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## THE USE AND ABUSE OF PRECEDENT IN LABOR AND EMPLOYMENT ARBITRATION

*Theodore J. St. Antoine\**

As he did so often with legal problems, Oliver Wendell Holmes put his finger on the key to the problem of precedent with a memorable assertion. Said he: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."<sup>1</sup> Notice that Holmes did *not* say it is a bad thing for a rule to have an ancient lineage. The question is whether the rule that may have made sense when Henry IV reigned, or when the Wagner Act was passed, has stood the test of time. The larger theme of this Institute is "Updating *Outdated* Policies and Procedures." That similarly suggests that the rules and practices requiring revision are those no longer serving their original purposes or not meeting today's quite different needs. The passage of time alone does not discredit a particular principle. What was wise and practical six centuries ago in England, or one century ago in this country, may still be so here today. My task and that of this Institute is to try to draw some of the necessary lines between change and continuity in various contexts. One must also determine whether the facts of a prior case are sufficiently like those of the case now to be decided that the former may properly serve as precedent.

Faculty members at my home institution, the University of Michigan Law School, and I personally have had two particular occasions to ponder the role of precedent in labor or employment arbitration. Frank Elkouri's 1951 S.J.D. dissertation at Michigan was the basis for the first edition of what has become the veritable "bible" of the labor arbitration profession, *How Arbitration Works*, now in its seventh edition.<sup>2</sup> There may have been rumblings of discontent about the prospect of such a publication about that time.<sup>3</sup> In any event, Frank Elkouri's and my mutual mentor at Michigan,

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<sup>1</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). On precedent generally, see BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 142-67 (1921); William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 SUP. CT. HIST. SOC'Y Y.B. 22; Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966); Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012).

<sup>2</sup> FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* (Kenneth May, Patrick M. Sanders & Michelle T. Sullivan, 7th ed. 2012).

<sup>3</sup> See Edgar A. Jones, Jr., *Labor Arbitration and Stare Decisis: Some Introductory Comments*, 4

Professor Russell A. Smith, a past President of the National Academy of Arbitrators (NAA), penned these prescient words in his Foreword to that first edition:

The next decade should disclose whether the recorded and published decisions of arbitrators have developed some generalized thinking about collective bargaining problems. . . . Some may view this prospect with alarm, based on a fear of stereotyped thinking and undue reverence for precedent. This attitude seems to me to show a lack of understanding of the judicial process. It is simply contrary to every canon of progress to refuse in this field or any other to conserve the accumulated wisdom and experience of the past and make such use of it for the solution of present problems as sound judgment may dictate.<sup>4</sup>

In the mid-1990s, three Presidents<sup>5</sup> of the NAA inveigled me into becoming Editor of a proposed shorter statement of the major principles developed in labor arbitration. A special objective was to provide a reference guide for inexperienced persons moving into the new and burgeoning field of so-called “employment” arbitration, that is, arbitration between employers and employees in nonunion settings. The very same fears of “stereotyped thinking” identified by Russell Smith were voiced by a number of Academy members. One of the most knowledgeable and revered, Professor Benjamin Aaron of the UCLA School of Law, worried that such a work would be a “*vade mecum*” (literally, “go with me”), a handy manual that could easily lend itself to giving cookie-cutter answers to complex, individualized questions.<sup>6</sup>

When the decision was finally made to proceed with *The Common Law of the Workplace* in 1998, I took care in the Preface to address these misgivings:

We are definitely *not* trying to set forth definitive rules. A large segment of arbitral decisionmaking depends on the contractual relationship of particular parties, and the judgment of the particular arbitrator they have selected to resolve their specific dispute. Indeed, this is so true that some persons, quite understandably, have doubted the wisdom of a project like the present one. Nonetheless, many of us believe that the experience of the past half century has yielded some generally accepted approaches

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UCLA L. REV. 657, 658 (1957) (“*Stare decisis*, it is feared by some, would prevent, or at best inhibit, the capacity of arbitrators operating under a collective bargaining agreement to reach sound decisions responsive to the justice of the case irrespective of abstract notions of logic.”).

<sup>4</sup> Russell A. Smith, *Foreword* to HOW ARBITRATION WORKS, *supra* note 2, at xi (1952).

<sup>5</sup> Arnold M. Zack, J.F.W. (Ted) Weatherill, and George Nicolau.

<sup>6</sup> Conversation with Benjamin Aaron, Professor, UCLA School of Law (circa 1996).

toward commonly encountered problems, or at least some widely recognized alternative ways of thinking about them. We feel this is knowledge worth sharing. When reasonable differences of opinion exist among reputable arbitrators, we shall do our best to point those out.<sup>7</sup>

Today I believe that the vast majority of arbitrators and advocates would agree that precedent has a salutary role to play in the arbitral process.<sup>8</sup> The situation is different, of course, from the function of precedent or *stare decisis* (translated by a fabled country lawyer as “the mistake stands!”) in the judicial system. There, the hierarchy of courts calls for lower courts to treat as binding the decisions rendered by higher courts. And to maintain the benefits of uniformity, predictability, and stability in the legal system, even the superior courts are reluctant to overturn their own precedent except for some compelling reason.<sup>9</sup> As free-wheeling a jurist as Justice Douglas was, he was prepared to say: “*Stare decisis* serves to take the capricious element out of law and to give stability to a society.”<sup>10</sup> At least in an operational sense, however, all arbitrators stand as equals. And, at least when not dealing with the same parties involved in the establishment of some particular precedent, an arbitrator ordinarily does not feel bound in a later case by a rule adopted earlier by another colleague, no matter how distinguished the latter may be. Arbitrators regard themselves as being appointed by the parties to decide their particular dispute in accordance with their chosen arbitrator’s own best judgment.

Yet even when not bound in any technical sense, an arbitrator may be strongly influenced by a well-reasoned decision in a prior case whose facts are closely similar to the present one. Why should the second arbitrator not take advantage of the anguished hours spent by a colleague in working his or her way through to a solution that seems entirely sensible? First and foremost, we assume that the second decisionmaker is indeed profiting from the meritorious contribution of a capable fellow arbitrator. Also, and not to be discounted, the very congruence of the results may provide a certain

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<sup>7</sup> Theodore J. St. Antoine, *Preface to the First Edition* of NAT’L ACAD. OF ARBITRATORS, THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS, at ix–x (Theodore J. St. Antoine ed., 2d ed. 2005).

<sup>8</sup> See generally *Precedential Value of Arbitral Awards*, in HOW ARBITRATION WORKS, *supra* note 2, at 11-1 to 11-36; Carlton J. Snow, *Contract Interpretation – Use of Prior Arbitration Awards*, in THE COMMON LAW OF THE WORKPLACE, *supra* note 7, § 2.16, at 85–86; Ken Jennings & Cindy Martin, *The Role of Prior Arbitration Awards in Arbitral Decisions*, 29 LAB. L.J. 95 (1978); Jerre S. Williams, *Arbitration in Court: Judging the Judges*, 1985 PROC. THIRTY-EIGHTH ANN. MEETING NAT’L ACAD. ARBITRATORS 21 (Walter J. Gershenfeld ed., 1986).

<sup>9</sup> See Douglas, *supra* note 1, at 736.

<sup>10</sup> *Id.*

comfort to the contesting parties in the two cases. After all, it appears that this was not just a matter of the luck of the draw as to who got which arbitrator. The mere accord of the two minds lends a certain air of objectivity and soundness to the ultimate determination. Finally, even if there was some arbitrariness in the initial judgment and no marked superiority in the arguments on one side or the other existed, much time, effort, and cost will have been saved by going along with a prior ruling. In those ways something like a body of arbitral jurisprudence is constructed. Generations of arbitrators and advocates, for example, have undoubtedly been spared countless hours of wrangling by quietly accepting the notion that, contrary to what the courts would say, an employer goes first in its presentation and has the burden of proof in an arbitration where an employee and a union are grieving a discharge or discipline.

Professor Edgar A. (Ted) Jones of the UCLA School of Law introduced a systematic study of arbitration awards to determine whether some consistent synthesis could be established.<sup>11</sup> For example, one analysis concluded that union grievances on employer subcontracting are generally upheld on the basis of the implied contractual limitation of objective “good faith” when the company terminates its regular employees, and when the subcontracted work is performed on the company premises much as before but now by employees of the subcontractor.<sup>12</sup> On the other hand, grievances are consistently denied when “the company abolishes the operation in its plant entirely, and sends the work out to a sub-contractor.”<sup>13</sup> Even so, one could imagine that an arbitrator’s appraisal of the limits on a company’s right to subcontract might be affected by competitive conditions in an industry or a union’s capacity to offer offsetting wage concessions.

Despite all the extensive use of precedent, eminent arbitrators have continued to offer cautionary words about an uncritical reliance on published awards. One of the most famous, Peter Seitz, gave several reasons: “[T]he most notable and highly respected arbitrators . . . only very infrequently submit their decisions for publication, and . . . new entrants into the profession seek publication of as many of their decisions as possible.”<sup>14</sup> Indeed, the paucity of published decisions by leading

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<sup>11</sup> Jones, *supra* note 3, at 657.

<sup>12</sup> Bruce Beckman, Note, *Labor Law: Arbitration: Right to Sub-contract: Limitations Implied from the Bargaining Agreement*, 4 UCLA L. REV. 662, 663 (1957).

<sup>13</sup> *Id.* at 663–64. On the duty to bargain about subcontracting under the National Labor Relations Act, 29 U.S.C. § 158(d) (2012), compare *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), with *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981). See also *Dubuque Packing Co., Inc.*, 303 N.L.R.B. 386 (1991), *enforced sub nom.* *United Food & Commercial Workers Int’l Union, AFL-CIO, Local No. 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993).

<sup>14</sup> Peter Seitz, *The Citation of Authority and Precedent in Arbitration (Its Use and Abuse)*, 38 ARB.

arbitrators was one of the major motivations for the National Academy of Arbitrators in producing *The Common Law of the Workplace*. The Academy consists of about 640 of the preeminent labor arbitrators in the United States and Canada.<sup>15</sup> Seitz continued that “one can find an arbitration decision on either side of almost any issue that arises in grievance arbitration . . . not only with respect to different arbitrators . . . . The best arbitrators . . . have been known to reverse themselves . . . .”<sup>16</sup> Furthermore, said Seitz: “If [arbitrators] read and check all citations and quotations [in several pages of a brief], they will expend time and effort and augment the cost of the arbitration to an extent that some parties will find wholly unacceptable.”<sup>17</sup> Seitz concluded: “Brief writers would do well to recognize the fact that one sound, well-reasoned and persuasive argument is worth a thousand citations of arbitral authority as precedents.”<sup>18</sup>

Seitz may somewhat overstate his case but his views are well worth pondering. Shortly after *The Common Law of the Workplace* was published, a fellow arbitrator approached me to express appreciation for the help the work had provided him in reaching a recent decision. He cited a perfectly valid general principle from our text on which he had relied. But he then proceeded to relate the facts of his case, and I was appalled to realize he had totally misapplied the principle. In that instance the misgivings of Ben Aaron and Peter Seitz were quite justified. Naturally, I like to think this was a rare misuse and not a common occurrence.

My own recommendations to both arbitrators and advocates about using precedent would vary greatly, depending on the particular facts of each case. If the charge is theft or assault on a supervisor, everything will probably turn on the evidence presented about the current incident, and the citation of precedent will largely be superfluous. But if the issue is subcontracting, absenteeism, or alleged discrimination against a handicapped employee, a look at *Elkouri* or *The Common Law of the Workplace* or some published awards may help to place the problem in a broader perspective. Still, when considering prior arbitral decisions, one must be careful to note differences in the nature of the industries, the size and location of the plants or shops, the age and experience and work records of the employees involved, and even the arbitrator’s reputation and the date of the award. Societal mores and attitudes, at least on certain subjects, can

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J. 58, 60 (1983). See also Alvin B. Rubin & Elven E. Ponder, *The Ostrich and the Arbitrator: The Use of Precedent in Arbitration of Labor-Management Disputes*, 13 LA. L. REV. 208, 209 (1953).

<sup>15</sup> See *Membership List*, NAT’L ACAD. OF ARBITRATORS, [http://naarb.org/member\\_list.asp](http://naarb.org/member_list.asp) (last visited May 5, 2014).

<sup>16</sup> Seitz, *supra* note 14, at 60.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 61.

change markedly in a short period of time. Think once-acceptable coarse "shop talk" versus today's treatment of sexual harassment in the workplace.<sup>19</sup> To make the most effective use of precedent, advocates should also avoid string citations or the mere recital of a couple of quotable quips. A good brief (or closing argument) should provide enough *facts* and contract language to show just how the cited case or cases relate to the case now before the arbitrator.

When arbitrators confront a prior arbitral award dealing with the same parties now before them, and especially with the same contract language between those parties, the proceedings take on much more of the formal trappings of *stare decisis*, *res judicata*, and collateral estoppel as those doctrines operate in the civil courts.<sup>20</sup> That is true even though, generally, arbitrators still do not feel technically bound in the same way as would a judge in like circumstances. As already discussed, the use of precedent and the concept of *stare decisis*—drawing on the decision reached and the principles enunciated in previous cases involving similar issues and similar facts—can apply to a current dispute regardless of whether the parties are the same or different. *A fortiori*, the values of stability and predictability would argue for following precedent if the very same parties are again arguing over similar facts and similar issues.

The screws tighten even further if the same parties are attempting to reopen a particular *claim* (for example, to premium pay for a specific period of time) or a particular *issue* (for example, eligibility for premium pay in general) that has already been decided between this union and this employer. In the interest of putting controversies at an end, the doctrine of *res judicata* (it has been decided) would bar the relitigation of the *claim* and the doctrine of collateral estoppel (precluded by one's prior related action) would bar the relitigation of the *issue*.<sup>21</sup> In each instance *res judicata* or collateral estoppel would have to arise from the final and binding decision of a tribunal having appropriate jurisdiction and authority over the parties, the claims, and the issues in dispute. The tribunal that made the prior decision need not be another arbitrator; it could also be a court or an

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<sup>19</sup> See Lisa I. Fried-Grobin, *Disciplining Sexual Harassers in the Unionized Workplace: Judicial Precedent Is Influencing Arbitrator Attitudes, Awards*, 77 CHI.-KENT L. REV. 823 (2002).

<sup>20</sup> See, e.g., DENNIS R. NOLAN, *LABOR AND EMPLOYMENT ARBITRATION IN A NUTSHELL* 285–90 (1998); Jay E. Grenig, *Stare Decisis, Res Judicata, and Collateral Estoppel and Labor Arbitration*, 38 LAB. L.J. 195 (1987); Timothy J. Heinsz, *Grieve It Again: Of Stare Decisis, Res Judicata and Collateral Estoppel in Labor Arbitration*, 38 B.C. L. REV. 275 (1997); Timothy J. Heinsz, *Other People's Messes: The Arbitrator as Cleanup Hitter*, 1994 PROC. OF THE FORTY-SEVENTH ANN. MEETING NAT'L ACAD. OF ARBITRATORS 236 (Gladys Gruenberg ed., 1994).

<sup>21</sup> Grenig, *supra* note 20, at 195–96.

administrative agency. But both the union and the employer must generally be parties in the prior case for these preclusion doctrines to apply. Furthermore, *res judicata* (claim preclusion) does not apply when there are different employees as individual grievants.<sup>22</sup> Each is said to deserve his or her “day in court” on each set of facts. To maintain stability in labor relations, however, collateral estoppel (issue preclusion) may still be applicable if the union and the employer are the same in all grievances.

Arbitrators tend to be less deferential to precedent than courts, even as to questions of *res judicata* or collateral estoppel affecting the same parties. That is part of the tradition that emphasizes the highly individualistic nature of arbitration, with the parties supposedly desirous of the judgment of this particular arbiter. My sense is this tradition may now be more constrained than formerly, with many parties having a heightened concern about stability and predictability. There is also judicial authority that principles of *res judicata* and collateral estoppel do apply to labor arbitration.<sup>23</sup> Yet, in a leading U.S. Supreme Court case on the subject, *W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*,<sup>24</sup> the Court concluded a second arbitrator could interpret a collective bargaining agreement as authorizing him to determine that a prior award regarding seniority was not binding in his decision.<sup>25</sup> Courts of appeals have seemed to follow suit in ruling that *res judicata* in labor arbitration is more a matter of contract interpretation than a strict legal principle.<sup>26</sup> But there is judicial support for the notion that a second arbitrator may at least need to explain why a prior award is not being given “final and binding” effect, in accordance with the customary language in labor contracts concerning arbitral decisions.<sup>27</sup> Justification for not following a prior award may be “clear” or “serious” error or changed circumstances. The upshot is that arbitrators left to their own devices still have a good deal of flexibility, ranging along a spectrum from their individualized judgment to the rules of *res judicata* and collateral estoppel,

<sup>22</sup> *Id.* at 198–99.

<sup>23</sup> *See, e.g.,* Action Distrib. Co. v. Int’l Bhd. of Teamsters Local 1038, 977 F.2d 1021, 1025 (6th Cir. 1992); *see also* Carlton J. Snow, *An Arbitrator’s Use of Precedent*, 94 DICK. L. REV. 665, 671 (1990).

<sup>24</sup> *W.R. Grace & Co. v. Local Union 759, Int’l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757 (1983).

<sup>25</sup> *Id.* at 765.

<sup>26</sup> *See, e.g.,* UAW v. Dana Corp., 278 F.3d 548, 555–56 (6th Cir. 2002); *Indep. Lift Truck Builders Union v. NACCO Materials Handling Grp, Inc.*, 202 F.3d 965, 968 (7th Cir. 2000); *United Indus. Workers v. Gov’t of the V.I.*, 987 F.2d 162, 166 (3d Cir. 1993).

<sup>27</sup> *See, e.g.,* Hotel Ass’n of Washington, D.C., Inc. v. Hotel & Rest. Emps. Union, Local 25, AFL-CIO, 963 F.2d 388, 390 (D.C. Cir. 1992); *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1425 (8th Cir. 1986).



in dealing with previous awards involving the same parties. Unions and employers or employers and individual employees are certainly entitled, however, to provide in their agreements whether arbitral awards have precedential effect, although apparently few parties have done that.<sup>28</sup>

A remaining issue is the use of judicial precedent (court decisions) by labor and employment arbitrators. Now, everyone seems to agree, including the Supreme Court,<sup>29</sup> that an arbitrator can look to external law for guidance in interpreting a contract, either collective or individual. Most parties can be presumed to want their contract construed so as to ensure its legal validity. But for several decades, beginning in the late 1960s, a titanic debate raged within the NAA over one question: What should an arbitrator do when confronted by an irreconcilable conflict between the contract and applicable public law? The focus at first, I should mention, was on collective bargaining agreements, and conceivably the answer might be different for an individual employment contract. In any event, Professor Bernard Meltzer argued that arbitrators were commissioned to apply the contract; it is the source of all their authority; and they "should respect the agreement and ignore the law" when the two diverge.<sup>30</sup> Arbitrator Robert Howlett reasoned that "every agreement incorporates all applicable law" and so the law should prevail.<sup>31</sup> A year later Richard Mittenthal joined the fray, along with this interloper. Mittenthal preferred a practical approach and did not follow either Meltzer or Howlett to their rigidly logical conclusions. Staking out a "middle ground," he would allow an arbitral award to "permit conduct forbidden by law but . . . not require conduct forbidden by law."<sup>32</sup> As discussant, I sided with Meltzer in giving priority to the contract rather than to the law.<sup>33</sup> My purist view is that the arbitrator's job is to say what the contract calls for and to leave questions about enforcing the award to the courts. An award contrary to controlling law is no more enforceable than a contract contrary to controlling law.

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<sup>28</sup> Heinsz, *supra* note 20, at 286-88. Another approach is that of U.S. Steel and the United Steelworkers. They have an arbitration panel that has constructed its own elaborate body of precedent, which is generally followed in subsequent cases.

<sup>29</sup> *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597-98 (1960).

<sup>30</sup> Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 1967 PROC. OF THE TWENTIETH ANN. MEETING NAT'L ACAD. OF ARBITRATORS 1, 16 (Dallas L. Jones ed., 1967).

<sup>31</sup> Robert G. Howlett, *The Arbitrator, the NLRB, and the Courts*, 1967 PROC. OF THE TWENTIETH ANN. MEETING NAT'L ACAD. OF ARBITRATORS 67, 83, 85 (Dallas L. Jones ed., 1967).

<sup>32</sup> Richard Mittenthal, *The Role of Law in Arbitration*, 1968 PROC. OF THE TWENTY-FIRST ANN. MEETING NAT'L ACAD. OF ARBITRATORS 42, 50 (Charles M. Rehmus ed., 1968).

<sup>33</sup> Theodore J. St. Antoine, *Discussion*, 1968 PROC. OF THE TWENTY-FIRST ANN. MEETING NAT'L ACAD. OF ARBITRATORS 75, 77 (Charles M. Rehmus ed., 1968).

The Supreme Court is on record in seeming agreement with the pro-contract contingent. In *United Steelworkers v. Enterprise Wheel & Car Corp.*, it stated that an award “based solely upon the arbitrator’s view of the requirements of enacted legislation” would have “exceeded the scope of the submission.”<sup>34</sup> Furthermore, as a practical matter, it is not always that easy to discern what “the law” is.<sup>35</sup> And some of our best arbitrators are not lawyers. For all the furor over this issue, however, the whole affair may be something of a tempest in a teapot. Cases of a truly *irreconcilable* conflict between contract and law are probably quite rare. Today, many collective bargaining agreements expressly incorporate antidiscrimination statutes by reference or track statutory language in a way that invites resort to legislative or judicial sources. Arbitrators now find external law daily grist for their mills. Thus, one scholar has asked, understandably, whether it is time to declare Howlett the winner in the great debate.<sup>36</sup>

Thirty-seven years after the initial Meltzer–Howlett exchange, the battle was renewed before the NAA, with an important twist.<sup>37</sup> A panel of able, experienced management and union lawyers had some new, imaginative, and highly contrasting opinions to offer concerning an arbitrator’s use of public law in deciding a case. Said a management pair: “[F]ederal law today prohibits an arbitrator from considering or applying external law in arbitration proceedings absent an agreement by the parties to delegate that authority to the arbitrator.”<sup>38</sup> Responded union counsel: “[I]f I want the law to be considered, I word the issue in a way that I can argue external law

<sup>34</sup> *United Steelworkers*, 363 U.S. at 597.

<sup>35</sup> See, for example, *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), which overturned the holdings of six courts of appeals in more than thirty cases and the dicta of two other courts of appeals in significant rulings concerning the legitimacy of seniority systems under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(h) (2012).

<sup>36</sup> Martin H. Malin, *Revisiting the Meltzer-Howlett Debate on External Law in Labor Arbitration: Is It Time for Courts to Declare Howlett the Winner?*, 24 LAB. LAW. 1, 3 (2008). In a 2004 survey I conducted among NAA members, about a 2–1 majority said they would follow the contract rather than the law in the event of an irreconcilable conflict. But almost 60% also stated they would *not* order a party to violate what they deemed to be external law. That was the position of a third debater, Richard Mittenthal. See Theodore J. St. Antoine, *External Law in Arbitration: Hard-Boiled, Soft-Boiled, and Sunny-Side Up*, 2004 PROC. OF THE FIFTY-SEVENTH ANN. MEETING NAT’L ACAD. OF ARBITRATORS 185, 189–90 (Charles J. Coleman ed., 2005).

<sup>37</sup> St. Antoine, *supra* note 36; Marilyn Teitelbaum, *A Commentary on the External Law Papers*, 2004 PROC. OF THE FIFTY-SEVENTH ANN. MEETING NAT’L ACAD. OF ARBITRATORS 216 (Charles J. Coleman ed., 2005); Robert M. Vercurysse & Gary S. Fealk, *The Role of External Law in Arbitration and Judicial Review*, 2004 PROC. OF THE FIFTY-SEVENTH ANN. MEETING NAT’L ACAD. OF ARBITRATORS 202 (Charles J. Coleman ed., 2005).

<sup>38</sup> Vercurysse & Fealk, *supra* note 37, at 208–09 (citing *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80–81 (1998)); see also *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 262 (2009). *But cf.* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974).

under the contract. . . . ‘Did the employer violate the just cause clause of the contract by discharging the grievant because of her sex.’”<sup>39</sup> Those quotations are the product of topnotch advocates at work. Federal law or Supreme Court decisions do not really *prohibit* arbitrators from looking at external law in their decisions;<sup>40</sup> they merely keep a decision from relying solely on external law instead of the contract or from barring subsequent court access absent appropriate waiver of the right to sue. At the same time, the problem of contract versus external law can largely be finessed by phrasing the issue in contract terms incorporating statutory language, such as charging a violation of the standard just cause provision by a discharge “because of sex.”

In so-called mandatory arbitration, individual employees must agree, as a condition for getting or keeping a job, to arbitrate rather than to sue in all employment disputes.<sup>41</sup> That includes statutory civil rights claims. Necessarily, therefore, an arbitrator’s authority to apply external law in these cases will be coextensive with the employees’ waiver of their right to bring a court action on such grounds.

I conclude with a cautionary word, which I hope will also contain an encouraging note, especially for nonlawyers among the advocates and arbitrators in the audience. We have moved away from the day when analyzing and applying the parties’ labor or employment contracts was all that was required for arguing or deciding cases.<sup>42</sup> Regardless of the theoretical question of whether external law is formally incorporated into today’s contract provisions or remains technically separate, legislation and judicial decisions have become daily staples in the process of arbitration under both collective bargaining agreements and individual employment contracts. That means doing business with such mind-twisters as ERISA,<sup>43</sup> OSHA,<sup>44</sup> and the Family and Medical Leave Act,<sup>45</sup> along with a range of antidiscrimination statutes.<sup>46</sup> ERISA is indeed daunting, for lawyers and

<sup>39</sup> Teitelbaum, *supra* note 37.

<sup>40</sup> See *supra* note 29 and accompanying text.

<sup>41</sup> The Supreme Court sustained such agreements in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). See also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

<sup>42</sup> The classic, prescient treatment of this development is David E. Feller, *The Coming End of Arbitration’s Golden Age*, 1976 PROC. OF THE TWENTY-NINTH ANN. MEETING NAT’L ACAD. OF ARBITRATORS 97, 108–09 (Barbara D. Dennis & Gerald G. Sommers eds., 1976).

<sup>43</sup> Employment Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001–1461 (2012).

<sup>44</sup> Occupational Safety and Health Act, 29 U.S.C. §§ 651–78 (2012).

<sup>45</sup> Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601–54 (2012).

<sup>46</sup> See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2–2000e–17 (2012) (prohibiting discrimination by employers or unions because of race, color, religion, sex, or national origin); Age Discrimination in Employment Act of 1975, 42 U.S.C. §§ 6101–07 (2012); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–213 (2012).

nonlawyers alike. But most statutory cases before arbitrators will deal with alleged discrimination because of race, sex, age, disability, and so forth. Now, the concept of discrimination can be subtle and difficult at times, but it is not the Internal Revenue Code. In most instances the issue is primarily factual, and arbitrators for years have been handling charges of discrimination because of union activity (or the converse).

It would be a great loss for the arbitration profession, and for labor and employment relations generally, if our outstanding labor economists and industrial relations experts who do not happen to be lawyers were to drop out or be excluded from the field. I would say the same, of course, about those excellent laypersons, business agents and human resource specialists, who represent unions and employers. In my experience, both effective advocacy and sound decisionmaking depend ultimately on individual talents, total commitment, lots of hard work, and balanced judgment, rather than any particular set of professional credentials. More broadly, some will ask, whatever their expertise, whether labor relations will have any place for them in the years to come. It is true that union density in the private sector in this country has declined from about 35% in the mid-1940s to only 6.6% in 2012.<sup>47</sup> But labor organizations still represent almost 16 million employees, public and private, in the United States.<sup>48</sup> Moreover, we are always going to have employers and employees with us. And our foremost empirical expert on employment arbitration, Professor Alexander Colvin of Cornell, estimates that one-fourth to one-third of the nonunion workforce is covered by mandatory arbitration agreements.<sup>49</sup> There should be plenty of work for labor and employment specialists for the foreseeable future. I do hope my words will serve as a kind of “precedent” for persons now contemplating their career choices.

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<sup>47</sup> U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, USDL-13-0105, UNION MEMBERS — 2012 (2013). See also Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, N.Y. TIMES, Jan. 23, 2013, <http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html>.

<sup>48</sup> U.S. DEP'T OF LABOR, *supra* note 47.

<sup>49</sup> Alexander J.S. Colvin & Kelly Pike, *The Impact of Case and Arbitrator Characteristics on Employment Arbitration Outcomes*, 2012 PROC. OF THE SIXTY-FIFTH ANN. MEETING NAT'L ACAD. OF ARBITRATORS 219, 222 (Nancy Kauffman & Matthew M. Franckiewicz eds., 2013).