The Use and Abuse of Management Rights

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Four very basic points highlight the issues which arise in disputes over the scope of management rights. Although the four points are indeed basic, we tend to forget them and thereby cause ourselves more unnecessary problems than need be the case. The four areas treated here are as follows:

1. The management rights/employee security-dignity area lies at the core of labor-management relations and the entire collective bargaining process.
2. The problems arising between labor and management in this area are largely formulated by economic factors beyond the control of the parties.
3. Conflicts arise between the parties because of a mutual lack of trust.
4. Although substantive differences between the parties exist on philosophical and factual bases, the procedural aspects of the management rights issue often exaggerate and exacerbate the conflict.

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1. Management rights/employee security and dignity goals are most often conflicting and therefore, this area of dispute is at the center of the labor-management relationship.

As Marvin Hill and I pointed out in our recent book on management rights: "No area of labor-management relations evokes so much emotion and controversy as does ‘management rights’ for it is the concept of management rights and its counterpart—the union’s quest for job security—that are at the core of the conflict between labor and management.”

It must not be forgotten that employers, in attempting to meet the profit maximization goal, feel that they must exercise exclusive, unencumbered and unilateral control of the entire spectrum of administrative decisionmaking. The union, in representing its members, is constantly attempting to intrude or penetrate more deeply this exclusive management domain. Thus the “who’s running the company” controversy comes to the fore.

Another way of looking at this natural conflict is to view management’s method of operation as one dedicated to efficiency, which is best achieved through complete flexibility in decisionmaking. Thus, management views its right to hire, fire, assign, transfer, layoff, demote and discipline as a necessary condition to sound and efficient management. The union sees these operations as manifestations of arbitrary, capricious and discriminatory acts. It thus tries to stabilize the predictability of those management actions through contract clauses protecting promotions (seniority), layoff rights (seniority), work assignments and job descriptions, and defining discipline (just cause) and subcontracting. The naturally conflicting goals—efficiency vs. predictability—set the stage for an area of conflict. Collective bargaining is a system for managing that conflict and for keeping it within bounds of rationality. Arbitration is a natural part of that system, designed to assist in maintaining the stability necessary to keep the process viable.

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2. See NLRB v. American Nat’l Ins. Co., 343 U.S. 395 (1952) (employer proposed management functions clause in which all matters pertaining to promotions, discipline, and work scheduling were within management’s exclusive control, and not subject to arbitration).
3. Cf. Allis-Chalmers Corp., 234 N.L.R.B. 350 (1978), modified, 252 N.L.R.B. 775 (1980), enforcement denied, 642 F.2d 766 (5th Cir. 1981). In Allis-Chalmers, the union filed a petition with the NLRB after the employer made unilateral decisions to enforce several previously unenforced work rules. See also Womac Indus., Inc., 238 N.L.R.B. 43 (1978) (employer unilaterally required the employees to furnish doctor’s excuses for absences due to illness).
4. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-197 (1982) (“to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other . . . the policy of the United States . . . [is that of] encouraging the process and procedures of collective bargaining”)
5. See Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). In Steelworkers,
2. *The problems in the management rights areas are conditioned upon the general economic conditions.*

While the conflict between labor and management is always present, it becomes more heated when the economic factors affecting the parties become more confining. Perhaps some examples will illustrate this point.

When the economics of an industry are good—profits are high, competition is not threatening, the labor market is tight—the employer is more willing to lower hiring standards or be less demanding about overtime assignments. The employer may also be willing to hire additional employees to be more accommodative to the union's demands to keep job assignments separate or to forego subcontracting work for cost reduction purposes. In sum, the employer is less cost-conscious because it is making money and can pass on the increased costs and thereby does not jealously guard those rights it deems to be exclusive. Intrusion on the flexibility of management's exclusive decisionmaking authority is tolerated to a greater degree when the conditions described above are present than when economic conditions are more demanding, the exception being where the philosophical dictates of a particular employer will not give way to pragmatism. The union, in turn, does not challenge every management deviation from the agreement because, for example, its bargaining unit is stabilized or growing, a good deal of overtime is available or employees are not being disciplined or discharged for questionable behavior. These conditions existed ten to fifteen years ago in the large industries such as steel, auto and rubber, and in regulated industries such as airlines, transportation and utilities.

In today's market, where the effects of deregulation, foreign competition and changing consumer consumption patterns are being felt, the opposite condition exists. When unions' strength allows it, they question and challenge every management act, such as the raising of hiring requirements, job enlargement, subcontracting and outsourcing. Management flexes its muscle because it can do so and it feels such flexing is good and necessary under the economic conditions being confronted.

While some of the differences, perhaps the most basic differences, between labor and management are ideological or philosophical, the key to the intensity of the conflict is more pragmatic. Americans are not by nature idealists. We are problem solvers and pragmatists. That philosophy likewise pertains to the labor and management field. Thus, if the economics of the situation allow it, the tolerance level the parties have for each other is greater.

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the Court stated: "Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." *Id.* at 581.
3. The conflict between the parties stems from a lack of mutual trust.

Unquestionably, then, the labor and management model in the United States is one of conflict. However, individual efforts are being made and a national effort exists to change that model to a cooperative one through win-win bargaining models, Quality of Work Life programs, quality circles, and a general adoption of nonadversarial bargaining techniques. There are extensive efforts in management circles to promote the new positive discipline programs. Despite these new efforts, however, the predominant posture remains adversarial. Even in the good times of the past, where the degree of adversarial challenge did not appear to be so heated, the basic distrust was still there and most certainly it is present today. The reasons for this situation are several. First, it was the way the system developed: it was born out of conflict. Second, each of the parties, when they enjoyed the right conditions, sought every benefit they could extract from the other without consideration of the long-term effect. Third, while class distinctions are denied, the differences do indeed exist and are perceived as such by both the management class and the workers.

Because the elements of this basic mistrust persist, the core difference between labor and management continues to manifest itself in this arena.

4. The differences between labor and management conditioned by the argument over substantive management rights are exaggerated and exacerbated by the often reckless use of procedural management rights by some employers.

Most of the debate over the existence of substantive management rights has long been settled. Those explicit rights spelled out in the agreement either by a laundry list or by a generic clause are accepted for obvious reasons. The question of residual rights or implied rights, however they may be labeled, are also acknowledged and are to be challenged by a reasonableness test only. However, many of the actors in labor and management, and even arbitrators, are unaware that management does enjoy an unencumbered procedural right to act. While that procedural right may at times be distinct from substantive rights—and at other times be very entwined with the substantive right—it is nevertheless a

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7. See Loewe v. Lawlor, 208 U.S. 274 (1908) (employers could state claim for treble damages against the union for Sherman Act violations); In re Debs, 158 U.S. 564 (1895) (labor violence enjoined in 1894 Pullman railroad strike).
fact that the right to initiate an action is management's. However, the price to pay for foolish, abusive or unreasonable use of that procedural right is ultimately questioned through the grievance/arbitration procedure.  

The problem with this aspect of management rights is that when management recklessly exercises its procedural rights, it is perceived by the union as a power play and therefore invites the union to react with reckless abandon.

These are the underlying realities behind disputes over management rights. At this point, some examples taken from my own arbitration experiences may prove helpful to demonstrate the concerns raised above.

Case No. 1

A dispute arose at a school where a teacher salary schedule existed and all teachers, except two, were placed on the salary schedule according to years of experience and educational attainment. All teachers prior to the hiring of these two grievants were placed on the salary schedule according to this criteria and the same was true of all teachers hired after these two. Management's argument defending its action was that they did what they did to those two teachers because it was their right to do so. There was nothing in the two grievants' backgrounds, experience or competencies that gave management reason to place them on the salary schedule at levels different from their experience or educational attainment. But management did what it did simply because it had the right to do so. Notwithstanding a salary schedule in the contract, management felt that the absence of a clause in the agreement to require placement by experience and educational attainment allowed it to do what it did. Clearly, in my mind, this was erroneous and I ruled so. But more importantly, I consider it an abuse of management's rights, clearly a procedural abuse and likewise a substantive abuse.

Case No. 2

A union represented employees who served as runners in a computer operation. At that time computers were batch-loaded and the union members under the contract were assigned as runners who physically carried the cards from one location to another to be batch-loaded. The contract was written in such a way that the data entry tasks were exclusively within the jurisdiction of these bargaining unit people. Be-

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8. See, e.g., Phillips Petroleum Co., 24 Lab. Arb. (BNA) 191 (1955) (Merrill, Arb.) (employer unilaterally discontinued electrical services it had historically supplied to employees who lived in adjacent company owned housing; arbitrator sustained union's grievance).

cause of changing technology and a need to have engineers gain direct access to the computers to perform hands-on technical functions, such as graphics and formulas, the company installed hands-on computers that allowed the engineers to have direct access so that they could enter the data themselves. The union grieved, seeking to have their operators (runners) placed on "standby" either to make the entries or watch the engineers as they did it. This was, in my judgment, a reasonable exercise of a management right by the employer and a clearly unreasonable challenge by the union.

Case No. 3

In this second computer case, a newspaper mailers' union had the work jurisdiction to stamp out metal mailing labels. Historically, the mailers received the printout list for the making of the metal plates from clerks in another bargaining unit. When the company installed word processors that printed out the mailing list, the mailers claimed their work was taken over by the clerks in the other bargaining unit. The mailers wanted to "press the button" that spewed out the list. Unquestionably they were victims of technological process, as were the computer runners, but their demand was clearly unreasonable. Again, this was a reasonable exercise of a management right.

Case No. 4

In a coal mine, some maintenance work—regrading and oiling roads on the mine property—had always been performed by mine bargaining unit personnel. The company claimed it had the right to subcontract the work because a technological change allowed for a new method with less labor and a more efficient result if the work were subcontracted. The contract was silent on the assignment of such work although the longstanding practice was to use unit personnel. The puzzling thing was the company subcontracted the work to a bargaining unit member who had a company do the work, but he, in turn, rented the equipment used in the work.

Many more examples can be cited, particularly in the areas of privacy rights, off-duty conduct, drug testing and the like. Nevertheless, the message is clear: the conflict level on these points is more heightened than ever.

I believe arbitrators, whose job is to be faithful to their jurisdiction under the contract and/or under the submission agreement, are nevertheless mindful of the four basic areas mentioned above. Those factors can and do influence their reasoning. For better or worse, their deliberations are not made without consideration of the societal and institutional factors surrounding them.
INTRODUCTION

The topic of arbitration and drug testing in major league baseball may best be approached by initially focusing on the recent arbitral drug testing decision. First, a little background.

In the early fall of 1983, the major league club owners, as represented by the Player Relations Committee, their bargaining arm, and the Major League Baseball Players Association, the union, initiated a series of negotiation meetings designed, according to their mutually constructed agenda, to create a joint project “in the education and treatment of chemical dependence and/or use/abuse problems in the major league baseball.” The Committee and the Association undertook the construction of a procedure that would assume primary jurisdiction over a professional, scientific response to the spectre of drug abuse in baseball. The hope was that a single program could be negotiated that would take the place of employee assistance programs already in place at some of the clubs. The new program would augment, if not replace, counseling and referral services that had been established by the Players Association.

I

THE JOINT DRUG AGREEMENT

On May 24, 1984, just such an agreement was reached when the parties executed a detailed compact of some sixteen pages that came to be known as the Joint Drug Agreement. By its very terms, the agreement was terminable by either party upon written notice served subsequent to December 31, 1984.

The Joint Drug Agreement established procedures intended to provide “a mechanism by which use, abuse and dependence problems re-
lated to certain substances, specifically cocaine and other similarly controlled drugs, can be recognized and the individual involved specifically encouraged to seek and secure professional assistance in overcoming that problem."

The Agreement did not preclude testing for drugs. It permitted diagnostic testing in connection with reason-to-believe determinations to be made by a panel of three medical experts who served as neutrals. It also permitted testing in connection with treatment and after-care. A player who failed or refused to participate in the program was placed outside the protections of the Agreement. Without the Agreement, the player, under the provisions of the collective bargaining agreement itself, was left vulnerable. Most significantly, of course, this would include a potential loss of salary.

In the body of the Joint Drug Agreement appeared this declaration by the Players Association:

"The Players Association does not object in principle to individual, voluntary testing on a case-by-case basis, provided that a player's agreement to any such test is truly voluntary and that such agreement is not secured through coercion or pressure of any sort, and the confidentiality and integrity of the testing process can be assured.

It is at the same time to be noted that the Joint Drug Agreement did not provide for noncause, random testing of all major league baseball players—that is to say, mandatory testing of every member of the bargaining unit.

II

THE BREAKDOWN OF THE JOINT DRUG AGREEMENT

In the fall of 1985, the Joint Drug Agreement had been in place for over a year. In September of that year, Curtis Strong was brought to trial in federal court in Pittsburgh on a charge of selling cocaine to a clientele that included prominent major league baseball players. Shortly after the conviction of Strong, Commissioner Peter Ueberroth sent a letter to every major league baseball player urging them to submit to three random urine tests during the course of the 1986 championship season. At the same time, the Players Association was asked to agree that any player who did not submit to the requested urine testing would be excluded from the protections of the Joint Drug Agreement still in place.

The Players Association resisted the proposed universal testing. The club owners responded on the morning of the third game of the 1985 World Series at a meeting in St. Louis by unilaterally terminating the drug agreement, as they had every right to do under its terms.

During the months preceding the 1986 opening of spring training in the West and in Florida, there were approximately 550 player contracts
proffered for renewal by the major league clubs. Most of these were year-to-year contracts. Acting on the advice of the Player Relations Committee, the club owners' bargaining arm, those 550 contracts included a clause that read as follows:

Player is of the opinion that it is vitally important to him and his professional career that his image not be tarnished by the spectre of drugs. Therefore, player voluntarily agrees to submit to any test or examination for drug use when requested by the club.

It was thereafter widely reported in the press that a number of players publicly endorsed the concept of mandatory, random drug testing. Others, however, protested that drug testing was not scientifically accurate and that the need for an observer during the process of the evacuation of urine and its placement in the sample vial constituted an unwarranted intrusion upon personal privacy. The players also expressed a fear that a slump in their performance, which happens to all of them at sometime, could trigger a midnight, unannounced testing demand.

All of the players whose contracts were up that winter nevertheless executed the agreements that were proffered. They did not have many other options and they acted on the advice of their bargaining representatives.

III
 Arbitration

The Players Association then challenged the action of the clubs, contending that pursuant to federal labor law and the terms of the collective bargaining agreement, the clubs were required to bargain with the Association regarding drug testing procedures rather than with individual players by offering them next year's contract with the clause in it. Article II of the basic collective bargaining agreement in baseball sets forth the acknowledgement of the clubs that the Players Association "is the sole and exclusive collective bargaining agent for all major league players with regard to all terms and conditions of employment." That same article, however, exempts from this stated bargaining authority of the Players Association any "special covenants" which actually or potentially provide benefits to a player beyond those found in the Uniform Players Contract, which is a negotiated addendum to the collective bargaining agreement that every player must sign. Special covenants are therefore not covered by the UPC and historically have been exempted from the duty to bargain. They usually cover such things as the provision of a single room for a player while traveling on the road, or the payment of round-trip airfare for a player's wife to join him during spring training. One special covenant between Rollie Fingers and the
Oakland A's provided that the club was obligated to supply him with the best moustache wax available for the entire season. Those are typical special covenants.

The clubs took the position in this grievance that the drug testing clauses added to the individual player contracts provided actual or potential benefits to the player and therefore were legitimate special covenants involving no obligation to bargain with the union. The Players Association, on the other hand, argued that any permissible, potential benefit must run to the player alone and not to the club. The Players Association further noted that the drug testing clause created an affirmative obligation on the part of the player where none had previously existed. The grievance matter at issue was therefore not whether drug testing would advance the interests of baseball, but rather whether the clubs may institute mandatory drug testing in the absence of an agreement to do so negotiated with the Players Association.

This grievance ultimately came before me in my capacity as chairman of the arbitration panel in major league baseball. The matter was heard over several months at various locations throughout the country. Finally, on July 30, 1986, I issued an award that found the unilaterally imposed drug testing clauses to be in violation of Article II of the basic agreement.

The players at the major-league level as a consequence of this decision are not subject to mandatory testing. While I may or may not believe that this is the best outcome, I was not free to construct my own social constraints. By rendering a decision that was no more or less than a proper and defensible interpretation of the collective bargaining agreement, I fulfilled my contractually limited role as contract reader.

The award stated that under the terms of the contract, neither the owners nor the Players Association were free to unilaterally change a working condition. While the parties remain free to negotiate an acceptable drug testing provision to be incorporated in the individual player contracts, the clubs may not, in the interim, unilaterally impose upon individual players a contractual obligation that did not previously exist.

The reaction of the club owners to that award was immediate and decisive. Invoking the historic prerogative of baseball ownership to fire the manager when things go wrong, the clubs promptly fired me. They had a right to do so under both the collective bargaining agreement and my personal contract with them.

With that the saga ends. At the present time there is no joint drug agreement in baseball, which I believe is a pity.
Arbitral Standards in Sexual Harassment Cases

William S. Rule†

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INTRODUCTION

Sexual harassment in the work place today takes many forms, some blatant and some subtle. Even the more subtle forms may result in a grievance being filed and won. Both supervisors and those they supervise need to be aware of the full range of actions which can lead to a charge of sex discrimination as defined by state and federal statutes. Perhaps the best way to approach this subject is to list a series of situations which may occur in the work place today and which may subject the instigator to a charge of sexual harassment and the grievance process:

1. Joan, a buyer for a large electronics firm, always turns down female salespersons but buys identical products from male salespersons.

2. Bob, a supervisor, says to Margaret, an employee: “Let’s you and me build a relationship overtime and I’ll see that you are taken care of.”

3. Nancy says to David, her supervisor: “Ruth got a promotion because she has been putting out for you off the job and I don’t think that is fair.”

4. Charles, a supervisor, says to Mary, an employee: “You have been here five years now and have done good work. An Assistant Manager job is coming up next month. You help me and I’ll help you.”

5. Jean bids for and is assigned to a special night cleanup crew which earns incentive pay for exceeding set team goals. She is

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10. These fact patterns are based on actual grievances.

SYMPOSIUM: ARBITRATION

the only woman on the crew. The work is tough but she can do it. The productivity of the group drops after she joins it and the crew earns no further incentive pay. The men on the crew blame Jean, saying they cannot work with her. Jean blames the men.

6. Ann's husband is her supervisor. Other employees complain that Ann gets easy jobs and extra overtime. Ann feels she gets the worst jobs.

7. Susan, a supervisor, seems to give all the easy jobs to her "special female friend." The male and female employees in Susan's section complain.

8. Stanley, the boss, tells his receptionist to wear short skirts and tight blouses if she wants to keep her job.

9. Kathy, who is very attractive, walks into the coffee room where some of the men are having coffee. They whistle at her. Kathy resents that kind of attention and has said so to the men before.

10. Nathan, a supervisor, admits he and Judy used to slip into the conference room once in a while and "have a little fun on the couch." He claims, however, that Judy also enjoyed it and he never forced her to do anything. Judy says she was harassed.

11. Tom, an office manager, flirts with the girls in the office every day. However, he never says anything at all to Helen, whom he considers unattractive. Helen claims sexual harassment.

12. Anthony, an outside salesperson with another company, always leers at the girls in the office when he comes in. Martha complains to the office manager.

Some of these situations involve so-called "quid pro quo" sexual harassment and others involve the more subtle question of hostile work environment sexual harassment. Each of these situations could lead to a charge of sex discrimination within the meaning of federal and state antidiscrimination statutes and could result in grievances leading to arbitration.

There should be no doubt in anyone's mind that sexual harassment does take place in the workplace. Perhaps the most widely cited survey on the subject was taken by Redbook Magazine in 1975. It found some ninety percent of 9,000 respondents said they had experienced some form of sexual harassment. Whether this volume of cases is due to the increasing number of women in the work force, changing values in society,

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12. What Men Do to Women on the Job: A Shocking Look at Sexual Harassment, REDBOOK 149, 217 (Nov. 1976); see also BUREAU OF NATIONAL AFFAIRS, SEXUAL HARASSMENT AND LABOR RELATIONS 23 (1981); U.S. MERIT SYSTEM PROTECTION BOARD, OFFICE OF MERIT SYSTEMS.
job competition or other reasons not yet identified is not clear. What is
clear is that there is a problem and all of us must deal with it.

I

JUDICIAL RECOGNITION OF HOSTILE ENVIRONMENT AS
SEXUAL DISCRIMINATION

Employment discrimination based on sex was added to the other
prohibited discriminations under the Civil Rights Act of 1964 in 1972. Effective court response to the problem was not forthcoming immediately, however.

For example, in a 1976 case in which a secretary alleged that her boss propositioned her at lunch during a discussion of her work and a possible promotion, the court found no discrimination because of sex. The secretary had refused her boss’ sexual advances, requested and received a transfer to a less desirable position, and was finally terminated. She sued. A New Jersey federal district court rejected the argument that sexual harassment constituted sexual discrimination:

If the plaintiff’s view were to prevail, no superior could, prudently,
attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time. And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or raise is later denied to the subordinate, we would need 4,000 federal trial judges instead of some 400.

Following Tomkins, it took ten years for courts to recognize sexual harassment as a form of discrimination. In 1986, the Supreme Court in Meritor Savings Bank, FSB v. Vinson held that employer creation of a hostile environment could constitute sexual harassment and sexual discrimination. In that case, Mechelle Vinson had worked for a vice-president by the name of Taylor for four years, rising rapidly in the bank. There is no evidence that she rose on any other basis except her administrative ability. After reaching the position of assistant branch manager, she took a leave of absence and, shortly after the leave of absence, was discharged for excessive use of the privilege.

She claimed four years of sexual harassment by Taylor, including required intercourse on forty or fifty occasions. In fact, the required in-


15. Id. at 557.

tercourse continued until she told Taylor she had a steady boyfriend. Taylor denied Vinson's allegations and the bank disclaimed liability on the ground that it lacked knowledge of the alleged harassment.

The district court noted that Vinson failed to file a complaint, considered the sexual relationship, if it existed, voluntary and not related to her continued employment, and further decided that the bank had no liability whatsoever. Upon review, the court of appeals decided that the district court had not considered whether Taylor had created a hostile or offensive working environment for Vinson. Voluntariness was not material if the sexual relationship was a condition of Vinson's employment, the court said, and decided that the bank was subject to absolute liability since a vice-president had been involved. The matter went to the Supreme Court.

The Supreme Court affirmed the concept of hostile environment as sexual harassment, even without economic detriment. The only question was whether advances were unwelcome and not whether participation was voluntary. The Court said the trial court could consider sexually provocative speech and dress in determining whether the employee found advances unwelcome, and further concluded that the liability issue had to be considered on a case-by-case basis. The Court also suggested that employers adopt a strong antisexual harassment statement and a grievance procedure for sexual harassment complaints with provisions that guaranteed that the harasser could not block the process. These procedures might insulate the employer against liability. It remains to be seen whether the effect of Vinson will be to insulate from liability employers with remedial schemes, however ineffective, or to improve the working conditions of the sexually harassed employee.

II

ARBITRATION OF SEXUAL HARASSMENT CLAIMS

Strangely enough, the concern of the parties over sexual harassment has not led to much contract language on the subject, at least in the West. Out of the fifty to one hundred labor contracts received each year in arbitration cases, this arbitrator has found only one contract with an article on sexual harassment.\(^\text{17}\) Many labor contracts prohibit sex discrimination along with discrimination based on race, creed, color, and national origin but make no reference to sexual harassment. In the INS-AFGE contract, for example, the article on sexual harassment quotes extensively from the EEOC Guidelines and even goes beyond those Guidelines in establishing employer liability. Obviously, under that contract an arbitrator would not have to be concerned about interpreting

external law since the law is in the contract. In time, the parties may see
fit to add similar language to their contracts. However, it does not ap-
pear to be a high priority bargaining item at this time. Contracts and/or
plant rules often list certain offenses such as gross insubordination, dis-
honesty and use of drugs on the premises as offenses justifying immediate
discharge without prior progressive discipline. It might be appropriate to
include sexual harassment in such lists. Although it is only one of the
various forms of discrimination which must be dealt with and although
there are degrees of sexual harassment just as there are degrees of insub-
ordination, such an inclusion would provide the parties with explicit lan-
guage governing the sexual harassment problem.

Even with the limited contract language on the subject, it is quite
clear there is a growing volume of reported sexual harassment cases in
arbitration.\footnote{18. See Nelson, Sexual Harrassment, Title VII, and Labor Arbitration, 40 ARB. J. 55 (Dec. 1985).} Nelson found sixty-four sexual harassment cases reported
since 1958 in his survey completed in 1985.\footnote{19. Id. at 62.} In addition, the reported
cases probably represent only the tip of the iceberg.\footnote{20. My own experience with such cases and discussions with other arbitrators have led me to
this conclusion.} One or both par-
ties generally seem to prefer to have such cases not published. Manage-
ment and labor apparently prefer not to wash dirty linen in public.

Any analysis of the published cases quickly establishes the fact that
they are almost all the result of grievances filed by an employee who has
been disciplined and/or discharged for alleged sexual harassment. Arbi-
trable standards have been developed by arbitrators over many years for
determining whether a management did or did not have just cause for the
actions.\footnote{21. See generally A. KOVEN & S. SMITH, JUST CAUSE: THE SEVEN TESTS (1985).} Probably the most difficult assessment the arbitrator makes is
the determination of credibility. The victim describes the harassment.
The accused either denies that it happened at all or denies that it hap-
pened the way the victim described the events. There are often no other
witnesses. Who is telling the truth? While always difficult, such credibil-
ity questions have been the subject of arbitrations for years. Arbitrators
seem as capable of dealing effectively with these questions in sexual har-
assment cases as they have in other discipline cases such as insubordina-
tion where often only the employee and supervisor were present and now
tell conflicting stories.

Beyond the credibility problems are the problems of interpreting ex-
ternal law. Since the parties cite EEOC Guidelines, Title VII and court
decisions, the arbitrator must decide to what extent to base his award on
the external law. While it is argued from time to time that arbitrators
should not interpret external law and should only concern themselves
with the terms of the agreement,\textsuperscript{22} an arbitrator has little choice in a case of sexual harassment, absent an agreement similar to the one cited earlier between INS and AFGE.\textsuperscript{23}

Fortunately for arbitrators, a recent study of employment discrimination cases resolved in court and heard in arbitration with emphasis on gender discrimination concluded:

Grievants are receiving the protections of the law through the arbitration procedure. The vast majority of awards comply with Title VII and simultaneously effectuate the intent of the parties to have these disputes settled through arbitration. Finality of awards is not really an issue as the statistics indicate that very few cases are relitigated and even fewer are reversed. Arbitrators are considering federal and state antidiscrimination statutes and regulations and applying them accurately. And finally, arbitrators are not afraid to and, in fact, may be better equipped then judges to handle the newest issues in this field.\textsuperscript{24}

Besides credibility and external law questions, the arbitrator is often faced with the question of whether there was adequate advance warning to the alleged sexual harasser. The disciplined employee will argue he was only doing what everyone else did and that he did not know there was a rule against what he considered good clean fun and the victim considered sexual harassment. Clear statements of policy widely circulated prohibiting all forms of sexual harassment would largely eliminate this problem and probably reduce the likelihood of an incident. In any event, such statements make it much more likely the discipline imposed will be sustained. Such policy statements may take many different forms but should make reference to EEOC Guidelines and be as complete as possible.\textsuperscript{25} While most such statements will be issued by management, unions, in their role as employer in their own operations, should also publish their own statements.

A special problem arbitrators find themselves facing in sexual harassment cases is the argument over whether or not the sexual activities of the accuser are appropriate evidence to be heard and to be considered in reaching a decision. This issue arose before this arbitrator several years ago in an unpublished case where a plant nurse accused a plant employee of sexual harassment.\textsuperscript{26} The record established that the nurse was fifty-one years old and had been married for thirty-one years. She told a convincing story of the alleged sexual advances and her strong resistance to

\textsuperscript{22} A. ZACH \& R. BLOCK, LABOR AGREEMENT IN NEGOTIATION AND ARBITRATION 27 (1984).
\textsuperscript{23} Id. at 37.
\textsuperscript{26} Apr. 15, 1981.
them. The grievant denied any sexual harassment and testified he had a drink with the nurse at the bowling alley at her invitation on the night of one alleged offense. The chief shop steward testified, over strenuous company objections as to relevancy, that he had engaged in some twenty-five incidents of mutual fondling with the nurse in his car and in her car driving to and from work in the year before the arbitration hearing. This arbitrator heard that testimony because it appeared relevant to the required credibility determination. The nurse was not recalled as a witness and did not deny the chief shop steward’s testimony. Based partially on this testimony, this arbitrator sustained the grievance and changed the discharge to a thirty day suspension. On that record, it was clear that the nurse’s strong sexual interest could have encouraged the grievant.

CONCLUSION

In conclusion, this arbitrator believes there will be more and more cases of sexual harassment heard in arbitration in the future both through collective bargaining grievance procedures and through grievance procedures unilaterally established by the employer for unorganized employees. Arbitrators will continue to be faced by hard questions such as those mentioned. Arbitrable standards generally developed for just cause determination will be followed where discipline is involved and new standards will be developed where established standards do not apply. One of the strengths of arbitration is its flexibility and adaptability to the needs of the parties. No doubt, in time, even what constitutes a “lustful leer” will be defined.
Deferral to Arbitration
and Use of External Law in Arbitration

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I

THE PECULIAR ROLE OF AN ARBITRATOR

A proper definition of the appropriate roles of arbitrators, administrative agencies and the courts depends in great part on the notion that, generally speaking, in labor relations, the interpretation and application of contracts is for arbitrators, and the interpretation and application of statutes is for the administrative agencies and the courts. Arbitrators deal primarily with contract rights and administrative agencies, like the NLRB and the courts, deal primarily with statutory rights. If that distinction is maintained, the problems of deferral to arbitration and the use of external law in arbitration can be more easily resolved.

It is a fundamental notion that parties generally commission arbitrators to read their contract and tell them what that contract means. Arbitrators are thus contractually empowered to provide the parties with a definitive interpretation of their agreement. That idea is so basic that a court, in reviewing an arbitral award, should treat it as if the parties themselves had stipulated that this was their interpretation of their contract. The notion that the arbitrator commits gross error in interpreting the contract then becomes a contradiction in terms.

David Feller, in a brilliant article, suggested that the peculiar nature of the arbitrator's role as interpreter of the collective bargaining agree-

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ment arises from the fact that the arbitrator is really setting terms that the parties could not have agreed upon because there are an infinite variety of situations unanticipated at the time the bargain is struck. Feller argues that collective bargaining agreements must, in fact, deal with these situations, if not in actuality, then putatively.

The real explanation for the nature of the arbitral role is a simpler one and applies to all arbitration agreements, whether labor arbitration or nonlabor arbitration. My view is simply that the arbitrator, in the labor context or otherwise, has this peculiar status because it is what the parties have agreed to. The collective bargaining agreement states explicitly that the arbitrator's decision shall be final and binding. As the precedents show, the answer is the same in commercial arbitration as it is in labor arbitration.

II

APPLICATION OF EXTERNAL LAW IN ARBITRATION

A question regarding external law in arbitration arises in two ways: in regard to the arbitrator's role, how the arbitrator should interpret the contract insofar as it may be affected by external law; and in regard to the court's role, how external law may apply to the enforcement of the award if the award is contested and goes to court.

A. Arbitrators' Jurisdiction Under Collective Bargaining Agreements

The notion that the arbitrator's authority depends upon the commission from the parties leads to the conclusion that ordinarily and theoretically the arbitrator is to apply the contract, not external law. The leading Supreme Court case of United Steelworkers v. Enterprise Wheel & Car Corp., the last of the Steelworkers Trilogy, specifically states that the arbitrator must not base her decision solely upon her view of the requirements of enacted legislation. The arbitrator's interpretation, to be valid, must "dra[w] . . . its essence from the collective bargaining agreement." In disputes that have caused a great deal of theoretical turmoil within the National Academy of Arbitrators and elsewhere over the years, I have taken the position that that rule applies even if the arbitrator concludes that the contract is in conflict with a statutory provision. If there is a direct, irreconcilable conflict between the arbitrator's notion of what the contract requires and her view of what a particular statute

29. Id. at 597.
requires, the arbitrator should follow the contract because it is the contract and not the law that the parties have asked the arbitrator to interpret and apply.

Many arbitrators are not lawyers. The arbitrator's view of the law may, in fact, be erroneous. The parties are asking for a reader of the contract to tell them what the contract means. It is then up to the courts to deal with the question of whether that reading is or is not in accord with enacted legislation.

In practice, much of this great debate about contract versus law is a tempest in a teapot, the importance of which may be exaggerated. First, if the parties have used contractual language that directly tracks the language of a statute, such as the National Labor Relations Act or the Civil Rights Act of 1964, that contractual language must be interpreted as an invitation to the arbitrator to read the contract in light of the statute. The parties have undoubtedly intended that the contractual rights with which they are dealing be analogous to the statutory rights. Therefore, in this situation, the arbitrator may take account of administrative and judicial decisions interpreting the statute as a guide to interpreting the contractual rights.

Second, there is no reason why the parties cannot empower the arbitrator, either implicitly or explicitly, to take enacted legislation into account. In the majority of cases where the contractual language is subject to two different readings—one which would be valid under the law and one which would be struck down as invalid—an arbitrator is merely exercising common sense if she concludes that the contract should be read in its valid sense.

Ultimately, however, the arbitrator's commission is grounded in the collective bargaining agreement or the ad hoc stipulations of the parties appointing her. Her authority can rise no higher than its source, the agreement of the parties providing for that commission.

B. Judicial Review of Arbitral Awards

When a court reviews an arbitration award, the Supreme Court has made it very clear over the years that the court should not concern itself with the merits of the determination. If the arbitrator has acted within her jurisdiction, has not been corrupt and has not denied the parties due process, then the court should accept her reading as the definitive interpretation of the contract even if the court might have read the contract differently. Simply put, a court should not indulge in second-guessing. 31

This view has given rise over the last couple of years, however, to some serious inquiries about what a court should do when it finds that

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the arbitrator’s reading of the contract is correct but that it conflicts with certain public policy notions. Should the court set aside the award? Although the court should bow to the interpretation that the arbitrator has rendered, it is also the function of the court to make certain that the enforcement of the arbitral award will not constitute a violation of law.

The issue that has emerged over the last few years in a series of contested cases in the courts of appeals is the extent to which a court should go beyond actual legislation or well-accepted principles of common law and indulge in its own notions of general public policy in determining the extent to which an arbitral award should be enforced. In a case currently before the Supreme Court, Paperworkers v. Misco, the Court may provide some insight into the resolution of this problem.

In Misco, an arbitrator’s reinstatement of a worker discharged for allegedly smoking marijuana was set aside by the court of appeals—after rewriting the findings—on the ground that it was contrary to public policy to reinstate an employee who worked with dangerous machinery and smoked marijuana on the job. It appears that the case will be reversed on the facts. But more important is what the Supreme Court may decide about the role of public policy notions in court review of arbitral awards.

In my judgment, the position the Court should follow is set forth in the amicus curiae brief written on behalf of the National Academy of Arbitrators by arbitration expert David Feller. In the brief, he argues that a court should not indulge in general notions of public policy in order to set aside an arbitration award; it is only when the award would call for the violation of some clear statutory principle or some fundamental principle of common law that a court should step in. Whether people should or should not be reinstated because they smoked marijuana is the kind of question that should be left to arbitration; the court should not engage in that kind of policymaking.

There are number of court decisions which have taken the position espoused in this brief—that it is better to narrow the range of review so that courts will not indulge their own notions of public policy. Under

36. Id. at 20-26. In reversing, the Supreme Court noted that the circuit court cited no statutory or case law which the worker’s actions violated. The Court stated that a court reviewing an arbitration award can refuse enforcement only when the award violates “existing laws and legal precedents . . . establish[ing] a well-defined and dominant policy . . . .” 108 S. Ct. at 374 (quotation omitted).
this view, the role of the courts is limited to ensuring that the enforce-
ment of the award does not directly violate an accepted statutory prin-
ciple or fundamental principle of common law.37

III
DEFERRAL TO ARBITRATION

The question of deferral to arbitration has two distinct aspects:
deferral to an award that has already been issued, and deferral to the
process prior to its being invoked. In both situations, a clear demarca-
tion between the arbitrator's contract-reading role and the NLRB's stat-
ute-interpreting roles can resolve the deferral problems.

A. Deferral to an Award

For many years, the National Labor Relations Board has held under
the Spielberg doctrine that it will recognize or honor an arbitration
award as long as the proceedings have been fair and regular, all the par-
ties have agreed to be bound, and the decision is not clearly repugnant
to the purposes and policies of the Act.38 It is troubling that the Spielberg
doctrine leads to the Labor Board's accepting an arbitration decision as a
determination of whether or not there was an unfair labor practice—a
question involving interpretation of statutory rights.

Rather, the Labor Board should recognize that what the arbitrator
is deciding is whether or not there was just cause for the discipline that
had been imposed under the contract. Of course, the Board may appro-
priately make use of that finding as to contract violation in making its
determination as to whether there was a statutory violation. An arbitral
finding of just cause for dismissal, for example, will be relevant to the
question of whether an employee actually was disciplined because she
engaged in a union activity. But in the one case it is a contractual issue,
and in the other case it is a statutory issue.

More recently in the Olin Corp. case, the Board added some refine-
ments to its doctrine, enlarging the scope of deferral. The Board estab-
lished a rule that the existence of parallelism between contractual and
statutory rights would be a sufficient basis for the Board to defer if the
arbitrator had been presented generally with the facts bearing on the un-

37. See, e.g., W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers, 461 U.S.
757, 766 (1983) (the public policy that would justify a court's refusal to enforce an arbitral award
"must be 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'" (quoting Muschany v.
United States, 324 U.S. 49, 66 (1945))); Northwest Airlines v. Air Line Pilots Ass'n, 808 F.2d 76, 78
(D.C. Cir. 1987) (upholding arbitral reinstatement of alcoholic pilot); American Postal Workers
Union v. United States Postal Serv., 789 F.2d 1, 8 (D.C. Cir. 1986) (upholding arbitral award where
arbitrator excluded grievant's statements as a violation of Miranda rights).
fair labor practice issue.  

The Board must realize that the same issue is technically not before the arbitrator that is before the Board, because the arbitrator is dealing solely with a contractual question. The Board should never abdicate its fundamental function of dealing with the statutory question. In the future, the courts must examine more closely the nature of the Board's deferral actions.

B. Pre-Award Deferral

The more difficult problem is the situation in which an employee has filed a charge of antiunion discrimination with the Board against an employer and the employer contends that the employee could have gone through the grievance and arbitration procedure because the contract also protects him against discrimination because of union activity. Under this contention, the Board should defer to an arbitration of the question.

In the *Collyer* case, the Board first accepted the notion that it would defer to arbitration where the charge was not one of individual discrimination, but rather of a refusal to bargain, in a context where the refusal to bargain was essentially a unilateral change of working conditions. As the employer's actions were arguably in violation of the contract, they were arguably subject to the grievance and arbitration procedure. Rather than interpreting the contract itself, the Board deferred to the arbitrator.

It is far more appropriate, in my view, to accept the deferral doctrine in a section 8(a)(5) refusal-to-bargain situation, because the essential issue in most of these cases is the meaning of the contract. An arbitral review of whether the employer did engage in a unilateral change examines the question of whether the employer violated some provision.

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39. Olin Corp., 268 N.L.R.B. 573, 574 (1984). There may be some disagreement among the courts of appeals concerning the NLRB's revised standards for deferring to arbitration awards. Compare *Taylor* v. NLRB, 786 F.2d 1516 (11th Cir. 1986) (Board may not presume that all arbitral proceedings confront and decide every possible unfair labor practice issue in bipartite grievance-arbitration proceedings) with *Bakery Workers Local 25* v. NLRB, 730 F.2d 812 (D.C. Cir. 1984) (apparently accepting new *Olin Corp.* standards for deferral when arbitrator has been "presented generally" with facts relevant to resolving unfair labor practice).

40. The *Spielberg* postaward deferral doctrine has long been held applicable to cases arising under both § 8(a)(3) (individual discrimination) and § 8(a)(5) (unilateral change/refusal to bargain) of the NLRA (29 U.S.C. § 158(a)(3), (5)(1982)). See, e.g., *Taylor*, 786 F.2d 1516 (§ 8(a)(3)); *Bakery Workers*, 730 F.2d 812 (§ 8(a)(5)).


in the contract with the action that it took. That is peculiarly subject to the jurisdiction of the arbitrator.

The Board, however, has not developed a clear doctrine about this kind of deferral. It has not recognized that the Collyer situation is not the only kind of case in which a section 8(a)(5) can arise. Some of the cases in which a section 8(a)(5) refusal-to-bargain charge is filed after unilateral action involve situations where the matter is not covered by the contract at all; it may be a matter completely omitted from the contract. Ordinarily, an arbitrator will find that the employer did not violate the contract in that situation because there was no provision in the contract preventing the employer from taking that particular action. The problem, however, is that it still may be a section 8(a)(5) violation. It may be the taking of unilateral action with regard to a mandatory subject of bargaining not covered by the contract and, therefore, subject to the duty to bargain during the life of that agreement, absent an appropriate management-rights clause or a zipper clause. The Board has not fully appreciated this distinction.

With regard to the individual discrimination cases, the Board has vacillated over the years. There have been several three-to-two decisions overruling one another, the current position of the Board being that it will defer to the grievance and arbitration process with regard to individual claims as well as with regard to refusal-to-bargain cases.43

This approach to individual claims is more troubling. A strong argument can be made that an individual employee has a statutory right to invoke the processes of the National Labor Relations Board and file her own section 8(a)(3) charge, and that the grievance and arbitration procedures of the collective bargaining agreement should provide only an alternative, supplementary remedy and not a basis for preventing the individual from going to the Board.

It is heartening to see that at least some of the courts have indicated that there must be scrupulous attention paid to whether there is a conflict of interest between the union and the employee in those situations. If any such conflict exists, the employee should not be precluded from having direct access to the Board.

CONCLUSION

There is a distinction between contract rights and statutory rights which must be always kept in mind in this area of law. Ordinarily, the

43. The Collyer doctrine was extended to § 8(a)(3) discrimination cases in National Radio Co., 198 N.L.R.B. 527 (1972). National Radio was overruled in General American Transportation Co., 228 N.L.R.B. 808 (1977), which in turn was overruled in United Technologies Corp., 268 N.L.R.B. 557 (1984), which revitalized the National Radio doctrine favoring deferral in § 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2) cases.
fundamental function of the arbitrator is to interpret and enforce contract rights, and, ordinarily, the fundamental function of administrative agencies like the NLRB and the courts is to interpret and enforce statutory rights. If this distinction is understood and maintained, defining the role of external law in arbitration will cease to be a difficult process.