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Arbitrator Ethics and the Second Look—*Functus Officio* in the National Labor Policy

Erwin B. Ellmann†

The term *functus officio* means a task or office performed. Once something has become *functus officio* it has no further legal authority. The major organizations of labor arbitrators have included the *functus officio* doctrine in their Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (the "Code"). The Code prohibits a labor arbitrator from clarifying or modifying his or her award once it has been issued, unless both parties consent. The author argues that the *functus officio* doctrine should be removed from the Code because it conflicts with national labor policy. After tracing the roots of the doctrine in the common law, the author argues that the courts in this country have not applied it to labor arbitration under collective bargaining agreements. The author asserts that the courts have recognized the important role arbitration plays in collective bargaining agreements, and that the national labor policy requires a complete resolution of a dispute by arbitration. Thus, the author contends, the courts have refused to invoke the *functus officio* doctrine to labor arbitration and have concluded that ambiguous awards should be returned to the arbitration process for clarification. Moreover, the author states that arbitrators have disregarded the doctrine in order to modify an award in a quicker, less costly manner. The author concludes that the *functus officio* doctrine should be eradicated from the Code.

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**INTRODUCTION: DOGMA & DECORUM**

Among the pieties of labor arbitration is that once an award has been issued, the arbitrator becomes *functus officio*, with no power to alter

† Shareholder, Levin, Levin, Garvett and Dill, P.C., Southfield, Michigan. B.A. 1936, J.D. 1938, University of Michigan. The author has been a member of the Michigan Bar for over fifty years, and has served as a labor arbitrator during most of that period.

or explicate the award in any way. Indeed, the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Service have established in their Code of Professional Responsibility for Arbitrators of Labor-Management Disputes that without the mutual consent of the parties, no “clarification or interpretation of an award is permissible.” The old common law dogma of functus officio has thus evolved into a moral imperative and a canon of professional ethics for all arbitrators who would serve in labor cases. “The time-honored doctrine of functus officio,” we are told, “is a rule of law, of prudence, of loyalty, and of ethics.” One prominent Academy member urges that steps should be taken by all who “have a stake in preserving the golden goose of arbitration,” to see that the ethical rules embodied in the Code are universally enforced.

While it is often convenient and even sensible for the labor arbitrator to refuse to tamper with an award once issued, to mandate impotence to correct any mistake or to fill any gap in an opinion in the name of ethics is anachronistic, absurd, and at war with national labor policy. It is high time to strip functus officio in labor arbitration of its talismanic magic. This paper proposes that the venerable doctrine be deleted from the Code.

I

REMEMBRANCE OF THINGS PAST

The term functus officio, meaning a task or office performed, is “applied to . . . an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.” Clothed in Latin raiment, the doctrine has been invoked to invalidate acts of public officials once their terms of office have expired and has even barred the efforts of courts to correct their own errors. In this country, the question of whether a court had power to remedy simple technical errors in its own judgments inspired a study of no less than 123 pages as late as 1921. Judges, mistrustful of arbitration as a usurpation of au-

5. Annotation, Correcting Clerical Errors in Judgments, 10 A.L.R. 526 (1921). The functus officio doctrine traces back more than seven hundred years to the reign of Edward I. See 3 WILLIAM BLACKSTONE, COMMENTARIES *408-11. In England, the Arbitration Act of 1889 first permitted
authority they regarded as their exclusive province,⁶ could hardly be expected to grant greater flexibility to arbitrators than they defined for themselves.

The perverse history of functus officio in arbitration goes back at least as far as Henfree v. Bromley.⁷ There, an umpire in a written award directed one party to pay a sum to the other party while advising them orally that the costs of the proceeding should be divided equally. The umpire then placed the award in the hands of his attorney for delivery to the parties. That same day the umpire was advised that one party refused to pay his share of these costs. The umpire thereupon struck his pen through the original award of 57 pounds, and inserted the sum of 66 pounds. He added the share of the costs, and signed the award anew “with a dry pen,” which was attested by witnesses.⁸ At trial, the celebrated Thomas Erskine quoted from Pirot’s case, 11 Rep. 27a, that “when any deed is altered in a point material by the plaintiff himself, or by any stranger without the privity of the obligee, be it by drawing a pen through a line or any material word, etc. the deed thereby becomes void.”⁹ His opponent, however, argued that the original award was valid since the arbitrator had no authority to alter the award, and the alteration was made “by mistake” without any fraudulent purpose.¹⁰ Lord Ellenborough, C.J., refused to view the case as a mere mistake of putting down the wrong sum; rather, it was “a new and distinct act of judgment” formed by the umpire “after his authority was spent and he was functus officio.”¹¹ Nevertheless, the court saw no objection to sustaining the original written award since the alteration in the sum found to be owed “was no more than a mere spoliation by a stranger, which would not vacate the award.”¹² Lord Ellenborough declared that he read the award “with the eyes of the law as if it were an award for 57, such as it originally was.”¹³ The common law thus became a fortress against correction of what the author himself acknowledged was an unintended result.

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8. Id.
9. Id. at 1306.
10. Id. Erskine’s opponent wanted to make the argument that the arbitrator could have corrected his mistake anytime before the delivery of the award. However, he realized a prior ruling by the same court precluded such an argument. Id.
11. Id.
12. Id.
13. Id.
The transplant of the common law to this country did not signal any greater hospitality to arbitral resolution of disputes. An award will either be enforced as made or rejected if it is in any respect deficient because of uncertainty or lack of finality, declared Chief Justice Marshall in *Carnochan & Mitchel v. Christie.*14 The Court would not supply any omissions.15 In *Carnochan & Mitchel,* the Court set aside the deficient award as if it had never been issued, and the Court remanded the matter to be tried as an ordinary suit in equity.16 Two years later, the Court noted that arbitrators “have been held to a more than ordinary strictness in pursuing the terms of the submission.”17 Then, in the 1863 case of *Bayne v. Morris,*18 the Court went out of its way to echo the *Henfree* rule that arbitral judgment is beyond recall. After reversing the judgment, the Court declared:

Inasmuch as this case is to be remanded, it is proper to say, that in the opinion of the court, the award of the 26th of January is inoperative and void. Arbitrators exhaust their power when they make a final determination on the matters submitted to them. They have no power after having made an award to alter it; the authority conferred on them is then at an end.19

State courts reached similar results.20 In some jurisdictions, an exception to the general rule was recognized to the extent that obvious clerical errors could be corrected after an award had been made.21 Several state courts declared their powerlessness to remand the matter to the arbitrator to correct an award;22 other courts would remand if permitted by statute or express stipulation of both parties.23 In some jurisdictions, it was held that an award which did not answer all questions submitted was incomplete and could accordingly be sent back for completion to the original arbitrator or another.24 If an issue was treated ambiguously, some courts found the award insufficiently “definite” and remanded it for clarification.25 This was held to be permissible under the United States

15. Id.
16. Id. at 467.
18. 68 U.S. (1 Wall.) 97, 99 (1863).
19. Id.
20. See Annotation, *Award or Decision by Arbitrators as Precluding Return of Case to or its Reconsideration by Them,* 104 A.L.R. 710 (1936).
21. Id. at 717.
22. Id. at 718-19.
23. Id. at 720-22.
25. See J.A. Bryant, Jr., Annotation, *Power of Court to Resubmit Matter to Arbitrators for Correction or Clarification, Because of Ambiguity or Error in, or Omission From, Arbitration Award,* 37 A.L.R. 3d 200 (1971).
Arbitration Act, applicable to non-labor disputes affecting interstate commerce. Generally, however, the commercial arbitrator who has issued an award has been treated in the eyes of the law like one who has beheld a Snark which proved a Boojum—he or she has simply melted into nothingness.

II
THE ROLE OF THE LABOR ARBITRATOR

Before World War II, arbitration clauses in collective bargaining agreements were not unknown. But it was only with the demise of the War Labor Board that third party resolution of labor disputes blossomed into a growth industry. When Labor Arbitration Reports appeared in 1946 the editors explained that labor arbitration could proceed under the common law, or applicable general or specific arbitration statutes. "In the absence of a specific exception as to their application to labor arbitration," they declared, "the general arbitration statutes may be used for labor arbitration." Thus, it seemed, if the functus officio doctrine defined the role of the commercial arbitrator, why should it not apply with equal vigor to the labor arbitrator?

Unlike the arbitrator of a commercial dispute, however, the labor arbitrator performs functions which are plainly distinguishable in kind and quality. We have been authoritatively reminded that the collective bargaining agreement is "more than a contract; it is a generalized code" which covers "the whole employment relationship" and "calls into being a new common law—the common law of a particular industry or of a particular plant." It is not entered into "voluntarily" but under

28. "It's a Snark!" was the sound that first came to their ears,
   And seemed almost too good to be true.
   Then followed a torrent of laughter and cheers:
   Then the ominous words "It's a Boo—"
   * * *
   In the midst of the word he was trying to say,
   In the midst of his laughter and glee,
   He had softly and suddenly vanished away—
   For the Snark was a Boojum, you see.
30. Id. at ix-x.
31. Id. at x.
32. The name's the same and that was enough to discourage analytical distinctions. "A fertile source of perversion in . . . theory is the tyranny of labels." Snyder v. Massachusetts, 291 U.S. 97, 114 (1934).
34. Id. at 579.
35. Id.
pre-existing compulsion upon the parties to deal with each other.\textsuperscript{36} Unlike the commercial arbitration submission, the grievance machinery under a collective bargaining contract “is at the very heart of the system of industrial self-government;” it is “a part of the continuous collective bargaining process.”\textsuperscript{37}

Congress has indicated in the Labor Management Relations Act\textsuperscript{38} that “[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.”\textsuperscript{39} This “unmistakable policy of Congress”\textsuperscript{40} commits the ultimate decisive function to the arbitrator and not the courts, for it is the “arbitrator’s construction [of the agreement] which was bargained for.”\textsuperscript{41} The “essence” of the grievance procedure which the parties establish in their agreements is “that an arbitral award shall put the dispute to rest.”\textsuperscript{42} “[W]here the parties have elected to submit their disputes to arbitration, they should be completely resolved by arbitration, rather than only partially resolved.”\textsuperscript{43}

Pursuant to their responsibility to fashion a body of federal substantive law to govern labor relations,\textsuperscript{44} courts have refused to be limited by common law doctrines in defining the role of the modern labor arbitrator.\textsuperscript{45} However disinclined courts may have been to allow common law arbitrators to cure ambiguities and deficiencies in their awards, and however voracious the judicial appetite may have been to supplant the arbitration process, labor arbitration under collective bargaining agreements has clearly escaped these fetters. To the contention that a court must only enforce or vacate an award, the Sixth Circuit responded:

Although that seems to be the law with respect to arbitration awards

\begin{thebibliography}{99}
\item[36.] Id. at 580.
\item[37.] Id. at 578, 580-81.
\item[40.] Id. at 411.
\item[43.] Hanford Atomic Metal Trades Council v. General Elec. Co., 353 F.2d 302, 308 (9th Cir. 1966). See also United Steelworkers v. W.C. Bradley Co., 551 F.2d 72, 73 (5th Cir. 1977).
\item[45.] The Supreme Court's opinion in Enterprise Wheel & Car Corp. did not quarrel with the lower court's observation that “the rule forbidding the resubmission of a final award, which was developed when the courts looked with disfavor on arbitration proceedings, should not be applied today in the settlement of employer-employee disputes.” United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (enforcing arbitrator's award which failed to specify the damages, but including the court of appeals' modification requiring that the amount due the plaintiff-employees be definitively determined by arbitration), rev'd on other grounds 269 F.2d 327, 332 (4th Cir. 1959).
\end{thebibliography}
generally, it is not the law when suit is brought under section 301 of Taft-Hartley. The federal common law of labor has developed to give the courts power to remand to the arbitrator when appropriate. A case such as this, where the arbitrator did not decide the question presented to him, is an appropriate one for remand to avoid the draconian choice of penalizing either the company or the employee for what is, after all, the arbitrator's failure.  

A party seeking clarification of an award is not required to invoke the entire grievance machinery anew. In the words of the First Circuit:

We start with the fact that it is firmly established within the federal labor law that a district court may, in the context of a section 301 [of the Taft-Hartley Act] proceeding, resubmit an existing arbitration award of the type here in issue to the original arbitrators for 'interpretation' or 'amplification.' This judicial power, which is in contrast to usual common law principles and requires no affirmative sanction in the contract or in any statutory provision, has been established by the federal courts in carrying out their mandate to 'fashion from the policy of our national labor laws' a substantive body of law applicable in section 301 cases. In large measure, it seems to have developed as a necessary corollary to the courts' reluctance themselves to interpret either collective bargaining agreements or arbitration awards based on the construction of such agreements. Whatever the genesis, there can be no question that the power exists.

Thus, if the award of the labor arbitrator only partially resolves the issues presented, the matter is properly remanded to the arbitrator since the parties are "entitled to a complete resolution of the issues presented." As the court found in United Papermakers & Paperworkers v. Westvaco, "when there is a failure to adjudicate an issue, the arbitrator has not exhausted his function and may be called upon once more to finish his task." The court will remand to the arbitrator "to make a complete award."  

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46. Grand Rapids Die Casting Corp. v. Local Union No. 159, 684 F.2d 413, 416 (6th Cir. 1982) (citations omitted). The LMRA is also referred to as the Taft-Hartley Act. Section 301 can be cross-referenced to 29 U.S.C. § 185 (1988).


49. Id. at 1022.

50. Id. at 1024.

51. United Steelworkers v. Interpace Corp., 447 F. Supp. 387, 391 (W.D. Pa. 1978). See also LaVale Plaza, Inc. v. R.S. Noonan, Inc., 378 F.2d 569 (3d Cir. 1967), where the court, in an extended discussion, refused to presume that the parties intended their arbitration to be governed by early common law principles, id. at 575; that the policy of finality of an award was "nourished by the primitive view of the solemnity of all judgments," id. at 572; that when an award does not resolve all issues submitted, the arbitrator has "not exhausted his function," id. at 573; and that where doubt remains the arbitrator is properly looked to for the purpose of resolving the confusion, id. The decision, though it involved a commercial dispute, is frequently cited in the labor context as well.
In directing remand to the arbitrator to complete his work, the court is not making a new contract for the parties but simply vindicating the agreement to arbitrate which they had already made for themselves. If the award is too ambiguous, indefinite, or uncertain to permit its enforcement, it should be clarified by the arbitrator. Normally, this is the very arbitrator who issued the award. In some circumstances, however, it may be desirable for a different arbitrator to be selected by the parties. If they cannot agree on an arbitrator to resolve the dispute, the appellate court may direct the trial judge to appoint one.

Furthermore, under the national labor policy there is a presumption that a grievance is arbitrable and that the arbitrator has authority to act. Even expiration of the collective bargaining agreement does not terminate the duty to arbitrate; “the alternative remedy of a lawsuit is the


United Mine Workers v. Consolidation Coal Co., 666 F.2d 806, 811 (3d Cir. 1981). In Smith v. Hussman Refrigerator Co., 442 F. Supp. 1144 (E.D. Mo. 1977), the arbitrator had selected six men to fill four openings. Confronted by the impossibility, the court found that the “proper course of action was to resubmit the same to the arbitrator for clarification.” Id. at 1146.


We should give the arbitrator that which the parties have denied him—a chance to remedy the employer's contractual violation in the light of all facts relevant to framing his award. It was the arbitrator's informed judgment and precise construction for which the parties bargained. Only by returning this matter to the arbitrator can we assure them of those benefits.

Similar concealment at the hearing created the ambiguity alluded to in Printing Pressman's Union No. 135 v. Cello-Foil Prod., Inc., 459 F.2d 754, 757 (6th Cir. 1972).

Bell Aerospace Co. v. Local 516, Int'l. Union, 500 F.2d 921, 925 (2nd Cir. 1974). See also Grand Rapids Die Casting Corp. v. Local Union No. 159, 684 F.2d 413, 416-17 (6th Cir. 1982). Where two arbitrators issued nearly simultaneous awards creating a possible conflict, remand was to both arbitrators in Printing Pressmen's Union No. 135 v. Cello-Foil Prod., Inc., 459 F.2d 754, 757 (6th Cir. 1972).

very remedy the arbitration clause was designed to avoid.” Matters of procedure should lie within the discretion of the arbitrator. Thus, in the light of these principles, it is not surprising that the applicability of the *functus officio* doctrine to labor arbitration has been questioned and rejected:

[It] is clear that the common law doctrine of *functus officio*, which states that once an arbitrator issues his/her award he/she is without authority to proceed further or to explain his/her award, does not apply to federal court enforcement of arbitration awards pursuant to § 301 of the LMRA.

The federal rule of labor law which is applicable to this case is that federal courts have the power to remand an arbitration award, to the arbitrator that issued it, where the award is incomplete, ambiguous or inconsistent.

In the words of the First Circuit: “In fashioning a substantive law of labor relations pursuant to section 301 of the Labor Management Relations Act . . . the federal courts have refused to apply the strict common law rule of *functus officio*."

Moreover, the absence of explicit statutory authority has not slowed the development of this remand doctrine in labor cases. Some earlier decisions borrowed justification from the United States Arbitration Act. In addition, the Uniform Arbitration Act, adopted by some


59. See John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964). In John Wiley & Sons, the Court rejected the employer's argument that the court, rather than the arbitrator, should determine whether the procedural requirements included in the collective bargaining agreement have been met. *Id.* at 556-57. The Court stated, “Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.” *Id.* at 557.

60. United Steelworkers v. Ideal Cement Co., 762 F.2d 837, 842 (10th Cir. 1985).


63. 9 U.S.C. §§ 1-16 (1988 & Supp. II 1990). Under § 11 of the Act, the court may correct an award in certain circumstances, and § 10(a)(5) states, “Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.” Section 1 indicated that the Act did not apply “to contracts of employment of . . . workers engaged in foreign or interstate commerce,” and whether this excluded grievances under collective bargaining agreements was debated at length. See, e.g., Service Employees Int'l Union v. Office Ctr. Services, Inc., 670 F.2d 404, 406 n.6 (3d Cir. 1982) (“[T]here is a serious question as to whether the applicability of the Act to labor arbitration agreements retains any vitality in this circuit.”); Dogherra v. Safeway Stores, Inc., 679 F.2d 1293, 1297 (9th Cir. 1982) (“Neither the Supreme Court nor this court has ever held the Federal Arbitration Act applicable to arbitration of labor disputes.”); General Warehousemen & Helpers Local 767 v. Standard Brands, Inc., 579 F.2d 1282, 1294 n.9 (5th Cir. 1978) (en banc), cert. denied, 441 U.S. 957 (1979) (“[T]he courts of appeals have charted an uneven path” as to whether the Act applies to disputes arising from collective bargaining agreements. “Most of the appellate courts which have
states, permits a court to order a rehearing before a new arbitrator, or in some instances, before the arbitrator who made the award. In the numerous instances where federal courts have remanded awards to the same or a different arbitrator, urged by one party and opposed by the other, there has been scant concern for the postulates that arbitration must be consensual and that courts do not make contracts for the parties. The courts also do not appear to have considered whether arbitrators merit additional compensation for the additional responsibility given them. Furthermore, the arbitrators to whom such an assignment has been remanded do not seem to quibble that they are bound by a judicial order in an action to which they were not a party. What is nonetheless reasonably clear is that the courts, vi et armis, may require labor arbitrators to clean up their own messes and make the very clarifications or interpretations which are prohibited by the Code of Professional Responsibility.

III

THE LABOR ARBITRATOR'S RESPONSE

For an agency proclaiming its dedication to prompt, informal dispute settlement, unencumbered by legalisms, it is surprising that the American Arbitration Association has been responsible for burdening the labor arbitration process with a relic of common law ritualism. Yet, we are told, the origin of the current provision of the Code of Professional Responsibility may be traced to a 1947 booklet which recited that

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67. Faced with a clear judicial order, however dubious, arbitrators, including this one, usually comply and "make the best of it." Cf. City of Saginaw, 92 Lab. Arb. Rep. (BNA) 137 (1989) (Ellmann, Arb.).

68. Hereinafter the "Association" or its full name.

69. Rehmus, supra note 66, at 127.
"the power of the arbitrator ends with the making of the award." In 1951, the Association and the National Academy of Arbitrators issued a Code of Ethics for Arbitrators which provided that an award "should reserve no future duties to the arbitrator except by agreement of the parties." Did this prohibit arbitrators from "unethical grasping" for business? Or did it simply disable them from doing a complete job for the parties who selected them? It took more than two decades for these questions to be confronted by the membership. In 1974, the Academy changed the language of the Code to its present prohibition against "clarification or interpretation of an award" except with the consent of the parties. This merely perpetuated the controversy; each side apparently walked away convinced that it was being professionally righteous either for reserving jurisdiction or for refusing it. During the ensuing years, the Code language has remained untouched and, Professor Rehmus reports, Academy members are still debating whether reserving jurisdiction is or is not a respectable thing to do.

Notwithstanding the development of a national labor policy which repudiates functus officio notions, the Academy remains concerned with whether and when the parties should be asked to permit the arbitrator to correct mistakes, fill in gaps, or complete the assignment he or she has been hired to perform. The Code itself is not questioned, only what it means.

70. AMERICAN ARBITRATION ASS'N, LABOR ARBITRATION: TECHNIQUES & PROCEDURES 21 (1947).
71. Hereinafter the "Academy" or its full name.
72. Rehmus, supra note 66, at 127.
73. Id. at 128.
74. Id. at 129.
75. Id. at 129-31, 135-37.
76. At the Academy's May 1992 annual meeting I argued that the ban on a labor arbitrator's second look deserved reconsideration and that § 6(D)(1) of the Code was anomalous to the national labor policy and should be deleted. In a paper to be published as part of the proceedings, entitled Functus Officio Under the Code of Professional Responsibility: The Ethics of Staying Wrong, in ARBITRATION 1992: IMPROVING ARBITRAL AND ADVOCACY SKILLS, PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS (Bureau of National Affairs, forthcoming February 1993), I traced the changes in judicial thinking which suggest that once parties agree to arbitrate their dispute, the labor arbitrator and not the court is responsible for fulfilling their expectations; it is the arbitrator who must deliver a complete and unambiguous award which squarely resolves all of the issues presented. The Academy proved more hospitable to me than to my views. I evoked scant sympathy from my panel critics on either side of the bargaining table. It was felt that judges will better decide whether an award should be clarified or interpreted than the arbitrator who issued it, although I detect meager evidence in the reported decisions that the courts welcome or undertake such an assignment. It was also felt, more strenuously, that prohibiting the arbitrator from reviewing his or her own handiwork at the request of only one of the parties maintains the integrity of the award, however deficient; the other party must be spared from changes of mind by weak-kneed arbitrators unable to resist the threats, cajolery, or impetrations of the loser. Skepticism greeted my insistence that arbitrators are a more robust and stout-hearted breed. In a straw poll at the end of the session my position was all but unanimously rejected by the sacerdotal guardians of functus officio.
The total and unconditional finality of the arbitrator’s award, safeguarded by the Code, is obviously evaded by a reservation of jurisdiction to add something to the award. At common law no such afterthought was permissible. Such an inflexible rule, however, would mean that to obtain relief from every ambiguity, mistake, or deficiency in a labor award, parties must resort to a court which will no longer listen and at most will compel the arbitrator to resume his or her former role. Or, perhaps, the victim can file a new grievance and repeat the trek through the entire contractual grievance procedure. Many arbitrators have shown impatience with such consequences; if disputes arose concerning implementation of their awards, they were prepared to resolve them without a new joint submission agreement or an intervening trip to the courthouse. Courts appear now to have little trouble with this approach. For example, the court in *A.H. Belo Corp.* declared, “After finding a violation of the collective bargaining agreement the arbitrator . . . was clearly within the scope of his authority in retaining jurisdiction to determine the amount of earnings lost by the grievant employee and then assessing such amount as damages.” Similarly, the Ninth Circuit has stated: “Arbitrators have broad powers to fashion appropriate remedies on submitted issues but they have no authority to decide issues not submitted by the parties. The arbitrator properly retained jurisdiction to decide disputes arising in the administration of the award.” Whether such a reservation suspends the finality of the award for purposes of judicial review has not been authoritatively resolved.

A genuine ethical imperative, one would think, should be safeguarded against nibbling at its roots. Yet arbitrators and courts, after mentioning the doctrine of *functus officio*, hold it inapplicable to the correction of “clerical mistakes, inaccuracies of mathematical computation, or similar errors of a technical nature not directly affecting the substance of a decision.” But why should minor clarifications be ethically accept-

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79. *Id. at 2575.*
81. Compare, e.g., Millmen Local 550 v. Wells Exterior Trim, 828 F.2d 1373 (9th Cir. 1987) (holding the award is not “final” and reviewable) with Hilton Int’l Co. v. Union de Trabajadores de la Industria Gastronomica, 600 F. Supp. 1446, 1451 (D.P.R. 1985) (holding the award is final and complete for federal jurisdictional purposes).
82. B & I Lumber, 81 Lab. Arb. Rep. (BNA) 282, 283 (1983) (Lumbley, Arb.). *Cf.* American Fed’n of Gov’t Employees Local 12, 89-I Lab. Arb. Awards (CCH) ¶ 8256 (1988) (Barnett, Arb.), where the arbitrator found that this principle did not permit her to correct her award which designated a union representative as “Esq.,” a mischaracterization regarded as a false and calumnious imputation of membership in the bar.
able while major ones are not? Or why should petty errors which don’t affect “the substance of a decision” be appropriately corrected while major errors or deficiencies going to the heart of the issue remain preserved under glass? Of course, it is desirable to have arbitrators with perfect foresight and unlimited circumspection who never make mistakes. Arbitrators should express themselves with unchallengeable clarity and demonstrate superhuman infallibility. But if they do not, it seems monstrous that their imperfections should be frozen in granite and mortgaged against correction to the consent of the party advantaged by the error or omission.

Despite the Code of Professional Responsibility, arbitrators and judges do not invariably shut their eyes to common sense. In one case, an experienced arbitrator, appointed by the Federal Mediation and Conciliation Service, employed surprising artifice to sidestep the Code. On February 17, 1975, he issued an award of punitive damages measured by 145 days of work of a single employee. On February 24, the employer wrote him questioning the basis for assessing damages. The arbitrator then wrote the parties, temporarily withdrawing the damage portion of the award and suggesting a further hearing. The union, quite content with the award, vigorously insisted that the award was final and binding. It said it would appear at the hearing only to learn the position of the arbitrator and the employer. After that hearing, the arbitrator released an opinion on March 18, made effective as of March 14. The opinion recited that the damage provision had been orally revoked on March 14, that the original provision improperly awarded damages for a “period of time during which no damages had been sustained,” and that a substitute award should be issued. The opinion recites:

It is the function of the Arbitrator to fashion an appropriate remedy for the wrong committed. This Arbitrator has recognized the error committed by him in a part of the original award. Further, the Arbitrator is of the opinion that his jurisdiction of a case extends for a period of thirty (30) days, subsequent to the date of making an award, for the purpose of correcting any error that may have been made at the time of the original award with respect to the remedy for the wrong committed.

The arbitrator appears to have indicated his disdain for the functus officio objection of the union by ignoring it. His opinion gives no hint of the source of the “thirty-day rule” which he invokes.

A somewhat more satisfying justification for ignoring the functus officio doctrine was suggested by Arbitrator Marlin Volz in Peabody Coal

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84. Id. at 918.
85. Id. at 920.
86. Id.
His position was that if courts can direct the arbitrator to resolve the entire issue put to him and remedy a deficiency in the award, a second arbitrator can assure the same result by using one of the solutions at his disposal, namely returning the grievance to a previous step in the process. In *Peabody*, the coal company laid off five shooters who then displaced five junior employees who, in turn, filed a grievance seeking back pay. Arbitrator Robert Gibson's fifteen-page opinion dealt only with the displacement of the shooters who were ordered reinstated to their former jobs; it left unmentioned the predicament of the five "bumped" grievants. The union accordingly asked for clarification, but the employer refused to join the request. Arbitrator Gibson considered that, absent company approval, he was without authority to do anything but leave the original award in effect, although it completely failed to touch on the grievance actually submitted. The laid off employees then filed a new grievance which came before Arbitrator Volz. Rigorists might have questioned the timeliness of the grievance or simply reiterated that the second arbitrator had no more authority to reconsider an award than the first arbitrator who was *functus officio*. They might even have suggested that since Arbitrator Volz was confined to interpreting and applying a collective bargaining agreement, he had no roving commission to evaluate the sufficiency of a colleague's award. However, these quiddities did not preoccupy Arbitrator Volz, who observed:

In similar cases where arbitrators have been found not to have decided a significant issue presented to him or her, courts commonly have remanded the decision to the Arbitrator for resolution of the unanswered question. The United States Court of Appeals for the seventh circuit, which includes Indiana, had before it such a case in *Young Radiator Co. v. International Union, U.A.W.*, 734 F.2d 321, 116 L.R.R.M. [BNA] 2575 (1984), where it explained:

"Under these circumstances, where the arbitrator has failed to rule on the issue upon which resolution of the parties' dispute should depend, we deem it appropriate to remand to the arbitrator. Although the general rule is that a reviewing court should either enforce or vacate an arbitration award, courts have the power to remand to the arbitrator where appropriate. . . . Where, as here, the arbitrator fails to address fully the question presented to him, remand is appropriate."

Where an arbitrator fails to decide the question, remand, according to the sixth circuit, is the preferred approach, in order "to avoid the draconian choice of penalizing either the company or the employee for what is,
after all, the arbitrator's failure." 92

Arbitrator Volz pointed out that only Arbitrator Gibson was in the best position to determine whether the grievants' complaints "have already been litigated to make applicable the doctrine of res judicata." 93 The effect of the award was best determinable by its author on the basis of the record originally before him. Accordingly, Arbitrator Volz ruled: "The Company is directed within two weeks from the date of this award to join the Union in requesting clarification or completion of Arbitrator Gibson's decision as stated immediately above." 94

Presumably, any misgivings of Arbitrator Gibson that he lacked authority to do what was asked by one of the parties were eliminated by Arbitrator Volz's direction to both parties to ask him again. The disposition by Arbitrator Volz seems pragmatic and resolute, even though it manifests a delegation of decisive authority by the more recent arbitrator selected by the parties to a former arbitrator who thought that he had been rendered impotent by the ethical strictures of the Code, and who had not been asked by the parties to decide the second grievance. If too fastidious an analysis had been applied to this situation, however, the five grievants might still be looking for a forum. No court could substitute for an arbitrator under the grievance procedure; no arbitrator could fill a vacuum left by the Gibson award; functus officio would assure that the grievants would remain in a state of perpetual limbo. 95

Another case illustrates difficulties in taking the Code too seriously. In San Antonio Newspaper Guild Local No. 25 v. San Antonio Light Division, 96 Arbitrator Peter Florey had directed that a reinstated employee be "made whole for any loss of earnings," but he did not indicate whether such loss should reflect interim earnings from outside sources. 97 The employer sought clarification of the ambiguity from Arbitrator Florey, but the union refused to join in the request, content to lurk behind the functus officio fortress. 98 The employer then filed a new grievance 99 against the union which went to hearing before a second arbitrator, Guy Hor-

92. Id. at 203 (quoting Grand Rapids Die Casting v. Local Union No. 159, 684 F.2d 413 (6th Cir. 1982)).
93. Id.
94. Id.
95. Ethyl Corp. v. United Steelworkers, 768 F.2d 180, 187 (7th Cir.), cert. denied, 475 U.S. 1010 (1986) ("[W]hatever theoretical difficulties remanding a case to an arbitrator who has lost jurisdiction may cause the fastidious analyst, the number of cases in which such remands have been made, and the common-sense reasons for the procedure in appropriate cases, put the issue beyond debate.").
96. 481 F.2d 821 (5th Cir. 1973).
97. Id. at 822.
98. Id. at 823.
99. W.R. Grace and Co. v. Local Union No. 759, 652 F.2d 1248, 1258 (5th Cir. 1981), reh'g denied, 659 F.2d 1076 (5th Cir.), aff'd, 461 U.S. 757 (1983) ("[I]f a party to the contract demands a second arbitration to test the validity of the first arbitration, the courts will order the second arbitra-
Horton proceeded to determine that the Florey award permitted a set-off of outside earnings. The union challenged the arbitrability of the second grievance. Judge Tuttle, speaking for the majority, noted that the labor contract between the parties contemplated arbitration of "grievances arising under this agreement" and that it was doubtful that "the award of an arbitrator—as opposed to the procedure for securing arbitration—falls within the four corners of the agreement before us." Nonetheless, he concluded that an arbitrator and not a court should elucidate the terms of the agreement and that Arbitrator Horton had in fact done so. Rather memorably, the court observed:

While we might otherwise be inclined to agree with the Union that even under the usual standard the Company's grievance did not present an arbitrable matter, we think that Arbitrator Horton's award in this instance, having resolved the dispute between the parties, should be given full effect. *Fieri non debet, sed factum valet.*

To conclude that a plea for elucidation of an award in the form of a new grievance should perhaps have been rejected but, since done, it is valid, marks a happy triumph of common sense over ideology—an exertion made necessary in the first place by the artificialities of the *functus officio* doctrine.

The professional arbitration establishment, as represented by the American Arbitrators Association, the Federal Mediation and Conciliation Service, and the National Academy of Arbitrators, has steadfastly refused to acknowledge that the national labor policy leaves little room for slavish obeisance to common law *functus officio* notions. Peter Seitz radically urged his colleagues in the Academy not to hesitate "to retain jurisdiction, delay the closing of hearings, and, if necessary, reopen hearings if they are of the opinion that their adjudicatory function cannot be responsibly discharged on the kind of presentation made by the parties on the record of the case," and not to hesitate to make interim or partial awards. Yet he still felt compelled to observe that "if *functus officio* were not a notion so firmly embedded in the common law of arbitration, we would have had to invent it." He suggested that the doctrine "protects the arbitrator from the late evening telephone calls," and the com-

100. *San Antonio*, 481 F.2d at 823.
101. *Id.*
102. *Id.* at 824 n.3.
103. *Id.* at 826.
104. *Id.* at 824.
106. *Id.* at 165.
plaints of losing litigants. With some passion, he averred that the doctrine “puts a dispute to bed. It lets sleeping dogs lie and prevents dead horses from being whipped.” That was in 1964. With some qualifications, Professor Rehmus in 1989 also professed the “virtues” of *functus officio* in virtually identical terms, though his slight amendment of Seitz’s words may have unintended radiations. “Blessedly,” he says, “the award puts the dispute to bed and lets sleeping dogs and arbitrators lie” — a suspicious gloss to a code of ethical responsibility.

It is one thing to discourage parties from attempting to piggy-back a second, independent claim to a proceeding in which an award has already been issued; it is quite another to preclude the arbitrator from taking responsibility to do his or her job completely, unambiguously, and without palpable mistake. To obviate the first possibility, all that is needed is recognition that the parties must agree to arbitrate the particular dispute before the arbitrator is empowered to resolve it. But *functus officio* has no legitimate role in preventing inconvenience to arbitrators from post-award complaints of disappointed litigants, however justified or unjustified they may be. Indeed, it would seem that arbitrators have an ethical responsibility to be as stalwart and sturdy as may be required both to fend off illegitimate criticism and to admit and redress the errors they may have made. Uninterrupted ease at the dinner table is a puny excuse for a Code of Professional Responsibility. Arbitrators trusted by the parties to resolve controversies involving substantial moneys and the critical fate of workers and enterprises should be capable of distinguishing situations where a postscript to an award is appropriate and where it is not. In no event should the exercise of sound judgment be clouded by notions that the arbitrator’s professional morality is at stake. As a litmus of good conduct, *functus officio* merits a requiem with accompanying “defunctive music.”

**CONCLUSION**

In *Gilmer v. Interstate/Johnson Lane Corporation*, the Supreme Court required a financial services manager to arbitrate a statutory age discrimination claim by reason of the unrestricted language in his individual contract of hire. Although the Court distinguished the position

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107. *Id.*
108. *Id.* at 165-66.
110. *Id.*
of employees covered by a collective bargaining agreement,\textsuperscript{114} it seems unlikely that the \textit{Gilmer} ruling will leave labor arbitration permanently unaffected. The ineluctable drive to pare judicial dockets, if nothing else, may well send an ever-widening range of disputes to arbitrators with a range of competencies. More cases mean more chances for mistakes. Consumers of arbitration products may come to feel that they should no more be victimized by faulty construction of their labor contract than by faulty construction of their automotive door-lock system. They will want to be able to look to the "manufacturer" who botched the work for direct relief. The persistent presence of the \textit{functus officio} doctrine in the labor arbitrators' Code of Professional Responsibility may not cause the heavens to fall, but the roar of approaching thunder seems louder.

\textsuperscript{114} \textit{Id.} at 1657.