

CHAPTER 1

PRESIDENTIAL ADDRESS:  
CONTRACT READING REVISITED

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**Introduction**

A quarter century ago, in a presentation at the Academy's annual meeting, I used the phrase "contract reader" to characterize the role an arbitrator plays in construing a collective bargaining agreement.<sup>1</sup> That two-word phrase may be the only thing I ever said before this body which has been remembered. Unfortunately, it is almost invariably misunderstood. Time and again members have reproached me: "What's the big deal about contract reading, anyway? Isn't it just the same as contract interpretation?" Or, more substantively scathing: "Do you really think, Ted, that all you have to do to interpret a labor agreement is to *read* it?!"

Those two masters of contract interpretation, Arthur Corbin<sup>2</sup> and Carlton Snow,<sup>3</sup> know that context is nearly everything in extracting meaning from a set of words. When I spoke of the "contract reader" years ago, it was in the context of a paper dealing with judicial review of an arbitrator's award. The process of contract interpretation as such was not my concern. I had a simple—but I like to think important—point to make. When a court has before it an arbitrator's award applying a collective bargaining agreement, it is just as if the employer and the union had signed a

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<sup>1</sup>St. Antoine, *Judicial Review of Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, in *Arbitration—1977, Proceedings of the 30th Annual Meeting*, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1978), 29, 30–36.

<sup>2</sup>Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 *Cornell L.Q.* 161, 171–72 (1965).

<sup>3</sup>Snow, *Contract Interpretation*, 55 *Fordham L. Rev.* 681, 688–92 (1987).

stipulation stating: “What the arbitrator says this contract means is exactly what we meant it to say. That is what we intended by agreeing that the award would be ‘final and binding.’” In this sense, an “erroneous interpretation” of the contract by the arbitrator is a contradiction in terms.

Now, my law school colleague Yale Kamisar, who has had more of his articles cited by the U.S. Supreme Court than any other contemporary scholar, advises us legal scribblers that it is not enough to have a sound idea. “To make a lasting impression,” says Yale, “you must couch your ideas in memorable language.”<sup>4</sup> So, way back in 1977, I tried my best to come up with a catchy phrase to convey my notion about the relationship between arbitrators and the contracts they are asked to interpret. What could be more apt than to get a court to think of the arbitrator as simply picking up the parties’ agreement and “reading it off” as easily and straightforwardly as A-B-C? Yale didn’t tell us, however, that sometimes you can succeed too well. The audience may remember your catchy phrase—and entirely forget your point!

Today I am going to take two quite different tacks. First, I shall update the thesis that I thought I was communicating to you nearly 25 years ago. The emphasis will be on what may be the hottest issue in judicial review: When may a court set aside an arbitral award on the grounds it violates public policy? Second, in response to your overwhelming demand, I’d like to talk a little about what many of you thought I was trying to say all along: How should an arbitrator go about “reading,” or interpreting, a contract?

### Judicial Review of Arbitration Awards

The story begins, of course, with David Feller’s great triumph in the *Steelworkers Trilogy*.<sup>5</sup> There the Supreme Court made arbitration the linchpin in the federal scheme for the implementation of collective bargaining agreements. More specifically, for our purposes, the Court in one of the three cases, *Enterprise Wheel*,<sup>6</sup> imposed tight constraints on judicial review of arbitral awards. So long as the award is not the product of fraud or corruption, does not exceed the arbitrator’s authority under the parties’ submission, and “draws

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<sup>4</sup>In a personal conversation with the author, circa 1970.

<sup>5</sup>*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

<sup>6</sup>*Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

its essence” from the labor contract, a court is to enforce the award without any attempt to “review the merits.”<sup>7</sup> Despite these strictures, the itch of the judiciary to right seeming wrongs has compelled the Court to revisit the subject, most notably in *Paperworkers v. Misco*.<sup>8</sup>

*Misco* presented the public policy question in dramatic fashion. The Fifth Circuit had refused to enforce an arbitrator’s reinstatement of an employee whose job was to operate a dangerous paper-cutting machine, and whose car had been found to contain marijuana while in the company parking lot. The Supreme Court reversed, declaring that “as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.”<sup>9</sup> The Court naturally recognized the general common law doctrine that no contract in contravention of law or public policy will be enforced. But it cautioned that “a court’s refusal to enforce an arbitrator’s *interpretation* of [labor] contracts is limited to situations where the contract as interpreted would violate ‘some explicit public policy’ that is ‘well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”<sup>10</sup>

Many lower courts have still not got the message. Judges have been so offended by the reinstatement of deviant postal workers, sexual harassers, and alcoholic airline pilots that they have disregarded the directives of *Enterprise* and *Misco*.<sup>11</sup> Unfortunately and unaccountably, the Supreme Court has not seen fit to step in and insist that its dictates be followed.<sup>12</sup> Thus, the First<sup>13</sup> and Fifth<sup>14</sup>

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<sup>7</sup>*Id.* at 596–99, 46 LRRM at 2425–26. But the arbitrator must not “dispense his own brand of industrial justice.” *Id.* at 597, 46 LRRM at 2425.

<sup>8</sup>484 U.S. 29, 126 LRRM 3113 (1987).

<sup>9</sup>*Id.* at 38, 126 LRRM at 3117.

<sup>10</sup>*Id.* at 43, 126 LRRM at 3119 (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766, 113 LRRM 2641, 31 FEP Cases 1409 (1983)) (emphasis in original).

<sup>11</sup>See *infra* notes 13–14 and 21–24 and cases cited.

<sup>12</sup>Dave Feller, who successfully argued in the *Steelworkers Trilogy*, *supra* note 5, has ruefully suggested that *less* deference may now be paid the awards in labor arbitration than in commercial arbitration. Feller, *Presidential Address: Bye-Bye Trilogy, Hello Arbitration!*, in *Arbitration 1993: Arbitration and the Changing World of Work*, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 1, 9–13.

<sup>13</sup>*U.S. Postal Serv. v. Postal Workers*, 736 F.2d 822, 116 LRRM 2870 (1st Cir. 1984) (postal worker embezzled \$4,325 worth of money orders); *Exxon Corp. v. Exxon Workers*, 118 F.3d 841, 155 LRRM 2782 (1st Cir. 1997) (driver of petroleum truck tested positive for cocaine).

<sup>14</sup>*Delta Queen Steamboat Co. v. Marine Eng’rs Dist. 2*, 889 F.2d 599, 133 LRRM 2077 (5th Cir. 1989), *cert. denied*, 498 U.S. 853, 135 LRRM 264 (1990) (grossly careless riverboat captain

Circuits have taken it upon themselves to find an award at odds with their notions of public policy, even though the action ordered, such as a reinstatement, would not have violated any positive law or established public policy if it had been taken by the employer on its own initiative. The Fourth,<sup>15</sup> Sixth,<sup>16</sup> Seventh,<sup>17</sup> Ninth,<sup>18</sup> Tenth,<sup>19</sup> and D.C.<sup>20</sup> Circuits have been far more faithful to the *Misco* mandate. They have enforced awards reinstating grievants which, in effect, did not sustain or order conduct that would have been forbidden to the employer acting unilaterally. The Second,<sup>21</sup>

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nearly collided with barges); *Exxon Corp. v. Baton Rouge Oil & Chem. Workers*, 77 F.3d 850, 151 LRRM 2737 (5th Cir. 1996) (chemical plant supervisor tested positive for drugs). *But cf. Atchison, Topeka & Santa Fe Ry. v. United Transp. Union*, 175 F.3d 355, 161 LRRM 2265 (5th Cir. 1999) (enforcing award of public labor board reinstating railroad employee testing positive for drugs); *Food & Commercial Workers Local 540 v. Pilgrim's Pride Corp.*, 193 F.3d 328, 162 LRRM 2513 (5th Cir. 1999) (award upheld requiring check-off of union dues of rehired employee without new check-off authorization).

<sup>15</sup>*Westvaco Corp. v. Paperworkers*, 171 F.3d 971, 160 LRRM 2844, 79 FEP Cases 595 (4th Cir. 1999) (worker admittedly sexually harassed co-employee).

<sup>16</sup>*Monroe Auto Equip. Co. v. Auto Workers*, 981 F.2d 261, 142 LRRM 2150 (6th Cir. 1992), cert. denied, 508 U.S. 931, 143 LRRM 2304 (1993) (installer of automobile test equipment violated company drug policy); *MidMichigan Reg'l Med. Ctr.-Clare v. Professional Employees*, 183 F.3d 497, 161 LRRM 2853 (6th Cir. 1999) (nurse negligently handled equipment during cardiac emergency); *TVA v. Tennessee Valley Trades & Labor Council*, 184 F.3d 510, 161 LRRM 2844, (6th Cir. 1999) (nuclear reactor unit operator used marijuana).

<sup>17</sup>*Chrysler Motors Corp. v. Indus. Workers (AIW)*, 959 F.2d 685, 139 LRRM 2865, 58 FEP Cases 692 (7th Cir.), cert. denied, 506 U.S. 908, 141 LRRM 2408, 59 FEP Cases 1536 (1992) (male forklift operator sexually harassed female co-worker by grabbing her breasts).

<sup>18</sup>*Stead Motors v. Machinists Lodge 1173*, 886 F.2d 1200, 132 LRRM 2689 (9th Cir. 1989) (*en banc*), cert. denied, 495 U.S. 946, 134 LRRM 2312 (1990) (auto mechanic repeatedly failed to tighten lug nuts on car wheels); *Food & Commercial Workers Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 174, 151 LRRM 2013 (9th Cir. 1995) (employees failing drug test were reinstated and employer's drug testing program was rescinded pending bargaining with union despite state regulation mandating random drug testing; court would vacate award on public policy grounds only if policy "specifically militates against the relief ordered by the arbitrator").

<sup>19</sup>*Communications Workers v. Southeastern Elec. Coop.*, 882 F.2d 467, 132 LRRM 2381 (10th Cir. 1989) (electric utility lineman in isolated incident sexually harassed customer in her home); *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201, 162 LRRM 2641 (10th Cir. 1999) (employee tested positive for marijuana following accident).

<sup>20</sup>*Northwest Airlines, Inc. v. Air Line Pilots*, 808 F.2d 76, 124 LRRM 2300 (D.C. Cir. 1987) (alcoholic airline pilot who had been relicensed by the Federal Aviation Administration (FAA)).

<sup>21</sup>*Compare Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840, 135 LRRM 2659, 54 FEP Cases 24 (2d Cir. 1990), cert. denied, 499 U.S. 922, 136 LRRM 2720, 55 FEP Cases 352 (1991) (male printer sexually harassed female co-workers; reinstatement set aside), with *Electrical Workers (IBEW) Local 97 v. Niagara Mohawk Power Corp.*, 1998 WL 253755, 158 LRRM 2198 (2d Cir. 1998) (nuclear plant technician supplied adulterated urine sample in drug test; reinstatement upheld), and *Electrical Workers (IBEW) Local 97 v. Niagara Mohawk Power Corp.*, 189 F.3d 250, 162 LRRM 2708 (2d Cir. 1999) (nuclear plant safety officer failed to respond to fire alarm and then lied repeatedly during investigation; reinstatement upheld). *Cf. Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 77 FEP Cases 182 (2d Cir. 1998), cert. denied, 526 U.S. 1034, 79 FEP Cases 512 (1999) (arbitral award rejecting claim under Age Discrimination in Employment Act may be vacated for "manifest disregard" of law or evidence).

Third,<sup>22</sup> Eighth,<sup>23</sup> and Eleventh<sup>24</sup> Circuits have vacillated on the issue, but the most recent decisions seem more in line with *Misco*.

Because I consider it one of the easier issues in arbitration, however much misunderstood by a number of courts, I shall deal brusquely with the rejection of otherwise legitimate awards on the basis of a nebulous public policy. That usually comes down to the highly subjective feelings of particular judges. For me, three estimable critics have correctly assessed the problem and arrived at the right solution. In various formulations, Judge Frank Easterbrook<sup>25</sup> and Professors Charles Craver<sup>26</sup> and David Feller<sup>27</sup> have concluded that if the employer (or the employer in conjunction with the union) has the lawful authority to take unilaterally the action directed by the arbitrator, such as reinstatement of a wrongdoing employee, the arbitral award should be upheld against public policy claims. If the airline would not have violated the regulations of the Federal Aviation Administration by putting the rehabilitated, relicensed alcoholic pilot back in the cockpit, the arbitrator's award to that effect is valid and enforceable. If the public utility would not have violated Title VII<sup>28</sup> by suspending rather than firing the sexual harasser because of certain mitigating circumstances, the arbitrator's award to that effect is valid and enforceable.

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<sup>22</sup>*Compare U.S. Postal Serv. v. Letter Carriers*, 839 F.2d 146, 127 LRRM 2593 (3d Cir. 1989) (postal worker shot at supervisor's car; reinstatement sustained), with *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 143 LRRM 2312 (3d Cir. 1993) (ship helmsman tested positive for marijuana; reinstatement set aside).

<sup>23</sup>*Compare Iowa Elec. Light & Power Co. v. Electrical Workers (IBEW) Local 204*, 834 F.2d 1424, 127 LRRM 2049 (8th Cir. 1987) (employee in nuclear power plant defeated safety lock to take shortcut to lunch; reinstatement vacated), with *Homestake Mining Co. of Cal. v. Steelworkers Local 7044*, 153 F.3d 678, 158 LRRM 3101 (8th Cir. 1998) (mine welder violated federal safety regulations by not shielding welding operations so as to avoid fire hazard; reinstatement upheld).

<sup>24</sup>*Compare U.S. Postal Serv. v. Letter Carriers*, 847 F.2d 775, 128 LRRM 2842 (11th Cir. 1988) (postal worker stole from the mails; reinstatement set aside), and *Delta Airlines, Inc. v. Air Line Pilots*, 861 F.2d 665, 130 LRRM 2014 (11th Cir. 1988), cert. denied, 493 U.S. 871, 132 LRRM 2623 (1989) (alcoholic airline pilot who had been relicensed by the FAA; reinstatement overturned), with *Florida Power Co. v. Electrical Workers (IBEW)*, 847 F.2d 680, 128 LRRM 2762 (11th Cir. 1988) (employee in possession of cocaine drove while drunk; reinstatement sustained).

<sup>25</sup>*E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Assoc.*, 790 F.2d 611, 618, 122 LRRM 2217 (7th Cir. 1986) (Easterbrook, J., concurring); Easterbrook, *Arbitration, Contract, and Public Policy*, in *Arbitration 1991: The Changing Face of Arbitration in Theory and Practice*, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1992), 65, 70–77.

<sup>26</sup>Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 Chi.-Kent L. Rev. 571, 604–05 (1990).

<sup>27</sup>Feller, *Court Review of Arbitration*, 43 Lab. L. J. 539, 543 (1992).

<sup>28</sup>Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq. (1994).

That approach is entirely in keeping with the underlying notion that the arbitrator is the parties' surrogate, their designated spokesperson in reading and applying the contract. What the parties are entitled to say or do on their own, the arbitrator is entitled to say or order. That simple principle seems so self-evident, and so implicit in the Supreme Court's rulings to date, that it should become the accepted norm in the future. This would merely confirm arbitration as the "final and binding" dispute resolution procedure that the parties' contracts almost invariably denominate it.

We may shortly have further enlightenment from the Supreme Court on this long-running debate. In March 2000, certiorari was granted in *Eastern Associated Coal Corp. v. Mine Workers District 17*.<sup>29</sup> This was another instance of marijuana ingestion by a worker in a hazardous occupation, here, a mobile equipment operator. In sustaining the arbitrator's reinstatement, the district court acknowledged that Department of Transportation (DOT) regulations expressed a "well defined and dominant public policy against drug use" by "those in safety-sensitive positions."<sup>30</sup> But both the district court and the court of appeals went on to say, in the latter's words: "There is no such public policy against the reinstatement of employees who have used illegal drugs in the past."<sup>31</sup>

In short, the key is whether the remedial action ordered by the arbitrator, not the triggering conduct of the employee, is contrary to public policy. Of course the drug-taking *employee* acted contrary to public policy. But the award-issuing *arbitrator* did not, and his decision should stand. Indeed, recognizing the possibility of the rehabilitation of wrongdoers is a hallmark of a humane and caring society.<sup>32</sup> Despite the ominous implications of a grant of certiorari when the court of appeals did not even deign to publish its opinion, that is the way the Supreme Court should rule in this case.

In addition to refusing to enforce an arbitral award that conflicts with substantive law or established public policy, courts have

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<sup>29</sup>120 S. Ct. 1416, 68 USLW 3585 (2000). For the case below, see 66 F. Supp. 2d 796, 163 LRRM 2817 (S.D. W. Va. 1998), *aff'd per curiam*, 188 F.3d 501, 1999 WL 635632 (4th Cir. 1999) (unpublished opinion). After this paper was delivered, the U.S. Supreme Court unanimously affirmed the Fourth Circuit's decision. *Eastern Associated Coal Corp. v. Mine Workers District 17*, 121 S. Ct. 462, 165 LRRM 2865 (2000).

<sup>30</sup>66 F. Supp. 2d at 804, 163 LRRM at 2823.

<sup>31</sup>1999 WL 635632, at 4.

<sup>32</sup>The classic treatment in the penal context is Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* 80-89 (Yale Univ. Press 1981).

vacated awards on several other grounds. These have included arbitrator fraud and corruption,<sup>33</sup> procedural irregularities,<sup>34</sup> lack of arbitrator jurisdiction or authority,<sup>35</sup> and arbitral “contract modifications” or “gross error”<sup>36</sup> in interpretation. With the exception of the “modification” or “gross error” grounds, these qualifications comport with the thesis that the arbitrator is the definitive contract reader. To set aside an arbitral award because of a jurisdictional or procedural defect is not the same as finding that the arbitrator misread the contract. Rather, it represents a determination that the premises that make the arbitrator’s reading authoritative or reliable are not satisfied. And when a court declines to enforce an award that violates law or public policy, it does not question the soundness of the arbitrator’s reading of the contract; it rules that the contract *as read* is unenforceable.

Much more troublesome is the notion that the arbitrator has invalidly “modified” or “altered” the contract or has committed “gross error” in interpreting it. True, many collective bargaining agreements expressly provide that the arbitrator may not “add to, modify, or alter” them in any way. Yet, in commissioning the arbitrator to decide the meaning of their contract, the parties have commissioned the interpretation of those very terms,

too. If courts are to remain faithful to the teachings of *Enterprise*

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<sup>33</sup>*E.g.*, *Pacific & Arctic Ry. & Navigation Co. v. United Transp. Union*, 952 F.2d 1144, 139 LRRM 2256 (9th Cir. 1991).

<sup>34</sup>*E.g.*, *Holodnak v. Avco Corp.*, 381 F. Supp. 191, 87 LRRM 2337 (D. Conn. 1974), *modified on other grounds*, 514 F.2d 285, 88 LRRM 2950 (2d Cir.), *cert. denied*, 423 U.S. 892, 90 LRRM 2614 (1975). A union’s violation of its duty of fair representation in handling an arbitration case may also negate the finality of the award. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 91 LRRM 2481 (1976).

<sup>35</sup>*Electrical Workers (IBEW) Local 728 v. Jetero Corp.*, 496 F.2d 661, 88 LRRM 2184 (5th Cir. 1974) (arbitrator could not base award on merit-pay provision when disputes concerning it were explicitly excluded from arbitration); *Electrical Workers (IUE) Local 791 v. Magnavox Co.*, 286 F.2d 465, 47 LRRM 2296 (6th Cir. 1961) (arbitrator empowered to decide validity of employer’s increase in assembly-line quotas could not order parties to negotiate for engineering studies to guide the setting of future quotas).

Positing that an arbitrator had exceeded her remedial authority under a contract enabled one court to set aside an award reducing three discharges to suspensions. *S.D. Warren Co. v. Paperworkers Local 1069*, 845 F.2d 3, 128 LRRM 2175 (1st Cir. 1988). The arbitrator found that an undercover agent had pressured the employees into handling drugs on company premises. The court pointed out that the contract gave the employer the “sole right” to discharge for “proper cause.” Wholly ignored was the notion that the mere listing of drug possession among several specific offenses that could lead to dismissal did not necessarily eliminate the requirement it had to constitute “proper cause” for discharge under the facts of a given case. For different views, see *F.W. Woolworth Co. v. Miscellaneous Warehousemen’s Union, Local 781*, 629 F.2d 1204, 104 LRRM 3128 (7th Cir. 1980); *Arco-Polymers, Inc. v. Oil, Chemical & Atomic Workers Local 8-74*, 671 F.2d 752, 109 LRRM 3157 (3d Cir. 1982).

<sup>36</sup>See *infra* notes 38–39 and accompanying text.

*Wheel*, they must recognize that most arbitral aberrations are merely the products of fallible minds, not of overreaching power.<sup>37</sup> There is an inherent tension between the “final and binding” arbitration clause and the provision barring additions or modifications. Arbitrators cannot function effectively as the parties’ surrogates in giving shape and meaning to their necessarily amorphous contracts unless they are allowed to fill the inevitable lacunae.

Another recognized but anachronistic common-law ground for setting aside arbitration awards is “gross error.” In *Electronics Corp. of America v. International Union of Electrical, Radio and Machine Workers, Local 272*,<sup>38</sup> an award was vacated because “the central fact underlying an arbitrator’s decision [was] concededly erroneous.” There the arbitrator had assumed, contrary to the evidence as presented to the court, that an aggrieved employee had not been suspended previously by the employer. Other courts, however, have been more diligent in adhering to the *Enterprise* and *Misco* standards rather than common-law precedents. Thus, Judge Richard Posner, speaking for the Seventh Circuit in *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Railway*,<sup>39</sup> drew “the line between a gross error by the arbitrator, which a reviewing court is not authorized to correct, and the arbitrator’s exceeding the scope of his authority by doing something other than contract interpretation, which the court is authorized to correct. . . . The test is not error; it is ultra vires.”

For all of that, many courts feel compelled to test an arbitral award against some minimum standard of rationality. It has been said that the award must in some “rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties’ intention,”<sup>40</sup> that the award must not be a “capricious, unreasonable interpretation,”<sup>41</sup> and that it must be “possible for an honest intellect to interpret the words of the contract and reach the result the arbitrator reached.”<sup>42</sup> The Su-

<sup>37</sup>See Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining 593 (West 1976).

<sup>38</sup>492 F.2d 1255, 1256, 85 LRRM 2534 (1st Cir. 1974).

<sup>39</sup>768 F.2d 914, 922, 120 LRRM 3022 (7th Cir. 1985) (holding arbitrator did not ignore contract provision but found it superseded by inconsistent provision in parties’ second contract). See also *Bieski v. Eastern Auto Forwarding Co.*, 396 F.2d 32, 38, 68 LRRM 2411 (3d Cir. 1968); *Aloha Motors Inc. v. Longshoremen (ILWU) Local 142*, 530 F.2d 848, 91 LRRM 2751 (9th Cir. 1976).

<sup>40</sup>*Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128, 70 LRRM 2368 (3d Cir. 1969).

<sup>41</sup>*Holly Sugar Co. v. Distillery Workers*, 412 F.2d 899, 904, 71 LRRM 2841 (9th Cir. 1969).

<sup>42</sup>*San Francisco-Oakland Newspaper Guild v. Tribune Publ’g Co.*, 407 F.2d 1327, 1328, 70 LRRM 3184 (9th Cir. 1969).

preme Court itself is responsible for some of this ambivalence about finality and deference to arbitration. In *Enterprise*, for example, it emphasized that the award must “draw its essence from the collective bargaining agreement” and that the arbitrator must not “dispense his own brand of industrial justice.”<sup>43</sup> That is an open invitation to a court sufficiently unhappy with the result an arbitrator has reached.

One of our most eminent colleagues recently ran afoul of just such an unhappy court. In *Garvey v. Roberts*,<sup>44</sup> the Ninth Circuit vacated an arbitration award rejecting baseball player Steve Garvey’s salary claim based on alleged collusion by the major league clubs. Earlier, the same arbitrator had chaired the panel that had found the clubs guilty of colluding to restrain salaries in the free-agent market. One of the clubs’ witnesses in the previous proceeding was the then president and chief executive officer of the club that had supposedly offered and then withdrawn a contract extension in favor of player Garvey. The witness there denied that collusion affected the Garvey negotiations. In the individual Garvey arbitration, however, that same witness presented a letter recanting his earlier sworn testimony and asserting his belief that the club had withdrawn the offer pursuant to the collusion scheme. Nonetheless, Arbitrator Roberts concluded that because of the “shadow” cast on the credibility of this witness and the lack of corroborating evidence, he could not find that the club’s action was a result of the collusion rather than a “baseball judgment founded upon [Garvey’s] age and recent injury history.”<sup>45</sup>

In the eyes of a 2-to-1 court majority, this decision “border[ed] on the irrational” and was an example of an arbitrator impermissibly “dispens[ing] his own brand of industrial justice.”<sup>46</sup> But what should be more sacrosanct than an arbitrator’s good-faith credibility determination? And in any event did not the court majority fall into a logical fallacy in treating Arbitrator Roberts’ two decisions as irreconcilable? To find that the major league clubs were colluding against free agents generally is not to find that the clubs were colluding against them in every single instance. One consolation for us in this case is that the majority opinion twice emphasizes this was a “unique” situation and should not be precedent for more traditional union-management arbitrations.

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<sup>43</sup>363 U.S. at 597, 46 LRRM at 2425.

<sup>44</sup>203 F.3d 580, 163 LRRM 2449 (9th Cir. 2000).

<sup>45</sup>*Id.* at 586, 163 LRRM at 2452.

<sup>46</sup>*Id.* at 590–91, 163 LRRM at 2456.

However wrongheaded I may consider the *Garvey* ruling, the reality is that there is some line of rationality beyond which courts will not allow an arbitrator's decision to stray. One could hardly ask for more from a court than the declaration: "The arbiter was chosen to be the Judge. That Judge has spoken. There it ends."<sup>47</sup> Yet that same court was prepared to set aside an award "if no judge, or group of judges, could ever conceivably have made such a ruling."<sup>48</sup> So, too, other courts that proclaim their allegiance to the *Enterprise* and *Misco* principles will balk at enforcing an award that they find has "no rational basis" because it ignores the "plain meaning" of the contract.<sup>49</sup> Regrettably, I cannot say that vacating an arbitral award on grounds of irrationality is contrary to the contract reader thesis. In the parties' final and binding arbitration agreement, they presumably took it for granted not only that arbitrators would be untainted by fraud or corruption, but also that they would not be insane and their decisions not totally without reason. In any event, it is probably impossible to keep courts from intervening, on one theory or another, when an arbitral award is deemed so distorted as to reflect utter irrationality, if not temporary insanity. One can only hope that the careful, artful drafting of arbitral opinions will keep this judicial exception to the finality doctrine to the barest minimum.

Finally, as is persuasively argued in a forthcoming article by David Feller,<sup>50</sup> the Federal Arbitration Act (FAA)<sup>51</sup> may provide the best solution to the problem of judicial review of labor arbitration awards. Regardless of the outcome of the current controversy over

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<sup>47</sup>*Safeway Stores v. American Bakery & Confectionery Workers Int'l Union, Local 111*, 390 F.2d 79, 84, 67 LRRM 2646 (5th Cir. 1968) (upholding award of additional pay for 24 hours of unperformed work on the grounds the contract guaranteed 40 hours' pay each week, even though the employer's payment for 16 hours in one week resulted from a change in paydays and not any loss in work time).

<sup>48</sup>*Id.* at 82, 67 LRRM at 2648.

<sup>49</sup>*Compare Wyandot, Inc. v. Food & Commercial Workers Local 227*, 205 F.3d 922, 163 LRRM 2705 (6th Cir. 2000), and *Newark Morning Ledger Co. v. Newark Typographical Union Local 103*, 797 F.2d 162, 167, 123 LRRM 2283 (3d Cir. 1986), with *Teamsters Local 957 v. Dayton Newspapers, Inc.*, 190 F.3d 434, 162 LRRM 2001 (6th Cir. 1999) (sustaining reinstatement of carrier dispatcher who grabbed carrier by the neck), and *Teamsters Local 115 v. DeSoto, Inc.*, 725 F.2d 931, 115 LRRM 2449 (3d Cir. 1984) (upholding award that plant closing violated contract although NLRB had ruled closing was not a mandatory subject of bargaining).

<sup>50</sup>Feller, *Putting Gilmer Where It Belongs: The FAA's Labor Exemption* (unpublished draft on file with the author). The Supreme Court in *Misco* seemed to assume that the FAA was not directly applicable to collective agreements, stating that "federal courts have often looked to the [FAA] for guidance in labor arbitration cases." 484 U.S. at 40 n.9 (emphasis supplied).

<sup>51</sup>9 U.S.C. §1 *et seq.* (1994).

the FAA's coverage of an individual worker's hiring arrangements,<sup>52</sup> Professor Feller maintains that collective bargaining agreements are not themselves "contracts of employment," because typically they only establish rules of employee conduct and do not create individual hiring agreements. Union-management contracts would therefore not be excluded under section 1 of the FAA, and the statute's terms should govern. If that view prevails, judicial review of labor arbitration awards under collective bargaining agreements could be sharply limited. Section 10 of the FAA provides for vacating arbitral awards only in cases of fraud, corruption, or misconduct on the part of the arbitrator, or an exceeding of, or incomplete exercise of, the powers granted the arbitrator. Nothing is said about an award's "drawing its essence" from the parties' contract. Review on the merits—even on the grounds of "irrationality"—is simply not authorized. FAA finality may well be more final than *Enterprise* finality.

### Contract "Reading" as Contract Interpretation

From what I have said, judges should have an easy time enforcing most arbitral awards. Instead, they make it hard on themselves. If they would just take our word for what a contract means, they would have far fewer problems.<sup>53</sup> We are the ones with the tough job. How should arbitrators go about divining the parties' "intent" when the reality is that they never contemplated the particular issue that has now arisen? What do we do when the "plain meaning" conflicts with bargaining history or established practice?

Two splendid articles by our colleagues Carlton Snow and Richard Mittenhal—do I dare apply that overused term "definitive" to them?—have said nearly all that needs to be said about plain meaning and past practice. Carlton is, for him, uncharacteristically blunt: "Arbitrators' continued invocation of the plain meaning rule is anomalous in light of the trend to reject the rule

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<sup>52</sup>The Ninth Circuit has recently held that §§1 and 2 of the FAA exclude all workers' "contracts of employment" from coverage. *Circuit City Stores v. Adams*, 194 F.3d 1070, 81 FEP Cases 720 (9th Cir.), cert. granted, 68 U.S.L.W. 3536 (U.S. 2000). Most courts of appeals are to the contrary, holding that only the contracts of employees in transportation industries who are "engaged in" commerce are exempt. See *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1086 n.6, 161 LRRM 2403 n.6 (9th Cir. 1999), citing authorities. Compare Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 Chi.-Kent L. Rev. 753, 760–62 (1990), with Finkin, *Commentary*, 66 Chi.-Kent L. Rev. 799–803 (1990).

<sup>53</sup>The courts of course will still have to examine the arbitrator's authority and conduct, and the award's compliance with law and "well-defined" public policy.

by the courts, the U.C.C. [Uniform Commercial Code], the Restatement [of Contracts], and treatise writers.”<sup>54</sup> Dick was prepared to declare, almost 40 years ago, that past practice “may be used to clarify what is ambiguous, to give substance to what is general, and perhaps even to modify or amend what is seemingly unambiguous.”<sup>55</sup> The rest of my remarks will mostly be embroidery upon the lessons of these masters.

Despite the teachings of Snow and Mittenthal, numerous arbitrators of high repute have accepted or at least paid lip service to the plain meaning rule and its benighted first cousin, the parol evidence rule.<sup>56</sup> In most cases this may cause little harm, at least as to the result. After all, we properly begin our interpretation of a collective bargaining agreement with the language of the contract, and often we can end there. But one of the great modern state supreme court justices, Roger Traynor of California, put his finger on the problem when he said:

A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.<sup>57</sup>

Put differently, if fidelity to the parties’ intent (or their putative intent about a problem that they never anticipated) is the touchstone of sound contract interpretation, the *a priori* rejection of any

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<sup>54</sup>Snow, *Contract Interpretation*, 55 Fordham L. Rev. 681, 704 (1987). See also Garrett, *Contract Interpretation: I. The Interpretive Process: Myths and Reality*, in *Arbitration 1985: Law and Practice*, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), 121, 125–28.

<sup>55</sup>Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy*, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Pollard (BNA Books 1961), 30–31, reprinted in 59 Mich. L. Rev. 1017 (1961). See also Mittenthal, *Arbitration Classics: II. The Ever-Present Past*, in *Arbitration 1994: Controversy and Continuity*, Proceedings of the 47th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 184; Aaron, *The Uses of the Past in Arbitration*, in *Arbitration Today*, Proceedings of the 8th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1955), 1.

<sup>56</sup>*E.g.*, *Gibson Refrigerator Co.*, 17 LA 313, 317 (Platt 1951); *Thunderbird Hotel*, 69 LA 10, 13 (Weiss 1977); *Merchandise Mart Properties*, 105 LA 704, 709 (Daniel 1995). Under the parol evidence rule (a rule of substantive law, not evidence), a writing intended by the parties as the complete and final integration of their contract may not be contradicted by any prior agreement or by any contemporaneous oral agreement. But there are numerous qualifications and exceptions. Perhaps most important, parol evidence is admissible for the purpose of interpreting the contract itself. 3 Corbin, *Corbin on Contracts* §§573, 579 (West 1960), 356–70, 412–31.

<sup>57</sup>*Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 37, 442 P.2d 641 (1968).

evidence reasonably probative of that intent cannot be justified.<sup>58</sup> In collective bargaining, what I would call “contextual interpretation” is likely to be grounded in evidence concerning negotiating history and past practice.

In recent decisions, arbitrators have frequently been prepared to look behind what might appear to be the plain meaning of the written instrument to discern intent from bargaining history and other parol evidence.<sup>59</sup> Of course, arbitrators sometimes play it safe by finding an ambiguity in the language as written, which makes their resort to extrinsic evidence quite conventional. But the arbitrators’ ambiguity is often the parties’ clear and unambiguous provision, sustaining the latter’s respective opposing positions.

Logically there seems no reason not to take a final step. If the parties, for reasons sufficient unto themselves—for example, to conceal trade secrets from the employer’s competitors—decided to cloak certain provisions of the collective agreement in a private code, an arbitrator should entertain evidence to that effect, however clear and unambiguous the language might otherwise appear. Professor Corbin is in accord.<sup>60</sup> Needless to say, in any case where one party alleges and the other denies the use of such a private code, the arbitrator is going to be skeptical that ordinary English has been thus stood on its head, and demand pretty convincing proof of the claim.

That brings us to what I consider the most practical argument in favor of the plain meaning rule—the time and cost of trying to prove that what seems on its face clear and unambiguous is not. Yet here, as in so many other instances, I believe that the solution has to be the sound discretion of the arbitrator.<sup>61</sup> I would not reject out

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<sup>58</sup>*Cf.* 5 Corbin, Corbin on Contracts §24.9, ed. Perillo (Michie rev. ed. 1998), 59 (“Interpretation Requires the Weighing of Evidence, Not Its Exclusion”).

<sup>59</sup>*E.g.*, *CBS Inc.*, 103 LA 596, 599 (Christopher 1994); *Malta Wood Windows & Doors*, 108 LA 1066, 1070–72 (Sharpe 1997); *Meadow Gold Dairies*, 110 LA 865, 870 (Bognanno 1998); *Fors Farms*, 112 LA 33 (Cavanaugh 1999); *Akzo Nobel Salt, Inc.*, 113 LA 645, 649–50 (Goldberg 1999). *Cf.* *Union Foundry Co.*, 113 LA 63 (Baroni 1999). *But cf.* *Mason City Community Sch. Dist.*, 109 LA 1125 (Hoh 1997); *Baltimore Sun Co.*, 103 LA 363, 370 (Cushman 1994).

<sup>60</sup>*See* 5 Corbin, Corbin on Contracts §24.8, ed. Perillo (Michie rev. ed. 1998), 55 (“Proof of the use of such a [private] code should determine interpretation even though it was invented on the spur of the moment for the purposes of just one contract.”).

<sup>61</sup>Arbitral discretion in discipline and contract interpretation cases has been perceptively explored in Dunsford, *Arbitral Discretion: The Tests of Just Cause: Part I*, in Arbitration 1989: The Arbitrator’s Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), 23; Mittenthal & Bloch, *Arbitral Implications: Hearing the Sounds of Silence: Part I*, in Arbitration 1989: The Arbitrator’s Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), 65.

of hand an offer to prove that the apparently clear and unambiguous was in fact intended to mean something totally different. But I would refuse proffered evidence that merely reflected one party's internal, uncommunicated understandings of contract terms, and I would give short shrift to testimony or exhibits that were vague and not directly on target. The language finally chosen by the parties to embody their agreement is entitled to that much respect.

Today's major issue concerning past practice is whether it can modify or override clear contractual language to the contrary. My sense is that a long-standing and well-accepted practice may prevail even over a "clear" and "express" provision in the agreement.<sup>62</sup> There is also substantial authority, however, that past practice cannot trump an unambiguous contract term.<sup>63</sup> Employers have responded to the encroachments of past practice by seeking various types of "zipper" clauses, designed to make the final written agreement the exclusive source of employee rights. Arbitrators are divided on the efficacy of this approach.<sup>64</sup>

Unions undoubtedly invoke past practice more often than employers in an effort to vary the literal contract language, but that is by no means universally true. My survey of recent arbitration decisions on past practice revealed several decisions in which employers profited from practices contrary to the contract terms.<sup>65</sup> In one rather unusual case, an employee sought the equalization of overtime on the basis of a contract provision, and the employer defended by relying on a long-standing practice. The arbitrator

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<sup>62</sup>*E.g.*, *Rexroth Corp.*, 101 LA 94, 97-98 (Bowers 1993) (40 years without 15 minutes for lunch); *Coca-Cola Bottling Co. of Mich.*, 104 LA 705, 708 (Shanker 1995) ("waiver" of specified times for lunch); *Georgia-Pacific Corp.*, 108 LA 43, 46-47 (Nicholas 1997) (firing for intoxication without referral to assistance plan); *Western Reserve Care Sys.*, 109 LA 984, 986-87 (Duff 1997) (private duty nurses allowed in operating room). *Cf. Albertson's, Inc.*, 106 LA 897 (Kaufman 1996) (across-the-board pay increases); *Ralphs Grocery Co.*, 112 LA 449 (Gentile 1999) (19-year practice of verbal warning as first disciplinary step; contract "ambiguous"); *T.J. Maxx*, 113 LA 533 (Richman 1999) (overtime for probationary employees; contract "ambiguous").

<sup>63</sup>*E.g.*, *National Uniform Serv.*, 104 LA 901 (Klein 1995) (denial of holiday pay); *Motor Appliance Corp.*, 106 LA 484, 487 (Suardi 1996) (ban on radios in plant); *Sanderson Plumbing Prods.*, 106 LA 535, 541-43 (Howell 1996) (timing of vacation requests); *Rice Food Mkts.*, 106 LA 726, 731-32 (Marcus 1996) (offense committed one day after "accountability" period); *Robinson Township Mun. Auth.*, 109 LA 984, 986-87 (Duff 1997) (switch of payday). *Cf. ITT Higbie Baylock*, 105 LA 1084, 1087 (Florman 1996) (plantwide ban on smoking); *Earthgrains Co.*, 112 LA 170, 173-76 (Grooms 1999) (consecutive vacation days).

<sup>64</sup>*Compare Village of Bourbonnais*, 113 LA 332 (Traynor 1999) (zipper clause prevails), *with Albertson's, Inc.*, 106 LA 897 (Kaufman 1996), and *Donaldson Co.*, 113 LA 723 (Kessler 1999).

<sup>65</sup>*See, e.g., Rexroth Corp.*, *supra* note 62; *Western Reserve Care Sys.*, *supra* note 62.

granted the grievance but, in deference to the past practice, denied any back pay.<sup>66</sup>

All these past practice cases are highly fact-specific. Generalizations are hazardous. But in my view, two fundamental principles are apposite. First, any contract, including a collective bargaining agreement, is subject to amendment by the parties to it. Second, for a practice to become sufficiently well established to be binding on the parties, it must meet the usual criteria of (1) clarity, (2) consistency, (3) longevity, and (4) mutual acceptability.<sup>67</sup> Mutual acceptability is especially crucial if the practice is claimed to have superseded a clear, express contract provision to the contrary. If all the conditions are properly met, however, the practice should prevail. The parties are in control of their agreement and, absent statutory or contractual<sup>68</sup> restrictions, they can fashion it or amend it just as well by deeds as by words. Arbitrators are simply following the parties' lead in acting accordingly.

#### **“Defensive” Treatment of External Law and Public Policy**

Let me append a few words about the treatment of arbitration cases presenting issues of external law or public policy generally. Once a great debate raged within the Academy over what an arbitrator should do when confronted with a conflict between the terms of a collective bargaining agreement and the requirements of external law.<sup>69</sup> I still believe that, theoretically, in the very rare

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<sup>66</sup>*Martin-Marietta Corp.*, 103 LA 48 (Girolamo 1994).

<sup>67</sup>Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy*, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Pollard (BNA Books 1961), 32, *reprinted in* 59 Mich. L. Rev. 1017 (1961). Absent an applicable zipper clause, other appropriate language of termination, or substantially changed circumstances, an existing past practice is ordinarily carried forward when a new contract is executed. Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1499 (1959).

<sup>68</sup>The traditional common law rule is that even by explicit contractual language, the parties cannot prevent a subsequent modification of the contract by oral or other unwritten means. 6 Corbin, *Corbin on Contracts* §1295 (West 1962); Farnsworth, *Contracts* §7.6 (Aspen Publishers, Inc. 2d ed. 1990).

<sup>69</sup>Compare Howlett, *The Arbitrator and the NLRB: II. The Arbitrator, the NLRB, and the Courts*, in *The Arbitrator, the NLRB, and the Courts*, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Jones (BNA Books 1967), 67, 83, 85 (follow the law), with Meltzer, *Ruminations About Ideology, Law, and Arbitration*, in *The Arbitrator, the NLRB, and the Courts*, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Jones (BNA Books 1967), 1, 16, 19 (follow the contract). See also Mittenthal, Meltzer, Howlett, and St. Antoine, *The Role of Law in Arbitration*, in *Developments in American and Foreign Arbitration*, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1968), 42, 58, 64, 75 (four separate papers).

case where there is an irreconcilable clash between contract and law (or “dominant public policy”), and the parties have not authorized the arbitrator, expressly or impliedly, to take external law into account, the arbitrator should follow the contract and ignore the law. That is the parties’ commission and the limit of the arbitrator’s authority.<sup>70</sup>

Nonetheless, as a practical matter, external law and public policy are now daily grist for the arbitration mills. This is especially true of civil rights statutes and the vital protections they provide against discrimination in employment on the grounds of race, sex, religion, age, disability, and the like. In the collective bargaining context, arbitrators are constantly applying antidiscrimination clauses covering such categories. An arbitral award in these situations, where statutory rights are implicated, is of course not entitled to the same final and binding effect that is customary in pure contract arbitrations.<sup>71</sup> But under the now-famous footnote 21 in *Gardner-Denver*, an arbitration decision in discrimination cases may be admitted in any subsequent court proceedings, and accorded “great weight” if certain conditions are met. Those include “procedural fairness,” contractual provisions that “conform substantially with [the applicable statute],” the “special competence of particular arbitrators” and “adequacy of the record.”<sup>72</sup>

All of us, advocates and arbitrators alike, have a professional responsibility to ensure compliance with these Supreme Court standards in mixed contractual-statutory arbitrations. Employers, unions, and employees should not have to spend time and money wastefully. To the extent the law allows, arbitral awards ought to constitute a final disposition of the discrimination claims. In practice much will depend on the losing party’s assessment of its chances of securing a more favorable result in the courts.

To promote finality, advocates, in preparing their arguments, and arbitrators, in drafting their decisions, must keep the *Gardner-Denver* factors in mind. I am going to take “procedural fairness” for

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<sup>70</sup>The Supreme Court seems in accord. An arbitral award is legitimate only if it “draws its essence” from the labor agreement, and arbitrators exceed the scope of the submission if they base their decision on their view of the “requirements of enacted legislation.” *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2423 (1960).

<sup>71</sup>*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974); cf. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 159 LRRM 2769 (1998).

<sup>72</sup>415 U.S. at 60 n.21.

granted. The others require deliberate attention. The antidiscrimination provisions of the contract may closely track the corresponding statute, but there are now extensive judicial glosses on all this legislation. The advocates should educate the arbitrator on the nuances of their particular case. In turn the arbitrators should demonstrate their awareness of the applicable law and pertinent court interpretations. That will also serve to establish their “special competence.” This could require more than the two or three pages often specified for expedited arbitrations. In an important and complicated case the parties may have to reconsider unrealistic page limitations. Sticking to rigid rules might ultimately prove, in terms of both the time and money of a later lawsuit, “penny-wise and pound-foolish.” For their part, arbitrators may have to ask themselves whether they can in good conscience handle a discrimination case without an opportunity for sufficient legal analysis to support their conclusions.

The final need is for an “adequate record.” I am no fan of costly verbatim transcripts in a fairly routine arbitration. Even in a sensitive civil rights case, a comprehensive recital of all the material testimony and other evidence in the arbitrator’s opinion may suffice. Especially if the facts are complicated or the testimony is likely to be conflicting, however, the parties and the arbitrator might be wise to employ a relatively cheap but efficient tape recorder, or even to arrange for a full-fledged transcript. Thus, in all the steps of a discrimination case, right through to the writing of any briefs and the decision, the advocates and the arbitrator should act “defensively.” They ought to envisage a federal judge looking over their shoulder, scrutinizing their every move and testing it against the *Gardner-Denver* criteria. That should be enough to sharpen up everybody’s skill at contract (or statute) reading!

An analogous approach should be followed in the “public policy” cases. If a sexual harasser or a drug offender in a safety-sensitive job is involved, the advocates and in particular the arbitrator ought not turn a blind eye to the policy implications. Judicial review is a distinct possibility. The arbitrator would enhance the likelihood of the award’s being sustained by forthrightly confronting the policy issues and explaining convincingly why the result reached is compatible with the public good. This is a long way from the almost totally autonomous, private domain of labor arbitration we once knew, but I think it accurately reflects the demands of the new age in which we find ourselves.

### Conclusion

In interpreting and enforcing labor agreements, the roles of arbitrators and courts are very different. The arbitrator is the parties' formally designated contract reader. Absent such abnormal circumstances as fraud, corruption, or an exceeding of authority, the arbitrator's award should be accepted by a reviewing court as if it were the parties' own stipulated and definitive interpretation of the agreement. The award of course is subject to the same kind of challenge on the grounds of illegality or violation of public policy as would have been the contract itself, had it come to court directly without the intervention of arbitration. But that should also be the limit of judicial review. If the parties themselves could lawfully have done what the arbitrator has ordered, the award should be affirmed and enforced.

In construing and applying the collective agreement, the arbitrator will naturally employ a variety of traditional interpretive tools. I have focused on two controversial areas. First, I would reject the broad reach of the plain meaning rule. Regardless of whether contract language appears clear and unambiguous on its face, I would admit all credible evidence, within the constraints of procedural feasibility at a hearing, that goes to show the actual intent of the parties. Second, in spite of seemingly clear, unambiguous contract terms, I would accept proofs of well-established, mutually accepted practices that indicate a modification or amendment of those provisions. In so doing I am most emphatically not trying to elevate the arbitrator over the parties. My aim is to be faithful to the parties' manifest intent in the deepest, truest sense.

Finally, as a person who treasures both tradition and autonomy, I can understand and sympathize with all those who lament the passing of a time when unions, employers, and arbitrators inhabited a self-made world of labor relations, for the most part untouched by public law and regulation. That day is gone. Yet we arbitrators have always operated within certain confines, namely, the parties' own contractual and bargaining frameworks. The difference is that the parties generally had no resort from our "final and binding" pronouncements, except to dismiss us from their panels. Today, a federal judge can bring us up short with a one-line order.

We can adapt to this new world either grudgingly or gracefully. My hope is we meet it as a challenge to the best that is within us. I am confident no member of this Academy lacks the capacity to

handle most of the applicable statutes and other law and policy. Take, for example, the concept of “discrimination” under federal law. It is subtle and elusive. But it is not the Internal Revenue Code. We have been dealing with “discrimination” under union-employer contracts for decades. We can deal with it under public law, too. Thus, we should not flinch from having to change some of our customary ways. Change, after all, is the law of growth and survival, and we ignore that truth at our peril.