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.

law and held that the strike was illegal and upheld the suspensions of those who refused to cross the picket line. I agree with Mike that competence on the part of the arbitrator is vital in applying law.

If you are going to have people applying statutory law, you have to make sure, to the best of your ability, that they are competent. Now, I don't say the economics professor was not competent or that his interpretation of the common law was clearly wrong, but I do say that you need special competence if you have that sort of an issue.

It is up to the parties, however, to determine what sort of issue they want the arbitrator to decide. I don't agree with Robert Howlett if he means that every arbitrator must look behind the contract to see if there might be some law or some statute that he should apply. I don't agree with that at all. I think you should look at the contract, period. If the contract brings you into collision with a statute or a rule of law, then you have more of a problem.

This reminds me of Rufus and Leroy, who were going down to apply for a job as a truck driver. They had these psychological tests like Hugo Black was speaking about yesterday. They asked this applicant, "Well, now, what would you do if you topped the hill and the lights went out suddenly on your truck?" He said, "Well, I'd slow down, pull off to the shoulder and I'd put out flares." They said, "That's great, good. That's what you should do."

Then they asked Rufus: "What if it was a bad rain, you topped the hill, and you saw another car coming head on? What would you do?" "Well," he said, "the first thing I'd do is wake up Leroy," The man further questioned, "What do you mean, you'd wake up Leroy? What's he got to do with it?" He said, "Well, Leroy ain't never seen no bad wreck."

Now, there is an area where you can get into a bad wreck. For example: departmental seniority cases. In many industries in the South, contracts provide for what they call a sanitation department. Well, all that means is that the blacks work there at sanitation workers' wages and they have no bidding rights in any other department. Now, I don't have to tell you that this is

plainly and patently in violation of the Civil Rights Act, as some courts have already held. But what do you do as an arbitrator? Suppose you have a grievance, and it can arise one of two ways. Suppose the company decides it is an illegal clause and therefore they allow a black man to bid for a job in another department, in violation of the contract? What do you do as an arbitrator? Suppose it works the other way? It could be a grievance by a black, saying that this clause violated the law. I don't really know what you think should be done in that sort of case.

My personal opinion is that you should follow the contract but put in a little dicta, "Go to the Civil Rights People. I have real doubts as to whether this is legal, but file your case with EEOC."

We are all familiar with the sex- and race-discrimination cases under the Civil Rights Act. But what about the issue involving religious discrimination—an employee who because of religious belief, real or alleged, refuses to work on Sunday? Well, one district court handled that under Title VII. The court said the employee had that right, and he couldn't be discharged even though that particular employer had a seven-day workweek.

There is a more recent case in Louisiana, *Jackson* v. *Very Fresh Poultry, Inc.* The employee was a Seventh Day Adventist, and he announced that after 5 p.m. on Friday he would not work any more until Sunday. The employer, after considering, said, "I can't use you if you set those limitations on your work." So he discharged him. I think I know what an arbitrator would do with that kind of case: It has been very clear in the past that you have certain rights under the law, but you have to accommodate yourself to the industrial needs and standards. But that is not what the court said. The court ordered him reinstated with full back pay, with the admonition that he could not be worked on Saturdays or after 5 p.m. on Fridays.

Now, what do you do with that type of case? What does an arbitrator do with it? Suppose you had it as a discharge case. The likelihood is that you would say there was just cause. When you are in a field of developing law, uncertain law, new law, different law, let the court decide. If you are in a field of clear statutory law, no question about it, then I would say: Apply it,

if it is within your submission agreement—and most ordinarily it would be. You may not realize it, but you are applying law all the time. You even get over into the equitable field—equitable estoppel. You may not call it that, but that is what it is all the same. If a promise has been made and there is reliance on that promise in negotiations, what arbitrator doesn't try to enforce it? You are then relying on the law of equitable estoppel, or whatever you may choose to call it.

We had a discussion yesterday about these intercepted communications—what you do with that. If, as Hugo says, the federal statute now says that you cannot use an intercepted communication, or cannot introduce it in evidence, what does the arbitrator do? Well, despite the fact that the contract doesn't address itself to this subject, to me it is quite clear: The arbitrator doesn't allow its admission into evidence, and he doesn't accept it for what it is worth. One of the most disturbing things in this whole field of arbitration is this business of accepting everything for what it is worth, with the arbitrator always smiling at you, saying, "You know, I'm smart enough not to give it any weight."

There was a case in Atlanta, Ga., involving an airline pilot who was discharged because he had had a few drinks in violation of the 12-hour rule. The junior people, the stewardess and another of the pilots who were guilty of the same offense, were not discharged, but this man, with 20 years with this particular airline, was discharged. In the trial of that case the company introduced evidence showing that he had been picked up three times in the past and charged with driving under the influence. In each instance the case was disposed of by a plea of nolo contendere.

The arbitrator discussed this. There was objection, but not too much. Yet the law of Georgia, on a plea of nolo contendere, is that it cannot be used or introduced for any purpose whatsoever in any proceeding. But it was. Now, whether it had weight, I don't know, but when you come face to face with a pure statutory requirement, then I don't think there is any question that you should follow it, that you should abide by it. On the other hand, when you come to a clause that gives you a right to decide the legal issue, and there are many of them, then I think you use your good judgment, and I think the judgment of the

members of this Academy is superior generally to the judgment of district court judges or certain courts of appeals judges.

In 1955 there was a strike at the Southern Bell Telephone Company involving communications workers. The Southern Bell Telephone Company insisted that Labor Board standards be applied, as far as the discharge and reinstatement of employees was concerned. I was in on the negotiations, and the best I could do was to come up with an agreement that said Labor Board standards *shall* be considered, but that the arbitrators might also *consider* arbitration standards. There was a board composed of Schedler, McCoy, Alexander, and Whiting, and when they looked to Labor Board standards they asked: "What are you talking about? The Truman Labor Board, or the Eisenhower Labor Board?" There is nothing more changeable than Labor Board standards, and particularly in this area of reinstatement of employees for misconduct.

My own view is that you are a servant of the parties. You are hired by the parties. You are paid by the parties. Don't stray. If the contract tells you what you are supposed to do, do that and that alone.

Now, if the parties, on the other hand, say to you, "We've got problems and we don't know whether a particular clause is legal," whether it be a picket-line clause, a union-security clause, or a seniority clause, it does not matter. In such a case the parties have hired you to decide that legal issue.

Discussion—

CHAIRMAN AARON: We have now a brief time in which we can have some suggestions or comments or questions from the floor.

MR. ROBERT HOWLETT: Well, as far as Mike Sovern's paper is concerned, I can't disagree too much. I might say that it is difficult to believe that there would be a situation where an arbitrator tried to rule on the law. One side or the other will present their case.

The first thing I suggest is more very fine articles on this subject in relation to Title VII. If any of you are interested in

this subject, there is an article by Harry Platt. There is an excellent article and paper by George Gould in one of the arbitration journals, I believe—a very, very thorough treatment of the whole civil rights question.

CHAIRMAN AARON: Mike, do you have any comment you would like to make?

DEAN SOVERN: I have two. I hadn't focused on something Tom said: that is, the use of law relative to excluding illegally obtained evidence. I don't think there is any doubt that arbitrators should rule on the evidence, taking into account whatever the law has to offer, when it is important to make a ruling, rather than receiving it for what it is worth.

The other comment is Tom's reference to Title VII. I agree completely with what he said, and out of sheer vanity, I will explain why. Painful as it may be for an arbitrator to keep his hands off any contract that is illegal or unjust, I think he should send it to the forum where it can be swiftly and efficiently disposed of.

MR. ADAIR: I would like to ask Mr. Howlett a question: Suppose an employer and a trade union had a contract containing a union-security clause or a check-off clause, and a short time later the employer says, "We aren't going to abide by it because it is illegal." Now, is there some sort of estoppel or waiver there? They had entered into the contract. What do you think about either party, whether it be the union or the company, coming in and saying, "The clause we agreed to is illegal; therefore we aren't going to abide by it?"

MR. HOWLETT: I would apply the law, that the clause is illegal, and I would not bypass it.

MR. ADAIR: This reminds me a little bit of the man who got a bill from a tax consultant that read: "$5 for preparing income tax and $25 for explaining it to you." He sent him a check for $5 and said, "I still don't understand it."

CHAIRMAN AARON: Bob's response brings to mind what may be a curious irony in the development of the law. I can recall, not so many years ago, when arbitrators faced with a discharge case which involved an alleged violation of the collective agreement

and an alleged unfair labor practice under the NLRA, would go out of their way to announce to the parties that they were deciding the contract question but were standing away from the question of an unfair labor practice, inasmuch as that issue was within the exclusive jurisdiction of the NLRB.

Now it seems we have come about 180 degrees and the arbitrator must say, if the Board is to honor that decision following filing of an unfair labor charge, "Yes, I did consider the question of the alleged unfair labor practice and have concluded that there was no unfair labor practice, nor was there any violation of the collective agreement."

I think it might be useful if we could get some reaction from our speakers on the desirability of the law's taking that particular direction.

DEAN SOVERN: I haven't made up my mind about the difference between arbitration awards. You may recall a case decided by Dave Cole—the case of a claimed violation by an employee who had ceased to pay dues, and under the right-to-work laws of the state, he probably didn't notice the grandfather clause in Taft-Hartley. Dave Cole held that the contract did require the dismissal and adjusted seniority accordingly, and that the company had acted correctly.

MR. ADAIR: You get into these situations of weightlifting, where females aren't supposed to lift more than 30 pounds. An arbitrator doesn't have too much trouble with those cases, or hasn't up to now. If the state law says 30 pounds and there is no question, the arbitrator sustains the company. But what about the conflict between the state law and the Civil Rights Act? It is true that women generally don't have as strong muscles as men, but it is not true in every case, so you have to consider the individual. Now, what does an arbitrator do? He can do what Arbitrator Turkus did, I suppose. He considered the law of the state and the Civil Rights Act and held that the latter was controlling. There he considered not only the contract, but two sets of laws—the state law and the federal law.

I think that this organization has the competence generally to determine when you must apply the law and when you should

not, and I think, when you get into these lines of seniority cases, particularly if you have a clear contract clause, you don't apply the Civil Rights Act. You suggest that the parties go to the courts if they have a legal question.