THE AUTHORITY AND OBLIGATION OF A LABOR ARBITRATOR TO MODIFY OR ELIMINATE A PROVISION OF A COLLECTIVE BARGAINING AGREEMENT BECAUSE IN HIS OPINION IT VIOLATES FEDERAL LAW

The obligation of a labor arbitrator to entertain statutory issues arising from a dispute over a collective bargaining agreement has recently been the subject of much controversy among those traditional mediators themselves, the labor arbitrators. To say that this controversy has not yet been resolved would be an understatement. This paper will attempt to set forth the positions advocated at the recent meetings of the National Academy of Arbitrators and to make a few suggestions that will hopefully shed some additional light on the controversy.

Several members of the Academy have supported the "orthodox" theory that the arbitrator's role is that of official reader and anything beyond that is beyond the scope of his responsibility and competence.[1] At the other extreme is the "liberal" theory that the arbitrator's responsibility is to terminate the controversy and that includes the solution of legal issues.[2] There are still other members of the Academy who would prefer a position between the two extremes and would allow an arbitrator to resolve legal issues on certain occasions.[3]

The resolution of controversies arising from collective agreements involves a unique tripartite system of adjudication. As is the case with most other disputes, many labor disputes will ultimately have to be resolved by the courts. Where certain charges of unfair labor practice are involved, Congress has granted the National Labor Relations Board jurisdiction.[4]

---

[1] Meltzer, "Ruminations About Ideology, Law, And Labor Arbitration," *The Arbitrator, The NLRB, And The Courts*, Proceedings of the Twentieth Annual Meeting, Nat'l. Academy of Arbitrators, (Washington: BNA Books, 1967) 1 [hereinafter cited as *1967 Meltzer paper*]; Meltzer, "The Role of Law in Arbitration: A Rejoinder," *Developments in American and Foreign Arbitration*, Proceedings of the Twenty-first Annual Meeting, Nat'l. Academy of Arbitrators, (Washington: BNA Books, 1968) 58; St. Antoine, "The Role of Law in Arbitration: Discussion," *Developments in American and Foreign Arbitration*, Proceedings of the Twenty-first Annual Meeting, Nat'l. Academy of Arbitrators, (Washington: BNA Books, 1968) 75.

[2] Howlett, "The Arbitrator, The NLRB, and The Courts," *The Arbitrator, The NLRB, and The Courts*, Proceedings of the Twentieth Annual Meeting, Nat'l. Academy of Arbitrators, (Washington: BNA Books, 1967) 67 [hereinafter cited as *1967 Howlett paper*]; Howlett, "The Role of Law in Arbitration: A Reprise," *Developments in American and Foreign Arbitration*, Proceedings of the Twenty-first Annual Meeting, Nat'l. Academy of Arbitrators, (Washington: BNA Books, 1968) 64 [hereinafter cited as *1968 Howlett paper*].

[3] Cox, "The Place of Law in Labor Arbitration," *The Profession of Labor Arbitration*, Selected Papers from the First Seven Annual Meetings of the Nat'l. Academy of Arbitrators, 1948-1954, (Washington: BNA Books, 1957) 76; Mittenthal, "The Role of Law in Arbitration," *Developments in American and Foreign Arbitration*, Proceedings of the Twenty-first Annual Meeting, Nat'l. Academy of Arbitrators, (Washington: BNA Books, 1968) 42; Sovern, "When Should Arbitrators Follow Federal Law," *Arbitration and the Expanding Role of Neutrals*, Proceedings of the Twenty-third Annual Meeting, Nat'l. Academy of Arbitrators, (Washington: BNA Books, 1970) 29.

[4] Labor Management Relations Act, 29 U.S.C. § 160(a) (1947).

In addition, to provide an even swifter method of reconciliation, many collective bargaining agreements have provided for private settlement through arbitration.[5] Both the courts[6] and the NLRB[7] have expressed policies favoring the private resolution of labor disputes.

The debate over the application of federal law by the arbitrator does not concern itself with those situations in which it is necessary for the arbitrator to examine the law in order to interpret a provision of the contract. For example, many agreements provide for dismissal of an employee for "just cause." Under such a provision if the employer decided to dismiss an employee for distributing union leaflets in the company parking lot, the sensible arbitrator would have to examine the NLRB's decisions in order to determine if "just cause" can be found.[8] The controversy also does not concern itself with those situations in which the parties have specifically asked the arbitrator to decide the statutory issue. The advocates of both the liberal and orthodox positions agree that the arbitrator may then rest his decision on the statute.[9]

The crux of the controversy is, what is the authority and obligation of a labor arbitrator to modify or eliminate a provision of a collective bargaining agreement because in his opinion its unaltered application would violate federal law?

The papers presented to the various annual meetings of the Academy have not resolved this issue. However, it is clear that the intent of all the advocates is to ensure that the parties to labor controversies will receive the best services that the arbitrator can provide. Certainly one goal that must be considered is that of providing a just resolution of the controversy with a minimum of litigation.

In an effort to elicit further information to help resolve this debate, a questionnaire was mailed to two hundred randomly selected members of the Academy. Of those members solicited, seventy-nine members completed and returned the questionnaire; and three members returned letters on the general topic. The results of this questionnaire demonstrated that, in total, there is almost a fifty-fifty division between the supporters of the "orthodox" and the "liberal" theories. However, particular questions demonstrate greater or lesser degrees of support for one or more of the various components of the theories. The essence of these questions and their results will be set out at various points in the paper in connection with the

---

[5] M. BERNSTEIN, PRIVATE DISPUTE SETTLEMENT 269 (1968).

[6] United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

[7] Spielberg Manufacturing Co., 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).

[8] Sovern, *supra* note 3, at 30.

[9] *Id.*

particular opinions examined. The full text of the questions posed and the complete response received will then be set out in a corresponding footnote.

THE ORTHODOX POSITION

Professor Bernard Meltzer is the leading exponent of the orthodox view. Essentially, his position is that the function of a labor arbitrator is to decide what the parties intended when they entered into the collective bargaining agreement. If this intention is contrary to some higher law, then it is the responsibility of one of the parties to take the case before an appropriate forum and let the legal decision be made there.[10] Meltzer stated, "Where . . . there is an irrepressible conflict, the arbitrator, in my opinion, should respect the agreement and ignore the law."[11] Meltzer's position may be summarized by the following quotation:

> Arbitrators should . . . respect . . . the agreement that is the source of their authority and should leave to the courts or other official tribunals the determination of whether the agreement contravenes a higher law. Otherwise, arbitrators would be deciding issues that go beyond not only the submission agreement but also arbitral competence.[12]

Under this theory, if the parties request that the arbitrator issue an additional advisory opinion on the legal issue involved,[13] or if they intended to incorporate legal standards into their agreement,[14] Meltzer would deem the arbitrator justified in resolving the legal questions involved. In fact, the professor would even go one step further and direct the arbitrator to look to the applicable law for guidance in order to avoid construing an ambiguous provision in an illegal manner.[15] If we accept Meltzer's previous assertion that arbitrators are generally not competent to cope with problems of statutory interpretation, then it seems difficult to accept the permissiveness of Meltzer's latter assertions.

In the absence of explicit language, it is difficult to factually determine the exact intent of various companies and unions entering into a collective bargaining agreement. It is, therefore, difficult to determine the extent to which the parties have consented to have the arbitrator resolve their disputes. However, Mr. Meltzer's second point, that individual labor arbitrators may not possess the necessary qualifications to decide the broad range of legal questions that may surface in a given dispute, seems more susceptible to a factual determination: Certainly not all arbitrators have law degrees. In fact, those who are lawyers may or may not possess special

---

[10] *1967 Meltzer paper* 16.
[11] *Id.*
[12] *Id.* at 17.
[13] *Id.* at 31.
[14] *Id.* at 15.
[15] *Id.*

talents in the specific areas of law involved. This point receives some support from the results of the questionnaire. That survey indicated that 82 percent of the members responding would characterize themselves as being either (1) competent and expert, or (2) competent, in deciding a question involving the National Labor Relations Act or Labor Management Relations Act. However, only 56 percent of the respondents would feel that positive if the question involved the Welfare and Pension Plans Disclosing Act, and only 36 percent would be that positive if the legal issue involved any of the federal antitrust statutes.[16]

Professor Meltzer is certainly not without support for his position. The idea that the arbitrator should respect the agreement and ignore the law draws support from the statement of Mr. Justice Douglas in *United Steelworkers of America v. Enterprise Wheel and Car Corp.* wherein he stated, "[the award] may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission."[17] This theory was also supported by Professor Theodore St. Antoine during a discussion period at the 1968

[16] The following is the actual question presented to the members of the Academy and its results:

Assuming you were authorized to do so, how would you feel about interpreting the provisions of a collective-agreement in accordance with the following statutes. (1) Would feel competent and expert; (2) Would feel competent; (3) Would rather avoid; (4) No opinion.

	(1)	(2)	(3)	(4)
National Labor Relations Act	48%	34%	16%	2%
Labor Management Relations Act	48%	34%	16%	2%
Railway Labor Act	24%	41%	32%	3%
federal antitrust statutes	12%	24%	57%	7%
Norris-La Guardia	31%	37%	29%	3%
Labor Management Reporting and Disclosure Act	29%	43%	26%	2%
Welfare and Pension Plans Disclosure Act	15%	41%	40%	4%
Civil Rights Act of 1964, Title VII	18%	47%	31%	4%
Fair Labor Standards Act	25%	45%	26%	4%
Executive Order No. 10988 Employee-Management Cooperation in the Federal Service	31%	44%	19%	6%

The following were the results of those respondents who indicated that they were also lawyers (Note: these results were also included in the total results set out above):

	(1)	(2)	(3)	(4)
National Labor Relations Act	65%	25%	7%	3%
Labor Management Relations Act	65%	25%	7%	3%
Railway Labor Act	34%	50%	13%	3%
federal antitrust statutes	16%	30%	42%	12%
Norris-La Guardia	43%	43%	9%	5%
Labor Management Reporting and Disclosure Act	39%	44%	12%	5%
Welfare and Pension Plans Disclosure Act	23%	53%	16%	8%
Civil Rights Act of 1964, Title VII	23%	58%	13%	6%
Fair Labor Standards Act	37%	39%	16%	8%
Executive Order No. 10988 Employee-Management Cooperation in the Federal Service	39%	44%	9%	8%

[17] 363 U.S. at 597.

meeting of the National Academy of Arbitrators.[18] St. Antoine's view is, "The Arbitrator is simply the 'official reader' designated by the parties to provide definitive interpretations of their agreement."[19]

Under the orthodox theory the arbitrator is not believed to have either the power of the obligation to modify or eliminate a provision of a collective bargaining agreement on the grounds that it conflicts with a statutory command. Therefore, the disciples of this theory find it unnecessary to reach the question of whether such activity would tend to curtail litigation.

There are several arbitration decisions that support the orthodox position.[20] In *Rowland Tompkins and Sons*, the arbitrator stated, "I may only decide whether the agreement as written has been breached, not whether the agreement as written breaches or violates any law."[21] The arbitrator in *C. Finkbeiner, Inc.* stated that the only situation in which an arbitrator would have the authority to determine legal questions involved in the issue submitted for arbitration is where the authority is, "clearly and unequivocally," granted.[22]

Middle Ground Positions

In keeping with the art of compromise that these professionals strive to practice, several leaders have proposed the adoption of middle ground theories. The first to advocate such a position was Professor Cox in a paper presented to the National Academy of Arbitrators in 1952.[23] His position is that the arbitrator should look to the statutes so as to avoid issuing an award that would require a violation of public law or policy.[24] Cox, however, warned that:

> The suggested principle includes important limitations. It does not suggest that an arbitrator should pass upon all the parties legal rights and obligations. It does not suggest that an arbitrator should refuse to give effect to a contract provision merely because the courts would not enforce it. Nor does it imply that an arbitrator should be guided by judge-made rules of evidence or contract interpretation. The principle requires only that the arbitrator look to see whether sustaining the grievance would require conduct the law forbids or would enforce an illegal contract; if so, the arbitrator should not sustain the grievance.
>
> If this occasionally requires lay arbitrators to rule upon difficult legal

---

[18] St. Antoine, *supra* note 1 at 77.

[19] *Id.*

[20] Butler Manufacturing Co., 68-1 ARB (CCH). ¶ 8263 (1968); International Paper Co., 67-2 ARB (CCH). ¶ 8589 (1967); Savoy Laundry and Linen Supply, Inc., 48 Lab. Arb. 760 (1967).

[21] Rowland Tompkins and Sons, 35 Lab. Arb. 154, 156 (1960).

[22] C. Finkbeiner, Inc., 44 Lab. Arb. 1109, 1114 (1965).

[23] Cox, *supra* note 3.

[24] *Id.* at 78.

> questions, they may comfort themselves with the knowledge that to err is human—even in the legal professions.[25]

This position was supported by Mr. Richard Mittenthal in an address before the Academy in 1968.[26] Mr. Mittenthal then embroidered upon the Cox position by urging that while an arbitrator's award may *permit* conduct forbidden by law but sanctioned by contract, it should not *require* conduct forbidden by law even though sanctioned by contract.[27]

Cox cites as an example a situation that occurred shortly after World War II in which the Selective Service Act was found to conflict with provisions in many collective bargaining agreements. The Act required companies to grant a preference to returning veterans over nonveterans in the event of layoffs. Most contract provisions provided that the returning veterans would only have the same senority they would have had if they had not been drafted. If an employer then laid off a nonveteran with senority over a veteran and the nonveteran filed a grievance claiming that the contract had been violated, the arbitrator would be forced to deny the grievance. His reason being that had the arbitrator ordered the nonveteran reinstated at the expense of the veteran, the arbitrator would have been ordering the company to do an illegal act.[28]

A question was submitted in the survey in an effort to ascertain the support among members of the Academy for this position. The results indicated 42 percent in favor of the Cox-Mittenthal position, 40 percent opposed, and 18 percent had no opinion. Thus a clear conclusion from that tabulation is difficult.[29]

It should be noted that the Cox-Mittenthal position does not concern itself with the question of the arbitrator's competence. In view of the questionnaire's results, as set out in connection with the comments on Profes-

---

[25] *Id.* at 79.

[26] Mittenthal, *supra* note 3.

[27] *Id.* at 50.

[28] Cox, *supra* note 3 at 77; *see* E. G. Dow Chemical Co., 1 Lab. Arb. 70 (1945).

[29] The following is the actual question presented to the members of the Academy and its results:

> Do you agree with the following position? The arbitrator's award may *permit* conduct forbidden by law but sanctioned by contract, however it should not *require* conduct forbidden by law even though sanctioned by contract.
>
> The following is an example of agreement with the above position: Congress passes a statute giving returning war veterans a preference over nonveterans in the event of layoffs. The management and the union have previously entered into a collective bargaining agreement with a provision providing that returning veterans shall have only the seniority they would have had if they had not been drafted. Management then retains a veteran and lays off a nonveteran with more seniority. The nonveteran grieves under the agreement. The arbitrator should deny the grievance because a reinstatement award, if it displaced the veteran, would require the employer to engage in conduct forbidden by law. If, on the other hand, the veteran had been laid off, the arbitrator would have been forced to also deny his grievance this time because his award would be merely permitting conduct forbidden by law, not requiring it.
>
> Yes (42%) No (40%) No Opinion (18%)

sor Meltzer's opinion, demonstrating the diversity of expertise among the Academy's members, Meltzer's competence point should not be overlooked.

Professor Cox is also of the opinion that the decision to entertain the legal question should be in part determined by the scope of the authority granted to the arbitrator.[30] If the arbitrator's scope of authority is broad, Cox feels that the arbitrator would be shirking his duties were he to avoid the legal question.[31] When a question concerning this theory was set forth in the survey, an almost even diversity of opinion was shown. Of those responding, 45 percent favored this position, while 44 percent were opposed, and 11 percent expressed no opinion. It should be noted, though, that the example of a broad scope of an arbitrator's authority used in the questionnaire was not as all-encompassing as the example Cox used.[32]

At the 1970 meeting of the Academy, Dean Michael Sovern also attempted to occupy the middle ground.[33] He began by meeting Meltzer's argument that arbitrators lacked the necessary competence to decide statutory issues. Sovern argued that while some arbitrators may not be qualified to decide particular statutory issues, others would be.[34] He further argued that if Professor Meltzer believes arbitrators are sufficiently competent to be guided by statutes so as to avoid construing an ambiguous provision in an illegal manner, then they ought to be competent enough to decide the issue openly.[35] Dean Sovern then listed four guidelines that he felt should be satisfied before an arbitrator entertains a legal issue:

> 1. The arbitrator is qualified.
>
> 2. The question of law is implicated in a dispute over the application or interpretation of a contract that is also before him.
>
> 3. The question of law is raised by a contention that, if the conduct complained of does violate the contract, the law nevertheless immunizes or even requires it.
>
> 4. The courts lack primary jurisdiction to adjudicate the question of law.[36]

---

[30] Cox, *supra* note 3 at 81.

[31] *Id.* at 82.

[32] The following is the actual question submitted to the members of the Academy and its results:

> Would you be more inclined to entertain the question of the applicability of federal law if the scope of the arbitrator's authority were broad rather than narrow? An example of a broad scope of authority being one in which the agreeement states that any dispute between the parties arising under the agreement may be submitted to arbitration. A narrow scope of authority being one which limits arbitration to disputes involving the interpretation and application of specific terms of the agreement (assuming the question involved is one of those specific terms).
>
> Yes (45%) No (44%) No Opinion (11%)

[33] Sovern, *supra* note 3.

[34] *Id.* at 35.

[35] *Id.*

[36] *Id.* at 38.

Sovern's first two conditions would appear eminently sensible to anyone contemplating the problem. If the arbitrator lacks the ability to interpret the statute and has no one to look to for assistance, there would be little to be gained by his attempt. If the legal question does not arise from the determination of an issue involved in a collective bargaining agreement dispute, a labor arbitrator would have no business deciding it. Such questions would be much more appropriate for resolution elsewhere. It is the third and fourth criteria that are the most controversial. It is Sovern's opinion that since a controversy arising from a collective bargaining agreement may force the parties into battle in three separate arenas (i.e., courts, NLRB, and arbitration), the arbitrator should come forth and attempt to terminate the dispute. If the arbitrator does not at least try to end the dispute, Sovern foresees mass confusion, long delays, and exorbitant expenses.[37] He cites as an appropriate situation a controversy between a company and a union over a union security clause. In such a situation, the union might demand the dismissal of an employee for failure to join the union. The company might then contend that while the provision does not require dismissal, even if it did, such action would be illegal under the National Labor Relations Act. This theory would then permit a complete resolution of the disagreement by a qualified arbitrator because the four guidelines are satisfied. One, the arbitrator is qualified. Two, the dispute arises from a contract interpretation controversy. Three, the company is claiming that even if the agreement requires dismissal, the N.L.R.A. nevertheless requires the company to retain the employee. Four, this is not a case where the federal courts have primary jurisdiction. Certainly, if the ultimate question is how may the arbitrator best serve the parties, this theory must be considered a step in the right direction.

The arbitration cases have demonstrated still other middle ground theories. In *Penick and Ford, Ltd.*,[38] the arbitrator stated that statutory law should be applied when it is clear, but if the NLRB or the courts have not yet had an opportunity to crystallize their legal theories, the arbitrator should abstain from entertaining the legal questions. The Connecticut State Board of Mediation held in *The Ingraham Co.*[39] that where the agreements provisions are patently and unambiguously in violation of law, the arbitrator should recognize this fact and refuse to enforce an illegal contract. However, the Connecticut Board felt the arbitrator should make certain that the violation is unmistakable and that he is not substituting himself for the authority and expertise of the recognized statutory forum.[40]

---

[37] *Id.* at 38, 39.

[38] Penick and Ford, Ltd., 62-2 ARB (CCH). § 8669 (1962).

[39] The Ingraham Co., 48 Lab. Arb. 884 (1966).

[40] *Id.* at 889.

THE LIBERAL POSITION

At the other extreme from Professor Meltzer's position is the position taken by Mr. Robert Howlett at the 1967 and 1968 meetings of the Academy.[41] It is his opinion that the arbitrator has a responsibility to entertain relevant statutory questions.[42] He stated, "Arbitrators *should* render decisions on the issues before them *based on both contract language and law.*"[43] Mr. Howlett relies heavily for the justification of his theory upon the policies announced by the National Labor Relations Board in the *Spielberg* case.[44] This case involved the dismissal of four employees for their activities during a strike. The arbitrator upheld the dismissal and the NLRB upheld the arbitrator stating that while the NLRB undoubtedly is not bound by the award of an arbitrator,[45] it will withhold its authority to decide charges of unfair labor practice where the proceedings appear to have been conducted in a fair and regular manner and the arbitrator's decision does not appear to be clearly repugnant to the policies and purposes of the act.[46] Howlett interprets the *Spielberg* test as being essentially due process.[47]

In 1962 the Board reaffirmed and extended the *Spielberg* doctrine in *International Harvestor Co.*[48] The resolution of the legal issue by the arbitrator was found to be not contrary to settled law and, therefore, not clearly repugnant to the Act. The Board stated,

> Nor do we find, as the Trial Examiner did, that the resolution of the legal issue before him was at variance with settled law and therefore clearly repugnant to the purposes of the Act. . . . However, we need not decide these questions in determining to accept the arbitrator's award since it plainly appears to us that the ward is not palpably wrong. To require more of the Board would mean substituting the Board's judgment for that of the arbitrator, thereby defeating the purposes of the Act. . . .[49]

The Board upheld the *Spielberg* doctrine stating it would accept an arbitrator's award, "[U]nless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act."[50] *Spielberg* and *International Harvestor* leave little doubt

---

41 *1967 Howlett paper; 1968 Howlett paper.*

42 *1967 Howlett paper* 78-79.

43 *Id.* at 83.

44 *Id.* at 79; Spielberg Manufacturing Co., 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).

45 *See* N.L.R.B. v. Walt Disney Productions, 146 F.2d 44 (9th Cir. 1945), *cert. denied*, 324 U.S. 877 (1945).

46 112 N.L.R.B. at 1082, 36 L.R.R.M. at 1153.

47 *1967 Howlett paper* at 79.

48 International Harvestor Co., 138 N.L.R.B. 923, 51 L.R.R.M. 1155 (1962), *aff'd.*, Ramsey v. N.L.R.B., 327 F.2d 784 (7th Cir. 1964), *cert. denied*, 377 U.S. 1003 (1964).

49 138 N.L.R.B. at 928, 51 L.R.R.M. at 1157.

50 138 N.L.R.B. at 927, 51 L.R.R.M. at 1157. For cases in which the Board has been un-

that National Labor Relations Board policy definitely favors arbitral determination of legal issues.

Howlett further suggests that his theory gains support from the notion that every contract includes all applicable law.[51] Mittenthal relies on Williston[52] and Corbin[53] to strongly and justifiably criticize this point as being highly artificial since it implies that everybody knows the law.[54]

Under Howlett's liberal theory, the arbitrator is not only under a duty to apply substantive law but is also under a duty to probe for a statutory violation.[55] He considers this necessary if the Board is to be able to fully exercise its policy of deferring to the arbitral decision. Howlett also points out that since the statute of limitations on unfair labor practices is only six months,[56] an injustice might result if the arbitrator fails to probe for a statutory violation.[57]

There are many arbitration cases supporting the liberal theory.[58] The Arbitrator in *Montgomery Ward and Company*[59] stated, [I]t is the present policy of the National Labor Relations Board to encourage and support intelligent arbitration as one of the presently indispensable methods of settling the great volume of labor disputes which arise in our time."[60]

Hawthorn-Mellody, Inc.[61] held that the National Labor Relations Act must be looked to for guidance in the determination of the applicability of a collective agreement provision stating that it would be "wholly unreasonable" to ignore both it and other legal obligations.[62]

FURTHER SUGGESTIONS

In an effort to determine the most appropriate future course for labor arbitrators to take, it may be helpful to disregard the individual question of whether or not an arbitrator should entertain legal issues and to view

able to defer to the arbitrators award because he failed to resolve the legal issue, *see* Raytheon Co., 140 N.L.R.B. 883, 52 L.R.R.M. 1129 (1963); Monsanto Chemical Co., 130 N.L.R.B. 1097, 47 L.R.R.M. 1451 (1961); I. Oscherwitz and Sons, 130 N.L.R.B. 1078, 47 L.R.R.M. 1415 (1961).

[51] *1967 Howlett paper* at 83.

[52] S. WILLISTON, CONTRACTS, § 615 (rev. ed., 1961).

[53] A. CORBIN, CONTRACTS, § 551 (rev. ed., 1960).

[54] Mittenthal, *supra* note 3 at 44; *But see* Van Huffman v. Quincy, 71 U.S. (4 Wall.) 535, 550 (1866); Adams v. Spillards, 187 Ark. 641, 61 S.W.2d 686 (1933).

[55] *1967 Howlett paper* at 92.

[56] Labor Management Relations Act, 29 U.S.C. § 160(b) (1947).

[57] *1967 Howlett paper* at 92.

[58] Clark Equipment Co., 50 Lab. Arb. 39 (1967); Alsco, Inc., 48 Lab. Arb. 1244 (1967); Pennsylvania Electric Co., 47 Lab. Arb. 526 (1967); Coakley Brothers Co., 47 Lab. Arb. 356 (1966); General American Transportation Corp., 42 Lab. Arb. 1308 (1964); Hancock Steel Co., Inc., 23 Lab. Arb. 44 (1954).

[59] Montgomery Ward and Company, 49 Lab. Arb. 271 (1967).

[60] *Id.* at 274.

[61] Hawthorn-Mellody, Inc., 42 Lab. Arb. 1296 (1964).

[62] *Id.* at 1299.

the question as part of an overall problem of how may the arbitrator best serve his employers. One manner in which the arbitrator may be of service to the parties is to aid in limiting the length of litigation necessary to resolve the controversy. Certainly most would agree that one reason for arbitration's popularity is the likelihood of it resulting in a speedy resolution of day to day industrial disputes. Where controversies are prolonged, both parties feel the pain of lowered production and efficiency.

One of the questions put to the members of the Academy in the survey attempted to ascertain the members' opinions as to whether the entertaining of the legal question by an arbitrator would tend to limit the length of litigation between the parties. A clear majority of those answering the question felt this would limit the length of litigation.[63]

There would be little hope of curtailing the length of litigation between the parties if those arbitrators called upon to rule on the legal questions were incompetent to do so. But the realities of the system must be considered and, as a practical matter, the legal issues likely to arise from a collective agreement are limited. As Dean Sovern points out, an arbitrator would have no business entertaining legal questions that did not arise in a dispute over a collective bargaining agreement.[64] It seems likely that many legal issues arising from disputes over collective agreements would involve interpretation of the National Labor Relations Act or the Labor Management Relations Act. It should be recalled that these are the statutes that 82 percent of the arbitrators returning the questionnaire felt either (1) competent and expert, or (2) competent to apply. In fact, among lawyer-arbitrators, 90 percent would consider themselves to possess at least that degree of competence. The percentage of respondents, both lawyer and nonlawyer, considering themselves as having at least that amount of competence for certain other statutes likely to arise from a dispute over a collective bargaining agreement is set out below. The figure in parenthesis represents the percentage of lawyer-arbitrators who regard themselves as possessing at least that degree of expertise.[65]

Railway Labor Act	65%	(84%)
federal antitrust statutes	36%	(46%)
Norris-La Guardia	68%	(86%)
Labor Management Reporting and Disclosure Act	72%	(83%)
Welfare and Pension Plans Disclosure Act	56%	(86%)
Civil Rights Act of 1964, Title VII	65%	(81%)

[63] The following is the actual question submitted to the members of the Academy and its results:

Do you feel that the interpretation of the legal question involved in a dispute over a collective bargaining agreement by the arbitrator would generally tend to limit the length of litigation between the parties?

Yes (60%) No (14%) No Opinion (26%)

[64] Sovern, *supra* note 3 at 38.

[65] Footnote 17, *supra.*

Fair Labor Standards Act	70%	(76%)
Executive Order No. 10988 Employee-Management Cooperation in the Federal Service	75%	(83%)

Therefore, with the exception of the federal antitrust statutes, it is obvious that a clear majority of the respondents consider themselves at least competent to entertain legal questions based on the above statutes. In addition, it seems likely that controversies involving the above statutes would constitute a large percentage of the legal questions arising from collective agreements. It is therefore submitted that today's labor arbitrator does possess the necessary expertise to resolve statutory issues in a large majority of the potential cases.

By stating that the arbitrator will be sufficiently competent to entertain the legal issue in a large majority of the potential cases, it is implicit that there will be some cases in which the individual arbitrator will not consider himself qualified to resolve the statutory issue. In that situation, the arbitrator may still be able to completely resolve his employers' controversy by procuring technical assistance from an expert in the particular field of law. The technical specialist could then provide the arbitrator with the help he needs to decide the legal issue. While this suggestion has not been widely used, the right of an arbitrator to procure assistance from a technical specialist has long been recognized. This privilege has been traditionally limited to assistance in the areas of technical specialities, but there is no reason legal advice could not be obtained in the same manner. This would not be in derogation of the arbitrator's authority since all responsibility would still rest with him, he would merely be calling upon the aid of a practitioner in a highly technical field to assist him in his decision in but one area of the controversy.

Certainly this suggestion does raise some questions. Such a procedure would increase the expense of arbitration. However, if it results in curtailing the length of litigation between the parties, the extra expense may serve as the basis for substantial savings in the long run. It may also be difficult to find a labor law expert who has not previously aligned himself with either labor or management. However, there is no reason why an arbitrator in search of specialized assistance should limit himself to the field of practicing labor lawyers. Several academics are labor law experts. In addition, an arbitrator might even call upon a fellow member of the Academy for assistance. In that case the parties would still have the benefit of the impartiality of the arbitrator they have selected because the additional member of the Academy would merely be serving in an advisory capacity with all final decisions resting upon that person selected by the parties. After considering the problems posed by such a suggestion, it is submitted that the problems raised are not significant and the advantages to be gained under such a procedure, such as limiting the length of liti-

gation, greatly outweigh the disadvantages. This theory would permit any arbitrator to resolve any legal dispute implicit in the interpretation of a collective bargaining agreement because any absence of qualifications in the particular arbitrator would be compensated by the expertise of the technical specialist. Therefore, there would be no need to limit the arbitrator's authority to controversies involving a few well-known labor statutes.

With the increased use of technical specialists there would be no more reason for a nonlawyer arbitrator to avoid statutory issues than there would be for him to avoid an engineering question or any other technical issue. The use of advisory specialists would enable the professional arbitrator to gather together all of the necesssary expertise to provide his employers with a just resolution of their dispute. This is consistent with the opinions expressed in response to the survey. The results of the questionnaire showed that 78 percent of the members responding felt that if any arbitrators were given the authority to entertain questions of federal law, it should not be limited to lawyer-arbitrators. Even among those members of the Academy who indicated that they were also lawyers, 71 percent favored permitting nonlawyer arbitrators to entertain legal questions.[66] This is also consistent with the idea previously expressed that most labor arbitrators even without the aid of technical specialists possess sufficient expertise to cope with the majority of legal issues likely to arise from a dispute over a collective bargaining agreement.

A minimum of research in the labor arbitration field will quickly demonstrate that the members of the National Academy of Arbitrators are dedicated professionals who are experts in the labor field. As experts, they are far more qualified to interpret labor statutes than are most judges. Whether or not they individually possess expertise on legal issues outside the scope of their speciality is normally unimportant because the type of legal problem that may arise from a collective agreement is limited and, therefore, there would normally be no need for any additional expertise.

In addition, the parties normally have the opportunity to select an arbitrator sufficiently competent to resolve the legal controversy. The questionnaire demonstrated that of those arbitrators involved in cases in which a legal issue was present, 77 percent were selected ad hoc.[67] This demon-

---

[66] The following is the question submitted to the members of the Academy and its results:

Assume that there are appropriate circumstances for a labor arbitrator to decide whether a federal law requires an arbitrator to modify or eliminate a provision of a collective bargaining agreement. Do you think that this power should be limited to lawyer-arbitrators?

Yes (14%) No (78%) No Opinion (8%)

The tabulation is this question was further broken down to include in the subject group only those members of the Academy who indicated that they were lawyers. (Note: The above tabulation includes the entire subject group including both lawyers and nonlawyers.)

Yes (18%) No (71%) No Opinion (11%)

[67] The following is the question submitted to the members of the Academy and its results:

strates that the parties do normally have an opportunity to select a particular arbitrator to resolve a particular dispute. Therefore, they could select an arbitrator competent in the particular legal area controverted. However, there is one caveat: The parties may not always take advantage of this opportunity. They may be more concerned with selecting an arbitrator on the basis of his impartiality, or lack of it.

Some arbitrators, who essentially are expounding middle ground theories, feel that an arbitrator may apply the law to modify or eliminate a provision of a collective bargaining agreement only if the law is clear.[68] Such a notion has the effect of crippling the authority of the arbitrator to apply pertinent law. If the law is clear to the arbitrator, it is probably also clear to the parties; and it would not normally be prudent for a party to controvert an issue he knows he will lose.

Such a notion completely fails to take account of the expertise of the labor arbitrator and fails to concern itself with the goal of curtailing litigation. Even in the hypothetical case in which new labor legislation is just enacted and the first controversy involving this legislation is presented to an arbitrator, there may still be advantages in permitting the arbitrator to entertain the legal question. If, in fact, this arbitrator is a labor expert, his opinion on the new statute may be very helpful to the members of the NLRB or the courts who will eventually have to resolve the issue. In fact, the *Spielberg* doctrine merely asks that the arbitral award be not repugnant to the statute. Under that theory there is even a good chance that the goal of curtailing litigation will be furthered since the award of an experienced arbitrator is not likely to be repugnant to even a new statute. In any event, there are advantages to be found when the arbitrator decides to entertain the legal issue even in the absence of clear statutory guidance.

CONCLUSION

There are many conflicting theories as to what the role of the labor arbitrator should be when one of the parties to a dispute over a collective bargaining agreement contends that the application of a provision would be contrary to federal law. The supporters of the orthodox view contend that the arbitrator should be content to be the official reader of the agreement. Recently there has been a movement among some members of the National Academy of Arbitrators to encourage their fellow members to attempt to resolve the entire controversy including any statutory issues involved. The latter view appears to be most consistent with the concept

Have you ever been involved in a case where a provision of the collective bargaining agreement was alleged to violate federal law? If you were involved in such a case, how were you selected as arbitrator?

Permanent Arbitrator (23%) Selected *ad hoc* (77%) Other (O)

[68] Penick and Ford, Ltd., 62-2 ARB (CCH). § 8669 (1962).

of providing arbitration as a swift means of settling industrial controversy. It is submitted that labor arbitrators are either competent to handle the statutory questions that may arise from a collective bargaining agreement or that the arbitrator is capable of obtaining the necessary legal advice through the use of a technical assistant. Hopefully, the members of the Academy will accept the responsibility of their expertise.

The last few annual meetings of the National Academy of Arbitrators have elicited several well considered opinions on this subject from some of the most distinguished members of the profession. Their papers have provided the expert testimony necessary to resolve this controversy. Hopefully, the humble questionnaire set forth in this article will help begin the second phase of gathering the necessary emperical data. Certainly if future attempts to gather data encounter as thoughtful responses as did this survey, the debate will soon be resolved.

James Young