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"JUST CAUSE" – A LEGAL, HISTORICAL AND CONTRACTUAL OVERVIEW REVISED & IMPROVED

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The Collective Bargaining Agreement (hereafter CBA) provides that the Employer will discipline or discharge an employee only for "just cause." It does not, however, define ***just cause***. While a precise definition of just cause does not exist, a comprehensive body of arbitral analysis on the subject is available and certain basic principles of what constitutes just cause are generally recognized. Just cause is a concept with a well-developed meaning. By using those terms, the signers made an informed decision divvying up the burden of proof, and requiring a fair result based upon facts and a full weighing of equities.

CBAs are not ordinary contracts. Thus, more generalized standards for contract interpretation can be applied, but must be tempered by the special need for adaptability. It is *impossible* for the parties, even in lengthy instruments, to spell out or anticipate every conceivable scenario. Rather, they are endeavoring in "an effort to erect a system of industrial self-government." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580, 46 LRRM 2416 (1970).

"Most arbitrators agree that rules of interpretations should be applied within the context of arbitral experience as well as the circumstances of a specific case. *See, e.g.*, *Warrior & Gulf* . . . at 582 (arbitrators are chosen because of parties' confidence in their knowledge of the 'common law of the shop. . .")

In other words, the phrase "just cause" is a term of art, which was negotiated and can only be understood in light of more than a half century of arbitral interpretation and application. An arbitrator is to bring his informed judgment to bear upon the particular controversy.

In interpreting the parties' language and their intent, the arbitrator bears in mind **Dobry's Cardinal Concepts Related to Just Cause in Arbitration**. They are:

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[1]Available to arbitrate nationwide. Zoom ready. I bill for travel and time from closest of four addresses: Warren, Michigan; Chicago, Illinois; Pittsburgh, Pennsylvania; and Covington, Kentucky.

1. *"Just cause" is a mixed question of law, public policy, contract (including practices) and fact, which the parties have agreed to have finally adjudicated by the arbitrator.*[2] The arbitrator owes his first duty to apply the contract, but if the contract incorporates the law then it must be applied too. This is a difficulty which is more common in public sector cases, but which can infect the private sector. For example, the Family and Medical Leave Act, the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA, 38 U.S.C. § 4301 – 4335) the General Duty Clause of the Occupational Safety Health Act, and the regulations of the Department of Transportation on drugs and intoxication by over-the-road drivers, and the National Labor Relations Act (or the state public sector analogue) all have application to private and public sector employers. However, even in private sector cases, a well-informed decision ought to be done in a manner consistent with the law, if such a reading is plausible.

2. *"Just cause" has an inherent procedural due process aspect to it*.[3] It is so central that it even spawned a book, Adolph M. Koven and

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[2] When an Arbitrator was appointed, he was designated by the parties to be their contract reader, and to interpret and apply on a final and binding basis the law, as necessary, as though it were part of the contract. *See* Eastern Associated Coal vs. Mine Workers District 17, 121 S. Ct. 462, 265 LRRM 2865 (2000). *Citing* Theodore J. St. Antoine, "Judicial Review of Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny, in Arbitration - 1977", Proceedings of the 30th Annual Meeting, National Academy of Arbitrators (BNA Books, 1978) 29, 30-36. *See also,* Theodore J. St. Antoine, "Presidential Address: Contract Reading Revisited," Arbitration 2000: Workplace Justice and Efficiency in the Twenty-First Century, Proceedings of the 53rd Annual Meeting, National Academy of Arbitrators (BNA Books, 2001), 1-19.

[3] In 1964, Arbitrator Carroll Daugherty attempted to crystalize the existing "common law" definition of just cause into seven independent tests. Some of them implicitly support the need for "due process" as part of any just cause analyses. These tests, in the form of questions, represent a generally accepted analysis of the just cause standard.
The seven tests articulated by Arbitrator Daugherty are summarized as follows:

1. Notice: Did the Employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?

2. Reasonable Rule or Order: Was the Employer's rule of managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business, and (b) the performance that the Employer might properly expect of the employee?

Susan L. Smith. May, Kenneth. (2006) [1992] *Just Cause: The Seven Tests (3rd Ed.)* (Washington D.C., BNA). ISBN 1-57018-549-2, This concept should be understood in the context of the particular industry and union; and the mechanical application of the "Seven Tests" is controversial among arbitrators. Although the seven tests articulated by Arbitrator Daugherty are useful in determining whether just cause exists in a particular disciplinary proceeding, they are not intended to be rigidly applied without regard to the employment setting in which they occur. Even Arbitrator Daugherty explained that the seven tests "do not represent an effort to compress all the facts in a discharge case into a 'formula.' Labor and human relations circumstances vary widely from case to case, and no formula can be developed where all of the facts can be fed into a 'computer' that spews out the inevitably correct answer on the sheet of paper. There is no substitute for sound human judgment."[4] Nor does it ineluctably follow that every procedural error will result in voiding a disciplinary penalty, as there may be a case of countervailing or even overbearing consideration.[5]

Nevertheless, at a bare minimum, a fair investigation which yields facts that stand up at the arbitration hearing is required.[6]

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3. Investigation: Did the Employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Fair Investigation: Was the Employer's investigation conducted fairly and objectively?

5. Proof: At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

6. Equal Treatment: Has the Employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?

7. Penalty: Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the Employer?

4 *Whirlpool Corp.*, 58 L.A. 421, 427 (1972).

5 *See* R.W. Fleming, *The Labor Arbitration Process* , 136-140 (Illini Press, 1965).

6 See: W. Willard Wirtz, "Due Process in Arbitration," in *The Arbitrator and the Parties: Proceedings of the Eleventh Annual Meeting of the National Academy of Arbitrators,*1958, pp. 1-44; R.W. Fleming, "Due Process

Notice of rules and penalties has an important function in the concept of 'industrial due process.' It is not just enough that rules exist, but they must be fairly and consistently enforced, and not negated by the express contractual language or the "past practice" in a particular shop.

The best arbitral thought makes it clear that a mutually accepted practice, which existed both before and after the execution of this agreement (the employer unilaterally denounced the practice in the middle of the contract term), can be viewed as an authentic construction of the meaning of its terms[7]

3. *A short-hand summary of just cause*, frequently applied by some arbitrators is (a) Is there proof of the allegations; and (2) If so, is the discipline appropriate. It being further understood that the burden of proof may increase or decrease depending upon the nature of the

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and Fair representation in Labor Arbitration," in *Arbitration and Public Policy: Proceedings of the Fourteenth Annual Meeting of the National Academy of Arbitrators, 1971, pp. 69-100; Sanford Kadish, "The Criminal Law and Industrial* Discipline as Sanctioning Systems, Some Comparative Observations," in Labor Arbitration *–Perspectives and Problems: Proceedings of the Seventeenth Annual Meeting of the National Academy of Arbitrators, 1964, pp. 1250264, F. And E. Elkouri, Chapter 150 "Discipline and* Discharge," How Arbitration Works, 3rd Edition, pp. 632-634; and Marvin Hill, Jr. And AnthonyV. Sinicropi, Chapter 3 - "Remedies in Discharge and Disciplinary Cases," in *Remedies in Arbitration* (BNA, 1981), pp. 92-93).

[7] Richard Mittenthal, **Past Practice and the Administration of Collective Bargaining Agreements**, reprinted in Arnold M. Zack, Ed., *Arbitration in Practice,* (1984, Cornell University), pp. 181-208. http://www.naarb.org/proceedings/index.asp. "The danger of ambiguity arises not only from the English language with its immense vocabulary, flexible grammar and loose syntax but also from the nature of the collective bargaining agreement. The agreement is a means of governing 'complex, many-sided relations between large numbers of people in a going concern for very substantial periods of time.' (Cox, 1958, p. 22). It is seldom written with the kind of precision and detail that characterize other legal instruments. Although it covers a great variety of subjects, many of which are quite complicated, it must be simply written so that its terms can be understood by the employees and their supervisors. It is sometimes composed by persons inexperienced in the art of written expression. Issues are often settled by a general formula because negotiators recognize they could not possibly foresee or provide for the many contingencies which are bound to occur during the life of the agreement. . . . ?

charges, who the respondent is, the size of the penalty imposed, and other factors that may be set forth in the labor agreement or rules.

4. *"Just cause" is individual. It depends on the facts. All the facts, both aggravating and mitigating must be fully considered.* This could include evidence (no matter how it cuts) of post discipline/discharge conduct – *e.g.*, evidence of rehabilitation; evidence of witness intimidation.

5. *"Just cause" is not monolithic.* It must relate to each employer's and union's unique policies and practices, and the total record. If there is no negotiated agreement that particular behavior will result in a specified penalty, the meaning of the phrase "just cause" is subject to interpretation and application, like any other contract term. Therefore, the question is not, "How does the arbitrator feel about it?" Rather, "what does the agreement require?" The law of *a* shop controls, not the generic law of *the* shop.[8]

6. Management is entitled to some discretion in penalty. While equal treatment is desirable in the abstract, it is preferable to make

[8] The inherent fallacy of treatises on labor arbitration -- e.g., such as Alan Miles Ruben, Ed., *Elkouri & Elkouri, How Arbitration Works* (6th Ed) (BNA, 2003) [published with the assistance of the American Bar Association Labor and Employment Law Section] – is that they imply that there is a unitary law of the shop. [A preemptive apology to Professor Ruben are no doubt in order, as I know him and know that is not his personal view.] Moreover, the reader is cautioned that *Elkouri,* for example, is not cumulative. **Do NOT throw away your old copies, as they are not obsolescent.** Indeed, given the prohibitively expensive costs of Elkouri, now available only by subscriptin, they are more valuable than ever. A better and more true to life representation of arbitral analysis is exemplified in Theodore J. St. Antoine, Ed., *The Common Law of the Shop: The Views of Arbitrators* (2nd Ed.) (BNA, 2005), which shows a sensitivity to the many facets in a record, and demonstrates the heterogeneous chorus of arbitral opinion. That book was compiled under the auspices of the National Academy of Arbitrators, although it does not purport to represent any NAA policy. There frequently is not one commonly accepted arbitral standard. One must pick and choose carefully amongst the reasoning and the cited arbitrators. It is available at National Academy of Arbitrators:.
https://naarb.org/wp-content/uploads/2013/12/The-Common-Law-of-the-Workplace.pdf

judgments based upon varying degrees of culpability, provocation, the existence of differing circumstances (*e.g.*, levels of seniority), etc.

7. One of the most important was the concept that all contracts include the inherent duty of parties to act in good faith and engage in fair dealing. The implied covenant restricts the right of management to exercise its reserved powers, when doing so would be arbitrary, unreasonable, or has the potential to destroy the bargain between the parties.[9] The essence of the covenant is that the employer may not exercise its discretion in a manner that deprives an employee of the fruit of the bargain. The 'fruit of the bargain' in question here is the right to a job, the protection of long term employees from job loss and the protection of their wages, hours and other terms and conditions of the agreement.

8. *The parties are encouraged to resolve cases short of discharge.* Therefore, **last chance agreements**, properly formed and executed by all concerned, should be treated by the arbitrator as a specialized addendum to the general labor agreement. Last chance agreements can demonstrate that the employer has 'gone the extra mile' to accommodate an employee's special needs. Arbitrators should enforce them as the parties intended them to be applied.

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[9]*See Ashland Oil Co.,* 95 LA 339, 344 (Volz, 1990) ("management in the exercise of its reserved authority, except to the extent specifically and clearly granted, is subject to the implied covenant of good faith and fair dealing"); *Sullivan & Cozart,* 97 LA 792, 795 (Florman, 1991) ("It must be assumed by reason of their continuing relationship that neither party would favor an interpretation which frustrated the fruits of the bargain to either one of them."). The principle has been applied to a variety of management actions. *Lamphere Schools,* 100 LA 918 (Glazer, 1993) (transfer of substitute teacher as deliberate tactic to prevent him attaining permanent status); *Homercenter School District,* 96 LA 389, 395 (Mayer, 1991) (improper assignment contrary to the School Code); *Ashland Oil Co., supra,* at 344 (Volz, 1990) (assigning maintenance work to temporary employees in preference to regular employees was discriminatory, unreasonable, and diminished "the fruit of the bargain -regarding seniority advancement).

9. In that regard, *if the parties have negotiated specific limits on the arbitrator's authority, the arbitrator will abide by them.* If a last chance agreement is signed by all concerned (union, employer and employee), ordinarily the only remaining question is whether is was violated.

10. *"Just cause" means the employer has the burden of going forward with evidence, and the ultimate burden of persuasion.* The quantity of that burden will depend upon the nature of the offense, the employee's service, and the magnitude of the penalty. Whether the employer gets to call the employee as its first witness at an arbitration is controversial.

11. *"Just cause" means the penalty fits the crime.* "Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the Employer?"[10] There is a ordinarily a preference for progressive discipline in all but the most cardinal offenses (e.g., theft). Arbitrators do consider the effect of sustaining or overturning discipline upon the work place. This can be a prospective inquiry, which would depend on the proofs.

12. *There are difficult evidentiary problems in discharge cases.* There is a contradiction between the need for efficient processing of grievances and the receipt of so-called 'offers of compromise.' Arbitration is the last step in the processing of a grievance. It is not uncommon for parties to discuss the gathered evidence or the possible penalties as a discipline or discharge case is processed. This provides a paper trail leading up to the arbitration. For example, in *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967) the United States Supreme

[10] *See generally,* Adolph M. Koven and Susan L. Smith, *Just Cause: The Seven Tests* (2nd Ed.) (BNA, 1992) pp. 377-447.

court upheld a union's request for information regarding a grievance filed by the union by noting that a union's right to information "…applies to labor-management relations during the term of and agreement."

On the other hand, it is not good policy to receive so-called "offers of compromise" (See Federal Rules of Evidence 406) which would ordinarily be barred in a court of law), as it may have long term destabilizing effect on the processing of grievances in the future. Of course, there is an inherent conflict when matters are revealed or discussed as the grievance is processed.

13. *Penalty is 'the other side of the coin' of remedy.* The proportionality of the penalty to the offense proved, if any, is related to the remedy for the alleged contractual violation. It is well-established that the arbitrator has broad remedial power, and that such a grant of authority is inherent in the phrase "just cause." Accordingly, the arbitrator's judgment on the issue of remedy and the propriety of penalty is precisely what the parties bargained for in their labor agreement's arbitration section. An arbitral appointment under this contract carries with it the inherent power to specify an appropriate remedy for its violation.

14. *The arbitrator's function in a discharge case involves review of management's decision for an "abuse of discretion."* In a recent cse involving an employee who rearranged a noose several times in a work place, this arbitrator wrote:[11]

> "This case, it is at the intersection of the provisions of the C.B.A., the plant rules, the company policies regarding discrimination, the opinions and rules of the Equal Employment Opportunity Commission, the laws of the United States, and administrative law and court decisions.[12]

[11] Unpublished opinion.

[12] See St. Antoine, Theodore, Editor. (2005) [1998] *The Common Law of the Workplace: The Views of Arbitrators* 2nd Ed. Gladys Gershenfeld, Chapter Editor. Chapter 6 "Discipline and

"On the one hand, there are conflicting provisions of the collective bargaining agreement. There are the non-discrmination language, the "just cause" protection and standard, and management's rights. These are potentially in conflict – one can call this "structural ambiguity."

"Under the collective bargaining agreement, the employer reserves the right to manage its own shop. It can establish rules of conduct that are enforceable and punishable if breached by an employee's conduct. In determining penalties, the employer has a modicum of discretion in the first instances, so that it can impose penalties, up to and including discharge, if doing so is reasonable under the circumstances.

The arbitrator reviews the employer's decision to end the employment relationship, that is fire or discharge an employee, to determine if there was an abuse of discretion.

In a legal context abuse of discretion has been defined as:

"1. an adjudicators failure to exercise sound reasonable and legal decision making. 2. an appellate court standard for reviewing a decision that is asserted. To be grossly unsound, unreasonable or illegal . See **discretion**."[13]

Managerial discretion has been defined as:

"discretion The nature and the amount of freedom possessed by the employer in the handling of his plant problems. Discretion exists in various forms in many areas of operation. Subject to the specific limitations, the contract or past

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Discharge" Dennis Nolan. "DISCRIMINATION AS MISCONDUCT OR BASIS FOR MITIGATION §§ 6.1, 6.2 and 6.6. Pp. 169-171; 180-181, 183. (Washington D.C.: Bureau of National Affairs) ISBN 1-57018-540-9. Zack, Arnold. (2000) *Arbitrating Discipline and Discharge Cases* (Horsham,Pennsylvania: LRP Publications), pp. 119-123. See also Zack, Arnold (June 3, 1998) *Grievance Arbitration: Issues on the Merits in Discipline, Discharge, and Contract Interpretation (Emerging Issues in Employee Relations)* (Lexington Books) Hardcover. ISBN-10:0669194581; ISBN-13: 978-0669194586.

[13]Garner Brian A, editor in chief; Black, Henry Campbell. [1891] (1999) *Blacks Law Dictionary*. 7th edition. (St. Paul, MN: West Group. Page 10. ISBN 0-314-22864-0.

practice, the amount of discretio, for example, in hiring common layoffs, promotions, discharge, etc., will vary from contract to contract. See also **management rights."**[14]

More specifically, the legal standard is more detailed:

"discretion. 1. a public official's power or right to act in certain circumstances, according to personal judgment and conscience. Also termed discretionary power. ... **judicial discretion**. In the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a courts power to act or not act when a litigant is not entitled to demand the act as a matter of right. . also turned legal discretion. .... 2. *Criminal & tort law*. The capacity to distinguish between right and wrong, sufficient to make a person responsible for his or her own actions. 3. Wise conduct and management; cautious discernment; prudence." Id. p. 479.[15]

15. *External law, including considerations of public safety and public policy,[16] can have an impact.*

Historically, use of external law by labor arbitrators – in lieu of or in addition to the collective bargaining agreement – has been controversial.[17]

However, the better view is that when the Arbitrator is appointed, he is designated by the parties to be their contract reader, and to interpret and apply on a final and binding basis the law, as necessary, as though it were part of the contract.[18]

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[14]Roberts, Harold S. *Roberts' Dictionary of Industrial Relations* 3rd Ed. (Washington, D.C.: Bureau of National Affairs) ISBN 0-87179-488-8 p. 152.

[15]Garner, supra. Page 10.

[16] *United Paperworkers International Union, AFL-CIO, v. Misco, Inc.* 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987) .

[17] Search "external law" at http://www.naarb.org/proceedings/index.asp. Proceedings of the National Academy of Arbitrators, Vols. 1-59, 1948-2005.

[18]See *Eastern Associated Coal vs. Mine Workers District* 17, 121 S. Ct. 462, 265 LRRM 2865 (2000). Citing Theodore J. St. Antoine, "Judicial Review of Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny, in Arbitration - 1977", Proceedings of the 30th Annual Meeting, National Academy of Arbitrators

As a matter of practice, I think that if an arbitrator can read the contract consistent with the law, but as a separate source of rights essentially independent of the law itself, the effect is to most insulate the award from judicial review. Then the court is forced into the position of having to substitute its judgment as to the meaning of the contract for yours, something it is expressly forbidden to do.

Writing cases that are Collyerized under the National Labor Relations Act is different. *Collyer Insulated Wire*, 192 NLRB 837 (1971). The arbitrator should consider writing a different kind of opinion, as you are not writing solely for the parties, but can expect scrutiny by the National Labor Relations Board under Spielberg Mfg. Co., 112 NLRB 1080 (1955).

So can external proceedings – such as the loss of a pilot or driver's license, or loss of a security clearance, – which remove a core requirement for an employee's job.

16. *There is a constant tension between the arbitration process and other proceedings.* For example, the existence of a simultaneous criminal proceeding can have consequence in an arbitration. The outcome of a criminal trial may be offered, recognizing that the standards of proof are very different. "Veteran's Preference" hearing may be received 'for what it's worth.' In Michigan there is a direct statutory bar on the use of any outcome or evidence from an unemployment compensation hearing, and the use of such evidence may undermine the finality of an arbitration award.[19]

(BNA Books, 1978) 29, 30-36. See also, Theodore J. St. Antoine, "Presidential Address: Contract Reading Revisited," Arbitration 200: Workplace Justice and Efficiency in the Twenty-First Century, Proceedings of the 53rd Annual Meeting, National Academy of Arbitrators (BNA Books, 2001), 1-19.

[19] Its use seems to violate a privilege that was created by statute, and which was long ago endorsed by the Michigan Supreme Court in the case of *Storey v. Meijer, Inc.* , 431 Mich. 368, 429 N.W.2d 169 (1988). Such a privilege is intended to bar the use of even potentially relevant, probative, and trustworthy evidence. The legislature and the courts have tried to insulate MESC. proceedings from becoming unduly burdened by legalisms, and any potential effect on other proceedings. Thus, the use of unemployment compensation determinations and any information from the Michigan Employment Security Commission in other civil proceedings is expressly barred by statute. §11(B)(1) of the Employment Security Act, MCLA 421.11(B)(1), MSA 17.511(B)(1), relying in part upon 2 Restatement Judgments 2d. §82, comment h, pp. 279-280. This case rejected both the preclusive effect (collateral estoppel) of an MESC. determination, as well as the use of any evidence collected by MESC. in other proceedings. *See also, Moody v. Westin Renaissance Co.* , 162 Mich.

Conversely, what if the defense of the discharge involves an allegation that the employee was discharged for union activity in violation of the National Labor Relations Act. Should the arbitrator decide that issue? If so, what standard should he use, and what will the effect of an arbitrator's finding be on a pending unfair labor practice charge?

17. *The public sector has additional problems which affect the employment relationship and need to be considered*. They arise from certain United States Supreme Court cases, namely: *Cleveland Board of Education vs. Loudermill*, 470 U.S. 539, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) [*quoting Board of Regents vs. Roth*, 408 U.S. 564, 576-78, 92 S.Ct. 2701, 33 L.Ed.2d 548 91972)]. and *Garrity vs. New Jersey*, 385 U.S. 493 (1967) and *Gardner vs. Broderick*, 392 U.S. 273 (1968) (which expanded Garrity) . Public employees and employers have complementary but contradictory burdens and roles under them. Trying to balance the constitutional rights and statutory duties is difficult at best. Misstatements of fact under a forced confession under Garrity are sometimes characterized as willful untruths allegedly rendering the employee (for example a discharged police officer) unfit for continued public service.

18. *The arbitrator ordinarily will not be directly concerned with the possibility of judicial review.* The Sixth Circuit Court of Appeals in *Michigan Family Resources vs. Service Employees International Union*, 438 F.3d 653 Decided January 26, 2007 by an *en banc* hearing of the circuit, recognized that the Sixth Circuit had been applying the wrong standard for many years. The court admitted (finally) that it is the arbitrator's judgment on the contract and the facts that was bargained for, and that the court does not sit to review the merits of the arbitrator's decision.

For the reasons indicated hereafter, the arbitrator should endeavor to write as "bullet proof" an award as possible. On the other hand, it is almost impossible to completely forestall judicial review: (a) the arbitrator should elucidate reasons and reasoning which show an understanding command of the controversy, and if possible judicial review seems 'in the cards', the arbitrator should use the opinion as an opportunity to educate the court; but (b) one cannot write opinions to satisfy the 'lowest common denominator' among potential judicable reviews.

App. 743, 413 N.W.2d 96 (1987).

19. *The duty to arbitrate statutory disputes (such a civil rights claim) is a potential question for the parties, the arbitrator and the courts with far reaching implications. Ordinarily, it is not required unless the contract is explcit in its command.*

In *14 Penn Plaza v. Pyett*, 129 S. Ct. 1456;. 173 L. Ed. 2d 398; 2009 U.S. LEXIS 2497 (2009) the decision was 5-4. Justice Thomas wrote the majority opinion; Justices Souter and Stevens wrote dissents. It raised the issue of whether an arbitration clause, contained in a collective bargaining agreement but explicitly covering statutory issues as well as contract issues, is enforceable as to those statutory issues. In Alexander v. Gardner-Denver, the Supreme Court held that arbitrating a contract claim does not preclude litigating a statutory claim on the same facts. The Court said some very negative things about the arbitration of statutory employment claims, one of which was that unions couldn't be trusted to enforce the statutory rights of minority employees. Another was that statutory claims generally were not suitable for arbitration. *14 Penn Plaza* all but reverses this part of *Alexander v. Gardner-Denver*. The NLRA says that employers and unions may bargain for terms and conditions of employment. The arbitration of discrimination claims is a term or condition of employment, so arbitration agreements covering discrimination claims are enforceable absent a specific provision in an antidiscrimination statute stating otherwise. There is no such provision in the ADEA. Therefore, arbitration agreements covering discrimination claims are enforceable. *Gardner-Denver* is not on point because the employer and union in that case had not agreed to arbitrate their statutory claims; Gardner-Denver was decided "on the narrow ground that arbitration was not preclusive". In the court's opinion, language in *Gardner-Denver* critical of arbitration, and suggesting that majoritarian unions might not vigorously pursue minority rights, was *dicta* and wrong.[20]

Historically, the courts and arbitrators had conceptualized the parallel existence of two separate rights (one contractual and the other statutory) as 'not being two bites at one apple, but being two bites from two apples.' The court disregarded a lot of the language in *Alexander*, and as the dissent opines, gave it a restrictive and artificial meaning.

[20]Given the Supreme Court of the United States recent tendency to disregard long standing precedent, your mileage may vary [YMMV].

This judicial "punt" (particularly on when union controls an individual's access to the arbitral forum) is arguably wrong, and ignored (if textualism is the criteria) the statutes at issue. It disregarded whether the parties to the collective bargaining agreement created an effective forum for the vindication of statutory and contractual rights. It would seem that the lack of an effective forum and full remedy power would be the condition precedent to an effective waiver of rights by the Union of individual rights.

This case is critical in that it potentially could *require* parties to present and arbitrators to hear and decide statutory discrimination cases (*e.g.*, Americans with Disabilities Act – newly amended and revived by Congress, with new rules from the Equal Employment Opportunity Commission pending); Age Discrimination in Employment Act) with the full panoply of legal discovery, expert witnesses, and legal remedies (including attorney fees and front pay – something that traditional labor arbitrators rarely impose, since reinstatement is the traditional preferred remedy for a wrongful discharge). Labor representatives, who may have presented discharge cases themselves, will be forced to 'act like lawyers' even if they are not so trained and licensed, and to present a whole different case (both substantively and procedurally unlike traditional labor arbitration).[21] They may be forced to retain counsel where they would not have done so before. This may be good for the legal profession, but it represents a sea change in the nature and operation of the forum.

20. *Finality is at the core of an effective arbitration proses.* By definition, arbitration is "final", so that so-called 'advisory arbitration' is an oxymoron. It is **not** supposed to be an intermediate decision that is appealable for errors of fact, law, or other alleged error.[22]

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[21] Obviously, the parties can (and sometimes do) decide to have an arbitrator decide such controversies. The foregoing is not intended to malign such choice for forum, but rather to suggest that it is ordinarily a knowing and informed choice made as a post dispute choice of forum. The Supreme Court, however, was dealing with a predispute waiver.

[22] See the *Steelworkers Trilogy*, Morris, "Twenty Years of Trilogy: A Celebration", Decisional Thinking of Arbitrators and Judges, Proceedings of the 33rd annual Meeting, National Academy of Arbitrators, 331. http://www.naarb.org/proceedings/index.asp. Proceedings of the National Academy of Arbitrators, Vols. 1-59, 1948-2005

The arbitrator's decision is contractually "final and binding."[23] This does not negate our fallability. In particular, we are both 'creatures of the contract,' and 'tied to the record.' Like the sculptor, our mission is not to impose our will on the stone, but is to find the shape within the stone.

As Supreme Court Justice Robert Jackson once said, "We are not final because we are infallible, we are infallible because we are final."

Nevertheless, the contractual provision for the arbitrator's decision being "final and binding" is not just a command for finality, and a waiver of the right to appeal by the parties (and a corresponding warning of limited review for the courts).

For the arbitrator it is a direct command that requires best efforts to render a decision – as embodied in a "bulletproof" opinion and firmly rooted in the contract – that is faithful to the agreement and the work place and culture in which it arises, and which does final justice to the facts as they are adduced at hearing.

Arbitrators are not "fungible goods" like peas in a pod. They differ in their life and professional experiences, and their approach to the arbitral function; this has an effect on their view of the facts, the contract, and the merits of a particular controversy.[24] In selecting an arbitrator, finding those who will benefit your organization and an individual grievant's short and long term interests is an essential inquiry for the parties.

Ideally, arbitrators are a catalyst. They try to benefit the process, the parties, and the relationship, while resisting the temptation to usurp the parties' bargain and their role in collective bargaining. It is the parties process. They convene the forum and choose the arbitrator to fit their needs. We need to bear that in mind.

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[23] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Wearrior & Gulf Navigation Co.*, 363 US. 574, 46 LRRM 2416 (1970); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 US 593, 56 LRRM 2423 (1960).

[24] See Cardozo, Benjamin N. *The Nature of the Judicial Process*. https://en.wikipedia.org/wiki/The_Nature_of_the_Judicial_Process

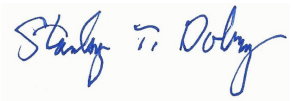
Some arbitrators will facilitate settlements at hearings: however, the manner and method are an art. In the writer's opinion, an arbitrator should not mix mediation (including exchange of offers of compromise and "shuttle diplomacy") with arbitration. Conciliation is a better course. One cannot 'unring the bell' once confidences have been entrusted, and this could effec[t the arbitrator's ability to perform the arbitrator's fundamental function. Particularly the implicit promises in rights arbitration[25] (obligation and threat) that he/she will work from "the record" as it happens to develop. This leverages the arbitrator's effectiveness in conciliating a settlement.

Thus, the Code of Professional Responsibility can obligate an arbitrator to withdraw, absent the parties' consent to continuance of the function.

Good arbitrators work from a record, and try to blend into the environment in which they find themselves. What is just in one labor environment may be unjust in another.

But the record carries with it inherent invitations to be fair, and fairness is a concept that must take into account the context in which the controversy arises.

RESPECTFULLY SUBMITTED,



STANLEY T. DOBRY

Dated: October 15th 2025

[25]This prophylactic principle and counsel does not apply to "interests arbitration" where mediation/arbitration ["med arb"] typically works best to achieve the result the parties should have come to through collective bargaining, once the facts are fully disclosed and their import understood.