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IS LABOR ARBITRATION LAWLESS?

ARIANA R. LEVINSON, ERIN O'HARA O'CONNOR,
& PAIGE MARTA SKIBA*

ABSTRACT

Labor arbitration is often viewed as a more peaceful, productive, and private alternative to workplace strikes and violence. On the other hand, statutory laws are intended to protect all workers, and contract law default rules and rules of interpretation often serve a protective role that could be harmful if ignored in this private dispute resolution setting. To provide more insight into how arbitrators decide labor disputes, we utilize our newly crafted data set of hundreds of labor arbitration awards spanning a decade. Unlike prior data sets, our data are more inclusive: they include both published and unpublished awards as well as cases decided by non-AAA arbitrators and industrial boards, enabling a fuller—and thus potentially more credible—study of differing types of labor arbitration. We find—counter to previous research—that the vast majority of awards do not cite to external authority such as statutes, administrative authorities, or case law, or to secondary sources. Yet, our awards provide little evidence that arbitrators explicitly declined to address a statutory issue raised by one of the parties. These findings indicate there is perhaps much more room for labor arbitrators to refer to external authority in their decision-making. Our results also indicate that reference to governing law depends on factors like attorney representation and service provider guidance. If so, our study has potential implications for the structure and desirability of arbitration for labor disputes as well as for other types of arbitration, including employment, consumer, and securities arbitrations. The inherent tension between peaceful, quick, private dispute resolution and the risks of potential lawlessness might be greater for the resolution of statutory claims, and if so, our study has implications for the desirability and structure of the arbitration of such claims. For example, examination of external authority and written reasoning could be required for the binding resolution of statutory claims in labor arbitration. Moreover, our more inclusive study indicates that there remains an inherent tension between peaceful, quick dispute resolution and the risks of potential lawlessness. More broad studies are warranted.

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INTRODUCTION

For several decades, arbitration and labor scholars have debated whether arbitrators should consider external authority when deciding labor grievances¹ as well as whether and the extent to which they in fact rely on external authority.² Labor arbitration is often viewed as a more peaceful, productive, and private alternative to workplace strikes and disruption of commerce.³ Under this perspective, harmonious employment relations are fostered by enabling labor and management to bargain for and create employment terms and protections that best suit the workplace and their collective interests without the constraints or interference of external laws or expectations.⁴ Notably, several respected labor arbitrators contend that arbitrators should not refer to authority external to the governing contract (the collective bargaining agreement), even when the mandate of the contract is contrary to external authority.⁵ On the other hand, statutory employment laws are intended to protect all workers, not just the unionized, and contract and tort rules often serve their own protective role that could be harmful if ignored in a private dispute resolution setting.⁶ Without resorting to external authority, arbitration could become “lawless.”

Our recently published article addresses the first issue of whether labor arbitrators consider external authority.⁷ In this article, we turn to exploration of the larger, and in some ways more significant, issue of whether labor arbitration is lawless. As reported in the first article, we find that contrary to previous research, external authority is not cited or referenced by a huge majority of awards, and we rely heavily

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1. See Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, in *THE ARBITRATOR, THE NLRB AND THE COURTS* 1 (Dallas L. Jones ed., 1967), reprinted in 34 U. CHI. L. REV. 545, 557 (1967).

2. See Harry T. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in *ARBITRATION—1975: PROCEEDINGS OF THE 28TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS*, 70 (Barbara D. Dennis & Gerald G. Somers eds., Bureau of Nat'l Affairs 1976), <https://maarb.org/proceedings/pdfs/1975-59.pdf> [<https://perma.cc/T2XZ-A37Y>]; see also Patricia A. Greenfield, *How Do Arbitrators Treat External Law?*, 45 INDUS. & LAB. REL. REV. 683, 693 (1992).

3. STEPHEN J. WARE, *PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION* 197-98 (3d ed. 2016).

4. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (“A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.”).

5. See *infra* Section II.A.

6. Clyde W. Summers, *Employment at Will in the United States: The Divine Rights of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 70-72 (2000).

7. See generally Ariana R. Levinson, Erin O'Hara O'Connor, & Paige Marta Skiba, *Predictability of Arbitrators' Reliance on External Authority?*, 69 AM. U. L. REV. 1827 (2020).

on and build upon the ideas expressed in our first article to explore the issue of lawlessness herein.⁸

The question of whether arbitration is lawless was posed by Christopher Drahozal's seminal 2006 article.⁹ In exploring this question, Drahozal tested the empirical assertion that arbitrators do not follow the law¹⁰ by reviewing empirical studies of labor and other arbitration awards, surveys administered to arbitrators, and award reversal rates. He found that "[o]verall, the evidence on whether arbitrators follow the law in their awards is inconclusive."¹¹ One factor to consider in assessing whether arbitration is lawless is awards' citation (or lack thereof) to external authority, such as statutes, cases, and administrative regulations—generally considered to be law.¹²

This tension between peaceful, private resolution of labor disputes and potential lawlessness was less obvious when the U.S. Supreme Court guaranteed workers could litigate statutory claims notwithstanding arbitration provisions in collective bargaining agreements.¹³ Today, however, collective bargaining agreements can, and some do, effectively require arbitration of unionized workers' statutory claims,¹⁴ creating what seems like at least a conceptual tension regarding the role of external authority in labor arbitration. Arbitration is not subject to the same due process standards;¹⁵ parties

8. See *id.* at 1881. Our reliance on the initial article means that text in this article may be similar or the same as some text in the prior article. We have indicated reliance either in text or by footnoting the pertinent parts of the initial article, as appropriate.

9. See generally Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187 (2006).

10. *Id.* at 190. The other two claims undergirding the argument that arbitration is lawless are that businesses insert arbitration clauses in adhesion contracts to avoid legal protections for the other party to the contract and that arbitration contributes to a failure of the courts to create law. *Id.*

11. *Id.* at 203.

12. See *id.* at 195-97 (relying on a study that reviews citation practices to assess whether arbitrators follow the law). We focus in this article on whether arbitrators cite external authority, statutes, cases, administrative regulations, and secondary sources, which state the law. A later article will address the issue of whether arbitrators cite arbitration awards, which may or may not be considered law.

13. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Supreme Court determined that a prior arbitration of employees' grievances did not preclude a subsequent lawsuit for employment discrimination. In *Wright v. Universal Maritime Service Corp.*, 525 US 70 (1998), the court reached the same conclusion but indicated in *14 Penn Plaza, LLC, v. Pyett*, 556 US 247, 274 (2009), that clear and unmistakable language in the CBA requiring binding arbitration of statutory clauses is enforceable.

14. *14 Penn Plaza, LLC, v. Pyett*, 556 US 247, 274 (2009); *Greene v. Am. Bldg. Maint.*, No. 12-CV-4899 DLI LB, 2013 WL 4647520, at *3 (E.D.N.Y. Aug. 28, 2013) (concluding that CBA waived right to file ADEA claim and citing four other cases finding a CBA to have similarly waived the right to file an employment suit).

15. Charles Smith, *The Application of Due Process to Arbitration Awards of Punitive Damages - Where Is the State Action?*, 2007 J. DISP. RESOL. 417, 417 (2007); PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* 145-56 (2013) (discussing due process as applied to arbitration).

may not be represented by attorneys;¹⁶ and arbitrators may be non-lawyers with little understanding or commitment to external legal protections.¹⁷

Prior empirical research and survey studies about what arbitrators actually do can serve to unintentionally mute or mask this tension, however. Specifically, as discussed in Part V.A.5, prior studies indicate that arbitrators quite commonly cite to external authority, especially when a statutory right is involved or when one of the parties introduces external authority in the arbitral proceedings.¹⁸ To provide one example here, Mark Weidenmaier built on Drahozal's "lawlessness" work with a study of four different types of arbitration, including labor arbitration, and concluded that "the evidence provides little support for the view that arbitrators and judges engage in qualitatively different kinds of [decision-making] or opinion-writing."¹⁹ Nearly half of his labor awards, all of which were published in BNA Reports, cited to a judicial opinion or arbitration award.²⁰

Such studies suggest that there is little reason to worry about the structure or outcomes of labor arbitration. When viewed closely, however, the sources of data previously available to study arbitral behavior have been limited in ways that may end up painting a rosier picture of labor arbitration than is warranted. For example, it is well known in the academic literature that survey responses can be self-serving and less than accurate,²¹ and that low survey response rates have the effect of further biasing the results.²² Thus, one might expect that arbitrators report higher rates of following the law than is

16. STEPHEN J. WARE & ARIANA R. LEVINSON, PRINCIPLES OF ARBITRATION LAW 209 (2017); Erin O'Hara O'Connor & Peter B. Rutledge, *Arbitration, the Law Market, and the Law of Lawyering*, 38 INT'L REV. OF L. & ECON. 87, 94 (2014).

17. Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 812, 830 (2009); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 252 (2012).

18. See *infra* Section V.A.5.

19. W. Mark C. Weidenmaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1091 (2012).

20. *Id.* at 1107.

21. See Philip S. Brenner & John DeLamater, *Lies, Damned Lies, and Survey Self-Reports? Identity as a Cause of Measurement Bias*, 79 SOC. PSYCHOL. Q. 333, 333 (2016), <https://doi.org/10.1177/0190272516628298> [<https://perma.cc/559X-BZWH>]; see also Anton J. Nederhof, *Methods of Coping with Social Desirability Bias: A Review*, 15 EUR. J. OF SOC. PSYCHOL. 263, 263 (1985), <https://doi.org/10.1002/ejsp.2420150303> [<https://perma.cc/UUT8-C28U>]; Peter A. Hausdorf, Stephen D. Risavy & David J. Stanley, *Interpreting Organizational Survey Results: A Critical Application of the Self-serving Bias*, 8 ORG. MGMT. J. 71 (2011), <https://doi.org/10.1057/omj.2011.11> [<https://perma.cc/48UN-SP3D>].

22. See Susan M.B. Morton et al., *In the 21st Century, What is an Acceptable Response Rate?*, 36 AUSTL. & N.Z. J. OF PUB. HEALTH 106, 106 (2012), <https://doi.org/10.1111/j.1753-6405.2012.00854.x> [<https://perma.cc/5N5G-L3TV>]; ALLYSON L. HOLBROOK ET AL., THE CAUSES AND CONSEQUENCES OF RESPONSE RATES IN SURVEYS BY THE NEWS MEDIA AND GOVERNMENT CONTRACTOR SURVEY RESEARCH FIRMS 500 (James M. Lepkowski et al. eds., 2008), <https://prrg.stanford.edu/wp-content/uploads/2007-TSMII-chapter-proof.pdf> [<https://perma.cc/4LBC-PMCP>].

actually the case. Empirical data about actual arbitrations can provide a more accurate picture, but because arbitration is private, access to the arbitrations is quite limited. Several empirical studies, including Weidenmaier's, have used arbitration data available through cases reported in BNA,²³ but in order for these arbitrations to be reported, the arbitrator and both parties must agree to the publication.²⁴ These studies thus share some of the same shortcomings present in survey data.

To provide more insight into how arbitrators decide labor disputes, we have amassed a new, more inclusive data set of hundreds of labor arbitration awards spanning a decade. Under the Federal Arbitration Act (FAA), parties who wish to confirm, vacate, or modify an arbitral award must submit a copy of the arbitration award as part of a filing in federal court,²⁵ and under the Labor Management Relations Act (LMRA), parties also often file the award.²⁶ Those awards are available as part of the PACER database,²⁷ so we studied arbitration awards from federal court cases that were filed between 2001 and 2011. Our new data set is the first to utilize the PACER data to extract labor arbitration awards, and it differs from prior data sets in that it includes both published and unpublished awards and cases. As a result, our data set enables a broader, and thus potentially more reliable, study of differing types of labor arbitration. Our data has its own limitations, which are discussed in Part IV.B. But it nevertheless provides an enhanced view of labor arbitration that can help illuminate important policy issues.

In contrast to previous research, we find that the overwhelming majority of awards *do not* cite to any external authority (statutes, administrative authorities, case law) or secondary sources.²⁸ Yet, our awards provide little evidence that arbitrators explicitly declined to address a statutory issue raised by one of the parties, indicating that arbitrators do not seem to affirmatively believe they should not cite to external authority. As we noted in Levinson et al. (2020), some protections may increase consideration of law. Arbitrators were more likely to cite to external authority if one or both parties was represented by an attorney in the arbitration hearing, which suggests that legal expertise matters to consideration of the law. In addition, arbitrators working through an arbitration service provider (AAA or FMCS) were more likely to cite to external authority than were arbitrators selected without aid of a service provider.

23. See *infra* Part III.

24. See *infra* Part III.

25. Federal Arbitration Act §13(b), 9 USC §1 *et. seq.* (2018).

26. Historically, parties filed cases to enforce or vacate arbitration awards under the LMRA, but more recently, some parties file under the FAA in addition to the LMRA.

27. See *infra* note 242.

28. See *infra* Section V.A.

We also noted that arbitrators may be more likely to consider the law in certain types of claims. Arbitrators handling statutory claims were more likely to cite external authority than were arbitrators handling other types of claims, but this difference was not as robust as we anticipated it would be. In fact, no awards involving allegations of discrimination under the CBA cited to external authority. On the other hand, awards addressing claims asserting a breach of a just cause provision (where interpretational aids might be useful) were more likely than other types of contractual claims to cite to external authority. These findings indicate there is perhaps much more room for labor arbitrators to refer to external authority in their decision-making.

Our results indicate that compliance with governing law (and therefore perhaps robust employee protections) depends on factors like attorney representation and service provider guidance. If so, our study has potential implications for the structure and desirability of arbitration for labor disputes as well as for other types of arbitration, including employment, consumer, and securities arbitrations.

Moreover, our more inclusive study indicates that there remains an inherent tension between peaceful, quick, private dispute resolution and the risks of potential lawlessness. Those tensions might be greater for the resolution of statutory claims, and if so, our study has implications for the desirability and structure of the arbitration of such claims. For example, examination of external authority and written reasoning could be required for the binding resolution of statutory claims in labor arbitration.

These policy issues are complex, and it would be foolish to claim that one empirical study can definitively resolve any of the issues raised in this article. Nevertheless, our study provides reasons to question the breadth of prior studies, and it raises questions worthy of further consideration. In addition, our data suggest more broad studies are warranted.

Before setting out our empirical findings, this Article briefly introduces the subject of labor arbitration in Part I. In Part II, we detail the debate over whether arbitrators should consider external law and the legal developments that suggest external law is more likely to be relevant in labor arbitration today. In Part III, we describe existing empirical studies of labor arbitrator reliance on external authority and discuss some of the limitations inherent in these studies. In Part IV, we describe our data, research question, and methodology. We report our empirical findings in Part V before concluding.

I. A BRIEF INTRODUCTION TO LABOR ARBITRATION

Labor arbitration in the U.S. has a relatively long history, stemming from efforts to encourage the private resolution of clashes between workers and managers.²⁹ Most arbitration in the labor context results from provisions placed in collective bargaining agreements (CBAs),³⁰ which are the agreements negotiated between unions and their companies regarding workplace conditions and rights, including benefits, seniority systems, and hiring and promotion procedures.³¹ The CBAs are considered to be private governance systems, and often the union and the company include a provision within the CBA that mandates that disputes arising under the CBA will be resolved in arbitration.³² Arbitration in the labor context was accepted by U.S. courts long before arbitration of many other types of disputes,³³ and in general, labor arbitration is insulated from the criticisms and attacks that beleaguer other types of arbitration. For example, in the last several Congressional sessions, bills have been introduced (but failed) to prohibit mandatory arbitration clauses in consumer, employment, and other types of transactions,³⁴ yet these bills routinely have excluded labor arbitration. Both the Arbitration Fairness Act³⁵ and the more recent Restoring Justice for Workers Act³⁶ explicitly permit arbitration provisions in collective bargaining agreements between unions and employers with the caveat that “no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement” of a constitutional or statutory right. These bills were advanced by advocates who protested the unfairness of arbitration that results from unequal bargaining power and contracts of adhesion.³⁷ The exclusion of labor arbitration from the prohibition indicates a general assumption that labor arbitration is not plagued with such problems and that it is a desirable, well-functioning mechanism to resolve workplace disputes. This Part briefly explains the history of labor arbitration, the process of the grievance arbitration system, and the types of written awards that typically result from labor arbitration.

29. Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 FLA. L. REV. 373, 377-79 (1983) (discussing arbitration as a solution to strikes and violence in the workplace).

30. WARE, *supra* note 3, at 197-98.

31. WARE & LEVINSON, *supra* note 16, at 181.

32. *Id.*

33. Nolan & Abrams, *supra* note 29, at 382-83.

34. See, e.g., Arbitration Fairness Act, S. 2591, 115th Cong. § 2 (2018); Restoring Justice for Workers Act, H.R. 7109, 115th Cong. § 2 (2018); Forced Arbitration Injustice Repeal Act, S. 610, 116th Cong. § 2 (2019); Safety Over Arbitration Act, S. 620, 116th Cong. § 402 (2019).

35. Arbitration Fairness Act, S. 2591, 115th Cong. § 402(b)(2) (2018).

36. Restoring Justice for Workers Act, H.R. 7109, 115th Cong. § 402(d)(2) (2018).

37. Rep. Nadler Issues Remarks at Markup of Forced Arbitration Injustice Repeal Act, TARGETED NEWS SERV., Sept. 10, 2019, 2020 LEXISNEXIS 125861151.

A. *The History of Labor Arbitration in the US*

In this section, about the history of labor arbitration, and the next, about the grievance arbitration system, we rely heavily on the background that we describe in our first article to provide the necessary context for our current argument regarding the potential risk of lawlessness in labor arbitration.³⁸

Even before the recent surge in arbitration of statutory employment law claims, unions and employers were using labor arbitration to resolve collective bargaining agreement (CBA) disputes. By the 1880s, labor arbitration “was familiar enough . . . to be recognized in the laws of a number of states.”³⁹ State law “simply authorized the courts to appoint local boards of arbitration upon the joint request of employers and employees.”⁴⁰ The type of labor arbitration common today, in which the dispute is resolved by a neutral umpire, “was routine in the unionized sector of the American economy” by 1940, when the United Automobile Workers and General Motors “substantially revised their arbitration procedure.”⁴¹ Arbitration often served as a substitute for strikes as a tool to resolve employment disputes, avoiding larger breakdowns in commerce,⁴² and also was an alternative to lawsuits involving contractual claims.⁴³

When employees choose union representation, they authorize the union to bargain with the employer on their behalf regarding the terms and conditions of employment, and that agreement typically takes the form of a CBA.⁴⁴ Most CBAs contain a clause that guarantees that employee discipline, including discharge, can only occur for a just cause.⁴⁵ This just cause provision replaces employment at will,⁴⁶ the common law default rule, which states that employees can be discharged for any reason or no reason at all;⁴⁷ thus, just cause is a significant contractual protection for union-represented employees.

38. Levinson et al., *supra* note 7, at 1832-37 (conveying some of the same information as that herein part “I. Background”).

39. DENNIS R. NOLAN, *LABOR AND EMPLOYMENT ARBITRATION: IN A NUTSHELL* 5 (2d ed. 2007).

40. *Id.*

41. *Id.* at 6.

42. *Id.* (noting that Louis Brandeis helped negotiate an agreement to end a garment industry strike in 1910 and chaired the resultant Board of Arbitration for a decade thereafter).

43. DOUGLAS E. RAY, *CALVIN WILLIAM SHARPE & ROBERT N. STRASSFELD, UNDERSTANDING LABOR LAW* 293 (4th ed. 2014).

44. *Id.* at 159.

45. WARE & LEVINSON, *supra* note 16, at 218.

46. *Id.*

47. *Id.*

Arbitration provisions are also extremely common in CBAs today,⁴⁸ and some experts state that virtually all CBAs “contain grievance procedures that utilize arbitration as the last step.”⁴⁹ Section 301(a) of the Labor Management Relations Act⁵⁰ confers jurisdiction on federal courts to enforce CBAs, and the United States Supreme Court has interpreted section 301(a) to also enable federal courts to enforce CBA arbitration provisions pursuant to federally-created common law.⁵¹ One rationale for this interpretation was a recognition that the arbitration provisions are “the *quid pro quo* for an agreement not to strike,”⁵² and therefore, workplace harmony (a key goal of federal labor policy) requires their vigorous enforcement. If a CBA contains an arbitration provision, federal courts are instructed to refer disputes about the CBA to arbitration⁵³ without any scrutiny of the merits of the dispute.⁵⁴

According to the Supreme Court, the CBA is not merely a contract, but rather it “is an effort to erect a system of industrial self-government.”⁵⁵ Often terms in the CBA are vague standards or references intended to be worked out over time as circumstances arise and the workplace and business evolve.

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. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the CBA.⁵⁶

This focus on the larger private employment relationship suggests a potential tension when disputes arise involving the statutory rights of individual employees to be free from discrimination or to create entitlements to particular terms of employment. When bargaining for

48. *Id.* at 181; Mario F. Bognanno et al., *The Conventional Wisdom of Discharge Arbitration Outcomes and Remedies: Fact or Fiction*, 16 CARDOZO J. OF CONFLICT RESOL. 153, 153-54 (2014).

49. KATHERINE V. W. STONE, RICHARD A. BALES & ALEXANDER J. S. COLVIN, *ARBITRATION LAW* 723 (3d ed. 2015) (placing frequency of arbitration provisions at “over 99 percent”).

50. 29 U.S.C. § 141 (2018); 29 U.S.C.S. § 185 (2018).

51. *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957).

52. *Id.* at 455 (“[Section 301] expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.”).

53. *United Steelworkers of Am. v. Am. Manuf. Co.*, 363 U.S. 564, 566 (1960) (interpreting section 203(d) of the LMRA which states that “[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application of interpretation of an existing [CBA]”).

54. *Id.* at 567.

55. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960).

56. *Id.* at 581.

and representing the collective, unions inevitably must trade off the vigorous representation of particular employee interests for the welfare of the group.⁵⁷ Yet, statutory employment rights are designed to extend to each individual employee without regard to union or other employee interests. Moreover, statutory rights are public rather than private law,⁵⁸ and they thus conflict with the notion that the workplace should be left entirely to self-government. For these reasons, in *Alexander v. Gardner-Denver Co.*,⁵⁹ the Supreme Court concluded that employees have an independent right to take their civil rights claims to court, notwithstanding a CBA's arbitration clause, even when the employee's claim was previously denied in arbitration.⁶⁰ The Court reasoned that "[Title VII] concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices."⁶¹

In the ensuing decades, however, the Supreme Court determined that the Federal Arbitration Act mandates enforcement of arbitration clauses in individual employment agreements,⁶² and that when arbitration agreements cover disputes involving statutory claims, their judicial resolution can be foreclosed.⁶³ Initially, the Court distinguished CBA arbitration by noting that in labor arbitration, the arbitrator's jurisdiction is confined by the CBA and that the union might not fully represent individual employee rights in all circumstances.⁶⁴ In 1998, however, the Court decided *Wright v. Universal Maritime Service Corp.*, in which it signaled without deciding that it might be possible for a CBA to declare that statutory rights' claims of union members must be resolved in labor arbitration rather than in the courts.⁶⁵ Whether *Wright* actually opened the door to court foreclosure of statutory claims and what would be needed to bargain for such disclosure was the subject of disagreement in the federal courts, so in 2009, the Court granted certiorari in order to settle

57. See generally RAY, SHARPE & STRASSFELD, *supra* note 43; *United Steelworkers of Am.*, 363 U.S. at 582.

58. Shyamkrishna Balganes, *Private Law Statutory Interpretation*, 92 S. CALIF. L. REV. 949, 969-70 (2019).

59. 415 U.S. 36, 48-60 (1974).

60. *Id.* at 59-60 (holding that when an arbitrator has decided against the union on a contractual discrimination claim that decision does not preclude the employee from bringing a statutory discrimination claim. The judge in the litigation can provide the arbitrator's decision the weight the judge deems appropriate, including no weight at all).

61. *Id.* at 51.

62. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991).

63. *Id.* at 35.

64. *Id.* at 34.

65. *Wright v. Universal Mar. Ser. Corp.*, 525 U.S. 70, 80-82 (1998).

the question.⁶⁶ In *14 Penn Plaza LLC v. Pyett*, the Court dismissed concerns about the proper resolution of statutory claims in labor arbitration and held that a CBA “that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable.”⁶⁷ Thus, prior to 1998, statutory employee claims were reserved for courts, between 1998 and 2009, federal courts were split on this issue, and after 2009, statutory claims could be definitively resolved in labor arbitration if the CBA clearly stated that the claims were to be so resolved. This development is important for the study period of our data, which spans from 2000 to 2011.

B. Grievance Arbitration System

CBAs often include not just a requirement to arbitrate disputes but also describe a process for handling grievances that is designed to resolve workplace disputes efficiently with as little formality as possible through negotiation, or ultimately arbitration, which is intended to be more efficient and less time-consuming than litigation.⁶⁸ Many involve a stepped procedure.⁶⁹ An example from one CBA is set out in Appendix A. The process begins at step one, where the employee discusses her grievance with her manager. If they are unable to resolve the grievance, it moves to step two, wherein the union puts the grievance in writing, and a union representative meets with a higher-level manager to attempt to resolve the dispute. Failing resolution at step two, the union representative invokes step three and meets with the general manager. At step four, the union requests arbitration. CBAs contemplate binding arbitration, which means that the arbitrator’s decision is final, judicially enforceable, and subject to appeal on only very narrow grounds that do not include legal or factual errors made by the arbitrator.⁷⁰

Each CBA provides its own procedure for choosing an arbitrator or panel of arbitrators. Some CBAs provide for use of a third-party arbitration service provider, such as the American Arbitration Association (AAA) or the Federal Mediation and Conciliation Service (FMCS).⁷¹ Arbitration service providers vet and provide training to

66. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 255 & n.4 (2009) (“We granted certiorari to address the issue left unresolved in *Wright*, which continues to divide the Courts of Appeals, and now reverse.”(internal citation omitted) (noting a circuit split on the issue)).

67. *Id.* at 274.

68. See Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements— with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. OF AM. ARB. 251, 254-56 (2006) (noting benefits of time and other cost savings when parties opt for arbitration rather than litigation in consumer and employment contexts).

69. WARE & LEVINSON, *supra* note 16, at 206.

70. *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (“Courts thus do not sit to hear claims of factual or legal error by an arbitrator . . .”).

71. WARE & LEVINSON, *supra* note 16, at 207.

panels of arbitrators that are made available to the parties,⁷² and they also provide rules of procedure that parties and arbitrators can utilize as a matter of default to govern their proceedings.⁷³ Depending on the terms of the CBA or the parties' preferences, the service provider can provide a list of affiliated arbitrators from which the parties can select an arbitrator or a panel of three arbitrators.⁷⁴ Varying procedures for selecting the arbitrators from this list can be followed. The service provider might give the parties a finite list of names⁷⁵ and the parties indicate their preferences, which the service accounts for in assigning an arbitrator.⁷⁶ Some CBAs may provide that the parties obtain a list from a service provider and then take turns striking arbitrators from the list until one arbitrator remains.⁷⁷ CBAs can specify the names of several arbitrators, and the parties may rotate through them⁷⁸ or pick by striking arbitrator names for each dispute. CBAs might also specify one-named arbitrator for all disputes, and some may simply provide for the parties to pick an arbitrator on a case-by-case basis.⁷⁹

Some CBAs contain a unique form of "arbitration,"⁸⁰ which enlists a joint arbitration board within the workplace instead of using a neutral third party. The joint arbitration board is usually composed of an equal number of employer or industry representatives and union representatives, and board members typically are not attorneys.⁸¹ If the joint arbitration board resolves the dispute, its decision is binding in the same way an arbitration award would be binding.⁸² The CBA

72. *The AAA National Roster of Arbitrators and Mediators: EXPERTISE MATTERS*, AM. ARBITRATION ASS'N: ARBITRATORS & MEDIATORS, <https://www.adr.org/aaa-panel> [<https://perma.cc/AFR8-63KQ>] (last visited April 1, 2021); 29 C.F.R. § 1404.5 (2019); Homer C. La Rue & Alan A. Symonette, *The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection*, 63 HOW. L.J. 215, 226 (2020).

73. See, e.g., Erin O'Hara O'Connor, Kenneth J. Martin & Randall S. Thomas, *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 162-65 (2012) (providing empirical evidence of choices of arbitration associations and their default rules).

74. WARE & LEVINSON, *supra* note 16, at 207-08.

75. *Id.* at 207.

76. *Id.* at 208.

77. *Id.*

78. *Id.* at 207.

79. *Id.* at 208.

80. "Arbitration" is described in quotes because not all courts would determine that such review panels constitute arbitration within the meaning of state law. See *Cheng-Canindin v. Renaissance Hotel Assocs.*, 57 Cal. Rptr. 2d 867, 871-72 (Cal. Ct. App. 1996). For the purposes of our study, we treat these dispute resolution processes as equivalent to arbitration when the CBA intends for them to be final and binding.

81. WARE & LEVINSON, *supra* note 16, at 208; Ariana R. Levinson, *What the Awards Tell Us about Labor Arbitration of Employment Discrimination Claims*, 46 U. MICH. J.L. REFORM 789, 830 (2013) [hereinafter Levinson, *What the Awards Tell Us*].

82. Levinson et al., *supra* note 7, at 1835.

might provide that the decision of the joint arbitration board is the final step of arbitration.⁸³

Arbitrators, even those who are selected by a service provider or are specified as a named arbitrator or panel of arbitrators in a CBA, do not necessarily have Juris Doctor degrees (J.D.s).⁸⁴ Some arbitrators have Doctor of Philosophy degrees (Ph.D.s) in labor relations or similar fields; others have relevant expertise gained by working in a particular unionized industry.⁸⁵ Indeed, one of the advantages of labor arbitration is its ability to have someone familiar with the industry and the nuances of labor relations to help give meaning to the parties' agreement.⁸⁶

Because arbitration is intended to be efficient and inexpensive, arbitration proceedings tend to be informal.⁸⁷ Discovery is limited,⁸⁸ and the rules of evidence are only loosely followed.⁸⁹ Arbitrators sometimes are more inquisitorial than U.S. judges,⁹⁰ and they are less likely to conclude that one party is correct or prevails when both have contributed to the fractious situation.⁹¹ Moreover, arbitrators often are

83. See, e.g., Ford, Harrison LLP, *Painting Contractor Gets Primer on Labor Arbitration*: 21 No. 2 Ill. Emp. L. Letter 6, LABOR RELATIONS 1 (2010).

84. Michel Picher, Ronald L. Seeber & David B. Lipsky, *The Arbitration Profession in Transition: A Survey of the National Academy of Arbitrators*, 3 CORNELL/PERC INST. ON CONFLICT RESOL. 1, 12 (2000), <http://naarb.org/proceedings/synopses.asp> [<https://perma.cc/X3S5-MDGU>] (noting that 61.4% of NAA arbitrators in 1999 had a law or J.D. degree).

85. See *id.* at 12, 21-22.

86. See *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), (“The labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect . . . such factors as the effect upon the productivity of a particular result, its consequence[s] to the morale of the shop, his judgment whether tensions will be heightened or diminished. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.”).

87. Erin O’Hara O’Connor, *Protecting Consumer Data Privacy with Arbitration*, 96 N.C. L. REV. 711, 728-29 (2018).

88. 3 IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 34.1 (1994 & Supp. 1999) (“Limitations on discovery . . . remain one of the hallmarks of American commercial arbitration Avoidance of the delay and expense associated with discovery is still one of the reasons parties choose to arbitrate.” (citing William L.D. Barrett, *Arbitration of a Complex Commercial Case: Practical Guidelines for Arbitrators and Counsel*, 41 ARB. J. 15, 19 (1986))); Christopher R. Drahozal, *Why Arbitrate? Substantive versus Procedural Theories of Private Judging*, 22 AM. REV. INT’L ARB. 163, 173 (2011).

89. WARE & LEVINSON, *supra* note 16, at 211.

90. Wayne D. Brazil, *When “Getting it Right” Is What Matters Most, Arbitrations Are Better than Trials*, 18 CARDOZO J. OF CONFLICT RESOL. 277, 282-83 (2017) (arbitrator discussing his use of questioning and active engagement in arbitration).

91. See Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 501-02 (1997). Rau attributes this tendency toward compromise solutions to a desire to garner repeat business from the parties. *Id.* at 523.

empowered to be more creative than judges in fashioning remedies for the parties.⁹²

C. Level of Formality of Labor Awards

Labor awards—like judicial opinions—are written with varying levels of formality. Some arbitrators may avoid accompanying their awards with written rationales that resemble judicial opinions on the theory that the failure to include written rationales helps to insulate the arbitration award from court scrutiny.⁹³ The idea is that courts must locate particular types of problems in order to set aside arbitration awards and those problems are almost impossible to identify without a written rationale.⁹⁴ On the other hand, many arbitrators who have received formal training through arbitration service providers, such as the AAA, or are required to stay current in their field, such as by the NAA (National Academy of Arbitrators), author written opinions supporting their award in each case.⁹⁵

92. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001) (“Arbitrators are chosen for their specialized experience and knowledge, which enable them to fashion creative remedies and solutions that courts may be less likely to endorse.”).

93. Our data set reflects that of 281 awards where a service provider was not used and the award was decided by a traditional arbitrator or panel of arbitrators, only eight (approximately 3%) contained the award with no opinion or explanation, whereas of the awards where no service provider was used and the award was decided by a joint board or similar group of industry experts, 52 of 121 (approximately 43%) contained only the award. The judiciary increasingly has effectively required arbitrators to issue written opinions explaining their awards in order for their decisions to survive judicial review. *See generally* 2 EMP. DISCRIMINATION L. & LITIG. § 13:63 (2020) (discussing split of opinion on whether to include written decisions with awards in labor employment arbitration).

94. Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law through Arbitration*, 83 MINN. L. REV. 703, 722-23 (1999).

95. *Cf.* W. Mark C. Weidenmaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1919. (2010); Cynthia Alkon, *Women Labor Arbitrators: Women Members of the National Academy of Arbitrators Speak about the Barriers of Entry into the Field*, 6 APPALACHIAN J.L. 195, 195-96 (2007) (describing requirements for entry into AAA requires training in dispute resolution, and NAA requires demonstrated experience); *see also* NATIONAL ACADEMY OF ARBITRATORS, CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES 7 (Sept. 2007), <https://naarb.org/wp-content/uploads/2017/03/NAACODE07.pdf> [<https://perma.cc/94SS-GPZG>] (“To this end, an arbitrator should keep current with principles, practices and developments that are relevant to the arbitrator’s field of practice.”); *see* Abraham J. Gafni, *Written Opinions in Arbitration Aren’t a Given*, LAW.COM (Sept. 22, 2008), <https://www.law.com/almID/1202424702244/> [<https://perma.cc/Q9GH-RR7Z>] (“AAA Labor Arbitration Rules provide the opposite presumption, i.e., that such a reasoned opinion will be issued by the arbitrator unless the parties agree that one should not be prepared.”); Michael Z. Green, *Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters*, 70 SMU L. REV. 639, 659 (2017) (“To be an NAA member, [in 2017] an arbitrator must have ‘a minimum of 60 written decisions in a time period not to exceed six years.’”) (citing *Membership Guidelines*, NAT’L ACADEMY OF ARBITRATORS <https://naarb.org/membership-guidelines/> [<https://perma.cc/S2UD-VXQ7>] (last visited Sept. 19, 2017)); *Membership Guidelines*, NAT’L ACADEMY OF ARBITRATORS <https://naarb.org/membership-guidelines/> [<https://perma.cc/S2UD-VXQ7>] (last visited Sept. 19, 2017) (In 2020, NAA required 60 written opinions in a six-year period).

Arbitrators who choose to write reasoned awards typically do so in order to show the parties that they have considered all of the arguments as well as the evidence presented.⁹⁶ Doing so helps the parties to accept the arbitrator's determination.⁹⁷ One of the aims of our empirical study is to learn more about the form, detail, and argumentation found in these typically private documents.

II. THE INEVITABLE TENSION BETWEEN PRIVATE CREATION OF WORKPLACE HARMONY AND VINDICATION OF PUBLIC LAW EMPLOYMENT PROTECTIONS

As originally conceived by the courts and scholars, labor arbitration is intended to prevent strikes and to enable the resolution of workplace disputes according to the private governance system contained in CBAs.⁹⁸ According to federal policy, in general, the arbitrator's award does not need to comply with governing law or legal principles.⁹⁹ It need only find its basis in the CBA and not violate clearly defined and important public policy principles.¹⁰⁰ From this perspective, arbitrators typically need not ground their reasoning or results in external legal authority.¹⁰¹ Indeed, non-lawyers might well not be trained to research, identify, or apply governing law, and nothing about labor arbitration requires the participation of lawyers as advocates or arbitrators.¹⁰² One might thus conclude from the structure and rationale of labor arbitration that arbitrators should not consider or cite to external legal authority when resolving disputes.¹⁰³ The CBA should be the only external document considered by the arbitrator.

However, legal rules and principles are fashioned to guide employers and to protect employees, and thus, they might be helpful or even normatively required guides for arbitrators. Consider, for example, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act

96. Weidenmaier, *supra* note 95, at 1918 ("One benefit of reasoned awards is that losing parties may be more inclined to view them as legitimate and thus to comply voluntarily. To that end, a 'careful demonstration that the decisionmaker has listened and responded to' the losing party's arguments may enhance the prospects of voluntary compliance.").

97. Calvin William Sharpe, *Integrity Review of Statutory Arbitration Awards*, 54 HASTINGS L.J. 311, 356-57 (2002) (noting labor arbitrators traditionally write opinions).

98. See Stone, Bales & Colvin, *supra* note 49, at ch. 5 (presenting and analyzing relevant case law and theoretical analyses of this basis for labor arbitration).

99. *But see* WARE & LEVINSON, *supra* note 16, at 193 (explaining some courts may apply a manifest disregard of the law standard to reviewing labor arbitration awards).

100. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960); WARE & LEVINSON, *supra* note 16, at 190 (explaining three primary grounds for vacatur as procedural unfairness, clearly exceeding authority granted by CBA, and violation of fundamental and well-defined public policy).

101. Meltzer, *supra* note 1, at 557.

102. *Id.* at 558.

103. *Id.* at 557.

(ADEA), the Family and Medical Leave Act (FMLA), and other employee protections, all of which are intended as universal protections for employees.¹⁰⁴ Even contract default rules, often considered private law, are designed to nudge parties toward particular norms of interaction and treatment which are implicated in arbitration.¹⁰⁵ Not surprisingly then, labor arbitrators and scholars have long debated whether arbitrators should consider statutes, particularly to ensure that their interpretation of a CBA does not violate the law.¹⁰⁶ Further, arbitrators and scholars have debated whether they should consider external authority to give meaning to the CBA¹⁰⁷ or to apply CBA provisions with clear legal counterparts, such as antidiscrimination provisions.¹⁰⁸ When should they consider other sources of law, such as administrative regulations, or court decisions interpreting a statute¹⁰⁹ or common law? Finally, secondary sources might help to clarify a complex area of the law.

A. *The Early Normative Debate over Reliance on Legal Authority*

The debate over citation to legal authority is essentially one about the hierarchy between the private governance systems contained in the CBA and the governance principles articulated by the state and contained in external legal authorities. Early on the debaters asked whether it would be permissible for a labor arbitrator to ignore governing law and consequently interpret a CBA in such a way that it requires or permits unlawful action. The most well-known articulation of this debate took place between Bernard Meltzer and Robert Howlett at the National Academy of Arbitrators (NAA) annual meeting in 1967. Meltzer argued that arbitrators should interpret the contract without regard to external law, even in cases where there is “an irrepressible

104. 42 U.S.C. § 2000e-2 (2018); Americans with Disabilities Act, 42 U.S.C. § 12101 (2018); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2018); Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2018).

105. On the use of default rules to nudge people toward superior outcomes, see generally Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1 (2013).

106. Martin H. Malin, *Revisiting the Meltzer-Howlett Debate on External Law in Labor Arbitration: Is It Time for Courts to Declare Howlett the Winner?*, 24 LAB. L. 1, 2 (2008).

107. Cf. Meltzer, *supra* note 1, at 557 (noting arbitrators should consider regulation as one factor when interpreting a loosely formulated standard like “just cause,” or adopt a contractual interpretation consistent with the law when a provision is “susceptible to two interpretations.”); Theodore J. St. Antoine, *External Law in Arbitration: Hard-Boiled, Soft-Boiled, and Sunny-Side Up*, in ARBITRATION 2004: NEW ISSUES AND INNOVATIONS IN WORKPLACE DISPUTE RESOLUTION, PROCEEDINGS OF THE 57TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 185, 188 (Charles J. Coleman ed., 2004), <https://naarb.org/proceedings/pdfs/2004-185.pdf> [<https://perma.cc/D52M-VYM9>] [hereinafter St. Antoine, *External Law in Arbitration*] (“Everyone seems to agree, including the Supreme Court, that an arbitrator may look to the law for guidance in interpreting a contractual provision.”).

108. Levinson, *What the Awards Tell Us*, *supra* note 81, at 830.

109. Even in a case involving a statutory issue, determining whether ordering a certain employer action would require an employer to violate the law might not be ascertainable from the face of the applicable statute.

conflict” between the CBA’s requirements and those of external law.¹¹⁰ In other words, “respect the agreement and ignore the law.”¹¹¹ For an arbitrator to do otherwise would require exceeding the granted contractual authority to interpret the contract¹¹² and require those who are not experts in the law, including those without any legal training, to interpret the law.¹¹³ Meltzer opined that if arbitrators considered the law in cases where the contract’s requirements appeared to be contrary to the law, “they would be impinging on an area in which courts or other official tribunals are granted plenary authority,” making “limited judicial review” inappropriate.¹¹⁴

Howlett argued, in contrast, that arbitrators should consider external law and should avoid making awards that required unlawful action.¹¹⁵ He proposed that “arbitrators should render decisions on the issues before them based on both contract language and law.”¹¹⁶ Indeed, some of the rules regarding the unionized workplace stem from legal principles. For example, the NLRA prohibits employers and unions from committing unfair labor practices. The relevant provisions prohibit employers from discriminating against employees for engaging in union activity or collective action to improve working conditions and require employers making changes to working conditions to bargain in good faith with the union first.¹¹⁷ CBAs frequently include protections parallel to these, such as clauses prohibiting anti-union discrimination.¹¹⁸ CBAs can also take the opposite approach and purport to eliminate NLRA protections, such as by allowing an employer to circumvent the requirement of bargaining with the union before changing certain working conditions.¹¹⁹ It is certainly possible for the same factual scenario to give rise to both an unfair labor practice charge and a grievance under the CBA.¹²⁰

110. Meltzer, *supra* note 1, at 557.

111. *Id.*

112. *Id.*

113. *Id.* at 558.

114. *Id.* at 558-59.

115. Robert G. Howlett, *The Arbitrator, the NLRB and the Courts*, in *THE ARBITRATOR, THE NLRB, AND THE COURTS: PROCEEDINGS OF THE 20TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 67, 104-06 (Dallas L. Jones ed., 1967), <https://naarb.org/proceedings/pdfs/1967-67.pdf> [<https://perma.cc/NS5S-2CZ3>] [hereinafter Howlett, *The Arbitrator*]; see also Robert G. Howlett, *A Reprise*, in *DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION: PROCEEDINGS OF THE 21ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 64, 68-69 (Charles M. Rehmus ed., 1968), <https://naarb.org/proceedings/pdfs/1968-64.pdf> [<https://perma.cc/T53E-W9NQ>] [hereinafter Howlett, *A Reprise*].

116. Howlett, *The Arbitrator*, *supra* note 115, at 83 (italics omitted).

117. Levinson et al., *supra* note 7, at 1839.

118. *Id.*

119. *Id.*

120. *Id.*

Howlett opined that arbitrators should actively look for statutory NLRA issues that need resolution.¹²¹ He argued that while the roles of the arbitrator and the National Labor Relations Board (NLRB) are “mutually exclusive” “in theory,” in reality “disputes are often difficult to classify’ and in some controversies a ‘blurred line . . . often exists.’”¹²² In Howlett’s view, arbitrators are bound by the law, and CBAs, like all contracts, include “all applicable law.”¹²³ Because contracts are circumscribed by external law, “[a]n award that does not consider the law may result in error.”¹²⁴ Howlett rebutted the notion that because some arbitrators are not attorneys they should not be addressing legal issues by pointing out that NLRB agents who must interpret and apply the law are not all attorneys either.¹²⁵

As to non-NLRA legal issues, Howlett argued that arbitrators have the time and energy to research the law and “that arbitrators, having some expertise in the area of labor law, are more knowledgeable in the area in which they work than are circuit judges.”¹²⁶ He noted that while labor arbitration is viewed as a substitute for a strike, it is also “a substitute for the courts.”¹²⁷ Responding to the argument that if arbitrators begin ruling on non-contractual legal issues, the courts will expand their review of arbitration decisions beyond the traditional limited grounds for review—lack of jurisdiction, fraud, or corruption—Howlett advocated for more extensive review given that arbitrators, like judges, do make mistakes.¹²⁸

Richard Mittenthal then contributed to the debate by offering a “middle ground” position¹²⁹—that an award may “*permit* conduct forbidden by law but . . . not *require* conduct forbidden by law.”¹³⁰ He asserted that in situations where the parties incorporate statutory provisions “as a portion of their contract,” an arbitrator “properly refer[s] to the relevant legislation.”¹³¹ Further, when the language in a CBA is general, an arbitrator properly considers “all relevant

121. Howlett, *The Arbitrator*, *supra* note 115, at 92; Levinson et al., *supra* note 7, at 1839-40.

122. Howlett, *The Arbitrator*, *supra* note 115, at 70 (quoting *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 268, 269 (1964)) (internal marks omitted); Levinson et al., *supra* note 7, at 1840.

123. Howlett, *The Arbitrator*, *supra* note 115, at 83; Levinson et al., *supra* note 7, at 1840.

124. Howlett, *The Arbitrator*, *supra* note 115, at 83.

125. Howlett, *A Reprise*, *supra* note 115, at 105.

126. *Id.* at 68.

127. *Id.* at 69 (quoting Clyde W. Summers, *Labor Arbitration: A Private Process with a Public Function*, 34 REV. JUR. U.P.R. 477, 494 (1965)).

128. *Id.* at 73-75.

129. Richard Mittenthal, *The Role of Law in Arbitration*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION: PROCEEDINGS OF THE 21ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 42, 42 (Charles M. Rehmus ed., 1968).

130. Mittenthal, *supra* note 129, at 50; Levinson et al., *supra* note 7, at 1840.

131. Mittenthal, *supra* note 129, at 42-43; Levinson et al., *supra* note 7, at 1840.

circumstances, including any relevant statute.”¹³² When a CBA uses a term that is vague, then an arbitrator “should choose that interpretation which will harmonize the contract with the law.”¹³³

However, Mittenthal disputed Howlett’s claim that the law is implied in every CBA.¹³⁴ First, Mittenthal argued that that premise is based on a fiction because judges determine the meaning of a contract on their own before then fashioning the remedy to comply with law.¹³⁵ Second, he argued, arbitrators’ authority stems from the parties’ contract rather than from public law, unlike judges’ authority, and so arbitrators should adhere to the intent of the parties over the requirements of the law.¹³⁶ Particularly where there is no mention of the specific law that may abrogate the CBA provision at issue in the arbitration, such as a law that requires seniority for veterans during a layoff, and where the contract instead requires seniority in a layoff based on actual time worked, the arbitrator should be able to resolve the contractual issue without consideration of the law.¹³⁷ In this circumstance, under Mittenthal’s approach, the arbitrator would deny the veteran’s grievance because the employer had followed the CBA and would leave it to the veteran to pursue his remedy in federal court.¹³⁸

After refuting Howlett’s claim, Mittenthal countered Meltzer’s claim that an arbitrator should follow the contract completely and ignore the law.¹³⁹ He pointed out that when law is an issue, parties can simply pick arbitrators with legal expertise, quashing Meltzer’s concern about arbitrators lacking legal expertise.¹⁴⁰ Furthermore, parties typically “do not wish to be bound by an invalid provision” and often include a separability or saving clause¹⁴¹ in their CBA.¹⁴² Parties also generally agree that the arbitrator’s award is final and binding, which suggests that they do not want an arbitrator to ignore the law and “invite[] noncompliance” with the award (on the part of an employer who is reluctant to violate the law).¹⁴³ For example, in the scenario described above, if the company had retained the veteran and the non-veteran with more seniority had raised a grievance, it would

132. Mittenthal, *supra* note 129, at 43; Levinson et al., *supra* note 7, at 1840-41.

133. Mittenthal, *supra* note 129, at 43; Levinson et al., *supra* note 7, at 1841.

134. Mittenthal, *supra* note 129, at 52; Levinson et al., *supra* note 7, at 1841.

135. Mittenthal, *supra* note 129, at 52; Levinson et al., *supra* note 7, at 1841.

136. Mittenthal, *supra* note 129, at 53; Levinson et al., *supra* note 7, at 1841.

137. Mittenthal, *supra* note 129, at 51-52.

138. *Id.* at 54-55.

139. *Id.* at 47-49.

140. *Id.* at 48; Levinson et al., *supra* note 7, at 1841.

141. These clauses mean that any unlawful provision should be separated from the rest of the agreement, and the rest of the agreement, which is lawful, should be upheld by the reviewing adjudicator.

142. Mittenthal, *supra* note 129, at 49; Levinson et al., *supra* note 7, at 1841.

143. Mittenthal, *supra* note 129, at 50.

be problematic for the arbitrator to sustain the grievance and require the employer to violate the law by retaining a non-veteran over a veteran.

B. Ignoring External Authority is Problematic Today

Many commentators have entered this debate and enriched the arguments on both sides,¹⁴⁴ but they note that the early position that arbitrators should ignore external authority was an easier one to sustain prior to a time when arbitrator jurisdiction extended beyond interpretation of the CBA and started to at least potentially include binding resolution of statutory claims. The proliferation of state and federal statutory employment rights, such as those applying to veterans, employees with family medical issues,¹⁴⁵ and to gay and transgender employees, has increased the degree of overlap between the CBA and statutory law.¹⁴⁶ Presumably, legislatures intend for these protections to apply to all employees, so labor arbitrators should be aware of and apply the relevant legal sources and principles. That norm can apply to any legal rule or principle designed to protect employees.

Perhaps most problematic is the lack of robust structural protection for unionized employees seeking to protect their statutory rights. As noted in Part I, today, employees can be forced to take their statutory claims to arbitration rather than courts.¹⁴⁷ This change in legal principle increases the jurisdiction of the arbitrator beyond the confines of the rights and responsibilities granted in the CBA, and,

144. See, e.g., David E. Feller, *Arbitration and the External Law Revisited*, 37 ST. LOUIS U. L.J. 973, 975 (1993) (arguing that “[e]xternal law is irrelevant even where the collective bargaining agreement has terms that look very much like a statute”); Theodore J. St. Antoine, *The Use and Abuse of Precedent in Labor and Employment Arbitration*, 52 U. LOUISVILLE L. REV. 431, 438 (2014) (arguing that difficult questions of legal requirements should be left to courts); Theodore J. St. Antoine, *Presidential Address: Contract Reading Revisited in ARBITRATION – 2000: WORKPLACE JUSTICE AND EFFICIENCY IN THE TWENTY-FIRST CENTURY: PROCEEDINGS OF THE 53RD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 16 (Steven Briggs & Jay E. Grenig eds., 2001), <https://naarb.org/proceedings/pdfs/2000-1.pdf> [<https://perma.cc/DC6X-T4FA>] (modifying position to resolve irreconcilable conflicts between the CBA and governing law in favor of the law, but otherwise, the CBA is a higher authority than legal principles); Malin, *supra* note 106, at 3 (arguing that arbitrators should be permitted to consider external law unless expressly prohibited in the CBA); Philip Baldwin, *The Eternal Debate on External Law in Labor Arbitration: Where We Stand Five Decades After Meltzer v. Howlett*, 16 PEPP. DISP. RESOL. L.J. 31, 31-32 (2016) (arguing that today, it is irresponsible for arbitrators to refuse to consider governing law and offering nuanced analysis to resolve conflicts between governing law and the CBA).

145. See Malin, *supra* note 106, at 15, 25-26 (discussing overlap between FMLA and CBAs).

146. Dennis R. Nolan, *Disputatio: “Creeping Legalism” as a Declension Myth*, 2010 J. DISP. RESOL. 1, 11 (2010) (“[T]he enormous outpouring of laws regulating employment . . . made it almost impossible to avoid potential conflicts between contracts and external law.”); Baldwin, *supra* note 144, at 31, 39 (same).

147. Malin, *supra* note 106, at 14-15.

arguably, this increased jurisdiction should be confined by legal principle. As noted earlier, movements to protect employees from mandatory arbitration agreements typically exempt labor arbitration under CBAs but do not exempt mandatory labor arbitration of statutory rights.¹⁴⁸ In general, the rationale for exempting labor arbitration is the added layer of protection that unions, as repeat-player employee advocates, provide to employees in arbitration.¹⁴⁹ Additionally, the protections provided by unionization and collective bargaining are generally more protective than the minimums established by law, such as employment at will and a wage of \$7.25 an hour, meaning that without arbitration, courts likely would be clogged with workplace disputes of a type they do not normally handle.¹⁵⁰ Moreover, labor arbitration is essential for preventing strikes and other workplace unrest.¹⁵¹ Unfortunately, these rationales do not necessarily apply in the context of statutory protections. These protections can be costly to employers,¹⁵² and unions might be willing to functionally trade away these often minority employee protections in favor of better terms for the majority.¹⁵³ In the end, perhaps no one in the CBA bargaining process or the grievance arbitration cares to protect the interests of the minority employee. Arbitrators poorly trained in or willfully ignoring these legal protections end up unwittingly making this trade possible.¹⁵⁴

148. See *supra* Part I.

149. Cf. Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 313 (2012) (noting distinction between employment and labor arbitration when it comes to a desire for repeat business on the part of the arbitrator).

150. 29 U.S.C. § 206 (setting current minimum wage at \$7.25/hour); MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 773 (5th ed. 2015) (explaining at will employment is the default in all states except Montana); George I. Long, *Differences Between Union and Nonunion Compensation, 2001-2011*, MONTHLY LAB. REV. 16, 16 (2013), available at <https://www.bls.gov/opub/mlr/2013/04/art2full.pdf> [<https://perma.cc/SK6G-KFEL>] (“[O]n average, union workers receive larger wage increases than those of nonunion workers and generally earn higher wages and have greater access to most of the common employer-sponsored benefits as well.”); WARE & LEVINSON, *supra* note 16, at 218 (most CBAs have provisions requiring just cause for discipline, including discrimination); Summers, *supra* note 6, at 85 (2000) (“The lack of legal protection could be remedied through collective bargaining, for collective agreements regularly prohibit discharge without just cause, provide living wages, sick pay, severance pay, paid holidays and vacation, and often medical insurance.”).

151. See *supra* notes 3, 4, 29, 40-42, 96, 98, 127 and accompanying text.

152. See, e.g., Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans without Disabilities*, 76 TENN. L. REV. 311, 315 (2009) (noting that employers resisted the ADA due to its perceived costs).

153. Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, 3 BYU L. REV. 591, 605-06 (1997); Janet McEaney, *Arbitration of Statutory Claims in a Union Setting: History, Controversy, and a Simpler Solution*, 15 HOFSTRA LAB. & EMP. L.J. 137, 158-59 (1997).

154. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53, 57 (1974) (noting that labor arbitrators often ignore or do not know governing laws).

Perhaps not surprisingly, then, almost all of those weighing in to the debate today acknowledge the desirability of considering external law in at least some labor arbitration contexts. This evolution results from the inevitable tension present in today's labor arbitration. On the one hand, it is as important as ever to promote workplace harmony and the private evolution of most workplace governance structures. On the other hand, too much cultivation of the private governance structures creates a risk of lawlessness in workplace dispute resolution. Such lawlessness can, in particular cases, rebound to the detriment of either employer or employee. To the extent that in some cases employers are better represented at the bargaining table than employees, the imbalance disfavors the employees.

III. WHAT DO LABOR ARBITRATORS ACTUALLY CONSIDER?

It is clear that there has been extensive debate over whether arbitrators *should* consider external authority, but much less has been written about whether labor arbitrators actually *do* consider external authority. Section A briefly describes previous studies of the question.¹⁵⁵ Unfortunately, much of what has been written on the latter inquiry predates the changes in arbitrator jurisdiction to cover statutory claims, and some studies rely on unreliable survey data or arbitration cases conducted or reported in ways that bias results. Section B discusses these weaknesses.

A. Previous Studies

Harry T. Edwards's¹⁵⁶ 1975 study "attempted to determine . . . the extent to which arbitrators are competent to handle 'legal' issues in employment discrimination cases."¹⁵⁷ He surveyed members of the NAA with a response rate of just below 50%.¹⁵⁸ "[Seventy-seven] percent of the respondents had read judicial opinions involving claims of discrimination under Title VII . . . 16[%] . . . had never read any such judicial opinions, and 7[%] . . . declined to answer."¹⁵⁹ Just over half of respondents (52%) said that they read "labor advance sheets [a particular type of secondary source] to keep abreast of current developments under Title VII," while 40% indicated they did not.¹⁶⁰ The remainder (8%) declined to answer.¹⁶¹

155. Section A relies on our prior summary of these studies in Part II, Section E of our initial article regarding this data set. Levinson et al., *supra* note 7, at 1844-51.

156. Edwards, *supra* note 2, at 59.

157. *Id.* at 71.

158. Of the 409 arbitrators originally surveyed, 200 responded to Edwards's questionnaire. *Id.* at 70.

159. *Id.* at 71.

160. *Id.*

161. *Id.*

The study also determined that “[n]early two-thirds of the responding arbitrators . . . believed that an arbitrator has no business interpreting or applying a public statute in a contractual grievance dispute.”¹⁶² Yet nearly all of the two-thirds who so believed “conceded that there were certain exceptions to this rule.”¹⁶³ Eighty-five percent agreed that it is appropriate for an arbitrator to consider public law “to avoid compelling [a party] to do something that is *clearly* unlawful.”¹⁶⁴ Ninety-five percent conceded that arbitrators may refer to governing law where “the parties have intentionally adopted a contract clause . . . with the object of incorporating the body of public law into the contract.”¹⁶⁵ “[Ninety-seven] percent . . . agreed that an arbitrator should consider public law when the parties have, by submission, conferred jurisdiction” on the arbitrator “to decide the contract issue in light of the applicable federal or state law.”¹⁶⁶ One-third of the overall respondents held the belief that “a collective bargaining agreement must be read to include by reference all public law applicable thereto.”¹⁶⁷

In a 1979 paper, Margaret Oppenheimer and Helen LaVan considered labor arbitration awards made in disputes involving employment discrimination.¹⁶⁸ The data set consisted of “[a]ll discrimination cases from March 1973 through November 1975 reported in [the BNA’s] *Labor Arbitration Reports*,” a total of eighty-six cases.¹⁶⁹ The awards “cited federal or state law or EEOC guidelines in 60[%] of the cases, and referred to judicial decisions in 40[%] of the cases. Other arbitration decisions were cited in 35[%] of the cases.”¹⁷⁰ Of these three categories of citation to external authority, “[17%] of all decisions cited all three, while another 28[%] cited two of the three.”¹⁷¹ The analysis found that citation to federal or state law or EEOC guidelines was higher in cases where the grievant prevailed, discrimination was found, or back pay was awarded.¹⁷² There was no significant relationship between these kinds of cases and citation to judicial decisions or other arbitration awards, except for a slight correlation between such citation and an award of back pay.¹⁷³

162. *Id.* at 79.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. Margaret Oppenheimer & Helen LaVan, *Arbitration Awards in Discrimination Disputes: An Empirical Analysis*, 34 *ARB. J.* 12, 12 (1979).

169. *Id.* at 13.

170. *Id.*

171. *Id.*

172. *Id.* at 16.

173. *Id.* at 15.

“Whether the arbitrator was a lawyer had no effect on any decision variables, nor was it significantly related to whether the arbitrator cited law, judicial decisions, arbitration, or past practice.”¹⁷⁴ The article concluded that “the feeling that arbitrators who are attorneys are more qualified to hear discrimination cases may be unfounded, unless one assumes that attorneys cite law more accurately. Qualifications such as familiarity with the industry and discrimination law, in particular, may be more relevant.”¹⁷⁵

Benjamin Wolkinson and Dennis Liberson reviewed labor arbitration cases that involved certain types of sex discrimination disputes from the Bureau of National Affairs (BNA) Labor Arbitration Reports between 1975-1980.¹⁷⁶ They found that many arbitrators cited to judicial decisions and EEOC guidance, embracing Howlett’s position “that every agreement implicitly incorporated all applicable law.”¹⁷⁷ Wolkinson and Liberson concluded that “some arbitrators still adhere to the position advocated by . . . Meltzer that arbitrators . . . should . . . respect the agreement and ignore the law,” while others “apply the law if there exists a definitive judicial decision bearing on the issue.”¹⁷⁸

Perry Zirkel’s examination of labor arbitration awards from 1972 to 1982 concluded that external law and other arbitration awards were considered in approximately 50% of the awards.¹⁷⁹ His data set consisted of 100 awards from the BNA Labor Arbitration Reports.¹⁸⁰ Five of the awards interpreted legal precedent or prior awards.¹⁸¹ Attorney representation did not correlate with whether an award interpreted legal precedent.¹⁸² His study indicates that one-third of the awards did not cite or reference external authority.¹⁸³

Patricia Greenfield examined the extent to which arbitrators relied on external law in 106 arbitration awards decided between 1980 and 1985.¹⁸⁴ She used cases in which at least one of the parties had filed an unfair labor practice charge, necessarily invoking the National Labor Relations Act.¹⁸⁵ Her study found that 55 of the 106 cases, 51.9%, “cite statutory issues” in the discussion section (as opposed to just in the

174. *Id.* at 16 (emphasis omitted).

175. *Id.*

176. Benjamin Wolkinson & Dennis H. Liberson, *The Arbitration of Sex Discrimination Grievances*, 37 *ARB. J.* 35, 36 (1982).

177. *Id.* at 44.

178. *Id.*

179. Perry A. Zirkel, *The Use of External Law in Labor Arbitration: An Analysis of Arbitral Awards*, 1 *Det. C.L. Rev.* 31, 43 (1985).

180. *Id.* at 38.

181. *Id.* at 41.

182. *Id.* at 42.

183. *Id.* at 43-44.

184. Patricia A. Greenfield, *How Do Arbitrators Treat External Law?*, 45 *INDUS. & LAB. REL. REV.* 683, 689 (1992).

185. *Id.* at 684.

portion of the opinion reciting the parties' positions).¹⁸⁶ The study shows that arbitrators cited statutory issues more frequently when the arbitrator was aware of a related unfair labor practice charge or when at least one of the parties raised a statutory issue.¹⁸⁷ Greenfield also found that the type of case significantly influenced the likelihood that the arbitrator would address a statutory issue in the discussion section of the opinion.¹⁸⁸ In cases claiming discrimination against an employee because of union activity, called Section 8(a)(3) cases because of the relevant section of the NLRA, arbitrators addressed statutory issues more frequently.¹⁸⁹ They did so in thirty-five of forty-nine, or 71.4%, of the Section 8(a)(3) cases.¹⁹⁰ In cases claiming a refusal by an employer to bargain with the union, called Section 8(a)(5) cases, arbitrators were significantly less likely to cite statutory issues.¹⁹¹ Arbitrators addressed a statutory issue in only twelve of the thirty-one, or 38.7%, of Section 8(a)(5) cases.¹⁹² Of the fifty-five cases raising statutory issues, fourteen cited NLRB decisions,¹⁹³ accounting for about 25% of all the cases raising statutory issues and about 13% of the total 106 awards studied. One of Greenfield's primary conclusions is that the majority of the awards studied failed to "create a record adequate for review" by the Board,¹⁹⁴ which had deferred to the arbitrator's decision. Despite some arbitrators being competent to address external law issues, "many cases are disposed of without statutory issues being addressed either adequately or at all," either by arbitrators or by Administrative Law Judges.¹⁹⁵

Dale Allen and Daniel Jennings surveyed the 641 members of the National Academy of Arbitrators (NAA) in 1987 regarding their decision-making processes; they received 296 usable questionnaires.¹⁹⁶ The questionnaire asked the arbitrators to rank several decision-making factors by importance.¹⁹⁷ Arbitrators ranked state and federal law lowest of the seven factors.¹⁹⁸ Allen and Jennings note that the law has no bearing on the main issue "[i]n the majority of arbitration cases," and many arbitrators believe that they should "restrict

186. *Id.* at 689.

187. *Id.* at 690.

188. *Id.* at 691.

189. *Id.* at 691.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 692.

194. *Id.* at 693.

195. *Id.*

196. A. Dale Allen, Jr. & Daniel F. Jennings, *Sounding out the Nation's Arbitrators: An NAA Survey*, 39 LAB. L.J. 423, 423 (1988).

197. *Id.* at 428.

198. *Id.*

themselves merely to examination of the labor agreement.”¹⁹⁹ The study also found that 88% of the arbitrators do not consult published labor awards “in the majority of decisions,” and that 64% “state that the use of precedent is not significant except for about one-third of the cases.”²⁰⁰

In a 2004 article, Ted St. Antoine reported the results of a survey he conducted of NAA arbitrators about their use of external authority.²⁰¹ He opened the article by describing the long-standing debate:

[Y]ears ago Bernie Meltzer and the late Bob Howlett squared off at our annual meeting in a classic confrontation on an issue that refuses to die. What should an arbitrator do when there is a seemingly irreconcilable conflict between a provision of a collective bargaining agreement and the dictates of external law?²⁰²

He concluded that a cross section of NAA members accept Meltzer’s position, “but when the going gets tough, most of them move over into” Mittenthal’s middle ground approach.²⁰³ St. Antoine received 52 completed questionnaires in response to a message to NAA’s unofficial 240-member email list.²⁰⁴ The results, as we reported in Levinson et al. (2020) indicated that:

- About half of the arbitrators will cite external law only where the parties have cited legal authorities.
- About 30% of the arbitrators will cite external law “when it seems especially pertinent,” even if the parties have not cited legal authorities.
- Around 60% of respondents indicated that they “seldom feel required to deal with the issue of contract versus law” because the “vast majority of contracts should and can be interpreted as consistent with the law.”
- When the contract irreconcilably conflicts with external law, “almost twice as many arbitrators said they would follow the contract, unless the parties instructed them otherwise, as said they would follow the law.”
- Almost 60% of arbitrators “would not order a party to violate external law as part of their award.”²⁰⁵

A 2005 article by Malin and Jeanne Vonhof noted that “parties’ expectations” about reliance on external authority in FMLA-related arbitrations “are evolving” because of the “pervasive influence of the

199. *Id.*

200. *Id.*

201. St. Antoine, *External Law in Arbitration*, *supra* note 107, at 186.

202. *Id.* at 185.

203. *Id.* at 186.

204. *Id.* at 189.

205. *Id.* at 189-90 (emphasis omitted).

FMLA,²⁰⁶ and that to the extent parties expect FMLA issues to be addressed by arbitrators, there is no longer a conflict between traditional expectations that arbitrators will interpret the CBA as written and what the law requires.²⁰⁷ Malin also noted that Elkouri and Elkouri found in 2003 that arbitrators decide cases involving the FMLA by relying on its provisions and the Department of Labor regulations “without regard to whether the collective bargaining agreement says anything about the FMLA.”²⁰⁸

Mark Weidenmaier explored, in a 2012 article, how frequently labor awards published by BNA cited external authority.²⁰⁹ Of the 208 randomly selected awards²¹⁰ he examined, he found that approximately 48.6% cited to either a judicial opinion or another arbitration award.²¹¹ Of those labor awards, 14.9% cited judicial opinions only.²¹² Of the labor awards citing either a judicial opinion or another arbitration award, about 76% cited “at least one arbitration award,” and 35.6% “cited only arbitration awards” and not judicial opinions.²¹³ Within a subset of twenty-five awards, which Weidenmaier examined more closely, the average number of citations to either judicial opinions or labor awards was 8.7 unique citations, with an average of 3.9 being to judicial opinions and 4.5 to arbitration awards.²¹⁴ The awards in this subset cited an average of “two or more unique precedents per page of legal analysis.”²¹⁵ Of these citations, an average of 2.3 “discussed the cited source in some detail or explicitly indicated reliance on the source,”²¹⁶ demonstrating that the arbitrators “did more than pepper their awards with string citations.”²¹⁷

Levinson explored, in a 2013 article, how frequently labor arbitration awards in discrimination cases published by BNA invoked different forms of external authority.²¹⁸ Examining a total of 111 awards involving statutory claims, Levinson found that “[f]orty decisions cited only the relevant statute or no [external] legal authority.”²¹⁹ Seventy-one cited to external authority other than the

206. Martin H. Malin & Jeanne M. Vonhof, *The Evolving Role of the Labor Arbitrator*, 21 OHIO ST. J. ON DISP. RESOL. 199, 200 (2005).

207. *Id.* at 200, 239.

208. Malin, *supra* note 106, at 26 (quoting FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 520 (Alan Myles Rubin ed., 6th ed. 2003)).

209. Weidenmaier, *supra* note 19, at 1101.

210. *Id.* at 1104-05.

211. *Id.* at 1111.

212. *Id.* at 1116.

213. *Id.* at 1126.

214. *Id.* at 1120-21, n. 117.

215. *Id.* at 1121.

216. *Id.* at 1121-22.

217. *Id.* at 1121.

218. Levinson, *What the Awards Tell Us*, *supra* note 81, at 830.

219. *Id.* at 831.

statute involved.²²⁰ Fifty-two cited judicial opinions, twenty-six cited other arbitral awards, and thirteen cited EEOC regulations or guidelines.²²¹ And “[s]eventeen [awards] cited a treatise or other secondary source.”²²² Thus, approximately 64% of the awards cited to at least one external legal authority of some kind, and 47% cited to judicial opinions.

B. The Weaknesses of Some Prior Studies

Learning and understanding what is actually happening in the world is notoriously difficult when it comes to human actions in private settings, and arbitration is no exception. The most we can hope to accomplish as a scientific matter is to amass the data we can, compare the biases and weaknesses inherent in the data available in each study, continue to study the phenomenon with data that is less biased or mitigates the biases of previous studies, and begin to draw inferences after many varied studies can be viewed together. When it comes to understanding labor arbitration, we are at the middle of the journey, not its end. Our study cannot take us to the end of the journey, nor can our study be used to draw any definitive policy conclusions. Nevertheless, our study lacks some of the difficulties present in prior studies, and it offers a more current glimpse than most studies. Before we introduce our data, we take a moment to explore some of the weaknesses of prior studies.

First, as already mentioned, much of the survey data and case studies are older. In particular, the Edwards; Oppenheimer and LaVan; Wolkinson and Liberson; Zirkel; Greenfield; and Allen and Jennings studies all predate both the proliferation of overlap between legal precedent and CBAs as well as the creation of arbitration as the exclusive forum for the resolution of employees’ statutory rights cases. Each of these legal developments should lead to greater reliance on external law than shown in the older studies, and data after 1998 would be particularly helpful to learning about how these changes are affecting the arbitral process.

Second, many of the prior studies rely on survey data, which the empirical literature recognizes as unreliable.²²³ To be sure, labor arbitration is private and very difficult to observe, so survey data is sometimes the best available evidence of what arbitrators do. Moreover, surveys can provide a glimpse of the thought processes of arbitrators. That said, they are plagued by biases due to poor response

220. *Id.* at 830.

221. *Id.*

222. *Id.*

223. *See supra* notes 21-22 and accompanying text.

rates and reputational pressures.²²⁴ Reputational pressures tend to cause survey respondents to answer questions in ways that cast them in a more positive light or to be more likely to respond as the respondents think the surveyors would like them to respond.²²⁵ Less-than-perfect response rates strengthen these biased results in the sense that those arbitrators who do not wish to answer in “positive” ways or who do not take care to deal with external sources in deciding their cases may be more likely to opt out of the survey by not responding.²²⁶ In the three surveys discussed above, one received responses from fewer than half the surveyed arbitrators, one received responses from approximately half of the surveyed arbitrators, and one received responses from less than 25% of those surveyed.²²⁷ While the information provided is certainly interesting and very enlightening for some purposes, they are limited and should be supplemented with other empirical evidence of arbitrator behavior.

Third, some of the empirical studies have used arbitrations published in BNA as the source of data.²²⁸ Because most arbitration awards are not made publicly available, the BNA published arbitrations are a natural source of study. However, the BNA awards will be biased due to the selection process for BNA publication. In order for the award to be published in BNA, the arbitrator must receive the consent of both parties for its publication. Thus, all of the relevant participants are choosing publication of the award.²²⁹ One might expect that unanimous consent will result in a skew of published awards toward those that the arbitrator feels were well-reasoned and relied on notions of public law and public policy. Awards with missing or shoddy reasoning and awards that refuse to consider governing laws would not likely make the selection cut. Again, these studies are valuable, especially in a world where awards remain private. But the conclusions that can be drawn from them are limited.

Fourth, some of the studies use arbitrations that are more likely than most awards to be subsequently reviewed by a government agency, such as the NLRB or EEOC.²³⁰ Even if those agencies regularly

224. *Id.*; FLOYD J. FOWLER, JR., SURVEY RESEARCH METHODS 10-12 (5th ed. 2013) (explaining bias resulting from nonresponse and distorting answers to look good).

225. See *supra* notes 21-22 and accompanying text; FOWLER, *supra* note 224, at 12.

226. See *supra* notes 21-22 and accompanying text; FOWLER, *supra* note 224, at 10-11.

227. See Edwards, *supra* note 156, at 70; Allen & Jennings, *supra* notes 196, at 423; St. Antoine, *supra* note 201-205, at 189.

228. See Weidenmaier, *supra* note 19, at 1107; Oppenheimer & LaVan, *supra* note 168, at 13; Wolkinson & Liberson, *supra* note 176, at 36; Zirkel, *supra* note 179, at 38.

229. Levinson, *What the Awards Tell Us*, *supra* note 81, at 811-12.

230. Oppenheimer & LaVan, *supra* note 168, at 13 (studying awards in disputes involving employment discrimination); Wolkinson & Liberson, *supra* note 176, at 36 (studying awards involving sex discrimination); Patricia A. Greenfield, *supra* note 184, at 684 (studying awards where one party had filed an unfair labor practice with the NLRB);

defer to the arbitrations, the potential for review and reversal by the agencies could influence the arbitrator's decision process. After all, the arbitrator wants the parties to be satisfied, and one feature of that satisfaction is to render a decision in ways that help ensure that the agency will defer to the accomplished agreement. Again, these studies are valuable, especially to the extent that they illuminate problems with arbitration notwithstanding the expected biases. But the biases do create limitations on at least some of the implications and inferences that the studies generate.

We turn next to our study, which although also inherently limited, lacks some of the biases and limitations found in prior studies.

IV. OUR STUDY

A. *Research Questions*

Similar to previous studies, in our initial article, we explored whether labor arbitrators actually consider statutes and other external authority and to what extent.²³¹ We also began to investigate whether arbitrators rely on external legal sources more frequently in certain types of cases.²³² For example, do arbitrators consider external authority more often in cases involving statutory claims than in those only involving breach of the CBA?²³³ Do they consider external authority more often in cases involving breach of just cause provisions (“just cause” is a vague term that might require an external source to illuminate meaning) than in other breach of CBA claims?²³⁴

We are also interested in whether a particular arbitrator's likelihood of considering external authority varies based on her attributes.²³⁵ Some labor arbitrators, for example, do not have a J.D.;

Levinson, *What the Awards Tell Us*, *supra* note 81, at 830 (studying awards in disputes involving employment discrimination); Joel Wm. Friedman, *The NLRB's Deference and Abstention Policies: Accommodation or Abdication?*, 92 TUL. L. REV. 883, 884 (2018) (The NLRB “has adopted a policy of withholding the exercise of its undisputed jurisdiction over statutory claims in favor of seeking resolution of the underlying dispute through arbitration.”); *United Parcel Service, Inc.*, 369 N.L.R.B. 1, 9 (2019) (explaining requirements for NLRB deferral to an arbitration award); *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1846-47 (2019) (“As a precondition to the commencement of a Title VII action in court, a complainant must first file a charge with the Equal Employment Opportunity Commission.”); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974) (“[T]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under title VII.”).

231. Levinson et al., *supra* note 7, at 1851.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

a lack of legal training might make it less likely that the arbitrator consults external law.²³⁶ While little is known on the background of labor arbitrators, as we cite in Levinson et al. 2020: “as of 2000, 61.4% of NAA arbitrators had J.D.s,²³⁷ and a study of eighty-one labor arbitrators’ awards issued between 1982 and 2005 found approximately 64.2% had J.D.s.”²³⁸ Our data set also includes decisions made by joint arbitration boards, which are groups of union and employer representatives who are unlikely to have J.D.s. While we cannot ascertain precisely from the awards whether a particular arbitrator does or does not have a J.D., we know the service provider, such as AAA or FCMS, and the presence of such a service provider might well be a proxy for whether the arbitrator has a J.D. or is otherwise exposed to the requisite legal knowledge through training or otherwise.

Relatedly, perhaps having attorney representation of the parties in the arbitration increases the likelihood of the arbitrator citing external authority. Recall that under some views of procedural justice, arbitrators should address the parties’ arguments and evidence in order to show them that their positions were fully considered.²³⁹ Attorneys may be more likely than other union or management representatives to cite external authority to the arbitrator when presenting a case, and so, the arbitrators are more likely to cite it themselves in their awards.

We summarize our findings here²⁴⁰ to lay the basis for our current investigation into the implications of this newer and in some ways, more reliable dataset’s implications to determine the extent of lawlessness in labor arbitration.

B. Research Data

Recognizing the limitations of prior empirical studies, we set out to create a new and broader database of labor arbitration awards. Our awards are drawn from the Public Access to Court Electronic Records federal court electronic docket (PACER). Just as federal courts have jurisdiction to enforce agreements to arbitrate contained in CBAs, they

236. *Id.*

237. *Id.*; Picher et al., *supra* note 84, at 12; *see also* Allen & Jennings, *supra* note 196, at 423 (1987 survey of 296 NAA members found that 51 percent of respondents possessed a law school education); J. Timothy Sprehe & Jeffery Small, *Members and Nonmembers of the National Academy of Arbitrators: Do They Differ?*, 39 *ARB. J.* 25, 27-28 (1984) (1983 survey of NAA members and nonmembers found that 54.3% of 1,040 arbitrators on the national AAA list of labor arbitrators held a law degree).

238. LAURA J. COOPER ET AL., MORE THAN WE HAVE EVER KNOWN ABOUT DISCIPLINE AND DISCHARGE IN LABOR ARBITRATION: AN EMPIRICAL STUDY 7, 22 (2015).

239. *See supra* Section I.C.

240. Levinson et al., *supra* note 7.

also have jurisdiction to enforce arbitration awards.²⁴¹ After 2000, those awards were made publicly available in PACER. We studied awards submitted in cases filed in federal court over the course of a decade. The awards were not confined to a particular arbitration association such as the AAA, nor were they confined to awards both parties agreed to publish or to particular types of labor or employment disputes. In this sense, our data set is broader than previous studies and more current than many.

In Levinson et al. (2020), we describe how the data set was constructed:

We searched on Bloomberg in the PACER database for “employ! and (arbitral /2 award).” We included all federal district court cases from 2000 to 2011 where the nature of the suit was classified as any of the following: Civil Rights - Disabilities - Employment [445]; Civil Rights - Employment [442]; Labor - Fair Labor Standards Act [710]; Labor - Family and Medical Leave Act [751]; Labor - Labor/Management Relations [720]; Labor - Labor/Management Reporting & Disclosure [730]; Labor - Other Litigation [790]; Other Statutes - Arbitration [896]. We used the broad search term in order to find all cases involving an arbitration award that dealt with employment or employers.²⁴²

The remainder of this section draws heavily on Levinson et al. to describe the process we used to assemble our new and broader database of labor arbitration awards.²⁴³ A research assistant examined each docket in all of the resulting cases from the years 2000-2006 and the docket in each fourth case (because of enormous growth in available findings over the course of study period) in our results for the years 2007-2011 to ascertain whether the case involved an arbitration award and if so, whether the award was available.²⁴⁴ A case was considered off-point if there was no award, as in a situation where arbitration was compelled by a judicial decision, or where a non-employment-related issue was arbitrated. The research assistants coded each available award in the on-point cases for citation to external authority, among other attributes. For this Article, we excluded employment arbitration awards, narrowing the database to include only labor arbitration awards (those cases where the entity on the employee side was a union or where the claim type was a breach of a CBA). The resulting data set of labor arbitration awards consists of 602 awards.

Because arbitration is a private process, it is not possible to obtain all labor arbitration awards for a certain period or to obtain a truly

241. WARE, *supra* note 3, at 151.

242. Levinson et al., *supra* note 7, at 1852.

243. *Id.* at 1851-55 (“Part III. An Empirical Study of Arbitration Awards”).

244. Thirty research assistants examined the dockets over a five-year period. Especially for cases in 2000 and 2001, the award is often not available in the electronic database, and we did not have funding to obtain the actual court files with the paper copies of the awards.

randomly selected sample. Thus, no data set of awards can be perfectly representative. In order to provide any empirical evidence about labor arbitration and arbitration more generally, we must use a non-representative sample; we do so while acknowledging its limitations.

Our new data set overcomes some of the acknowledged limitations of the samples of arbitration awards used by previous authors, as described in Part III, but the data set has limitations of its own. Unlike BNA, our database includes awards that the parties did not elect to publish, including handwritten awards by joint arbitration boards. Our database is not limited to a single service provider, so it is more representative than others. Our sample can provide insight into arbitration where the arbitrator was not selected through a service provider and arbitrations were conducted by a range of other service providers, including the FMCS and state service providers.

Our data come from PACER, a system that provides access to every document electronically filed in each federal district court case in the nation. Because of this, our database does not include many awards that did not result in a court case—in other words, cases where both parties were satisfied and complied with the award in the first instance. However, some of our awards are “confirmed without opposition,” meaning that the parties were satisfied. Other awards ended up in the data set because they were used as support for an argument, sometimes by other parties entirely, and so, may have been complied with by the parties involved in the arbitration without their own litigation. Most awards in our data set, however, are awards that led to a court case because one party to the arbitration was unsatisfied.

Many parties file a case in federal district court in an effort to vacate an award with which they are dissatisfied, although the standard for vacating an arbitration award is strict. A labor award can be vacated only when: 1) “the award results from procedural unfairness, such as fraud, corruption, or bias”; 2) the arbitrator “clearly exceeded” his authority to interpret the CBA “by contravening a clear provision”; or 3) the award itself, not the CBA provision, “violates a fundamental and well-defined public policy.”²⁴⁵ Because our data set likely overrepresents awards with which one party was dissatisfied (and presumably also thought they had a chance of meeting the narrow legal standard), we might adjust our expectations of what our study accomplishes accordingly. For instance, perhaps awards citing external authority are less likely to be contested in court because the parties perceive them as more authoritative. Alternatively, perhaps, they are more likely to be contested because a party objects to the reliance on external law.

As mentioned above, however, our data set also includes a substantial number of awards that the parties did not dispute. It

245. WARE & LEVINSON, *supra* note 16, at 190 (marks omitted).

contains 258 cases, approximately 42.86% of the total, where the award was not challenged.²⁴⁶ It is not uncommon for unions to seek to “confirm” labor awards because they are not self-enforcing. In these cases, the union files in federal district court to confirm the award and either the employer does not appear, so that a default judgment issues, or the employer stipulates to the confirmation. Our data set also includes cases where one of the parties to the litigation cites to an arbitration award as relevant authority. The prior award could deal with the same fact pattern and parties involved in the litigation. Alternatively, it could involve a dispute between completely different parties than those involved in the more recent arbitration, with the citation signifying that the prior arbitration is relevant to the court case. In the latter category of cases, the award is being used as persuasive authority (as a court opinion or administrative agency decision would be), and the parties to the arbitration did not dispute the outcome of the cited award, nor did the parties to the arbitration directly dispute the award in the former category of cases (which we know because no one has moved to vacate it). Rather, they may disagree over whether the court should rule similarly to how the arbitrator ruled in the dispute. The cases that invoke a former arbitration award in this way include unlawful employment discrimination cases brought under Title VII and other anti-discrimination statutes, wage and hour cases, Family and Medical Leave Act (FMLA) cases, and a broad range of other types of labor and employment law disputes, such as those involving whistleblowers, breach of duty of fair representation, wrongful discharge in violation of public policy, intentional infliction of emotional distress, due process, and the Employee Retirement Income Security Act (ERISA).

More of the awards in our data set are drawn from later years than from earlier years, given our reliance on an electronic database that was growing in court participation over the study period. Thus, results generated from cases decided in the mid-2000s paint a more accurate picture of labor awards issued nationally than do the awards generated in the early 2000s, when fewer district courts were submitting electronic records. Nevertheless, cases from the early 2000s provide an accurate sense of individual district courts, and we have no reason to believe limited court participation biases our data in any particular direction.

This is the second of five planned articles studying labor arbitration awards with this data set. The first article examined arbitrator reliance on external authority to determine the extent to which arbitrators rely on legal authority.²⁴⁷ The third will examine reliance

246. These cases were each coded as 0=no challenge indicated. The resolution in these cases ranges from being settled or dismissed not on the merits, confirmation of an award by default judgment, or confirmation of an award not via default judgment.

247. See generally Levinson et al., *supra* note 7.

on prior labor awards to provide a sense of the degree to which nonlegal external sources influence arbitration. The fourth will report on arbitrator attributes recently added to our dataset and further explore the impact of arbitrator attributes, including whether they have a J.D., on the awards. A fifth will focus on the degree to which arbitrator citation to external authority influences the outcomes of subsequent court litigation over their enforcement. The fourth may provide an opportunity to consider further the extent of lawlessness in labor arbitration, which is the issue explored in this current Article that builds upon the findings initially reported in our first article.

V. THE RESEARCH FINDINGS

Section A of this Part sets out our findings on the frequency with which awards cite to external legal authority²⁴⁸ and concludes that when we use a data set that eliminates inherent biases toward citing external legal authority, the incidence of even acknowledging the presence of external authority, let alone relying on it, is shockingly low. Section B looks at whether certain attributes of the arbitration proceedings correlate with the citation to external authority and finds that arbitrations using service providers or attorney representation are more likely to have arbitrators mention external legal authority in their awards.

Section C tests for whether certain types of labor arbitration disputes are correlated more highly with citation to external authority. We find that labor arbitrations involving statutory claims are slightly more likely to cite external legal authority than are claims based on breach of the CBA, but the results required modification in order to be statistically significant. Furthermore, and surprisingly, no CBA claim based on the CBAs' nondiscrimination provisions cited to external authority. Although we can of course draw no firm conclusions based on this one study with its own limitations, our results, taken together, suggest that labor arbitration may be lawless when it comes to statutory rights based on discrimination—the very place that the law needs to have independent force to be effective. Finally, breaches of the CBAs' just cause provisions were more likely to cite to external legal authority than were breaches of other CBA provisions.

A. *Rates of Citation to External Authority*

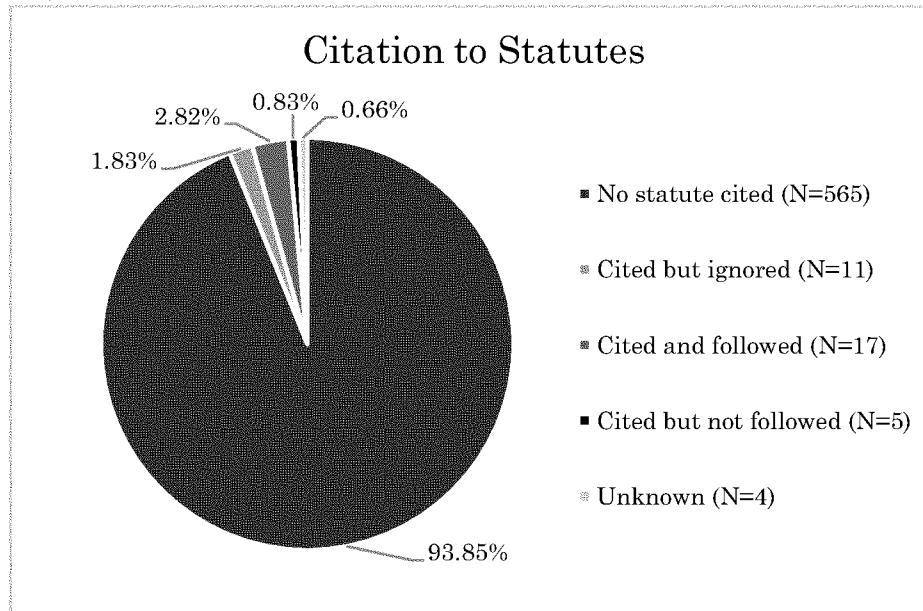
This section examines the number of awards that cite to external legal authority, specifically statutes, cases, and administrative authority, or to secondary sources.

248. Some awards cite to other labor arbitration awards, and we will share these findings in a third article focused on the use of arbitral “precedent” in labor arbitration.

1. Citation to Statutes

As reflected in Figure 1 and noted in our prior article,²⁴⁹ only seventeen of the 602 awards in our database cite to and follow or rely on a statute. This is approximately 2.82% of the awards. Eleven additional awards mention a statute but do not address it in the analysis. Five awards mention a statutory issue and explicitly decline to address it. Overall, 565 of the awards, approximately 94%, do not mention a statute *at all*.²⁵⁰

Figure 1: Award Cites Statute. N = 602



At first blush, these results are shockingly dismal. Although labor arbitration scholars claim that reliance on statutes has increased over the years,²⁵¹ our data indicate that during the 2000s, arbitrators did not cite to statutes in the vast majority of awards. While other studies of awards have found much higher percentages of awards relying on statutes, those studies were distinct in that they addressed specific situations of prohibited discrimination, such as on the basis of race or

249. Levison et al., *supra* note 7, at 1856.

250. In two instances, we had only part of the award, so we could not code for whether or not a statute was relied on during arbitration.

251. Wolkinson & Liberson, *supra* note 176, at 44; Malin & Vonhof, *supra* note 206, at 200.

sex,²⁵² or cases known to have raised an NLRA issue,²⁵³ and importantly, the arbitrations taking place in those contexts contemplated federal agency review of the awards. Moreover, some of these studies use BNA data, with the limitations we discussed earlier. Outside of these rarified contexts, it appears that arbitrators continue to view their role as the facilitator of a purely private governance system. And such data indicate that arbitration may be somewhat lawless when it comes to acknowledging governing statutory law.

On the other hand, perhaps the results are not quite as shocking as they appear at first blush. Because the vast majority of the arbitrations in our data set involve claims involving breach of the CBA rather than statutory claims, this dearth of reliance on statutes makes sense. Recall from our discussion in Part III.A of the survey responses of arbitrators that arbitrators indicated that in most cases they need not consider a statute, often because only a contractual breach is at issue.²⁵⁴ Even so, arbitration scholars have recognized the growing overlap of claims that constitute both a breach of the CBA and a statutory claim,²⁵⁵ suggesting that this rationale is limited.

Our data also indicate that in very few awards, just five in total, arbitrators explicitly followed the Meltzer approach and affirmatively declined to address a statutory issue presented to them. This result is admittedly speculative because we can only observe awards where the arbitrator chose to discuss that a statutory issue was raised. This may be a situation where, as discussed earlier, saying less helps to insulate the award from later judicial challenge. In another handful of cases, eleven awards mention a statute but do not apply it. Here too, one of the parties likely mentioned a statute, but the arbitrator omitted its treatment in the award's reasoning. With little elaboration, it is difficult to tell whether the arbitrator was willfully ignoring relevant statutory law or determined that the statute was not relevant to resolving the dispute. Still, overall, we can say that arbitrators very rarely explicitly reject governing statutory law in their awards.

252. Oppenheimer & LaVan, *supra* note 168, at 13 (finding 60% of 86 BNA labor arbitration awards, from 1970-75, dealing with discrimination cited a federal or state statute or EEOC guidelines).

253. Greenfield, *supra* note 184, at 689 (finding 51.9% of 106 labor arbitration awards, from 1981-85, related to NLRB cases cited "relevant statutory provisions").

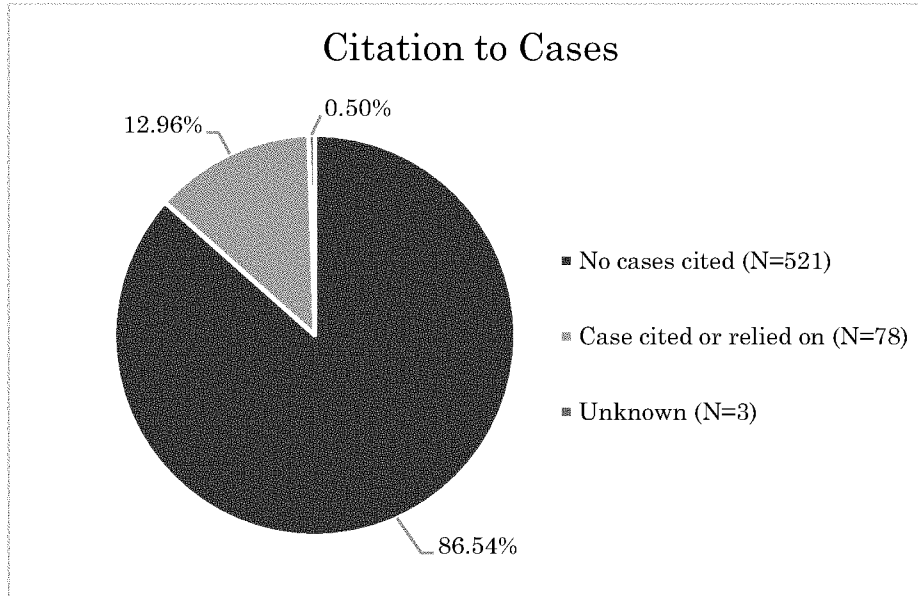
254. Allen & Jennings, *supra* note 196, at 428; St. Antoine, *External Law in Arbitration*, *supra* note 107, at 189-90.

255. See Malin, *supra* note 106, at 15, 25-26 (discussing overlap between FMLA and CBAs); Nolan, *supra* note 146, at 11 ("[T]he enormous outpouring of laws regulating employment . . . made it almost impossible to avoid potential conflicts between contracts and external law."); Baldwin, *supra* note 144, at 31, 39 (same).

2. Citation to cases

In addition to the dearth of reliance on statutes, our data indicate that arbitrators are only somewhat more likely to incorporate judicial opinions into their reasoning. As shown in Figure 2,²⁵⁶ seventy-eight, or only approximately 13%, of the awards cite to at least one judicial opinion.

Figure 2: Award Cites Judicial Opinion. N = 602



The percentage of awards citing judicial opinions in our database is decidedly lower than the approximately 25% finding in Weidenmaier's study of 208 BNA labor cases.²⁵⁷ The difference likely reflects the fact that published awards are more likely than unpublished awards to cite to judicial opinions. Moreover, published awards likely include a narrower subset of cases than are found in our data set. For example, Weidenmaier's data set included 137 discipline or discharge cases (approximately 65.87%) and 71 other cases.²⁵⁸ Our data set includes 208 discipline or discharge cases²⁵⁹ (approximately 34.55%) and 394 other cases. Because cases involving just cause are more likely to cite external authority than other types of cases, the prior studies relying

256. This data is also reported in our prior article. See Levinson et al., *supra* note 7, at 1859.

257. Weidenmaier's study reported that 101 of the 208 cases (48.6%) cited to either an arbitration award or judicial opinion. Of those 101, 55.4% cited a judicial opinion, leading us to conclude that 56 of the 208, approximately 27% of the total, cited to a judicial opinion. Weidenmaier, *supra* note 19, at 1114 fig.2, 1145 tbl.A-1.

258. *Id.* at 1105 tbl.1.

259. Coded as cases where a collective bargaining agreement is allegedly breached as involving a just cause provision (states employees can be disciplined only for good reason).

on databases including more discipline cases may overrepresent the extent labor arbitrators are citing to authority. If so, the tension between the goals of workplace arbitration and lawlessness are more prominent than previously believed. Here too, a broader set of arbitration awards yields differing results than prior studies and indicates that labor arbitration awards are more lawless, at least in the sense of their failure to rely on primary legal sources, than previously understood.²⁶⁰

If we can identify protections that increase the likelihood of reliance on legal authority without significantly reducing the efficiency and workplace focus of labor arbitrations, then lawlessness would be less of a concern, given the robustness of reliance on court opinions when they are cited. Once an arbitrator uses case authority in his reasoning, our data set indicates that the robustness of his reliance is consistent with the findings of other studies.²⁶¹ The awards in our database citing judicial opinions cite an average of 3.68 opinions each, with a median of two judicial opinions cited.²⁶² The average is consistent with Weidenmaier's finding that among twenty-five BNA labor award cases citing external authority, the average number of judicial opinions cited was 3.9.²⁶³ Although we cannot draw any definitive conclusions from these results, one might tentatively postulate that although most arbitrators do not consider external legal authority at all, those who do incorporate case law are willing to embrace that exercise somewhat robustly. Because our findings discussed below indicate that use of service providers and attorneys positively correlate with citation to external authority, these two protections or similar protections, such as vetting and training arbitrators in a way similar to service providers, could decrease the potential for arbitral lawlessness.

260. Other types of indicators of lawlessness include whether businesses are providing for arbitration for the purpose of avoiding mandatory legal rules, whether arbitrators' practices differ from those of judges, and whether arbitrators follow other arbitration awards. Drahozal, *supra* note 9, at 190-91.

261. Levinson et al., *supra* note 7, at 1860.

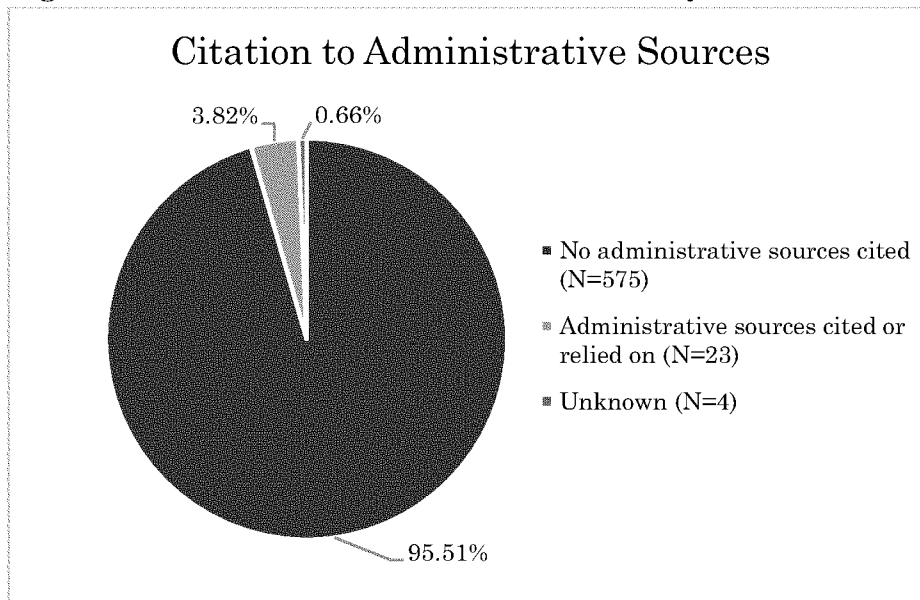
262. *Id.*

263. Weidenmaier, *supra* note 19, at 1120-21 tbl.3.

3. Citation to Administrative Authority

Figure 3 shows that of the 602 awards, 23 awards (approximately 4%) cite to administrative authority, such as administrative agency rules, regulations, guidelines, opinion letters, or findings.²⁶⁴

Figure 3: Award Cites Administrative Authority. N = 602



Like citation of statutes and judicial opinions, citation of administrative authority is an important indicator of the extent to which arbitrators rely on external law in their decision-making processes.²⁶⁵ Administrative authority, such as NLRB decisions and EEOC regulations, relates to a wide variety of employment-related disputes in a manner similar to judicial opinions. Our study provides a new data point regarding how frequently labor awards cite to administrative authority. The finding of 4% is lower than the previous finding of citation to administrative authority of approximately 13%²⁶⁶ and approximately 11.71%.²⁶⁷ These studies focused on cases alleging discrimination or a violation of the NLRA, likely biasing their results higher than found in our data set. Here too, with all the same caveats, we find a greater sense of lawlessness in arbitration than indicated in previous studies.

264. This data was previously reported in Levinson et al., *supra* note 7, at 1860-61 fig.3.

265. Oppenheimer & LaVan, *supra* note 168, at 13; Wolkinson & Liberson, *supra* note 176, at 44.

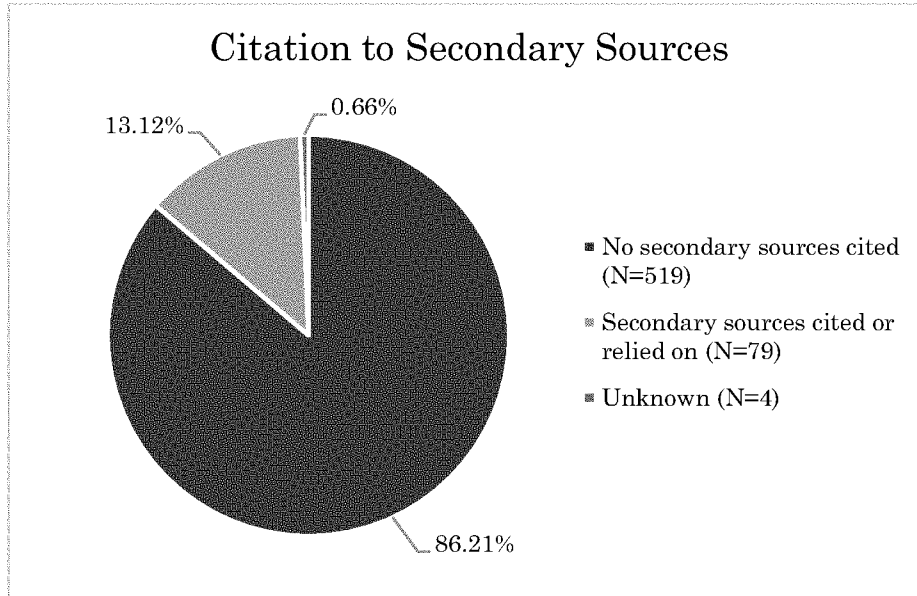
266. Greenfield, *supra* note 184, at 690-92; *see also supra* notes 192-193 and accompanying text for calculation of the 13.

267. *See* Levinson, *What the Awards Tell Us*, *supra* note 81, at 830. This is calculated by dividing the total 111 cases by 13 citing EEOC cases.

4. Citation to Secondary Sources

As reflected in Figure 4,²⁶⁸ of the 602 awards, 79 awards (approximately 13%) cite a secondary source. Secondary sources include any other authority that describes legal rules or governing precedent, including but not limited to treatises and services that discuss cases, other legal authority, or other labor arbitration awards.

Figure 4: Award Cites Secondary Sources. N = 602



We included citation to secondary sources because some courts rely on secondary sources for established principles of law, and arbitrators likely do also. We hypothesized, without examination, that arbitrators may rely on secondary sources to a greater extent than some courts do for a variety of reasons, such as not having as extensive access to judicial opinions, not being attorneys and so relying on summaries provided by attorneys, or having more limited time. Reliance on secondary sources provides a more efficient and less expensive method for arbitrators to assure they are considering the law without having to do in-depth research of statutory, case, and administrative law.

Only two studies examine the use of secondary sources by labor arbitrators. Edwards' survey found that 52% of labor arbitrators reviewed labor advance sheets, which were a form of secondary source in common use in the 1970s.²⁶⁹ Of course, reviewing and citing or relying on such sources in fashioning an award are two very different exercises, so the survey data cannot serve as a direct comparison to our results. Levinson is the only other study to actually examine

268. Levinson et al., *supra* note 7, at 1862 fig.4.

269. Edwards, *supra* note 2, at 71.

reliance on secondary sources.²⁷⁰ She found that 17 of 111 BNA published labor arbitration awards (approximately 15.32%) cited secondary sources.²⁷¹ That study focused on published discrimination cases,²⁷² so we would expect her findings to reflect greater reliance on secondary authorities. Instead, her findings are very similar to that found in our current, broader data set. This unexpected similarity is worthy of further exploration. The fact that data sets biased in favor of greater reliance on legal authority do not also reflect biases in reliance on secondary authority may indicate at least an implicit appreciation that secondary sources are not “law” per se. Moreover, it might suggest that reliance on other labor arbitration awards, themselves reflections of the world of private governance, would not be subject to the same biases that encourage greater reliance on external legal authority. We leave to a later article a deeper exploration of arbitrator reliance on labor arbitration awards because the question of whether the awards temper or fuel lawlessness is nuanced and worthy of its own extended investigation.

5. Overall Citation to External Authority and Its Implications

As previously reported, of the 602 awards, 99 awards (approximately 16.4%) cite to at least one statute, judicial opinion, or administrative authority.²⁷³ Five hundred three awards (more than 83%) cite *no* external authority, other than possibly a secondary authority.²⁷⁴ Our finding of 16% is substantially lower than the rates reported by previous authors. In Oppenheimer’s sample, 60% of labor arbitration awards cited a statute or regulation,²⁷⁵ and in Greenfield’s sample, 51.9% of labor arbitration awards addressed statutory issues.²⁷⁶ Again, the lower number in our study may be due to the larger number of cases in our data set that are purely contractual disputes that do not relate to statutory law, while the other studies focused on discrimination and cases alleging an NLRA violation. Yet even Zirkel’s study, which did not focus on statutory-like claims, concluded that only a third of cases did not involve external authority,²⁷⁷ in contrast to our finding of more than 83%.²⁷⁸ Nevertheless, our study indicates that reliance on external legal authority does not appear to be increasing, and it indicates that the

270. Levinson, *What the Awards Tell Us*, *supra* note 81, at 830.

271. *Id.*

272. *Id.* at 810.

273. Levinson et al., *supra* note 7, at 1863.

274. *Id.* at 1863.

275. Oppenheimer & LaVan, *supra* note 168, at 13.

276. Greenfield, *supra* note 184, at 689.

277. Perry A. Zirkel, *The Use of External Law in Labor Arbitration: An Analysis of Arbitral Awards*, 1985 Det. C.L. Rev. 31, 43-44 (1985).

278. Levinson et al., *supra* note 7, at 1863.

vast majority of arbitrations deal exclusively with norms of private governance. Our 16% seems more in line with old survey data that, in general, arbitrators do not rely on external authority.

Of the cases citing external authority—at least one statute, judicial opinion, or administrative authority—the majority cite only judicial opinions. Of the ninety-nine awards citing external authority, sixty-seven awards (approximately 66.7%) cite only judicial opinions (one or more), and no statute or administrative authority. Thirteen of the ninety-nine awards (approximately 13%) cite more than one of the three types of external authority—statute, judicial opinion, and administrative authority. Three of the awards cite a statute and one or more judicial opinions, while one cites a statute and one or more administrative documents. Only seven of the ninety-nine awards cite only a statute.

Overall, the raw numbers indicate that, despite widespread recognition that today's arbitration often requires that arbitrators incorporate legal principles into their decisions, most continue to follow the advice of Meltzer by treating the workplace as a system of purely private governance. This result is particularly troubling for the period of time that our study covers. By the early 2000s, some of the federal circuit courts were already concluding that *Wright* signaled that the CBA could, under certain circumstances, commit the employees to resolve their statutory claims exclusively through binding arbitration.²⁷⁹ And in 2009, prior to the end of this study, the *Pyett* case had made this possibility available throughout the United States.²⁸⁰ And yet, despite this legal development, arbitrator behaviors regarding reliance on external authority seem to have remained static.

Prior studies unwittingly masked the degree to which arbitration has remained lawless by focusing on those rarified awards that were made publicly available. In those cases, public scrutiny likely was known or anticipated at the time the award was rendered, and such a filter might well have influenced prior results. Put together, prior studies indicate that labor arbitrators much more regularly rely on external legal authority, and they thus imply that labor arbitration manages to accomplish two policy goals at once: It (1) promotes workplace harmony by facilitating well-functioning private workplace governance systems, and (2) vindicates individual employees' statutory rights provided in state and federal law. Our new and broader study of labor arbitration suggests that, without outside review or training, there is an inevitable tension between these two

279. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 255 (2009) (noting that “[w]e granted certiorari to address the issue left unresolved in *Wright*, which continues to divide the Courts of Appeals, and now reverse” (citing federal appellate court cases) (internal citation omitted)).

280. *Id.*

goals. When employers, unions, employees, and arbitrators have an incentive to further the first goal, the latter goal is at risk.

This conclusion is tentative at best for several reasons. First, while prior data is biased toward greater reliance on external legal authority, our data may reflect some bias in the opposite direction. More studies are needed, to be sure. Second, most of our arbitrations involve CBA disputes rather than purely statutory disputes, so our study is not ideal for drawing widespread conclusions about statutory rights. That said, many CBA claims also relate to statutory claims under antidiscrimination laws, FMLA, and wage and hour laws, and thus, the overall lack of citation to legal authority seems troubling. In addition, many contractual and common law employment legal principles are designed to nudge the parties toward or outright require more employee protections, so it seems troubling to one author that they rarely enter the decision equation in our awards. Again, more studies are needed. Third, we leave to a later article a fuller exploration of reliance on prior labor arbitration awards, which could in part contain the relevant governing legal principles. We look forward to reporting on that study soon.

Even if we had full confidence in the picture of labor arbitration painted by our awards, there still remains the question of what an optimal citation to external legal sources should be. Surely very thorough and exhaustive research and citation would make labor arbitration time-consuming and expensive, which, on average, likely would not benefit either employees or their workplaces. Our study does show that the awards are citing external authority in a significant minority of cases. Might that be sufficient? Our instinct, especially given the incredibly low citation to statutory authority, is no. In any event, our study shows that labor arbitration can be studied in new ways, and our preliminary results show that the assumption that labor arbitrators increasingly rely on external legal authority may not be true. In short, we think we have demonstrated the need for more studies to identify whether the shortcomings we have observed are real and significant to the arbitration outcomes.

B. Attributes of the Arbitration Proceeding that May Affect the Likelihood of Citation to External Authority

If certain attributes of arbitration result in more reliance on legal authority, then those attributes might decrease the risk of lawlessness. We studied whether the use of a service provider, such as the AAA or FMCS, increases citation to external authority and whether the presence of an attorney for at least one party increases reliance on external authority.²⁸¹

281. Levinson et al., *supra* note 7, at 1866-71.

We coded for whether the arbitration was conducted under the auspices of a service provider and, if so, the identity of the provider for each award. Many labor arbitrations take place under the supervision of the AAA or the FMCS. The significance is that these organizations vet the arbitrators, making sure they have prior experience, and train the arbitrators,²⁸² so that they use best practices—presumably including addressing law for statutory claims—and are more likely to have a higher number of attorney arbitrators on their lists than might be experienced elsewhere. Even non-attorney arbitrators working with the larger arbitration associations are required to participate in training programs where they are likely exposed to relevant governing legal principles and sources for learning more about such legal principles. In contrast, some labor arbitrations are decided by joint grievance boards, an arbitrator named in the contract, or an arbitrator selected by the parties. These arbitrators are more likely to be laypeople with industry experience and less likely to be attorneys—or provided with relevant legal training—than we observe with service provider arbitration.²⁸³ Thus, we hypothesized that arbitration conducted through service providers are more likely to produce awards that at least mention external legal authority than are arbitrations conducted without them.

Similarly, because survey data indicates that arbitrators are more likely to mention external legal authority when one or both parties rely on that authority in their cases, we coded for whether attorney representation in the arbitration proceedings influenced whether the arbitration award cited to legal authority. Using the reasoning we just applied to attorney arbitrators, some of us hypothesized that representation by attorneys would increase citation to external legal authority. One of us, who has experience in labor arbitrations and who has long followed the literature on lay labor arbitration, hypothesized that non-lawyer union and management representation would be equally effective at citing relevant external authority due to the fact that relevant legal knowledge is part of the training for this position. Zirkel's study found no correlation between representation by an attorney and citation to external authority.²⁸⁴

This section first presents the data that addresses whether the parties are using any service provider and data that addresses whether using a particular service provider correlates with citation to external authority. Second, it assesses whether arbitrations where any

282. *The AAA National Roster of Arbitrators and Mediators: EXPERTISE MATTERS*, AM. ARBITRATION ASS'N: ARBITRATORS & MEDIATORS, <https://www.adr.org/aaa-panel> [<https://perma.cc/8YWC-JMD3>] (last visited Jan. 10, 2021); 29 C.F.R. § 1404.5 (2019); La Rue & Symonette, *supra* note 72, at 226.

283. Levinson et al., *supra* note 7, at 1835; WARE & LEVINSON, *supra* note 16, at 208; Levinson, *What the Awards Tell Us*, *supra* note 81, at 830.

284. Zirkel, *supra* note 179, at 42.

of the parties are represented by attorneys are more likely to yield awards that cite external authority.

1. Service Provider Arbitrators Cite More to External Authority

As previously reported, a large number of the awards in our data set, almost three-fourths, have no service provider indicated.²⁸⁵ This provides an excellent opportunity to compare previously reported rates of citation to law to a data set with presumably higher numbers of non-service provider cases. As Table 1 shows, of the 503 awards that cite no external authority (statute, judicial opinion, or administrative authority), 355 (approximately 71%) are awards where there is no indication of a service provider. In sixty-six (approximately 13%) of those 503 awards, the FMCS was used, and in fifty awards (approximately 10%), the AAA was used.

TABLE 1

For the awards that cite no statute, judicial opinion, or administrative authority, how are the various service providers represented?

	No External Authority	
	Number of Cases	Percentage of Cases
No Service Provider	355	70.58%
AAA	50	9.94%
FMCS	66	13.12%
JAMS	0	0.00%
State Service	30	5.96%
Court ordered/annexed	0	0.00%
National Mediation Board	1	0.20%
Dispute Prevention & Resolution, Inc.	1	0.20%
Total	503	100.00%

As Table 2 shows, of the ninety-nine awards that cite to any type of external authority (statute, judicial opinion, or administrative authority), forty-seven awards (approximately 47%) have no indication of a service provider. Twenty-one awards (approximately 21%) indicate that FMCS was used, and twenty cases (approximately 20%) indicate that AAA was used.

285. Levinson et al., *supra* note 7, at 1868.

TABLE 2

What is the numeric and percentage breakdown of service providers for the awards that do cite to a statute, judicial opinion, or administrative regulation?

	External Authority	
	Number of Cases	Percentage of Cases
No Service Provider	47	47.47%
AAA	20	20.20%
FMCS	21	21.21%
JAMS	1	1.01%
State Service	8	8.08%
Court ordered/annexed	1	1.01%
National Mediation Board	1	1.01%
Dispute Prevention & Resolution, Inc.	0	0.00%
Total	99	100.00%

As shown in Table 3, when comparing the seventy AAA awards to the eighty-seven FMCS awards, we found no statistically significant difference between the rate at which the respective servicers' awards cite external authority (approximately 29% for AAA cases and 24% for FMCS cases). When comparing the 402 awards in the database with no indication of a service provider to those authored by an AAA or FMCS arbitrator, we found that a statistically significant higher proportion of awards authored by service provider arbitrators cite to external authority. Only approximately 12% of the awards without a service provider reflected citations to external authority. We used a two-tailed T-test run on STATA to determine whether the differences were statistically significant.

TABLE 3

	External Authority		No External Authority	
No Service Provider (N=402)	47	11.69%	355	88.31%
AAA (N=70)	20	28.57%	50	71.43%
FMCS (N=87)	21	24.14%	66	75.86%
Note: There is statistically significant difference in the citation to external authority between no service provider and AAA (at the 1% level) and between no service provider and FMCS (at the 1% level), but there is not a statistically significant difference in the citation to external authority between AAA and FMCS.				

Even when joint boards, which are less likely than arbitrators to write an opinion to accompany an award, are excluded, arbitrators appointed by the AAA and FMCS cite external authority at a higher rate than those who are not. One hundred twenty-one of the 402 awards where no service provider was used (approximately 30.10%) were decided by joint boards or similar groups of industry experts rather than a traditional arbitrator or panel of arbitrators. Two hundred eighty-one of these awards were decided by an arbitrator or panel of arbitrators. As reflected in Table 4, when we compare these 281 awards to those written by arbitrators appointed by the AAA and FMCS, we found forty-five (approximately 16%) of the awards indicating no service provider cite to external authority, whereas twenty and twenty-one awards respectively of the AAA and FMCS awards (approximately 24%) cite to external authority, a statistically significant difference.

TABLE 4

	External Authority		No External Authority	
No Service Provider, Individual or Panel Arbitrator (N=281)	45	16.01%	236	83.99%
AAA (N=70)	20	28.57%	50	71.43%
FMCS (N=87)	21	24.14%	66	75.86%
Note: There is statistically significant difference in the citation to external authority between no service provider using an individual or panel arbitrator and AAA (at the 5% level) and between no service provider using an individual or panel arbitrator and FMCS (at the 1% level).				

While the results are consistent with our hypothesis, we cannot say whether the differences reflect better legal training, more care taken in providing reasoning in the arbitration awards, or selection of arbitrators from service providers in the types of cases that involve legal issues. The care in writing awards may be a reflection of the fact that service provider arbitration is more costly, and a greater willingness to incur such costs may also indicate a greater willingness to pay for a carefully reasoned award. Conversely, the lack of a service provider may reflect the parties' desire for quick, cheap dispute resolution. Even so, perhaps parties should be educated about the relative lawlessness of the more efficient processes. In any event, this is an area where more studies are warranted.

2. Citation to External Authority Rises with Legal Representation

One might assume that when attorneys represent one or more parties at hearings, the resulting awards would contain more external authority references because attorneys have been trained to cite authority and do so regularly in administrative proceedings and court. Therefore, they should be more likely than non-attorneys to cite statutes, case law, and administrative authority to the arbitrator, which in turn is likely to yield awards that cite external authority.

According to the data reflected in Table 5,²⁸⁶ of the 384 awards in connection with which at least one party was represented by an attorney,²⁸⁷ eighty-three (approximately 22%) cited external authority.

286. This data was reported in our prior study. Levinson et al., *supra* note 7, at 1868-71.

287. These included cases where representation of the employee or the employer was coded as representation by in-house counsel, attorney representation by outside counsel, or

In contrast, of the 100 awards where no party was represented by an attorney,²⁸⁸ only nine (approximately 8%) cited external authority—a statistically significant difference indicating that one or both parties' representation by an attorney correlates with citation to external authority in the ultimate award.

TABLE 5

	External Authority		No External Authority	
Attorney (N=384)	83	21.61%	301	78.39%
No Attorney (N=110)	9	8.18%	101	91.82%
Note: There is a statistically significant difference in citation to external authority when an attorney is involved and citation to external authority when no attorney is involved (at the 1% level).				

Prior studies suggested that parties' citation to external authority would increase the likelihood that an arbitrator would cite it in her award. Edwards' study found that while the large majority of arbitrators generally believed that they should not consider external authority, 97% agreed that if both the parties cited applicable law in their submissions then the arbitrator should consider it.²⁸⁹ St. Antoine's survey found that about half of the arbitrators will cite external law only where the parties have done so in their submissions.²⁹⁰ The current study empirically verifies the general phenomenon expressed in these survey claims, although we are unable to tell from the data when external authority is being raised by the advocates.

What motivates arbitrators to cite to authority raised by the parties is unclear. Perhaps, as mentioned earlier, best practices require arbitrators to address the parties' arguments, legal and otherwise. Or perhaps legally-trained arbitrators cite authority only when they think it will be helpful to the parties and they believe the lawyers will be more persuaded by authority or better able to understand it. Or perhaps lawyers are more likely to represent the parties in the types of dispute in which external authority has relevance to its proper resolution or where the resolution of the case is difficult and thus more nuanced reasoning is warranted. Finally, perhaps the arbitrator worries that when attorneys are involved in an arbitration, court

attorney representation but was indeterminate whether counsel was in-house or outside counsel.

288. These included cases where representation of both the employee or the employer was coded as either no attorney representation or no appearance.

289. Edwards, *supra* note 2, at 79.

290. St. Antoine, *supra* note 107, at 189-90.

review of the award is more likely. Whatever the motivation, the influence seems clear.

While it is generally more expensive to hire an attorney rather than having a business representative or human resources expert represent the parties in arbitration, the data indicate that greater expense leads to greater consideration of the law. We tentatively conclude that risk of lawlessness is decreased by attorney representation.

C. *Claim Type and Citation to External Authority*

Presumably, some legal claims are easier to resolve without resort to external legal authority than are others. When an arbitrator must resolve a dispute based on clear language in the CBA, presumably she focuses the bulk of her attention on fact-finding and may have little need to consult legal authority. Claims not based on the CBA, claims with statutory counterparts, and claims based on vague CBA language that needs interpretation or meaning are more likely to need assistance from external sources.

This section explores whether the type of claim affects the likelihood that arbitrators cite to external authority. First, we explore whether claims based on statutory rights are more likely to cite to external authority. Second, we explore whether citation to external authority is more likely in certain types of CBA claims than in others.

1. *Statutory Claims May Be More Likely to Produce Awards That Cite External Authority*

Because, by definition, a statutory claim involves statutory authority external to the CBA, we predicted that awards resolving statutory claims would cite external authority more often than would awards that do not resolve statutory claims. As shown in Table 6, of the forty-five arbitrations in which a party asserted a statutory claim, nine awards (approximately 20%) cite to external authority.²⁹¹ Of the 557 cases in which no statutory claim was brought, 90 awards (approximately 16%) cite to external authority. This result comports with our expectation that external authority would be cited more often in arbitrations involving a statutory claim, but, surprisingly, the difference is not statistically significant. Our results might lack power because only a small number of cases cite external authority. Alternatively, arbitrators might be citing authority with equal frequency in CBA disputes, either because some particular types of CBA disputes also are heavily dependent on legal authority or because any case—CBA or not—that is not resolved during the first several steps of workplace dispute resolution, is likely to be difficult—thus, an equally good candidate for relying on external assistance.

291. This data was reported in our prior study. Levinson et al., *supra* note 7, at 1873.

TABLE 6

	External Authority		No External Authority	
	Statutory Claim (N=45)	9	20.00%	36
No Statutory Claim (N=557)	90	16.16%	467	83.84%

Because of the small number of awards in our data set addressing a statutory claim (forty-five), we were unable to ascertain whether arbitrators of different types of statutory claims, such as Title VII versus ERISA, were more likely to cite external authority. No award in our sample citing external authority involved ERISA; however, twenty-one of those that do not cite any external authority involved ERISA. We would not expect ERISA cases that involve an employer's failure to pay into an ERISA-governed benefit fund to cite external authority because normally, the union or trust fund only needs to establish the failure to pay and the amount owed, which are purely factual questions that do not require reliance on authority.²⁹² Indeed, a review of the twenty-one awards in our data set discloses that nineteen of the twenty one cases involved a failure to pay amounts owed to benefit funds,²⁹³ and sixteen were default arbitration awards where the employer did not contest the non-payment.²⁹⁴ Of the remaining two, one involved a factual dispute²⁹⁵ and the other involved an interpretation of only the CBA, as stipulated by the parties, and not of

292. Levinson et al., *supra* note 7, at 1873-74.

293. See, e.g., *Int'l Union of Operating Eng'rs Local 825 v. R.E. Pierson Constr., Co.*, No. 1:11-cv-07469 (D.N.J. Dec. 23, 2011) (BNA Court Docket); *Int'l Union of Operating Eng'rs Local 825 v. Statewide Hiway*, No. 1:10-cv-00386 (D.N.J. Jan. 22, 2010) (BNA Court Docket); *California Drywall/Lathing Indus. Labor-Mgmt. Coop. Comm. v. Alvarado*, No. 3:06-cv-01576 (N.D. Cal. Feb. 28, 2006) (BNA Court Docket); *Int'l Union of Operating Eng'rs Local 825 v. Advantage Contracting & Envtl. Servs.*, No. 2:11-cv-05952 (D.N.J. Oct. 11, 2011), (BNA Court Docket); *Trs. of the NYC Dist. Council of Carpenter Pension Fund v. Metro Furniture Servs., LLC*, No. 1:11-cv-07013 (S.D.N.Y. Oct. 05, 2011) (BNA Court Docket); *Local Union No. 456 IBEW v. Bullet Elec., Inc.*, No. 2:11-cv-05690 (D.N.J. Sept. 30, 2011) (BNA Court Docket); *Elec. Workers Local 58 v. Lakes Elec. Co.*, No. 2:10-cv-13193 (E.D. Mich. Aug. 12, 2010) (BNA Court Docket).

294. See, e.g., *Int'l Union of Operating Eng'rs Local 825 v. R.E. Pierson Constr., Co.*, No. 1:11-cv-07469 (D.N.J. Dec. 23, 2011) (BNA Court Docket); *Int'l Union of Operating Eng'rs Local 825 v. Statewide Hiway*, No. 1:10-cv-00386 (D.N.J. Jan. 22, 2010) (BNA Court Docket); *Int'l Union of Operating Eng'rs Local 825 v. Advantage Contracting & Envtl. Servs.*, No. 2:11-cv-05952 (D.N.J. Oct. 11, 2011), (BNA Court Docket); *Trs. of the NYC Dist. Council of Carpenter Pension Fund v. Metro Furniture Servs., LLC*, No. 1:11-cv-07013 (S.D.N.Y. Oct. 05, 2011) (BNA Court Docket).

295. *Dist. Council of Iron Workers v. Production Res. Grp.*, No. 3:03-cv-00149 (N.D. Cal. Jan 10, 2003) (BNA Court Docket) (finding stageworkers were performing ironworker's work).

ERISA (or any other law).²⁹⁶ As shown in Table 7, when we exclude the twenty-one ERISA cases from the total of thirty-six awards addressing statutory claims that do not cite authority, the difference in likelihood of arbitrators citing external authority in cases involving statutory claims becomes statistically significant at the 1% level. This finding is consistent with our prediction.

TABLE 7

	External Authority		No External Authority	
Statutory Claim (N=24)	9	37.50%	15	62.50%
No Statutory Claim (N=557)	90	16.16%	467	83.84%
Note: The difference in likelihood of arbitrators citing external authority in cases involving statutory claims is statistically significant at the 1% level for both statutory claim cases and no statutory claim cases.				

Based on this analysis, we weakly conclude that labor arbitrators more often cite external authority in cases involving a statutory claim than in those involving a contractual breach. Further, the analysis reveals that in some number of non-statutory cases, arbitrators are also citing external authority. This makes sense given that many terms in any agreement, including the CBA, will be vague and require assistance in order to give it meaning. Consider, for example, requirements of just cause, good faith, reasonableness, and safety. Moreover, as discussed earlier, some CBA provisions incorporate obligations that parallel statutory rights. Because the frequency of citation to external authority is small, our findings support Allen and Jennings conclusion that “[i]n the majority of arbitration cases,” the law has no bearing on the issue and many arbitrators believe that they should “restrict themselves merely to examination of the labor agreement.”²⁹⁷ However, in approximately 16% of awards that did not involve a statutory issue (90 of the 557), labor arbitrators did cite external authority. That is a significant minority, supporting the opinion embraced by Mittenthal, and more recently Malin, that arbitrators must consider external authority in some situations.²⁹⁸

296. *United Steelworkers of Am. v. Kelsey-Hayes Co.*, No. 4:11-cv-15497 (E.D. Mich. 2011) (BNA Court Docket).

297. Allen & Jennings, *supra* note 196, at 428.

298. Malin, *supra* note 106, at 14.

2. *Citation to External Authority is Lower in CBA Discrimination Claims and Higher in Just Cause Claims*

We also examined whether certain types of CBA claims cite to external authority more often than others. We hypothesized that claims dealing with nondiscrimination provisions would be more likely to cite to external authority than would those dealing with other CBA provisions, because the nondiscrimination provisions overlap so heavily with statutory rights. To test this hypothesis, we compared disputes based on nondiscrimination with disputes based on any other breach of a collective bargaining agreement. We hypothesized the same for disputes based on seniority provisions, due to their overlap with FMLA leave, and for disputes based on harassment and refusal to accommodate, also due to overlap with statutory protections.²⁹⁹

As reflected in Table 8, the vast majority of the awards in our database allege at least one violation of the CBA.³⁰⁰ There is no statistically significant difference between the rate at which awards involving at least one violation of the CBA and those that do not, a total of thirty-seven awards, cite to external authority. A total of 565 awards allege a violation of the CBA, with eighty-eight awards citing external authority and 477 awards not citing external authority. We coded these awards for whether the breach alleged was a breach of a just cause provision, a nondiscrimination provision, or a seniority provision.³⁰¹

TABLE 8

	External Authority		No External Authority	
Collective Bargaining Agreement Breach (N=565)	88	15.58%	477	84.42%
No Collective Bargaining Agreement Breach (N=37)	11	29.73%	26	70.27%

299. See generally Malin & Vonhof, *supra* note 206, at 200, 213, 227, 232-33.

300. For prior reporting of this data, see Levinson et al., *supra* note 7, at 1876.

301. The other CBA awards addressed non-unit employees performing work, including subcontracting cases, failure to pay into a fringe benefit fund, other benefits issues, including leave, and wages or compensation, including overtime pay.

Contrary to our expectations, as shown in Table 9,³⁰² only four of the awards involved a non-discrimination provision, and none of those awards cited any external legal authority—an astonishing result. That said, four awards is much too small a number to draw firm conclusions. Perhaps employees with nondiscrimination claims are adhering to raising statutory theories for relief rather than relying on the CBA. And, in general, employees suffering from discrimination may be electing to bring administrative charges or lawsuits rather than pursuing a grievance in arbitration.

TABLE 9

	External Authority		No External Authority	
Nondiscrimination (N=4)	0	0.00%	4	100.00%
Other Collective Bargaining Agreement Breach (N=565)	88	15.58%	477	84.42%

Those cases alleging breach of a seniority clause also yielded results that contradicted our hypothesis. As shown in Table 10, and previously reported, only three of the eighty-eight cases citing external authority involved a breach of a seniority provision (approximately 15%), and seventeen of the 477 of those that did not cite external authority involved a breach of a seniority provision.³⁰³ In comparison, eighty-seven of all breach of CBA claims cite external authority (approximately 16%), and the difference is not statistically significant.

TABLE 10

	External Authority		No External Authority	
Seniority (N=20)	3	15.00%	17	85.00%
Other Collective Bargaining Agreement Breach (N=555)	87	15.68%	468	84.32%

302. See Levinson et al., *supra* note 7, at 1878.

303. *Id.*

We also were interested in harassment and refusal to accommodate claims. To investigate these, we coded for cases that involved an adverse action, where an employee was denied something promised or to which the employee was entitled, or the employee was harassed, punished, terminated, suspended, laid off, forced to resign, not promoted, not accommodated, or not hired. Three hundred ninety-nine of the 602 awards were of this type. Seventy-five of the ninety-nine awards that cite external authority involved an adverse action. Three hundred twenty-four of the 503 awards that do not cite external authority involved an adverse action.

We expected that cases involving harassment and refusals to accommodate would cite external authority at a higher rate than cases involving other adverse actions because there is statutory and case law, from Title VII, the ADA, and similar state laws, that can be drawn upon to help determine when harassment and when refusals to accommodate are unlawful. As shown in Table 11, and previously reported, of the seven cases alleging harassment, only one cited external authority (approximately 14% of the cases involving harassment).³⁰⁴ Of those alleging other types of adverse actions, seventy-five cited external authority (approximately 19%). As shown in Table 12, and previously reported, of the twelve cases alleging a refusal to accommodate, only two cite external authority (approximately 17%). Of those alleging other types of adverse actions, seventy-four (approximately 19%) cite external authority.³⁰⁵ These differences were not statistically significant, suggesting that these case types do not determine whether arbitrators cite external authority.

TABLE 11

	External Authority		No External Authority	
Harassment Alleged (N=7)	1	14.29%	6	85.71%
Other Adverse Action Alleged (N=399)	75	18.80%	324	81.20%

304. Levinson et al., *supra* note 7, at 1880.

305. *Id.*

TABLE 12

	External Authority		No External Authority	
Refusal to Accommodate Alleged (N=12)	2	16.67%	10	83.33%
Other Adverse Action Alleged (N=396)	74	18.69%	322	81.31%

The cases involving a breach of a just cause provision actually referred to external authority at a statistically significant higher rate than awards addressing other types of breach of a CBA. One of us expected the reverse to be true because a just cause provision is a contractual guarantee without a statutory equivalent, unlike a clause, such as a non-discrimination clause, for which there are many similar statutory guarantees of non-discrimination. On the other hand, one of us (the contracts law scholar) expected the opposite result because just cause provisions are incredibly vague and require comparisons with other cases in order to provide the clause with meaning. As shown in Table 13, and previously reported, forty-three of the 208 awards addressing a just cause provision cite external authority (approximately 21%) while fifty of the 372 awards addressing other types of breach of the collective bargaining agreement (approximately 13%) refer to external authority.³⁰⁶ This difference is statistically significant at the 5% level. Perhaps when a discharge is at issue, arbitrators are more likely to cite external authority to buttress the strength of their decision because the consequences are seemingly harsher than other adverse actions, such as a failure to promote or to provide overtime pay. In the labor arbitration context, discharge is considered the equivalent to “capital punishment,” and employers must follow fair procedures and have a very good reason to discharge an employee. Thus, arbitrators may wish to explain the outcome in an extremely thorough manner and rely on external authority to do so. On the other hand, our contracts scholar author finds arbitrator reliance on external authority to be entirely consistent with judicial treatment of vague, yet important, employment contract provisions.

306. *Id.* at 1879.

TABLE 13

	External Authority		No External Authority	
Just Cause (N=208)	43	20.67%	165	79.33%
Other Collec- tive Bargain- ing Agree- ment Breach (N=372)	50	13.44%	322	86.56%
Note: The difference between citation to external authority between just cause cases and other CBA cases is significant at the 5% level for both just cause cases and other collective bargaining agreement breach.				

CONCLUSION

Labor arbitration is broadly lauded as a mechanism that furthers workplace harmony through quick, inexpensive, and private resolution of disputes by industry experts who assist labor and management in the evolution of their private governance system. Over time, statutory rights for individual employees have proliferated, and currently, they sit alongside and are embedded into collective bargaining agreements. Today, those workplace agreements can force employees to labor arbitration for enforcement of their statutory rights, effectively foreclosing their resort to courts. Is private arbitration sufficiently robust to protect these individual rights? What about other employment protections that could be strengthened by reference to external legal authority? The answers to these questions turn on multiple factors, one of which is whether labor arbitrators recognize, understand, and apply the public laws that protect employees. To date, most empirical studies suggest that labor arbitrators broadly cite to relevant legal authority, especially in civil rights and discrimination cases. Those studies provide a small glimpse into an essentially private mechanism through the study of available labor arbitrations to date. For a variety of reasons as we have discussed, prior available awards are not representative of labor arbitration as a whole, and so, the picture they paint is also unrepresentative of reality.

This article has utilized the federal court filing system to obtain and study several hundred arbitration awards now publicly available through the PACER database.³⁰⁷ These awards enabled us to observe a much broader set of arbitrations outside those that are publicly provided by the parties or subject to enhanced federal agency scrutiny.

307. *See supra* Section V.

In our initial article, we reported our statistical findings and concluded that, in most instances, labor arbitrators are not relying on or citing to external authority.³⁰⁸ In this Article, we have drawn upon those findings to address the broader, and perhaps more significant, issue of “lawlessness” in arbitration. Our study of these awards contributes substantially to the question of whether labor arbitration can simultaneously provide private justice and vigorous enforcement of public employment policy or whether its private nature renders labor arbitration inherently “lawless.”

Our data demonstrates that the overwhelming majority of awards do not cite to external authority.³⁰⁹ We find that using a service provider, specifically the AAA or FMCS, correlates with a greater likelihood of awards citing to external authority than awards that result from a non-administrated process. We also find that representation of one or both parties by an attorney correlates with a greater likelihood of awards citing to external authority.³¹⁰ Perhaps these findings have implications for the attributes of the labor arbitration process needed in order to vigorously protect statutory rights.

We also document, as anticipated, that a statistically significant higher percentage of the awards that cite external authority than those that do not are cases addressing statutory issues, but this is evident only after unpacking various claims types in the data.³¹¹ In addition, the awards addressing claims asserting a breach of good cause provision were more likely than other types of contractual claims to cite to external authority,³¹² which suggests that arbitrators are more likely to consult external authority to inform vague clauses with complex meaning. These areas of enhanced citation make sense and suggest that some labor arbitrators understand the proper role of external authority in private dispute resolution. However, our findings indicate that the overall use of external authority is much lower than prior studies indicate, even in these areas where external authority is most valuable to just outcomes.

Our new data set will enable a series of future studies into labor arbitration, including its use (or not) of prior arbitration awards as a source of precedent. We will also be able to study post-arbitration litigation, which seems to have expanded exponentially in recent years, as well as whether citation to external authority affects the

308. Levinson et al., *supra* note 7, at 1882. Our heavy reliance on our initial article wherein our initial statistical analysis was reported resulted in sometimes significant textual overlap between the two articles. We have indicated the portions of this article that heavily rely on the prior article in text or by footnoting.

309. *See supra* Sections V.A.1 & 5.

310. *See supra* Section V.B.2.

311. *See supra* Section V.C.1.

312. *See supra* Section V.C.2.

deference subsequently granted to those awards by the federal courts. In follow-up studies, we will more fully study labor arbitration outcomes, including whether there is a repeat-player effect, whether attorney representation affects win rates, and whether the arbitrator's and parties' gender affects win rates. For now, we can say that labor arbitration's paltry citation to external authority suggests that there remains an inherent tension between private promotion of workplace harmony and the vigorous protection of other public policies. More studies are needed to help overcome the limitations of all data sets in this field, including ours, and firm policy conclusions are not possible at this time. But our data do indicate that we should not be sanguine that labor arbitration is insulated from the "lawlessness" observed in other arbitral contexts.

APPENDIX A

Appendix A is an excerpt from the Agreement Between Walt Disney World Co. & the Service Trades Council Union effective May 2, 2004-April 28, 2007. It is available at *Service Trades Council v. Walt Disney World Co.* (M.D.Fl. May 29, 2007) case 6:07-cv-00908-GAP-KRS document #1 filed 05/29/07, available at <https://www.bloomberglaw.com/document/X1Q6KNH314O2>.

ARTICLE 19 - GRIEVANCE PROCEDURE**SECTION 1. GRIEVANCES SETTLED ACCORDING TO PROCEDURE**

The parties to this agreement agree that any grievance arising out of the interpretation or application of the term of this Agreement, with the exception of terminations, discipline based on an HR Compliance investigation and policy grievances which will be expedited to Step 3, shall be settled promptly in accordance with the following procedure.

SECTION 2. DEFINITIONS

(a) **Grieve:** A grievance within the meaning of this procedure is defined as a dispute or difference of opinion between the parties concerning the meaning, interpretation, application, or alleged violation by the Company of this Agreement.

(b) **Time Limits:** The parties recognize that it is important that grievance be processed and resolved as rapidly as possible: therefore, the number of days indicated at each step of the grievance procedure should be considered as a maximum, and every effort should be made to expedite the process. All termination grievances will be given priority for processing. The limits specified may be extended by mutual agreement as evidenced by a waiver in writing signed by an authorized representative of the Company and the Union, otherwise, the grievance shall be regarded as withdrawn.

(c) **Recording Device:** The parties agree that no recording devices of any kind shall be permitted or utilized during Step 1, 2, 3, or 4 of the grievance procedures.

(d) **Back-pay Awards:** The parties agree that any Joint Standing Committee or Arbitrator award of back pay shall be lessened by unemployment compensation or any other compensation received by the grievant during the period of termination prior to reinstatement.

(1) **Back-pay awards** for those employees in lipped classifications, with the exception of Banquets and Dinner Shows, will be paid at the appropriate Labor Grade 10 rate.

(e) Information Requests: The company will make every reasonable effort to provide any requested, relevant information regarding grievance to the Union with seventy-two (72) hours. In circumstances where the Company is unable to provide information within seventy-two (72) hours, the Union will be provided with an estimate of the time of provision.

SECTION 3. GRIEVANCE PROCEDURE

Step 1. Any employee, believing that he/she has suffered a grievance, shall discuss the matter with his/her immediate Guest Service Manager. The employee may choose whether to discuss the matter with his/her Guest Service Manager with or without the assistance of his/her Union representative. In order to be deemed timely, a grievance must be discussed by the employee with his/her Union representative.

In order to be deemed timely, a grievance must be discussed by the employee with his/her immediate Guest Service Manager within fourteen (14) calendar days after the employee has had a reasonable opportunity to become aware of the occurrence, whichever is later. The employee must indicate that his/her discussion with, the Guest Service Manager is a grievance. Failure to observe the aforementioned time limitation shall be deemed a waiver and the grievance will be regarded as abandoned.

The immediate Guest Service Manager shall give an oral reply within three (3) calendar days after submission of the grievance. If the immediate Guest Service Manager fails to give an oral reply within the time limits provided, the grievance may be appealed to the next Step of the grievance procedure.

Step 2. If the grievance shall not have been adjusted under Step 1, then within seven (7) calendar days after the reply under STEP 1, the grievance shall be reduced to writing upon the accepted Grievance Form which shall set forth the relevant information concerning the grievance, including a short description of the alleged grievance, the date on which the grievance occurred and an identification of the section of the Agreement alleged to have been violated and shall be submitted to the employee's Area Manager who shall immediately forward copies to Employee Relations. The Area Manager or his/her designated representative and the Union representative or his/her designated representative shall meet within seven (7) calendar days after invocation of Step 2 in an attempt to settle the grievance. It shall be incumbent upon the Union Representative to request such meeting. The Area Manager or his/her designated representative shall provide the employee and the Union representative with a written reply within

five (5) days after the parties have met. If the Area Manager fails to give a written reply within the time limits provided, the grievance may be appealed to the next Step of the grievance procedure.

Step 3. If the grievance shall not have been adjusted under Step 2, then within seven (7) calendar days from the date of the Area Manager's written decision or a date when the decision or a date when the decision should have been submitted by the Area Manager, the grievance shall be presented in writing to designee, the Employee Relations Representative, and the employees Union Business Representative or his/her designee shall be held within twenty-one (21) calendar days of the grievance. The General Manager/Director or his/her designee shall provide the Union Business Representative or his/her designee with a written reply with five (5) calendar days after the parties have met. If the General Manager/Director or his/her designee fails to give written reply within the time limit provided, the grievance may be appealed to the next Step of the grievance procedure.

Step 4. If the grievance shall have been submitted but not adjusted under Step 3, either party may within seven (7) calendar days after receipt of the written reply request in writing that the grievance be submitted to a Joint Standing Committee, which shall meet within fourteen (14) calendar days of the appeal, unless extended by mutual agreement of the Company and the Union.

The Joint Standing Committee shall consist of one (1) representative of the Company and one (1) representative of the affiliated Union(s).

The Joint Standing Committee shall meet at least twice per month to investigate, review, and if necessary, conduct a hearing of all outstanding grievances referred to it. Decisions of the Joint Standing Committee shall be final and binding upon all parties at interest. The Joint Standing Committee shall provide a written determination of all cases reviewed within three (3) calendar days after it has met. If the Joint Standing Committee is unable to resolve a grievance before it, the grievance may be appealed to the next Step of the grievance procedure.

The parties agree that upon notification of the Vice President of the Employee Relations and the President of the Service Trades Council Union, Step 4 of the grievance procedure may be waived and grievances addressing institutional issues, affecting either the Company or the Council, may be expedited to Step 5.

Step 5. If the grievance shall have been submitted but not adjusted under Step 4, either party may within seven (7) calendar days after receipt of the written reply request in writing that the grievance be submitted to an Arbitrator mutually agreed upon by the Company and

the Union. If agreement is reached, the arbitration must occur within thirty (30) days after the joint selection of the arbitrator. If the Company and the Union do not mutually agree upon the selection of an Arbitrator, then an Arbitrator shall be selected from a panel of seven (7) Arbitrators furnished by the Federal Mediation and Conciliation Service. Either party, at their discretion may refuse one list, which has been presented by a Federal Mediation and Conciliation Service for a pending arbitration hearing. At this point, the parties have a maximum of fourteen (14) calendar days from the date the list is received to strike the panel. The Rules for the Federal Mediation and Conciliation Service shall govern the selection of an Arbitrator and the conduct of the arbitration hearing. The Arbitrator shall not have the authority to alter, amend, change, modify, add to or subtract from, or reform any provision, Article or language of this Agreement. The Decision of the Arbitrator shall be final and binding on all parties with no further appeal, except for reasons of setting aside an Arbitrator's Award, as set forth in applicable Federal and Florida Statutes. Any joint expense incidental to or arising out of the arbitration shall be borne equally by the Company and the appropriate Union. Only one grievance shall be before a specific Arbitrator at one time.

SECTION 4. GRIEVANCE SETTLEMENTS

A grievance having been settled at any step of the grievance procedure will be affected no more than seven (7) calendar days after the date of the settlement.

