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GRIEVE IT AGAIN: OF STARE DECISIS, RES JUDICATA AND COLLATERAL ESTOPPEL IN LABOR ARBITRATION

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INTRODUCTION

A basic notion of our legal jurisprudence is that once a court has rendered a final judgment neither party can resurrect the decided matters in a subsequent lawsuit.[1] The reasons for this precept are both practical in nature and consistent with theories for a just resolution of disputes. It would be a waste of resources if parties could relitigate issues that have been decided after a full and fair adjudication.[2] The prevailing party would have little regard for a judicial forum if the loser could continue to assert issues that a court had already determined.[3] Further, it would be difficult for parties to enter into stable relationships if they were unsure that a judicial mechanism would bring finality to disputes that arise between them.[4] As a result of these considerations, courts have developed theories of stare decisis, res judicata, and collateral estoppel to ensure that once claims and issues are adjudicated the matters involved therein are conclusively resolved.[5]

Traditionally, parties to labor contracts have utilized arbitration rather than litigation to settle their differences.[6] The success of labor

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[1] *See generally* RESTATEMENT (SECOND) OF JUDGMENTS §§ 17–20, 27–29 (1982).

[2] *See, e.g.*, FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 11.2, at 588–89 (4th ed. 1992); CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, § 4401, at 4–5 (1982).

[3] *See* WRIGHT ET AL., *supra* note 2, § 4401, at 4.

[4] *See* Allan D. Vestal & Marvin Hill, Jr., *Preclusion in Labor Controversies*, 35 OKLA. L. REV. 281, 296–98 (1982).

[5] *See, e.g.*, Kremer v. Chemical Constr. Corp., 456 U.S. 461, 465 (1982); Federated Dep't Stores v. Moitie, 452 U.S. 394, 401 (1981); Allen v. McCurry, 449 U.S. 90, 96 (1980); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979); *In re* Belmont Realty Corp., 11 F.3d 1097, 1102 (1st Cir. 1993); Horowitz v. Alloy Automotive Co., 992 F.2d 100, 105 (9th Cir. 1992); *see generally* JAMES ET AL., *supra* note 2, §§ 11.1, 11.2, 11.6; WRIGHT ET AL., *supra* note 2, §§ 4401, 4403.

[6] Almost 99% of collective bargaining agreements provide for arbitration as the means to

arbitration as a means of dispute resolution has been a factor in the increasing use of arbitration in other fields.[7] Not surprisingly, the same issue of finality arises in labor arbitration as it does in litigation. A recent survey of experienced arbitrators indicated that eighty-five percent of them had encountered cases where one side presented a previous arbitration award between the same or related parties as determinative of the issues involved.[8] Because parties to a collective bargaining agreement normally have a continuing, long-term relationship, it is not unusual that issues decided in prior arbitration cases later become points of contention once more.[9] Unless some form of the principles of finality that have developed under the law of judgments in litigation also become applicable to labor arbitration, nothing would stop a losing party in a prior arbitration from grieving the matter again.[10] This Article will first consider the concepts of stare decisis, res judicata, and collateral estoppel in the labor-arbitration context and will review the dictates of the law as to whether a prior award on the same issue binds a subsequent arbitrator.[11] Next, this Article considers what approaches arbitrators have taken when confronted with decisions of prior arbitrators on the same matter.[12] Finally, this Article suggests an approach as to when arbitrators should defer to a prior arbitral decision.[13]

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determine controversies over the meaning or interpretation of the labor contract. *See* BUREAU OF NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 37 (13th ed. 1992). Typically, the company and union select a neutral outside arbitrator. *See id.*

[7] *See* Michele M. Buse, *Contracting Employment Disputes Out of the Jury System: An Analysis of the Implementation of Binding Arbitration in the Non-Union Workplace and Proposals to Reduce the Harsh Effects of a Non-Appealable Award*, 22 PEPP. L. REV. 1485, 1488 (1995); Martin H. Malin & Robert F. Landeson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 HASTINGS L.J. 1187, 1188 (1993); Stephen A. Plass, *Arbitrating, Waiving and Deferring Title VII Claims*, 58 BROOK. L. REV. 779, 793 (1992).

[8] These findings are based on a questionnaire sent by the author to 140 members of the National Academy of Arbitrators. The survey asked (1) whether the respondent had ever ruled on the same issue with the same parties as another arbitrator, (2) whether the second arbitrator considered herself or himself to be bound by the prior arbitrator's decision on the same issue and (3) under what circumstances would the respondent feel bound by a prior award. The author received 80 responses for a 57% return rate. The survey is on file with the author.

The National Academy of Arbitrators is a professional and honorary organization of the most experienced and accepted labor arbitrators in the United States. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 20–21 (4th ed. 1985 & Supp. 1985–89).

[9] ELKOURI & ELKOURI, *supra* note 8, at 20–21.

[10] *See generally* RESTATEMENT (SECOND) OF JUDGMENTS §§ 17–20, 27–29 (1982).

[11] *See infra* notes 14–74 and accompanying text.

[12] *See infra* notes 75–116 and accompanying text.

[13] *See infra* notes 117–50 and accompanying text.

I. The Legal Rules of the Game

Before stepping onto the labor-arbitration playing field, all players must know the rules of the game. One of these rules is the extent to which a labor arbitrator possesses the authority to reject another arbiter's opinion, a concept which entails notions of stare decisis, res judicata, and collateral estoppel.[14] These legal precepts are based upon distinct rules of law that courts have developed over centuries of litigation.[15] One might consider that there is no place in labor arbitration for such principles because one reason that parties may choose the arbitral forum to resolve their disputes is to avoid the use of rigid, legalistic rules to decide cases. However, arbitrators often apply legal doctrines based on the finality of judgments because they recognize that the rationales embodied in them are based upon "every principle of common sense, policy and labor relations."[16]

A. *Stare Decisis*

Stare decisis is the application of awards "involving different parties but similar issues" where the subsequent arbitrator utilizes the reasoning found in prior cases.[17] In legal decisions, a precedent is binding when determined by a superior court and applied by an inferior tribunal. The lower court is required to utilize the standard established by the higher judicial body because it is that tribunal which determines the applicable rule of law. Because labor arbiters are considered "courts of equal rank" with respect to each other, the decisions by other arbitrators may be persuasive but they are not binding on a subsequent arbitrator.[18]

Some views have become so embedded in labor arbitration jurisprudence that, although not technically binding precedents, arbitrators almost universally apply these principles. For instance, placing the burden of proof on an employer in a discharge case has become

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[14] *See* Elkouri & Elkouri, *supra* note 8, at 421–22.

[15] *See supra* note 8; *see also* Restatement (Second) of Judgments § 17 cmt. d.

[16] Pan Am. Ref. Corp., 9 Lab. Arb. Rep. (BNA) 731, 731 (1948) (McCoy, Arb.).

[17] *See* Owen Fairweather, Fairweather's Practice and Procedure in Labor Arbitration 374–75 (Ray J. Schoonhoven ed., 3d ed. 1991).

[18] *See* Philip Harris, *The Use of Precedent in Labor Arbitration*, 32 Arb. J. 26, 26 (1977); Lillian J. Howan, Comment, *The Prospective Effect of Arbitration*, 7 Indus. Rel. L.J. 60, 65 (1985); *see also* Carlton J. Snow, *An Arbitrator's Use of Precedent*, 94 Dick. L. Rev. 665, 670 (1990) (suggesting greater deference to arbitral precedent). There are some industries, such as coal, steel, railway and the postal service, where the parties have established national and regional arbitration boards. In these situations, by contract, companies and unions decide that, under principles of stare decisis, the decisions of appellate review boards or umpires are binding upon regional or

"arbitral law."[19] Yet if an arbitrator determined that in a particular instance the union should have the burden of disproving the just cause of a discharge, this approach, although perhaps heresy, would not violate any binding principle of stare decisis. When the parties chose this particular arbitrator to determine whether the employee had been dismissed for just cause, they accepted that the arbitrator's view of the standard would be applied in interpreting their contract, rather than any principles of a higher tribunal.[20] Because a hierarchical structure does not exist in arbitration, decision making occurs on a case-by-case basis with each arbitrator bringing his or her expertise and background to resolve the particular problem for which the parties chose the decisionmaker. It is up to the individual arbitrator to determine whether and to what extent the general principles of interpretation of labor contracts will apply in a given case. In most cases, arbitrators will conform to those norms that have become acceptable in labor arbitration because that is what the parties expect. Nevertheless, stare decisis is not required in labor arbitration because the relevancy of past decisions is a matter of arbitral discretion rather than binding precedent.

B. *Res Judicata and Collateral Estoppel*

Res judicata and collateral estoppel are related but distinct concepts in the law of judgments.[21] Unlike stare decisis, both of these theories require not only identity of issues, but also of parties involved in the actions.[22] Res judicata involves the notion of claim preclusion, whereas collateral estoppel entails the idea of issue preclusion.[23] Res judicata bars a person from relitigating a claim if (1) there is a final judgment from prior litigation, (2) the matters raised in the subsequent case either are the same or could have been litigated in the prior action, and (3) the claims in the second action involve either the same party or persons in privity with that party.[24] Collateral estoppel prevents a party from relitigating an issue if (1) the issue in the

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local arbitrations. *See* McElroy Coal Co., 93 Lab. Arb. Rep. (BNA) 566, 567 (1989) (McIntosh, Arb.); ELKOURI & ELKOURI, *supra* note 8, at 422–25; *see also* Shrewsberry Coal Co., Gen. Constr. Crew, 98 Lab. Arb. Rep. (BNA) 108, 109 (1991) (Volz, Arb.) (discussing res judicata doctrine in Arbitration Review Board cases in coal industry).

[19] *See* ELKOURI & ELKOURI, *supra* note 8, at 661.

[20] *Cf.* Harris, *supra* note 18, at 26; Snow, *supra* note 18, at 676–77.

[21] *See* WRIGHT ET AL., *supra* note 2, § 4402, at 6.

[22] *See* Snow, *supra* note 18, at 672–76.

[23] *See id.*; WRIGHT ET AL., *supra* note 2, § 4402, at 6.

[24] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 & n.5 (1979); RESTATEMENT (SECOND) OF JUDGMENTS §§ 17–20 (1982).

subsequent litigation is the same as that raised in the prior litigation, (2) the issue was actually litigated and necessary to a final adjudication, (3) the person against whom the doctrine of collateral estoppel is asserted was a party to or in privity with a party to the prior action, and (4) the party precluded had a full and fair opportunity to litigate the issue.[25]

A primary difference between the two doctrines is that res judicata is based upon finality of judgments, whereas collateral estoppel gives binding effect to the fact finding process in a prior proceeding.[26] For res judicata to effectively preclude a claim there must be identical parties in both causes of action, but for collateral estoppel to occur only the person against whom issue preclusion is asserted must have participated in the prior action.[27] Moreover, in order to apply collateral estoppel to bar the relitigation of an issue, the participant in the second action must show that the issue was actually contested in the first proceeding.[28] In contrast, one can exercise the doctrine of res judicata so long as the party in the prior litigation had an opportunity to raise a claim even if the party did not actually do so.[29]

An example of the distinction between the two principles can be seen in the situation of a default judgment.[30] If a plaintiff receives a default judgment against a defendant, in a subsequent action involving the same matter the plaintiff could assert res judicata against every defense that the defendant raises because the defendant's claims have merged into the prior judgment. However, if a party not involved in prior litigation asserted the same cause of action against the defendant who had defaulted in the first action, the plaintiff in the second action could not utilize collateral estoppel to bar any defenses because there were no actual findings made in the first default judgment.

Courts have applied concepts of res judicata and collateral estoppel in the context of labor arbitrations.[31] In *Action Distributing Co. v. Teamsters Local 1038*, an employer challenged the propriety of an arbitrator's decision in favor of the union on the ground that the award

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[25] *See* Montana v. United States, 440 U.S. 147, 154 (1979); Blonder-Tongue Labs. v. University of Ill. Found., 402 U.S. 313, 323–24 (1971); RESTATEMENT (SECOND) OF JUDGMENTS §§ 27–29.

[26] *See* Kasper Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 535–36 (5th Cir. 1978); WRIGHT ET AL., *supra* note 2, § 4402, at 7.

[27] *Compare* RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1982), *with* RESTATEMENT (SECOND) OF JUDGMENTS § 29.

[28] *See Kasper Wire Works*, 575 F.2d at 536; WRIGHT ET AL., *supra* note 2, § 4402, at 7.

[29] *See* WRIGHT ET AL., *supra* note 2, § 4402, at 6.

[30] *See* G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 657 (1988).

[31] *See, e.g.*, Action Distrib. Co. v. Teamsters Local 1038, 977 F.2d 1021, 1025 (6th Cir. 1992).

was contrary to that of a prior arbitral determination on the same matter between it and the union.[32] The employer claimed the second determination was invalid under principles of res judicata and collateral estoppel.[33] Describing the claim preclusion effect of the doctrine of res judicata, the court determined that a prior decision "operates as an absolute bar to any subsequent action on the same cause between the same parties or their privies—not only with respect to every matter that was actually litigated in the first matter, but also to every ground of recovery that might have been presented."[34] In characterizing the issue preclusion effect of the doctrine of collateral estoppel, the court stated: "[O]nce an issue is actually and necessarily determined . . . termination is conclusive in subsequent suits based on a different cause of action involving any party to the prior litigation."[35] The court held, however, that the claims in the two arbitration cases were sufficiently different so that neither doctrine prevented the union from arbitrating the issue in the second case.[36]

Courts and other authorities have determined that certain principles of res judicata and collateral estoppel apply in the field of labor arbitration.[37] Whether these doctrines bind arbitrators to the same extent as they do courts of law entails notions of balancing the need for predictability and stability in labor relations with the individual discretion that an arbitrator must bring to bear in making a decision. An important issue is whether the law requires arbitrators to utilize res

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[32] *See id.* The first arbitrator had concluded that an employer that had purchased part of the business of a predecessor was not required to place four of its employees on a preferential hiring list at a time when there was no need for their services. *See id.* Subsequently, the employer hired employees other than the four grievants in the prior case, and the union grieved the matter again. *See id.* The second arbitrator determined that once the hiring needs arose the employer should have given preferential treatment to the four grievants. *See id.* The employer argued that the first arbitrator's decision was binding over that of the second on grounds of res judicata or collateral estoppel. *See id.*

[33] *See id.*

[34] *Id.* at 1026.

[35] *Id.*

[36] The court determined that the first arbitrator ruled on whether the union had a right to force the company to establish a preferential hiring list when it was not seeking employees, but the second ruled on the preferential seniority rights of those who were actually hired. *Action Distrib. Co.*, 977 F.2d at 1026–27.

[37] *See, e.g.*, Schweizer Aircraft Corp. v. Local 1752 Auto Workers, 29 F.3d 83, 87 (2d Cir. 1994); American Fed'n of Television & Radio Artists v. WCCO Television, Inc., 934 F.2d 987, 992 (8th Cir. 1991); Torre v. Falcon Jet Corp., 717 F. Supp. 1063, 1066 (D.N.J. 1989); Fried v. Brevel Motors, Inc., 666 F. Supp. 28, 33 (E.D.N.Y. 1987); ELKOURI & ELKOURI, *supra* note 8, at 414–36; FAIRWEATHER, *supra* note 17, at 374–87; MARVIN F. HILL & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION 390–409 (2d ed. 1987); Jay E. Grenig, *Stare Decisis, Res Judicata and Collateral Estoppel in Labor Arbitration*, 38 LAB. L.J. 195, 203 (1987); Malin & Landeson, *supra* note 7, at 1190; Vestal & Hill, *supra* note 4, at 296–98; Howan, *supra* note 18, at 65.

judicata and collateral estoppel when there has been a prior arbitral award on the same matter involving one or both of the same parties.[38]

C. *Legal Structures*

In considering what limits, if any, courts place on an arbitrator's authority to reject a prior award involving the same issue between the same parties, the guiding star is *W. R. Grace & Co. v. Local 759, United Rubber Workers*.[39] In this case, a second arbitrator found that the first arbitrator's interpretation of the collective bargaining agreement concerning seniority provisions was not binding.[40] In the subsequent appeal, the Supreme Court focused only on the enforceability of the second award, without commenting on the validity of the first, and decided that the scope of the second arbitrator's authority to determine that he was not bound by the prior decision was itself a matter of contract interpretation.[41] The Court concluded that the second arbitrator's decision, holding that the first award was without precedential force, drew its "essence" from the provisions of the contract and thus met the review standard developed in *United Steelworkers v. Enterprise Wheel & Car Corp.* some years earlier.[42] Although some have questioned the extent of the *W. R. Grace* holding, it suggests that res judicata in labor arbitration is not a binding legal principle but a matter of contract interpretation.[43]

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[38] *See infra* notes 39–74 and accompanying text.

[39] *See generally* 461 U.S. 757 (1983).

[40] *Id.* at 761.

[41] *See id.* at 765.

[42] *Id.* at 766. In *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596–97, 599 (1960), the Supreme Court noted that:

> [t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. . . . [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. . . . [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

Id.; *see also* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36–38 (1987).

[43] *See* ELKOURI & ELKOURI, *supra* note 8, at 425–26 n.46; HILL & SINICROPI, *supra* note 37, at 398; Thomas G.S. Christensen, *W.R. Grace and Co.: An Epilogue to the Trilogy?*, 37 NAT'L ACAD. ARB. 21–32 (1985).

Subsequent lower court cases have leaned in this direction.[44] For example, in *Production & Maintenance Employees' Local 504 v. Roadmaster Corp.*, the union had lost an arbitration in which it had claimed that the employer must continue to bargain with it and apply a labor contract despite the employer's hiring of a majority of permanent replacements during a strike.[45] Undeterred by its initial arbitral setback, the union filed a second grievance alleging the same claim but based on a different theory.[46] The company refused to arbitrate on the ground that the claim was precluded by res judicata.[47] The Seventh Circuit, citing *W. R. Grace*, found no preclusion and affirmed the district court judge's order to arbitrate.[48] The court held:

> Whether more than one arbitrator can take a crack at interpreting the contract is itself a question of contractual interpretation. . . . Arbitrators frequently interpret the scope and binding effect of earlier arbitral decisions. Parties to a collective bargaining agreement may elect to have rigorous rules of preclusion or lax ones. Courts enforce rules of merger and bar, precluding a second litigation to consider claims that could have been, but were not, resolved in the first. Contracting parties and their arbitrators do not always select such strict rules.[49]

This deference to the second arbitrator's determination of the binding effect of a prior award was followed in *Hotel Ass'n of Washington, D.C., Inc. v. Hotel & Restaurant Employees Union, Local 25*, but with

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[44] *See, e.g.*, United Indus. Workers v. Virgin Islands, 987 F.2d 162, 166 (3d Cir. 1993); Hotel Ass'n of Washington, D.C., Inc. v. Hotel & Restaurant Employees Union, Local 25, 963 F.2d 388, 393 (D.C. Cir. 1992); Production & Maintenance Employees' Local 504 v. Roadmaster Corp., 916 F.2d 1161, 1167 (7th Cir. 1990); Connecticut Light & Power Co. v. Local 420, International Bhd. of Elec. Workers, 718 F.2d 14, 16 (2d Cir. 1983); Courier-Citizen Co. v. Boston Electrotypers Union No. 11, 702 F.2d 273, 277 (1st Cir. 1983); Bacardi Corp. v. Congreso de Uniones Industriales de Puerto Rico, 692 F.2d 210, 212 (1st Cir. 1982); Westinghouse Elevators of P.R., Inc. v. S.I.U. de Puerto Rico, 583 F.2d 1184, 1187 (1st Cir. 1978); International Union of Elec. Workers, Local 616 v. Byrd Plastics, 428 F.2d 23, 27 (3d Cir. 1970); Teamsters Local 623 v. United Parcel Serv., Inc., 785 F. Supp. 509, 512 (E.D. Pa. 1992); Glass & Allied Workers Int'l Union v. Deena Prod. Co., 638 F. Supp. 34, 39 (W.D. Ky. 1986); Wagner Div., McGraw Edison Co. v. Local 1104, International Union of Elec. Workers, 583 F. Supp. 239, 244 (E.D. Mo. 1984), *rev'd*, 767 F.2d 485 (8th Cir. 1985); Teamsters Local 786 v. Glenview Material Co., 562 N.E.2d 289, 292 (Ill. App. Ct. 1990).

[45] 916 F.2d at 1162.

[46] In the first grievance, the union argued that the arbitrator had made his decision solely on the basis of the National Labor Relations Act, but in its second grievance, the union based its claim on the collective bargaining agreement. *See id.*

[47] *See id.*

[48] *Id.*

[49] *Id.*; *see also Westinghouse Elevators*, 583 F.2d at 1184.

a twist.[50] There, the subsequent arbitrator disagreed with a prior arbitrator's award interpreting a premium pay clause even though the two were members of a permanent panel of arbitrators chosen by the parties to resolve matters of contract interpretation.[51] Again, the appellate court applied *W. R. Grace* for the proposition that it was the second arbitrator's call to determine the binding effect of the prior arbiter's award.[52] The employer argued that the first arbitration by contract was "final and binding" and thus bound subsequent arbitrators.[53] The court rejected the argument, noting that both arbitrators' opinions were plausible interpretations but that the court was reviewing only the second.[54] In such a circumstance, the court would enforce the second, inconsistent award because "the [collective bargaining agreement] as a whole requires [the second arbitrator] only to consider, not necessarily to follow, a prior award in making his own decision."[55] According to *Hotel Ass'n of Washington*, the second arbitrator is not totally a free agent because that person must give some consideration to prior interpretations.[56] The court intimated that if the latter arbitrator had totally ignored the first award on the same issue, then a different result may have occurred.[57]

Such a limit was placed on the discretion of an arbitrator who entirely disregarded a prior award between the parties in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*.[58] There, a second arbitrator, contrary to the decision of a previous arbitrator, had struck down an employer's "no beard" grooming rule.[59] The appellate court concluded that the second arbiter's award did not draw its essence from the

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[50] 963 F.2d at 392.

[51] In 1986, the first arbitrator had determined that a hotel need not pay a part-time employee "premium pay." *See id.* at 394. In 1988, the second arbitrator, under the same contract with the same parties, but a different hotel in the multi-employer association, found that the hotel was required to pay part-time employees such premium pay. *See id.* The second arbitrator rejected the company's claims of res judicata and collateral estoppel, stating that "no Arbitrator should issue a decision that is contrary to his own judgment on the law or his own sense of justice." *Id.* at 389.

[52] *Id.* at 389.

[53] *See id.* at 390; *see infra* notes 91–106 and accompanying text regarding "incorporation theory."

[54] *Hotel Ass'n of Washington*, 963 F.2d at 390.

[55] *Id.*

[56] *See also* Wilbur Chocolate Co. v. Bakery Workers Union Local 464, No. CIV.A.86–5479, 1988 WL 33881, at *5 (E.D. Pa. Mar. 31, 1988) (second arbitrator's decision improper because he failed to give appropriate consideration to prior arbitral award regarding same issue between same parties), *aff'd*, 862 F.2d 312 (3d Cir. 1988).

[57] *See Hotel Ass'n of Washington*, 963 F.2d at 390.

[58] 807 F.2d 1416, 1419 (8th Cir. 1986).

[59] *See id.* at 1419.

contract because it ignored what the court considered relevant contract provisions and the "law of the shop."[60] The court determined that, when the first arbitrator definitively construed a provision of the collective bargaining agreement, "such construction becomes part of the existing labor agreement."[61] The court held:

> Although an arbitrator generally has the power to determine whether a prior award is to be given preclusive effect, . . . courts have also recognized that the doctrine of res judicata may apply to arbitrations with strict factual identities. . . . If an arbitrator does not accord any precedential effect to a prior award in a case like this, or at least explain the reasons for refusing to do so, it is questionable when, if ever, a "final and binding" determination will evolve from the arbitration process.[62]

In *Trailways Lines*, the court gave substantial deference to the idea that the first award had contractual effect.[63] Thus, in addition to considering the first arbitrator's interpretation, as cautioned by the court in *Hotel Ass'n of Washington*, *Trailways Lines* indicates that the second arbitrator should explain its inapplicability where a contract makes arbitration decisions "final and binding" on the parties.[64]

Another danger of inconsistent awards was exemplified by *Connecticut Light & Power Co. v. Local 420, International Brotherhood of Electrical Workers*.[65] Two arbitrators in a span of months gave contrary interpretations to a manning clause.[66] The first arbitrator required the company always to have a work crew of at least three persons; the second held that this was not necessary.[67] The court determined that "both . . . awards would survive judicial scrutiny under the *Enterprise Wheel* test."[68] However, the court concluded that in such circumstances

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[60] *Id.* at 1422.

[61] *Id.* at 1419.

[62] *Id.* at 1424–25. It is interesting to note that the second arbitrator did refer to the award granted by the first arbitrator, but concluded that the prior decision represented the "minority view" and did not resolve the contractual issue presented to the second arbitrator. *See id.* The second arbitrator also noted "[t]he principles of stare decisis and res judicata do not have the same doctrinal force in arbitration proceedings as they do in judicial proceedings." *Id.* at 1419 n.7.

[63] *See* 807 F.2d at 1424–25.

[64] *See id.* at 1425.

[65] 718 F.2d 14, 21 (2d Cir. 1983).

[66] *See id.* at 18.

[67] *See id.*

[68] *Id.* at 21.

it was up to the court itself to "select that interpretation which most nearly conforms to the intent of the parties."[69] The court then resolved the conflict by acceding to the second award, which it concluded was the better reasoned approach and more closely reflected the intent of the parties.[70] Although the court's decision brought finality to the dispute, it is difficult to avoid the conclusion that the result was at the cost of the court deciding the merits when it chose the "correct" award.[71]

Despite *Connecticut Light & Power*, under the "essence" standard of review, courts generally should confirm even conflicting awards.[72] The "legal rules of the game" as established by the Supreme Court in *W. R. Grace* allow subsequent arbitrators considerable latitude to disregard the awards of prior arbiters. As long as the differing awards have a basis in the contract, each passes *Enterprise Wheel* muster and should be confirmed by a reviewing court. This approach makes much sense in the context of labor arbitration. Otherwise, in determining whether res judicata or collateral estoppel apply in a given situation, courts would be drawn into a morass of decision making on substantive issues which the parties have committed to labor arbitration. For instance, courts would have to determine whether the second arbitration involves the same or related parties and, likewise, whether the issues were sufficiently identical or could have been raised in the first arbitral proceeding. Other issues, such as changed circumstances between the time of the first arbitral award and the second, would be relevant. All of this could require elaborate fact finding which the Supreme Court has determined courts should avoid in the labor arbitration context because the parties by contract have committed such issues to the arbitrator.[73]

Placing the determination of the applicability of prior awards in the hands of arbitrators may result in conflicting awards. Although it is an understandable temptation for a court, as in *Trailways Lines* or *Connecticut Light & Power*, to step in and make a final determination when the second arbitrator creates a conflict of decisions on the same issue between the same parties with little explanation or justification, this approach should be avoided. Otherwise courts, rather than arbitrators, will end up interpreting labor agreements contrary to the terms

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[69] *Id.*

[70] *Connecticut Light & Power*, 807 F.2d at 21.

[71] *See id.*

[72] *See supra* note 42.

[73] *See Misco*, 484 U.S. at 44–45; Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 410–13 (1976).

of the arbitration clause and the congressional policy favoring arbitration.[74] If inconsistent awards cause significant problems for the parties, resolution is available at the negotiating table or once again through the grievance-arbitration machinery.

Nevertheless, cases like *Trailways Lines* and *Connecticut Light & Power* should be warning signs that arbitrators should tread carefully when declaring that a prior opinion involving the same parties and the same issue is unsound and will not be given res-judicata or collateral-estoppel effect. Due care in explaining both the rightness of a position and the wrongness of the prior award is advisable to ensure surviving strict *Enterprise Wheel* scrutiny by a reviewing court.

II. Arbitral Approaches

The weight of legal authority has placed the deference accorded to a prior award primarily in the hands of arbitrators.[75] Because the issue of determining the binding effect of a prior award between the same parties on the same issue is a common one, many arbitrators have considered the applicability of res judicata and collateral estoppel to labor arbitration.[76] Not surprisingly, they hold a wide spectrum of views on the binding effect of prior awards involving the same issues and one or more of the same parties.[77] These opinions generally fall within one of three broad categories that may be described as (1) the contractual approach, (2) the incorporation theory, and (3) the independent judgment principle.

A. *Contractual Approach*

As in most arbitral situations, the first rule is to follow the intent of the parties.[78] Some agreements specifically state that prior decisions are binding; others state just the opposite.[79] For instance, in the coal

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[74] *See* 29 U.S.C. § 171(b) (1994); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960).

[75] *See supra* notes 14–74 and accompanying text.

[76] *See supra* note 8.

[77] *See* Elkouri & Elkouri, *supra* note 8, at 414–19.

[78] *See id.* at 348 ("The rule primarily to be observed in the construction of written agreements is that the interpreter must, if possible, ascertain and give effect to the mutual intent of the parties."); Fairweather, *supra* note 17, at 172 ("An arbitrator's principal function is to interpret the collective bargaining agreement."); Jay E. Grenig, *Principles of Contract Interpretation*, *in* 1 Tim Bornstein & Ann Gosline, Labor and Employment Arbitration § 14.10[2] (1995) ("The primary goal of contract interpretation is to determine the mutual intent of the parties.").

[79] *See, e.g.*, Teledyne Ryan Aeronautics, 95 Lab. Arb. Rep. (BNA) 1072, 1074 (1990) (Weiss, Arb.) (parties agree that prior arbitration will bind them on subsequent issue).

industry, parties to the National Bituminous Coal Wage Agreement have a special provision regarding the precedential impact of arbitration awards.[80] In this sector, the parties at one time had established a national arbitration board with appellate review over certain decisions made by local arbitrators.[81] The appellate board had powers by contract that embodied notions of stare decisis and res judicata.[82] Although the parties eliminated the review board, some of its decisions still have binding effect.[83] Decisions by the review board which fall under the applicable provisions of the labor agreement must be followed by other arbitrators.[84] It would be beyond an arbitrator's authority to refuse to give preclusive effect to an earlier award where the company and union have determined that the award should have an effect.[85]

The contrary situation exists in some labor contracts. In certain industries companies and unions have established expedited arbitration procedures.[86] Parties often establish an accelerated grievance mechanism due to a backlog of cases which causes them to conclude that the grievance process can be streamlined. For instance, in applicable cases in the steel industry, management and union officials modified their normal arbitration requirements for hearings, transcripts, and briefs

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[80] Article XIII, section k of the contract provides: "[A]ll decisions of the Arbitration Review Board rendered prior to the expiration of the National Bituminous Coal Wage Agreement of 1978 shall continue to have precedential effect under this Agreement to the extent that the basis for such decisions have not been modified by subsequent changes in this agreement." For decisions involving the National Bituminous Coal Wage Agreement of 1978, see Island Creek Coal Co., 104 Lab. Arb. Rep. (BNA) 1075 (1995) (Suntrup, Arb.); Amax Coal Co., 104 Lab. Arb. Rep. (BNA) 790 (1995) (Stoltenberg, Arb.); Drummond Co., 97 Lab. Arb. Rep. (BNA) 983 (1991) (Kilroy, Arb.); Freeman Coal Co., 87 Lab. Arb. Rep. (BNA) 665 (1986) (Clarke, Arb.); Consolidation Coal Co., 82 Lab. Arb. Rep. (BNA) 889 (1984) (Abrams, Arb.).

[81] *See supra* note 18.

[82] *See supra* note 18.

[83] *See* ELKOURI & ELKOURI, *supra* note 8, at 118.

[84] One such principle concerned the doctrine of res judicata. In *Arbitration Review Board Decision 78–24*, the tribunal concluded that an arbitration decision binds a subsequent arbitrator when the grievance arises between the same parties, at the same operation, on the same fact situation, and involving the same issues of contract interpretation and application as presented in a former grievance decided by a prior award. Because *Arbitration Review Board Decision 78–24* was rendered prior to the expiration of the 1978 National Bituminous Coal Wage Agreement and has not been subsequently changed in the contract, it continues to have precedential effect. *See* Island Creek Coal Co., 105 Lab. Arb. Rep. (BNA) 710, 712 (1995) (Jones, Arb.); Arch of Ill., 105 Lab. Arb. Rep. (BNA) 445, 446 (1995) (Feldman, Arb.); Old Ben Coal Co., 102 Lab. Arb. Rep. (BNA) 823, 827 (1994) (Feldman, Arb.); Arch of West Virginia, 90 Lab. Arb. Rep. (BNA) 1220, 1222 (1988) (Volz, Arb.); Monterey Coal Co., 89 Lab. Arb. Rep. (BNA) 989, 991 (1987) (Fullmer, Arb.); Freeman United Coal Mine Co., 84 Lab. Arb. Rep. (BNA) 1302, 1303 (1985) (Feldman, Arb.).

[85] *See supra* note 80.

[86] *See, e.g.*, ELKOURI & ELKOURI, *supra* note 8, at 293–95 (discussing steel industry).

so that particular grievances could be resolved more quickly and efficiently, but at the same time in a fair and just manner.[87] Because this expedited process does not involve the full decision making procedure of a normal arbitration, the parties have determined that the decisions are not binding precedent.[88] In the final analysis it is the parties' decision whether they want an arbitrator to give res judicata or collateral estoppel effect to prior decisions. The arbitrator is the "creature of the parties" and must defer to their determination.[89] For an arbiter to refuse to follow contractual dictates concerning the binding nature of previous awards would cause the decision to be void because it would not be based on the "essence" of the contract as required by *Enterprise Wheel*.[90]

B. *Incorporation Theory*

Although any arbitrator must adhere to contracts which specifically require that prior awards be given precedential effect, few labor agreements have such clauses.[91] As a result, most arbitrators have discretion to determine whether awards between the same parties should preclude subsequent grievances over the same or related matters.[92] Many arbitrators utilize what may be referred to as the "incorporation theory" to give binding effect to prior decisions that meet the criteria established by the principles of res judicata or collateral estoppel.[93] Under this approach, the typical contractual clause making an arbitral decision "final and binding" not only settles the dispute between the parties but also causes the award to become part of their contract.[94] This is especially true where subsequent negotiations have not changed the outcome of the award. There each party had an opportunity to

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[87] For a description of the expedited arbitration procedure in the steel industry, see ELKOURI & ELKOURI, *supra* note 8, at 293–95; MAURICE S. TROTTA, ARBITRATION OF LABOR-MANAGEMENT DISPUTES 221–22 (1974).

[88] *See* Ben Fischer, *The Steelworkers Union and the Steel Companies*, 32 NAT'L ACAD. ARB. 198 (1980).

[89] *See* John E. Dunsford, *Role and Function of the Labor Arbitrator*, 30 ST. LOUIS U. L.J. 109, 112 (1985).

[90] *See supra* note 42.

[91] A 1971 study of a sample of 400 collective bargaining agreements indicated that only three percent of the contracts addressed the precedent-setting aspects of arbitration awards. *See* BUREAU OF NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 1:1, 51:8 (7th ed. 1971). Of those few that did, all but two provided that an award would not be considered precedent. *See id.*

[92] *See supra* notes 39–74 and accompanying text.

[93] *See, e.g.*, Allegheny Ludlum Steel Corp., 30 Lab. Arb. Rep. (BNA) 1011, 1013 (1958) (Valtin, Arb.); *see also* FAIRWEATHER, *supra* note 17, at 380–81.

[94] *See* BUREAU OF NAT'L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 37 (13th ed. 1992).

alter the effect of an arbitral decision through bargaining, but chose not to do so.[95] Accordingly, a later arbitrator faced with the same issues between the same parties is as bound by the first decision as by the language of the parties' agreement.[96]

An example of the incorporation theory is Arbitrator Dennis Nolan's decision in *Stone Container Corp.*[97] There, a prior arbitrator had granted to affected employees monetary relief from the employer for improper overtime bypasses.[98] Arbitrator Nolan determined that the company had not litigated the remedy issue before the first arbitrator and that "[f]ull litigation might well have convinced [the first arbitrator], as it did me, that there was no implied agreement to compensate victims of overtime bypasses with money."[99] In other words, had this been a case of first impression, Nolan indicated he would have concluded that there was no binding practice requiring a monetary remedy, as opposed to an opportunity to make up missed overtime work.[100] Nevertheless, Nolan concluded that the company had an opportunity to arbitrate the issue of remedy and that the first award of monetary relief was controlling:

> As a matter of arbitral jurisprudence, an arbitrator's interpretation of an agreement binds later arbitrators in similar cases. In effect, the award amends the Agreement until the parties jointly change the arbitrator's interpretation. The Company and the Union have said as much in Article V of the Agreement, which makes an arbitrator's award "final and binding upon all matters as to which he shall have authority."[101]

Arbitrator Hartwell Hooper in *Monarch Tile, Inc.* gave further rationale for the incorporation theory:

> If this arbitrator were to ignore the earlier decision and issue a contrary decision merely because he preferred a different interpretation, the parties would be right back where they were when the dispute first arose. They would have gone

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[95] *See* Grenig, *supra* note 37, at 202 (losing party's failure to cause change in contract language in later collective agreement acts as form of estoppel to prohibit another grievance on issue).

[96] *See id.*

[97] *See generally* 96 Lab. Arb. Rep. (BNA) 483 (1990) (Nolan, Arb.). *See also* United Tel.-S.E., 101 Lab. Arb. Rep. (BNA) 316 (1993) (Nolan, Arb.).

[98] *See Stone Container*, 96 Lab. Arb. Rep. (BNA) at 484.

[99] *Id.* at 488.

[100] *See id.* at 486.

[101] *Id.*

> through the trouble and expense of two arbitration cases without having their dispute resolved. If the Company were to prevail this time, the parties would be deadlocked at a score of 1 to 1. Under these conditions, no one should be surprised if the Union wanted another turn at bat. Like an extra-innings baseball game, the dispute could potentially go on indefinitely and never be resolved if each subsequent arbitrator felt free to go his own way with the issue. That would defeat the purpose of the arbitration clause and deprive the parties of any degree of confidence in what the contract means. They would not be well served by that.[102]

However, even under the incorporation theory, there are generally accepted exceptions allowing a later arbitrator to disregard a prior award. For instance, if there is not an identity of parties or issues in the first and second awards, the previous decision should not be binding because either it is not a component of these parties' agreement or it is a matter that has not been decided.[103] Other exceptions to the incorporation theory were aptly noted by Arbitrator Jack Clarke in *North American Rayon Corp.*:

> The situations where an arbitrator has commonly declined to follow a prior arbitration decision between the same parties at the same facility and involving the same issue are those wherein (1) the prior decision was an instance of bad judgment, (2) conditions existing at the time of the prior decision and of the grievance being arbitrated are significantly different, (3) there was not a full and fair hearing at the time of the earlier decision and (4) the prior decision was made without the benefit of some important facts or considerations.[104]

These exceptions provide opportunity for a second arbitrator to distinguish the decision of the first in appropriate circumstances. For

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[102] 101 Lab. Arb. Rep. (BNA) 585, 587 (1993); *see also* International Ass'n of Fire Fighters, 86 Lab. Arb. Rep. (BNA) 1201 (1986) (Alleyne, Arb.).

[103] *See, e.g.*, International Chem. Workers Union Local No. 189 v. Purex Corp., 427 F. Supp. 338, 342 (D. Neb. 1977) (different issues); Teamsters Local No. 25 v. Penn Transp. Corp., 359 F. Supp. 344, 349 (D. Mass. 1973) (same); Pemco Aeroplex, Inc., 98 Lab. Arb. Rep. (BNA) 105, 107 (1992) (Baroni, Arb.) (same); City of Oak Creek, 90 Lab. Arb. Rep. (BNA) 710, 712 (1988) (Baron, Arb.) (different parties).

[104] 95 Lab. Arb. Rep. (BNA) 748, 751 (1990); *see also* Monarch Tile, Inc., 101 Lab. Arb. Rep. (BNA) 585, 587 (1993) (Hooper, Arb.); ELKOURI & ELKOURI, *supra* note 8, at 428–30; HILL & SINICROPI, *supra* note 37, at 399–400.

instance, because labor agreements are continuous in nature, it is not unusual that the effect of an arbitration decision can last for years upon their relationship. Yet, if the situation substantially changes because of new circumstances or technology, then the basis for the prior arbitral decision may no longer exist.[105] Likewise, it would offend basic notions of due process to obligate a party to follow a decision when the person was unfairly deprived of an opportunity to contest a matter in a prior case. On the other hand, these exceptions should not be allowed to undermine the incorporation theory. Any losing party will argue that the prior decision was "bad judgment" or will assert some factual difference in the present case. However, when the parties and the issues are fundamentally the same, most arbitrators who follow the incorporation theory place a heavy burden of persuasion on the party seeking to reverse a prior decision.[106] By giving deference to prior arbitral awards as an integral part of the collective agreement, arbitrators adhering to the incorporation theory uphold the rationale of res judicata and collateral estoppel in the labor-arbitration context.

C. *Independent Judgment Principle*

At the other end of the doctrinal spectrum are arbitrators who emphasize the independent judgment which parties want an arbitrator to bring to a proceeding—even to issues heard a second or third time.[107] This is a narrower approach to the effect of the arbitral decision making process than that used by those who adhere to the incorporation theory. Because there is no appellate system resulting in binding precedent in labor arbitration, those who follow this principle believe that companies and unions want an arbitrator to resolve a given dispute unfettered by the opinions of other arbitrators.[108] For instance, Arbitrator Millard Cass in *Hotel Ass'n of Washington, D.C., Inc. v. Hotel & Restaurant Employees Union, Local 25* disregarded another arbitrator's award on the same contractual issue between the parties and concluded that this was appropriate when the prior decision was "contrary to his own judgment on the law or his sense of justice."[109] Underlying this theory is the notion that arbitration is meant to solve only the

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[105] *See also Monarch Tile*, 101 Lab. Arb. Rep. (BNA) at 587 (prior award by arbitrator that forbade employer from banning smoking in lunch room and designated areas no longer binding because of scientific evidence introduced at second hearing concerning effects of second-hand smoke).

[106] *See id.* (party seeking to reverse prior decision has heavy burden of persuasion).

[107] *Cf.* ELKOURI & ELKOURI, *supra* note 8, at 416–17.

[108] *See supra* text accompanying notes 17–19.

[109] 963 F.2d 388, 389 (D.C. Cir. 1992); *see also* W.R. Grace & Co. v. Local 759, United Rubber

particular issue that the parties submit to an arbitrator without binding them to a given course of conduct as a result of prior decisions.[110]

This position was well stated by Arbitrator Robert Williams in a case where he gave no effect to the awards of two prior arbitrators on an issue involving assignment of overtime, because he concluded that they had incorrectly interpreted the agreement:

> The reasoning of prior awards should be followed if they were correctly decided. If previous awards incorrectly interpret an agreement they should be disregarded as erroneous. . . . In [*North American Rayon Corp.*] Arbitrator Clarke contended arbitrators follow prior awards even in cases in which the later arbitrator would have reached a different result. Supposedly, this norm promotes stability in the collective bargaining relationship. I dare say, erroneous awards promote instability, not stability.[111]

This "independent judgment" approach allows each succeeding arbitrator to determine de novo the correctness of the prior award in interpreting the contract.[112] Arbitrator Williams invited the parties to "relitigate the same issue in a later incident until their agreement is correctly interpreted and applied."[113] As to his own award, he believed:

> [I]f a party does not understand the reasoning and result in this case to correctly interpret and apply the Agreement, they are free to grieve a later similar incident and seek another arbitrator's opinion. The next arbitrator can review the opinions of three (3) prior arbitrators and decide his case. At least in theory, the parties and arbitrators eventually will recognize correct reasoning and results.[114]

The independent judgment principle gives little deference to prior decisions between the parties even as to similar issues.[115] This

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Workers, 461 U.S. 757, 761 (1983); Westinghouse Elevators of P.R., Inc. v. S.I.U. de P.R., 583 F.2d 1184, 1188 (1st Cir. 1978).

[110] *See* ELKOURI & ELKOURI, *supra* note 8, at 416–17.

[111] Hercules, Inc., Am. Arb. Ass'n Case No. 31-300-00129-91, at 25–26 (July 17, 1992) (Williams, Arb.) (unpublished opinion on file with author). For *North American Rayon Corp.*, see 95 Lab. Arb. Rep. (BNA) 748, 750 (1990) (Clarke, Arb.); *see supra* note 104 and accompanying text.

[112] *See Hercules, Inc.*, Am. Arb. Ass'n Case No. 31-300-00129-91, at 25–26).

[113] *Id.*

[114] *Id.* at 26–27.

[115] *See id.*

method avoids the application of legalistic rules such as res judicata or collateral estoppel.[116] In addition, it likely shifts the process of dispute resolution from arbitration to negotiation by causing the parties to settle their own differences so as to avoid the problem of inconsistent awards.

III. A Recommended Policy of Deference

A. *Principle of Constraint*

A study of arbitral cases and authority indicates that most arbitrators are closer to the incorporation theory than to the independent judgment principle.[117] Those adherents to the incorporation theory believe that the parties' relationship is based on more than just the words in their collective bargaining agreement or the actions and practices developed over time. Often when the parties cannot agree on the terms of their contract or the course of action that they should follow, they turn to the arbitration process to define their association. Under the incorporation theory, the resultant awards become a part of that relationship which should be changed only by the parties through negotiation, but not by later arbitrators unless convincing reasons exist. This approach gives more emphasis to the arbitration process and its finality than does the independent judgment postulate.

A recent questionnaire to members of the National Academy of Arbitrators also indicated support for the incorporation method of adhering to prior awards.[118] The responses typically stated that the first arbitration decision should be followed "unless completely off the wall" or "clearly erroneous" or "palpably wrong" or "it should be thrown in

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[116] *See* Social Sec. Admin., 91 Lab. Arb. Rep. (BNA) 927, 930 (1988) (Kaplan, Arb.) (res judicata applies to judicial proceedings and not to labor arbitration).

[117] *See* Elkouri & Elkouri, *supra* note 8, at 426–28; Fairweather, *supra* note 17, at 380–81; Monarch Tile, Inc., 101 Lab. Arb. Rep. (BNA) 585, 588 (1993) (Hooper, Arb.); United Tel.-S.E., 101 Lab. Arb. Rep. (BNA) 316, 317 (1993) (Nolan, Arb.); Southeastern Pa. Transp. Auth., 100 Lab. Arb. Rep. (BNA) 767, 769 (1992) (Goulet, Arb.); Goodyear Tire & Rubber Co., 98 Lab. Arb. Rep. (BNA) 1196, 1198 (1992) (Florman, Arb.); General Servs. Admin., 97 Lab. Arb. Rep. (BNA) 641, 643 (1991) (Hockenberry, Arb.); Stone Container Corp., 96 Lab. Arb. Rep. (BNA) 483, 485 (1990) (Nolan, Arb.); Armco, Inc., 95 Lab. Arb. Rep. (BNA) 34, 36 (1990) (Strongin, Arb.); Lucky Stores, Inc., 88–2 Lab. Arb. Awards (CCH) ¶ 8316 (1988) (Jones, Arb.); International Ass'n of Fire Fighters, 86 Lab. Arb. Rep. (BNA) 1201, 1204 (1986) (Alleyne, Arb.); Todd Shipyards Corp., 69 Lab. Arb. Rep. (BNA) 27, 29 (1977) (Jones, Arb.); Tennessee River Pulp & Paper Co., 68 Lab. Arb. Rep. (BNA) 421, 424 (1976) (Simon, Arb.); Howard Papermills, 67 Lab. Arb. Rep. (BNA) 863, 867 (1986) (Dworkin, Arb.); Allegheny Ludlum Steel Corp., 30 Lab. Arb. Rep. (BNA) 1011, 1013 (1958) (Valtin, Arb.).

[118] *See supra* note 8.

the wastebasket."[119] One arbitrator noted that "although [the arbitration system involved] no hierarchy, [following a prior decision on the same issue between the same parties] avoids confusion and arbitrator shopping."[120] Another response insightfully pointed out that the parties could "overrule bad decisions in negotiations."[121]

Nevertheless, it would be erroneous for labor arbitrators to require complete adherence to a res judicata/collateral estoppel approach in all cases. Some cases by their nature lack the identity of issues necessary for a prior award to be binding. The outcome of such cases usually are fact-dependent and often require that the arbitrator weigh various individual criteria.[122] Typical examples would be discipline and discharge cases. Often management establishes a rule and takes disciplinary action against an employee who violates it.[123] For instance, an employer may promulgate an absenteeism policy which provides given levels of discipline for employees who are absent without good cause.[124] If an employee is disciplined for violating this policy, the union might challenge both the reasonableness of the absenteeism rule and whether the worker should have been disciplined under it. If an arbitrator upheld both the rule and the discipline of the particular employee who had violated it, this decision would not, in all respects, bind a subsequent arbitrator faced with a grievance from a different employee disciplined under the same policy. The second arbitrator should follow the first award on the appropriateness of the company's absenteeism policy for the reasons discussed under the incorporation theory.[125] However, the application of the rule to the second employee depends upon the individual situation.[126] Whether

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[119] *See supra* note 8.

[120] *See supra* note 8.

[121] *See supra* note 8.

[122] *See* Vestal & Hill, *supra* note 4, at 360–62.

[123] *See generally* Motor Prod.-Owosso Corp., 106 Lab. Arb. Rep. (BNA) 215 (1996) (Borland, Arb.) (discipline for violating rule prohibiting drinking alcohol on company premises and becoming under the influence); Monsanto Co., 105 Lab. Arb. Rep. (BNA) 923 (1996) (O'Grady, Arb.) (discharge of employee for violating company rule against theft); Store Kraft Mfg., 100 Lab. Arb. Rep. (BNA) 666 (1993) (Bailey, Arb.) (discipline for violating company rules against engaging in non-essential conversations and entering plant without permission while off duty); Indianapolis Pub. Transp. Corp., 98 Lab. Arb. Rep. (BNA) 557 (1991) (Doering, Arb.) (summary discharge for violating company rule prohibiting carrying weapon on company property).

[124] *See, e.g.*, Dixon Ticonderoga Co., 100 Lab. Arb. Rep. (BNA) 1222, 1224 (1993) (Feldman, Arb.); Multiplex Co., 98 Lab. Arb. Rep. (BNA) 1203, 1205 (1992) (Hilgert, Arb.); Potlatch Corp., 96 Lab. Arb. Rep. (BNA) 1074, 1077 (1991) (Goldstein, Arb.); Cooper Indus., 94 Lab. Arb. Rep. (BNA) 830, 832 (1990) (Yarowsky, Arb.); General Foods Corp., 91 Lab. Arb. Rep. (BNA) 1251, 1254 (1988) (Goldstein, Arb.).

[125] *See supra* text accompanying notes 91–106.

[126] *See* Arch of Ill., 82 Lab. Arb. Rep. (BNA) 625, 628 (1984) (Hewitt, Arb.) (prior award that

that employee breached the rule and, if so, the amount of appropriate discipline would be issues that the second arbitrator must determine based upon weighing many factors in the particular circumstances of the case rather than applying res judicata principles from the prior award.[127]

Another caution in applying res judicata or collateral estoppel in labor arbitration is the identity of the parties to the action. Both the collective agreement and arbitration cases decided thereunder are between management and union. The union, however, operates in a representative capacity on behalf of employees in the bargaining unit. In most instances when the union arbitrates an issue, it will act as the duly authorized agent capable of binding employees.[128] However, this might not always be the case where the parties' interests may diverge.[129] An issue as to the identity of parties may also arise in situations involving multiple parties, such as members of a multi-employer association, an employer with more than one bargaining unit or a pension dispute affecting employer, union and trustees.[130] In all of these instances an arbitrator must give careful consideration to the relationship of all

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determined employee's failure to report without good cause would be unexcused absence establishes reasonableness of rule but is not res judicata as to its application); *see also* Arch of W. Va., 90 Lab. Arb. Rep. (BNA) 1220, 1222 (1988) (Volz, Arb.); Monterey Coal Co., 89 Lab. Arb. Rep. (BNA) 989, 993 (1987) (Fullmer, Arb.).

[127] A similar situation exists in cases where the issues concern not so much the meaning of the contract or the parties' rights under it, but an application of the agreement to particular circumstances. *See, e.g.*, Consolidated Coal Co., GR. No. 94–47A, 1995 WL 594606 (Jan. 4, 1995) (Fullmer, Arb.) (res judicata has limited utility in cases involving whether past practice or custom has changed over time); York Daily Record, Inc., 99 Lab. Arb. Rep. (BNA) 337, 342 (1992) (Valentine, Arb.) (prior award not controlling on issue of value to be given employee's prior work experience in determining starting wage level).

[128] *See, e.g.*, Schweizer Aircraft Corp. v. Local 1751 Autoworkers Union, 29 F.3d 83, 89 (2d Cir. 1994) (res judicata will apply to union arbitrating grievance on behalf of retired employees).

[129] Where statutes provide employees with individual rights, arbitration cases brought by unions do not have res judicata or collateral estoppel effects on later judicial proceedings by employees because of differing interests between the two parties. *See, e.g.*, McDonald v. City of W. Branch, 466 U.S. 284, 289 (1984); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 734 (1980); Alexander v. Gardner-Denver Co., 415 U.S. 36, 43 (1974).

[130] *See* Hotel Ass'n of Wash., D.C., Inc. v. Hotel & Restaurant Employees Union, Local 25, 963 F.2d 388, 392 (D.C. Cir. 1992) (prior award in favor of employer in multi-employer association does not bind arbitrator in decision on same issue between same union and different employer member of association); American Fed'n of Television & Radio Artists v. WCCO Television, Inc., 934 F.2d 987, 992 (8th Cir. 1991) (pension trustees not bound by arbitration award adverse to union as to employer's benefit contributions); Fairview Southdale Hosp., 96 Lab. Arb. Rep. (BNA) 1129, 1133 (1991) (Flagler, Arb.) (arbitrator not bound by prior award involving same employer but with different union). *But see* Fried v. Brevel Motors, Inc., 666 F. Supp. 28, 36 (E.D.N.Y. 1987) (res judicata precludes pension trustees from recovering employer contributions after union loses arbitration award on same issue because of commonality of interest between trustees and union); Lucky Stores, Inc., 88–2 Lab. Arb. Awards (CCH) ¶ 8316.

connected to the dispute before concluding that a prior award is binding.[131]

Before applying the incorporation theory to bar a party from re-arbitrating a matter, an arbitrator should also consider the *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.*[132] These ethical canons not only require "impartiality" but also that the arbitrator assume "full personal responsibility for the decision in each case decided."[133] This approach requires the second arbitrator not to elevate consistency above reason so as to perpetuate erroneous interpretations.[134] In many instances, a fair award depends upon a flexible approach in determining the binding effect of a prior award as applied to the individual factors of a subsequent case. For these reasons an arbitrator should not rely on too legalistic an application of stare decisis, res judicata or collateral estoppel.

On the other hand, the essence of a contract is to allow parties to plan for and control the future of their relationship to the fullest extent possible. Consistency in decision making on the same issues fulfills their expectations as to the effectiveness of the grievance-arbitration clause in producing "final and binding" decisions.[135] These guides to the future enable the parties not only to plan their actions in accordance with past interpretations, but also to settle similar grievances without incurring the expense of another arbitration proceed-

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[131] *WCCO Television* provides an example of the detailed analysis required in determining the identity of the parties. *See* 934 F.2d at 994. There, the union had arbitrated a claim that certain employees were covered under the pension provision of the parties' labor contract. *See id.* The arbitrator concluded that (1) the employees were covered under the contract and so the employer was liable for pension contributions on their behalf but (2) due to the union delay in filing the grievance, the employer need only make these contributions prospectively. *Id.* at 995. The trustees of the pension fund then filed a lawsuit for past contributions. *See id.* The court determined that (1) the arbitrator's decision denying past contributions did not bind the pension trustees because they were different parties with different duties than the union but (2) the trustees could use offensive collateral estoppel for the arbitrator's finding that the employer was liable for contributions for the disputed employees to preclude the employer from relitigating this issue. *Id.* Although there was a lack of identity of parties in the two proceedings between the union and the pension trustees, the same was not true for the employer. *See id.*

[132] *See generally* AMERICAN ARBITRATORS ASS'N & FED. MEDIATION & CONCILIATION SERV., CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR MANAGEMENT DISPUTES (1985) [hereinafter CODE].

[133] The *Code* also discusses the use of precedent when the parties have not addressed this in their agreement: "When the mutual desires of the parties are not known or when the parties express differing opinions or policies, the arbitrator may exercise discretion as to these matters, consistent with acceptance of full responsibility for the award." *See id.* §§ 1.A.1., G.1., 1.G.1.

[134] *See, e.g.*, Gonce v. Veterans Admin., 872 F.2d 995, 1001 (Fed. Cir. 1989) (arbitrators are to bring "their best independent judgment to bear, not ritualistically follow what others have done").

[135] *See supra* note 91.

ing. Abuse of the arbitral system through harassing claims is also avoided. This approach engenders a respect for the arbitration mechanism in that judgments will be based upon reason rather than individual opinion. Congruity and finality instill in all parties—employers, unions, and employees—a proper regard for the integrity of the process. Thus, a second arbitrator who is faced with an issue that has already been determined in an arbitration case between the parties should give deference to the decision before overturning it.

This principle of constraint was analyzed by Arbitrator Edgar Jones in *Lucky Stores, Inc.*, where he followed a prior award regarding bargaining-unit work under an agreement between a multi-employer and a multi-union unit.[136] Arbitrator Jones concluded that, once the issue had been decided after a full and fair hearing, the award became "part of the fabric of the binding consensus of the parties, subject to alteration only as a consequence of their mutual agreement."[137] While the second arbitrator must bring "the integrity, intelligence and prudence of each arbitrator that the parties assess and expect will be brought to bear upon the resolution of the issue," the arbitrator "is not precluded—but is nonetheless constrained—in the exercise of that jurisdiction."[138] He determined that "[t]he constraint expected of the second arbitrator arises out of an exercise of arbitral discretion that is inferably required by the Agreement; it is not the result of deference to some judicial mandate."[139] In other words, courts reviewing arbitral decisions rightly reject the incorporation theory because it leads them too deeply into a consideration of the merits of arbitrators' decisions under the *Enterprise Wheel* standard.[140] Nevertheless, as a matter of interpretation, arbitrators normally should apply the incorporation theory as a principle of constraint that accords with the parties' contractual expectations. If the prior award meets the criteria for res judicata or collateral estoppel on its face, sound policy dictates that the later arbitrator should defer, unless the party challenging the award can demonstrate clear and convincing reasons why these doctrines should not apply.

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[136] 88–2 Lab. Arb. Awards (CCH) ¶ 8316, at 4582.

[137] *Id.* at 4583.

[138] *Id.* at 4583–84.

[139] *Id.* at 4584.

[140] *See supra* text accompanying notes 73–74.

B. *Prior, Inconsistent Awards*

When an arbitrator is faced with prior, inconsistent awards, there are different considerations than when the person is in the role of the second arbiter considering issues previously arbitrated involving the parties. If two prior arbitrators have looked at essentially the same situation between the same or related parties and have come up with conflicting results, this creates a predicament for the parties. This situation may not be due to any error by the prior arbitrators. Difficult issues may reasonably cause arbitrators to view the same issue and reach different results. The second arbitrator, who disagreed with the first arbitrator, may not have been convinced by the persuasiveness of the principle of constraint or may have applied one of the exceptions to the arbitral res-judicata principles.[141] Despite the opposite conclusions reached by the arbitrators, reviewing courts are likely to uphold their decisions.[142] Whatever the cause of the contrary decisions, the parties may look to a third arbitrator to clean up what has become a mess in their relationship.

For example, suppose that an employer and a union have an overtime clause which requires: "All work performed on Saturday will be at overtime rates when the department is in operation." The employer claims that this means only when the department is in "full" operation; the union argues that the clause applies when there is "any" operation in the department on Saturday. Arbitrator *A* finds for the union; Arbitrator *B* determines that *A* was "clearly wrong" and holds for the company. If the parties take the issue to a third arbitrator, whose award should that arbitrator follow—*B*, who was last; *A* or *B*, whoever the third arbitrator believes reasoned the issue better—or should the third arbitrator follow different reasoning?[143] When faced with diametrically opposed awards, the third arbitrator is in a situation different from that of a reviewing court which can apply the *Enterprise Wheel* standard and hold that both *A* and *B* were right, i.e., both decisions drew their "essence" from the contract. In the situation of a third arbitration, the parties do not want to know whether the opposite conclusions of *A* and *B* can be considered grounded in the contract. Rather, they need to know whether employees who work on Saturday should receive straight-time or overtime rates.

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[141] For the exceptions to the principles of res judicata or collateral estoppel in arbitration, see *supra* text accompanying notes 64–66.

[142] *See supra* text accompanying notes 39–74.

[143] This hypothetical situation is similar to that faced by Arbitrator Edward Krinsky in *Escanaba Paper Co.*, FMCS No. 79K/22108 (Dec. 12, 1979) (unpublished opinion on file with author), discussed *infra* notes 144–49 and accompanying text.

Arbitrator Edward Krinsky, when faced with conflicting awards in a situation similar to that of the hypothetical overtime grievance, aptly concluded: "It does not make sense to this arbitrator to reverse [Arbitrator *B*] simply because this arbitrator would not have reversed [Arbitrator *A*] had he been in [*B*'s] place."[144] In other words, Krinsky determined on the basis of the principle of constraint that *B*'s decision—which found that *A*'s opinion was "clearly erroneous"—was incorrect.[145] He appropriately gave more deference to *A*'s award as a reasonable interpretation of the contract, which he would have followed.[146] However, because *B* had not followed *A*'s decision, Krinsky had to provide the parties with a resolution.[147]

When an arbitrator is faced with prior, inconsistent interpretations, each of which is reasonable, the rationale for the incorporation theory wanes because the parties have achieved neither consistency nor finality. Certainly the parties do not intend to incorporate into their collective bargaining agreement clauses which cancel each other out. By calling in the third arbitrator, they have indicated that they have been unable to resolve the matter either in negotiations or through the grievance process. In this situation Krinsky decided that "it would seem best that this arbitrator do what the parties have asked him to do in their stipulation of the issue, namely to review the merits of the issue and make an award."[148] Applying the independent judgment theory is a sensible approach in this circumstance. While the third arbitrator may be influenced by the soundness of the reasoning of *A* or *B*, who were faced with the same issue between the same parties, this effect is more like the persuasiveness of precedent rather than the principle of constraint. When neither the prior arbitrators nor the parties themselves can give definitive meaning to their contract, the arbitrator who hears the dispute a third time should have more room to create a solution that will be dispositive. Arbitrators who hear a dispute that is being decided a fourth[149] or fifth time[150] should make an independent decision a fortiori.

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[144] *Escanaba Paper Co.*, FMCS No. 79K/22108, at 6–7.

[145] *See id.* at 6.

[146] *See id.*

[147] *Id.*

[148] *Id.*

[149] *See Escanaba Paper Co.*, FMCS No. 79K/22108, at 7. For such a situation, see Independent Steelworkers' Alliance, 88–1 Lab. Arb. Awards (CCH) ¶ 8273, at 4355 (1988) (Mikrut, Arb.). Arbitrator Mikrut was faced with three differing interpretations by prior arbitrators as to the effect of a waiver of the grievance and arbitration procedure in a last-chance agreement. *See id.*

[150] *See, e.g.* Certainteed Corp., Am. Arb. Ass'n Case No. 30–300–00065–92, at 7 (1993) (Abrams, Arb.) (unpublished opinion on file with author). Arbitrator Abrams found himself reviewing five prior, inconsistent decisions on the same issue. *See id.*

Conclusion

Because of the continuing relationship between parties to a collective bargaining agreement, matters previously decided often are grieved again and come before a labor arbitrator. In such circumstances arbitrators must determine the preclusive effect to give to the decisions of other arbitrators on the same issues involving the same or related parties. Whether and to what extent labor arbitrators apply notions of res judicata and collateral estoppel is important for the development of arbitral jurisprudence and its use by management and labor. A review of awards indicates that under the principle of constraint, most arbitrators viewing the same issue between the same parties will follow the prior decision unless, in the words of Bernard Meltzer, it is "preposterously wrong."[151]

Even in the situation where the second arbitrator feels compelled to disagree with the prior arbitrator, this disagreement is often accomplished by distinguishing facts or arbitral principles rather than by saying that the prior decision was "palpably erroneous." In most circumstances there is no contradiction of opinion but rather a difference of opinion. Since claims rising through the grievance process to arbitration are often close issues, it is not surprising that arbitrators reach different, albeit sound, conclusions. This is why courts under *Enterprise Wheel* review have no hesitancy in upholding conflicting awards.[152]

Before declaring a prior award as clearly erroneous and not entitled to res judicata or collateral estoppel effect, Meltzer suggests that "arbitrators should keep their humility in order."[153] Consistency and finality often are better served by following the principle of constraint rather than creating a mess of conflicting awards which others must clean up. However, when the arbitrator is faced with multiple, inconsistent opinions, then the arbiter must use independent judgment to decide the matter. In such a circumstance, it is a test of the arbitrator's discretion and creativity to handle the matter in a manner which not only resolves the problem but also affirms the parties' belief in the arbitration system.

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[151] Bernard D. Meltzer, *Ruminations About Ideology, Law and Arbitration*, 20 Nat'l Acad. Arbs. 1, 20 (1967).

[152] *See supra* note 42.

[153] Meltzer, *supra* note 151, at 8.