal issue than by not deciding it. This is certainly not true in any legal sense—*i.e.*, whether the arbitrator orders compliance with an illegal provision or declines to do so because of its illegality, a court may review to determine that issue of law. And Mittenthal himself recognizes this. See *Developments in American and Foreign Arbitration* at 50, n. 30. Whether an arbitrator gives the parties greater finality as a practical matter by deciding disputed issues of law is not at all clear. As will appear below, sometimes he does and sometimes he doesn't.

[10] *Developments in American and Foreign Arbitration* at 50.

Let me illustrate Mittenthal's distinction with a simple case. Suppose a collective agreement provides that departmental seniority shall govern layoff and recall. Suppose further that application of this provision would require laying off black workers with considerable plant seniority who have just been allowed to transfer into previously segregated departments. The black workers affected claim that compliance with the agreement's departmental seniority system would violate their rights under Title VII of the Civil Rights Act of 1964. According to Mittenthal's thesis, if the employer lays off the blacks and they grieve to arbitration, the arbitrator should reply that the contract has not been violated and the blacks should seek their remedy under Title VII. If, on the other hand, the employer lays off whites with greater departmental seniority than the blacks and the whites grieve, a different response is called for. The contract has indeed been violated and the arbitrator should say so, but if he believes the contract is illegal, he should say that too and refuse to issue an award upholding the grievance. To repeat the key passage from Mittenthal: "[A]lthough the arbitrator's award may *permit* conduct forbidden by law but sanctioned by contract, it should not *require* conduct forbidden by law even though sanctioned by contract."

Mittenthal met the fate so often meted out to men who try the middle ground. Meltzer and Howlett both criticized him. And Ted St. Antoine joined them. All agreed that Mittenthal's distinction between an arbitrator's permitting and requiring illegal conduct would not do. Meltzer put it this way:

> "[Mittenthal's formula] is not supported by the authority conferred on the arbitrator by the parties; or by the expertise imputed to arbitrators and courts; or by the twin desires for finality of arbitration awards and the limitation of judicial intervention. Under Mr. Mittenthal's approach, the role accorded to law would depend on how an employer resolved a controversy and not on its essential character or the functions properly delegated to different adjudicative agencies. In my opinion, such an approach transforms an accidental consideration into a decisive one."[11]

I have not done Meltzer, Howlett, or Mittenthal full justice in this brief summary, but I believe I have put their central ideas before you. I turn now to mine.

[11] *Id.* at 60.

II. Competence and Consent

Anyone who would urge, as I intend to, that arbitrators should sometimes pass on the legality of a contract provision must first meet Meltzer's arguments on competence and consent.

Whether an arbitrator is qualified to deal with a disputed issue of law depends, of course, on the issue and on the arbitrator. Consider a recent case decided by Judge Frankel in the Southern District of New York.[12] National Dairy had two ice cream facilities in the New York metropolitan area. They were covered by contracts with two Teamster locals which included a company promise not to "establish or operate a plant for production of ice cream or frozen dessert products outside of [the unions'] area for sale or distribution of such products in the Metropolitan Area. . . ." During the term of the contract, National Dairy's Philadelphia plant sold ice cream products to Scooper Dooper, Inc., which distributed them, among other places, within the metropolitan area. The unions claimed breach of contract, maintaining that the company was producing outside of their area for distribution within it.

The arbitrator upheld the union's construction of the contract, saying that it manifested "the parties' intent to protect the achieved labor standards by preventing the importation of ice cream products into the Metropolitan Area from other areas where lower labor standards prevail." Though the company argued that the clause only covered sales by National Dairy itself and that any broader restriction would violate the antitrust laws, the arbitrator expressly refused to decide the antitrust issue. He deemed it an issue "far more appropriate for the courts to decide."

Taking the hint, the company sued to have the award, and the contracts to the extent that they required enforcement of the award, declared null and void. Before Judge Frankel, the company supplemented its antitrust claim with the contention that the arbitrator's construction also violated Section 8 (e) 's ban on hot-cargo clauses. The court rejected both arguments and held the arbitrator's interpretation valid and enforceable.

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[12] *National Dairy Products Corp.* v. *Milk Drivers and Dairy Employees Union, Local 680,* 308 F. Supp. 982, 73 LRRM 2444 (1970). [The decision was unreported when this paper was written. The foregoing citations were inserted in galley, but footnotes have not been added to provide the page numbers of the quotations taken from the opinion.]

Was the arbitrator qualified to decide the antitrust and 8 (e) questions? Suppose this case had arisen five years ago when Judge Frankel was still Professor Frankel and, occasionally, Arbitrator Frankel? Would Arbitrator Frankel have been any less qualified in that incarnation to decide the antitrust and 8 (e) questions? I have labored an obvious point: Some arbitrators are as qualified as reviewing judges to rule on the law and some are not.

I have another difficulty with Professor Meltzer's view concerning the ability of arbitrators to apply federal law. He accepts, as everyone does, the complete propriety of an arbitrator's construing an ambiguous agreement to preserve its legality. He says:

> "[W]here a contractual provision is susceptible to two interpretations, one compatible with, and the other repugnant to, an applicable statute, the statute is a relevant factor for interpretation. Arbitral interpretation of agreements like judicial interpretations of statutes, should seek to avoid a construction that would be invalid under a higher law." [13]

Since the *National Dairy* clause was ambiguous, Meltzer would have allowed the arbitrator to examine the antitrust laws to see whether they would be violated by the interpretation sought by the union. Had the arbitrator made the inquiry and believed the union's position illegal, he could have written an opinion that ended like this:

> "The parties' agreement is susceptible to either of two constructions—one legal, the other illegal. Presuming that they intended a lawful agreement, I find that the clause in question governs only sales by National itself within the Metropolitan Area. The grievance is, therefore, denied."

If the arbitrator's qualifications allow that, I do not see how they can be inadequate to answer the very same antitrust question when urged as a reason for not ordering compliance with a clear provision. There may be other reasons for distinguishing between the two cases, but the arbitrator's lack of qualifications cannot be one of them.

I turn now to Meltzer's other key argument—the parties have authorized the arbitrator to construe the contract, not the law.

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[13] *The Arbitrator, the NLRB, and the Courts* at 15-16.

Though this might once have been irrefutable, two factors combine to rob it of at least some of its force. I have already suggested one of these: the very considerable division of authority as to the proper response of an arbitrator when faced with a question of law. As long as many arbitrators and practitioners—though a minority—believe that an arbitrator does have the power to resolve statutory questions under the standard arbitration clause, it cannot be said with complete assurance that parties intend to withhold such power when they are silent on the subject.

Far more important is the Supreme Court's rejection of conventional intent analysis as the definitive approach to arbitration provisions. The Court has indicated that arbitration clauses are part of a system of administration that the Court will itself define in part. And the needs of that system as perceived by the Court can overrule any but the most explicit limitations on the arbitrator's power.

John Wiley & Sons v. *Livingston* [14] helps make the point. As many of you will recall, that case arose out of the merger of Interscience Publishers, Inc., with the much larger John Wiley & Sons. As a result, Interscience, with whom District 65 had a collective agreement, ceased to exist as a separate entity. District 65 maintained that its agreement with Interscience survived the merger in certain respects that were binding on John Wiley & Sons. The company disagreed, the union sued to compel arbitration, and the case made its way to the Supreme Court.

The Court first made it clear that "Federal law, fashioned from 'the policy of our national labor laws,' controls." [15] It proceeded next to declare the answer dictated by federal labor policy:

> "It would derogate from 'the federal policy of settling labor disputes by arbitration,' *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established. . . ." [16]

Did the Court reach this result because the parties intended

[14] 376 U.S. 543, 55 LRRM 2769 (1964).
[15] *Id.* at 548.
[16] *Id.* at 549.

it? Mr. Justice Harlan, writing for a unanimous Court, was candid, as usual:

> "The preference of national labor policy for arbitration as a substitute for tests of strength between contending forces could be overcome only if other considerations compellingly so demanded. We find none. While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. . . . Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance . . . and by the requirements of the National Labor Relations Act, that *it is not in any real sense the simple product of a consensual relationship.* Therefore, although the duty to arbitrate . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed." [Emphasis added.] [17]

Justice Harlan underscored the point with a footnote reminding us that the *Steelworkers* trilogy had laid down "the principle that when a contract is scrutinized for evidence of an intention to arbitrate a particular kind of dispute, *national labor policy* requires, within reason, that 'an interpretation that covers the asserted dispute' . . . be favored." [18] In other words, an intention of the parties not to arbitrate, unless made extraordinarily explicit, does not control.

Applying the Court's approach to our problem, we can conclude that when a statutory question is intertwined with a contract question, whether the arbitrator has authority to resolve both is not solely a matter of the parties' intent. It is also a matter of federal labor policy. Meltzer himself put it perfectly: "[T]he critical question [is] whether arbitral assumption of such jurisdiction is a desirable method of coordinating a private system of adjudication with a governmentally imposed legal and administrative framework." [19] And the Supreme Court has indicated that we are free to seek the best answer to that question, whatever the parties may have intended, unless they have been fully explicit.[20]

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[17] *Id.* at 549-550.
[18] *Id.* at 550.
[19] *Developments in American and Foreign Arbitration* at 61.
[20] I do not believe a different conclusion is required by the dictum in *Enterprise Wheel* indicating that an award "based solely upon the arbitrator's view

III. When?

Like the judge who has been bribed by both sides, we are now free to address the matter on the merits. I believe that an arbitrator may follow federal law rather than the contract when the following conditions are met:

1. The arbitrator is qualified.
2. The question of law is implicated in a dispute over the application or interpretation of a contract that is also before him.
3. The question of law is raised by a contention that, if the conduct complained of does violate the contract, the law nevertheless immunizes or even requires it.
4. The courts lack primary jurisdiction to adjudicate the question of law.

Let me illustrate by referring back to the *National Dairy* case. Suppose the arbitrator was an initiate in the mysteries of antitrust law and hot-cargo clauses. My first condition would then have been met. (I shall take up presently the question of who decides when this condition is satisfied.) My second and third conditions were met because the arbitrator was asked to resolve a dispute over the meaning of the contract and the employer claimed that the antitrust laws required him to violate the agreement if the union's interpretation of it were upheld.

As to the antitrust question, however, my fourth condition was not met. Federal district courts have full authority to deal with antitrust questions. The antitrust defense could, therefore, be raised in a court action to enforce the award and the question resolved by the appropriate tribunal. Since the arbitrator's decision on a question of antitrust law would not be entitled to the finality attaching to his interpretation of the contract, little would be gained by having him decide it first.

Contrast the claim that the construction sought by the union would violate 8(e). The NLRB, not the courts, has primary

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of the requirements of enacted legislation . . . would mean he exceeded the scope of his submission." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2423 (1960). The *trilogy* obviously did not require the Court to think this specialized problem through, particularly since *Enterprise Wheel* did not hold the award in that case "based solely upon the arbitrator's view of the requirements of enacted legislation."

jurisdiction over that question. But when the union sues to enforce its award, it will be in court, not before the Board, and it is there that the employer will presumably raise its hot-cargo defense. If the arbitrator has refused to consider that defense, the result may be that a labor law specialist has deferred to a judge far less competent to decide the matter.[21] And the judge's decision may well be final, either because the loser does not want to litigate further or because the judge has invalidated the clause, a decision that would be difficult to bring to the NLRB.[22]

It is possible, of course, to say that the employer should take his hot-cargo claim to the NLRB. A strict allocation of function would then call for the arbitrator to construe the contract, for the district court to stay enforcement of his award until the NLRB had decided the 8 (e) issue, and for the Board to decide whether the contract construction supplied by the arbitrator was lawful under that section. I submit, however, that we should prefer any solution not attended by serious disadvantages to one that would require a party to litigate in three separate forums to settle a contract dispute.

The hot-cargo claim thus brings my fourth condition into play and, since the first three were also present, the arbitrator should decide the 8 (e) issue. What are the consequences of that course? First, the parties may treat his decision as final, thereby disposing of the matter. If they do not, the district court is free to treat the statutory issue afresh, but if our arbitrator is the qualified expert we have hypothesized, his opinion should help the court and may well be wholly persuasive. The NLRB's sometime deference to arbitration awards

[21] See Meltzer, "Ruminations About Ideology, . . ." in *The Arbitrator, the NLRB, and the Courts* at 17, n. 40: "Where an award is attacked in a judicial proceeding as contrary to the NLRA, judicial competence to deal with such questions may be challenged. For suggestions that such challenges should be rejected, see Sovern, 'Section 301 and the Primary Jurisdiction of the NLRB,' 76 *Harv. L. Rev.* 529, 551, 564 (1963); Meltzer, 'The Supreme Court, Congress and State Jurisdiction over Labor Relations II,' 59 *Colum. L. Rev.* 269, 291-292 (1959.)" See also Dunau, "Three Problems in Labor Arbitration," 55 *Va. L. Rev.* 427, 439-441 (1969); Smith and Jones, "The Supreme Court and Labor Arbitration, The Emerging Federal Law," 63 *Mich. L. Rev.* 751, 804 (1965).

[22] A decision by the arbitrator that the clause is invalid may make it impossible for the union ever to get an NLRB determination of that claim. But, as the text indicates, if this consideration led the arbitrator to refuse to decide the issue, the court would presumably resolve it and the union would be no closer to an NLRB determination.

may also persuade the loser to dispense with that forum. In sum, a decision by the arbitrator may materially shorten the litigation and yield a better result than the district court would have reached on its own. The cost seems modest; the arbitrator will already be familiar with the facts and so the parties need bear only the extra expense of submitting the legal issue. In Professor Meltzer's words, this seems "a desirable method of coordinating a private system of adjudication with a governmentally imposed legal and administrative framework."

At this point, I have suggested four prerequisites for the exercise of arbitral authority over questions of law; attempted to justify the application of that formula when all four conditions are met; and explained why a different result is called for when the courts are fully competent to deal with the legal issue, that is, when my fourth condition is not present. I propose now to look more closely at all four conditions.

With respect to the first condition, who is to decide whether the arbitrator is qualified to tackle the issue of law? The answer is simple: The arbitrator himself must resolve that question. If he feels unqualified to resolve a statutory issue pressed on him by a party, his only duty is to avoid possible confusion by making it clear that he has limited his consideration to the contract question. An arbitrator whose training and areas of specialization have not equipped him to resolve a particular statutory question serves himself, the parties, and the system best by saying so. (If the statutory question is a part of the submission expressly agreed upon by the parties, the unqualified arbitrator should, of course, decline the case.)

Not all arbitrators are notable for their humility and some may assume they are qualified when they are not. The parties can often protect against this in their selection. And, of course, the arbitrator's decision is not final on statutory matters. The risk of immodesty seems worth running.

My second condition—that the question of law be implicated in a contract-interpretation dispute that is also before the arbitrator—is necessary because unless it is met, the parties belong in some other forum altogether. Consider again my seniority hypothetical in which an employer lays off black

workers pursuant to a departmental seniority system and they grieve to arbitration. Their claim, you will recall, was not that the contract was misconstrued, but that the action violated Title VII of the Civil Rights Act of 1964. Congress has designated the Equal Employment Opportunity Commission and the federal courts to handle such cases. Unless all of the parties expressly agree to submit the dispute to an arbitrator, there is no reason why he should assume jurisdiction over it.

My third condition is at the center of the battle, the point where Meltzer, Howlett, and Mittenthal clash most sharply. Let me illustrate how that condition works.

Suppose a dispute between a union and an employer over the meaning and legality of a union-security clause. The union demanded the dismissal of an employee who failed to become a member. The employer responded that the union-security clause did not require dismissal in these circumstances and that if it did, the clause was to that extent unlawful under the NLRA. If the employer remains adamant and the union takes him to arbitration before a qualified arbitrator, my formula permits a decision on the statutory question. The arbitrator is qualified; the statutory question is implicated in a contract-interpretation dispute; the employer is claiming that if his refusal to dismiss does violate the contract, the NLRA nonetheless requires him to stand fast; and the courts lack primary jurisdiction to decide the NLRA issue. The case is thus a simple reprise of our hot-cargo problem of a few moments ago.

Contrast a case in which my third condition is not met. Suppose that management, immediately after a strike settlement, transfers a number of employees, including several of the strike leaders. The union claims that the transfers constitute discrimination in violation of Section 8 (a) (3) and offend against the seniority provisions of the parties' agreement. Suppose further that the arbitrator finds the seniority provisions no barrier to the transfers. Should he go on to decide the 8 (a) (3) question?

If he refuses to decide it, a court need never enter the case, Since an award upholding the transfers requires no action of anyone, there is no need for the company to seek enforcement.

If the union seeks to set the award aside as contravening 8 (a) (3), the court could fairly take the position that the NLRB is the proper forum. After all, under the *Steelworkers* trilogy the court has no role to play in interpreting the contract. The suit would then merely be asking the court to hear the 8 (a) (3) charge. And that is the NLRB's business.

Consequently, if the arbitrator refuses to decide the question of legality, the union may be forced to two forums for redress —the arbitrator and the NLRB.[23] While that is hardly a model of speedy justice, let us consider the alternative.

Let us suppose that the arbitrator decides the NLRA question and that he finds the transfers violated 8 (a) (3). He accordingly orders the grievants restored to their old jobs. If the company wishes to contest the decision, a federal district court may now be drawn squarely into the middle of a dispute in which it has no business. Whether the union sues to enforce the award or the company to set it aside, the judge cannot routinely uphold the award as though it rested solely on the contract. His most probable response would be to set the award aside as in excess of the arbitrator's jurisdiction. The union would then have to relitigate the question before the NLRB.[24] Even if the judge regarded decision of the 8 (a) (3) question by the arbitrator as permissible, the standard arbitration clause would not endow the award with the same finality as one based on the contract; to save the company from being absolutely precluded by the arbitrator's 8 (a) (3) decision, the judge would either have to review that decision himself

[23] Even though the arbitration proceeding may still be pending, the wise union attorney will take care to file his 8a(3) charge before the NLRA's six-month statute of limitations expires. In Title VII cases, however, the Court of Appeals for the Fifth Circuit has ruled "that the statute of limitations, which has been held to be a jurisdictional requirement, is tolled once an employee invokes his contractual grievance remedies in a constructive effort to seek a 'private settlement of his complaint.' . . . We do not think that Congress intended for a result which would require an employee thoroughly familiar with the rules of the shop, to proceed solely with his Title VII remedies for fear that he will waive these remedies if he follows the rules of the shop or to do both simultaneously, thereby frustrating the grievance procedure." *Culpepper* v. *Reynolds Metals Co.*, 2 FEP Cases 377, 379 (5th Cir., 1970).

[24] The Board could not simply invoke its precedents on deference to arbitration awards. For one thing, none of those decisions defers to an award set aside by a court as in excess of the arbitrator's jurisdiction. For another, the union in our problem needs a cease-and-desist order from the Board, not a decision "to respect the award and dismiss the complaint in its entirety." *International Harvester Co.*, 138 NLRB 923, 51 LRRM 1155 (1962).

or stay enforcement until the union filed a charge and obtained an NLRB determination.

Thus, if the arbitrator decides the statutory question and holds the transfers invalid, he may have succeeded only in requiring the parties to go to three forums instead of two for final relief. Or he may have substituted an inappropriate forum —the reviewing court—for the appropriate one—the NLRB. Or, since we cannot dismiss the possibility that the parties will accept his decision, he may have disposed of the matter.

What if, after considering the statutory question, he decides the transfers were legal? If the union then went to the NLRB, it might find itself foreclosed by Board deference to an arbitration award. And knowledge that this might happen would tend to dispose the union to accept the arbitrator's decision as final. On the other hand, the union might choose to go to court to set the arbitrator's award aside. Again, the court might well find that the arbitrator had exceeded his powers. Or, conceivably, the court might find the union estopped to deny the arbitrator's power to decide an issue the union had presented to him. Then the court would have to decide whether it should review the arbitrator's decision and, if so, on what terms.

Where does all this complexity and confusion lead us? It leads me to my third condition. When an employer claims that his conduct, if a contract breach, is nonetheless required by law, the arbitrator should decide that question because the alternatives seem worse. They are either decision by a court or a parceling out of the case among three forums—arbitrator, court, and Board. Decision by a qualified arbitrator at least holds out the possibility of a quick, correct decision.

When my third condition is not met, the arbitrator should not decide the question of law. The reason, as we have just seen, is that the consequences of decision seem worse than those of abstention. Abstention has the virtue of clarity: The arbitrator decides the contract question and the Board decides the statutory question, and everyone concerned can know who is to do what. If the arbitrator decides, there is always the chance that his decision will conclude the matter, but if it

does not, he may have succeeded only in dragging the courts into the case in addition to or in place of the NLRB.

To put the point another way, when an employer claims his conduct, if a breach of contract, is required by law, the case is tangled enough to warrant an arbitrator's gambling on improving matters. Deciding the statutory question might help greatly and can't hurt much. When that condition is lacking, the case, though complex, is not so badly snarled and there is a serious risk that a decision by the arbitrator will make things much worse.

You may have noticed that my third condition is not all that different from Mittenthal's distinction between an award that *permits* illegal conduct and one that *requires* it. And his distinction strikes me as sound for the most part. To repeat, an award that would require conduct proscribed by the NLRA either drags the courts into NLRA decisions or provokes a three-forum journey. An award that permits illegal conduct does not have the same consequences.

But Mittenthal's formulation fails to allow for cases in which a court is an appropriate tribunal to decide the issue of law. In those cases, there is little reason not to pass even a claim of illegality along.

That, or course, is the reason for my fourth condition, which I would like to explore with you now in the context of Title VII. For a case in which the first three conditions are met, let us return to an earlier hypothetical: An employer ignores a departmental seniority provision and lays off whites with greater departmental seniority than recently transferred blacks; the white employees grieve to arbitration; the employer defends on the ground that his decision was required by Title VII. Under my formula, the arbitrator should decide the Title VII issue only if the courts lack primary jurisdiction to adjudicate it.

As I read Title VII, that condition is not met. The preliminary recourse to the Equal Employment Opportunity Commission required by that statute is intended to permit conciliation, not to obtain an adjudication from a specialized tribunal. Indeed, the EEOC has no power to adjudicate. A complainant whose case is not voluntarily settled must come to federal court if he wishes to have the matter adjudicated.

Since the courts are entrusted with primary jurisdiction to decide Title VII questions, my fourth condition is not satisfied and the arbitrator should not decide the statutory question. In our hypothetical, he would presumably decide that the employer violated the agreement, that the white grievants are, insofar as the contract is concerned, entitled to the jobs. He should also make it absolutely clear that he is not deciding the Title VII issue. Then, in the ensuing action to enforce or set aside the award, the court can apply Title VII to the award and, if appropriate, invalidate it.[25] The case is, in short, just like the antitrust problem in Judge Frankel's *National Dairy* decision.

IV. Conclusion

Though labor law is our specialty, our subject today is really the administration of justice. In answering the question before us, we seek to have the best possible forum or forums resolve any particular dispute with the minimum of litigation possible under our trifurcated system. That has led me to ask, first, whether the arbitrator is qualified to decide the noncontractual issue. If he is not, he is obviously not the best possible forum and he ought not to decide the question.

If he is qualified, I ask next: What is the alternative to his deciding the legal issue? Unless the case also involves a contract question, the alternative is simply a proceeding in what-

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[25] The analysis becomes more complex if the employer asserts his Title VII defense in a state with its own fair employment practices law, but the answer remains the same. In essence, Title VII bars federal action on a case arising in a state with its own antidiscrimination law until the responsible state agency has had 60 days to dispose of the matter. See Sovern, *Legal Restraints on Racial Discrimination in Employment* (New York: Twentieth Century Fund, 1966), 93-95. This provision does not, however, appear to deprive a complainant of his right of recourse to the federal courts after the state agency and the federal Equal Employment Opportunity Commission have had their chance. Here again, then, the federal court remains an appropriate tribunal to decide the Title VII question. Its jurisdiction is merely postponed in the interest of accommodating other agencies and processes. Where, however, the arbitration process must also be accommodated, a problem Congress never considered, my own view is that the federal court should feel free to deal with the award as I have suggested in the text.

If the employer asserts both a Title VII and a state law defense, literal application of my formula would have the arbitrator decide the state law issue but leave the Title VII issue for the federal court. The wastefulness of that division of labor would lead me as an arbitrator to abandon my formula at this point, decide only the contract question, and let the court sort out the legal issues.

ever tribunal normally would have heard the legal issue. A grievant with a Title VII, FLSA, or any other claim that does not require an interpretation of the contract has no reason to be in arbitration and his being there unnecessarily complicates his litigation. Hence my second condition: The arbitrator should not decide a question of law unless it is implicated in a contract dispute that is also before him.

But even when that condition is satisfied, we still need to ask: What are the consequences of a decision by the arbitrator? What is the probability that his award will effectively terminate the dispute? If he doesn't decide the legal question, who will? When? My third and fourth conditions are an attempt to be responsive to these concerns. When the courts are competent to deal with the matter, let them. The arbitrator's refusal to decide then permits a relatively swift answer from a competent tribunal likely to dispose of the matter.

Even when the courts are not competent, I have suggested that arbitrators should decide only those questions of law tendered by claims that the law immunizes or requires a contract violation. This limitation would have the arbitrator decide only when his decision seems likely to advance the interests we pursue—to diminish the chances of a decision by an incompetent tribunal and avoid increasing confusion and complexity.

As this summary suggests, I do not regard my four-step formula as a rigid rule. It is rather an effort to organize the factors relevant to decision into a manageable principle. When special circumstances make application of that principle inappropriate, as an arbitrator I would not hesitate to lay it aside. For example, consider again our case of a union grievance complaining of an employer's refusal to dismiss an employee in accordance with a union-security clause. Suppose further that by the time the case reaches the arbitrator the employee in question has filed an 8 (b) (2) charge, a complaint has issued, and the trial examiner has found an 8 (b) (2) violation. On these facts, the arbitrator would be foolish to address the 8 (b) (2) question even though my conditions were met. A decision by him would not end the litigation; it would merely confuse it. He should construe the contract, making clear that he has not con-

sidered the statutory issue. A wise district judge would then stay enforcement of the award in anticipation of an early Board decision.[26]

Comment—

THOMAS S. ADAIR*

Mr. Chairman, I don't have a prepared paper to give you. I can't quarrel too much with Mike Sovern's comments. I think they are very sound, very erudite. This is a field in the law—an area in the law—that we all have problems with, and I think we can start out with a very basic assumption that, generally speaking, the arbitrator decides only what we hire him to decide. That means that your contract sets out his authority, or, if it does not, your submission agreement states what the arbitrator is to decide, and, therefore, he applies the law only if the contract or the submission agreement invites him to.

I represent a client that has a contract with several clauses that are intertwined with the law. For example, it immunizes an employee who respects a picket line, as far as discipline is concerned, if four conditions are met: One of these conditions is that the strike must be a legal strike. If that condition is an issue, how do we handle it? Well, we get a man like Russell Smith, for example, when the matter seems to be entwined with a secondary boycott. Russell, with all his knowledge of boycott, on which he is expert, was selected for such a case. The next time we had an economics professor. This was a strike involving hospital employees, a private hospital, a nonprofit hospital. There was no claim of illegality on the part of the hospital that was being struck, but this particular employer nevertheless disciplined the employees for refusing to go in and perform their telephone repair work. Well, presumably this was a legal picket line, but the economics professor applied his interpretation of the common

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[26] I submit that special circumstances justifying an exception to my formula also exist when a contract claim is resisted on the ground that the agreement is illegal because the union lacked majority support when the agreement was made. I have suggested elsewhere that "The no-majority defense should be deemed immaterial in a contract action." Sovern, "Section 301 and the Primary Jurisdiction of the NLRB," 76 *Harv. L. Rev.* 529, 561-564 (1963). I refer the reader to that discussion for elaboration of the argument that neither courts nor arbitrators should undertake to decide whether a union enjoyed majority support when the agreement in question was signed.