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PREDICTABILITY OF ARBITRATORS’ RELIANCE ON EXTERNAL AUTHORITY?

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

ABSTRACT

Should arbitrators consider authority—such as statutes or case law—external to the collective bargaining agreement when deciding labor grievances? Do they rely on such external authority? If so, do they do so in particular circumstances or in certain types of cases? To provide more insight on this often-debated issue, we have amassed a new data set of hundreds of labor arbitration awards spanning a decade. In contrast to previous research, we find that the overwhelming majority of awards do not cite to any external authority (statutes, administrative authorities, case law, or secondary sources). Yet, only a small fraction of awards explicitly decline to address a statutory issue or do not address external authority cited by one of the parties and mentioned in the award. Other significant findings: one or both parties being represented by an attorney in the arbitration hearing correlates with citation to external authority. Instances where arbitrators are drawn from the American Arbitration Association or the Federal Mediation and Conciliation Service rosters result in a greater likelihood of citation to authority than when arbitrators are selected without aid of a service provider. Awards addressing claims asserting a breach of a just-cause provision are more likely than other types of contractual claims to cite to external authority.

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Our new data set differs from prior data sets in that it includes published and unpublished awards and cases decided by industrial boards, enabling broader study of differing types of labor arbitration.

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INTRODUCTION

Should arbitrators consider external authority when deciding labor grievances? Do they rely on external authority? If so, do they do so in particular circumstances or in certain types of cases? We have amassed a new data set of labor arbitration awards to help answer these questions. This article reports our findings about whether labor arbitration awards from 2000 to 2011 cite to external authority. While empirical data cannot, without inference, answer the question of whether labor arbitrators *should* consider external authority, it can shed light on whether they *do* consider external authority.

Empirical examination can also reveal the factors that enhance the likelihood that arbitration awards will cite to external authority. For example, perhaps citation to external authority is more likely in cases where parties are represented by attorneys than when they are not, or when arbitration is conducted by an arbitrator selected via a third-party service provider (service provider) rather than an ad hoc arbitrator selection process. And perhaps some types of disputes (e.g., statutory claims) are more likely to be resolved using external authority than are others (e.g., disputes involving the meaning of contract terms).

When arbitrators ignore external legal authority, outsiders charge that this private dispute resolution is lawless. Christopher Drahozal has empirically explored the question of whether arbitrators follow the law.¹ He explores empirical studies of arbitration awards, including of labor arbitration awards; surveys of arbitrators; and reversal rates to conclude that “[o]verall, the evidence on whether arbitrators follow the law in their awards is inconclusive.”² Citation to external authority, such as statutes, cases, and administrative regulations, that we generally consider to be law, is one point of information to help answer the question.³

Why care whether or not arbitrators cite legal authority or whether arbitration is lawless? Over the decades more and more disputes are decided outside of court through alternative dispute resolution, including through arbitration. In many settings, an aggrieved individual

1. Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 *LOY. L.A. L. REV.* 187, 189–90 (2006).

2. *Id.* at 194, 203.

3. *See id.* at 195–96 (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.

or group may never be able to file suit, but must seek relief through arbitration instead.⁴ Many adhesion contracts, and contracts between more equal parties, contain arbitration clauses,⁵ and the Supreme Court has mandated the enforcement of arbitration clauses in a broad variety of contexts.⁶ Some argue that this is a positive development favoring low-cost, efficient resolution of disputes,⁷ while others argue that claimants in some types of arbitration are deprived of necessary due process.⁸ Lawlessness is a concern because it suggests that arbitration can be used to circumvent legal protections designed to aid one of the parties or to further public policy.⁹

Building on Drahozal's work, Mark Weidemaier's 2012 article explores four different types of arbitration, including labor arbitration, to determine that "the evidence provides little support for the view that arbitrators and judges engage in qualitatively different kinds of decision-making or opinion-writing."¹⁰ Nearly half of the labor awards in Weidemaier's study cite to a judicial opinion or arbitration award and, although only 14.9% cite only to judicial opinions, a higher

4. STEPHEN J. WARE & ARIANA R. LEVINSON, *PRINCIPLES OF ARBITRATION LAW* 3–4 (2017).

5. *Id.* at 3–4; FOLBERG ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* 544, 562–63 (2d ed. 2010).

6. FOLBERG ET AL., *supra* note 5, at 551; *see, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (upholding clause barring classwide arbitration); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (upholding arbitration clause under federal law in light of state-law challenge); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268–69, 282 (1995) (upholding arbitration clause under the Federal Arbitration Act's interstate commerce provision); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (subjecting age discrimination claim to mandatory arbitration clause); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (upholding clause on arbitrating statutory claims); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) ("[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . .").

7. *See* David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 *STAN. L. REV.* 1557, 1578 (2005).

8. *See* Kathryn A. Sabeth & David C. Vladeck, *Contracting (Out) Rights*, 36 *FORDHAM URB. L.J.* 803, 830 (2009) (discussing how arbitration disproportionately benefits defendants); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 *IND. L.J.* 239, 241–42 (2012) (asserting that through removing process costs, primarily by limiting discovery, arbitration promotes claim suppression).

9. *See* Drahozal, *supra* note 1, at 190.

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

percentage cite to both judicial opinions and arbitral awards.¹¹ His study also found that labor arbitration may form its own system of precedent. Specifically, “[l]abor arbitrators cite past awards more frequently, and in greater numbers, than arbitrators in the other regimes, and labor arbitrators often justify their decisions by citing *only* other arbitration awards.”¹² Thus, his study suggests that while all arbitrators generally follow the law expressed in judicial opinions, labor arbitrators are more likely to consider arbitral awards than judicial decisions.

There is a long-standing debate in the labor arbitration field about whether arbitrators should rely on legal authority.¹³ Consistent with already articulated concerns about lawlessness, some scholars have argued that labor arbitrators have a duty to consider and follow external authority and to render decisions that are consistent with the law.¹⁴ At the same time, other preeminent labor arbitrators have long argued that arbitrators should not consider authority external to the governing contract (i.e., the collective bargaining agreement), especially when external authority conflicts with the mandate of the contract.¹⁵ In the labor arbitration community, this debate is known as the Howlett-Meltzer debate, after the two arbitrators who initially presented the cogent arguments on each side in 1967.¹⁶ In the years since, scholars have articulated refined positions, and some have argued that the rise in employment laws has made citation to external authority in labor arbitration awards unavoidable.¹⁷

11. *Id.* at 1111, 1114 fig.2, 1145 tbl.A-1.

12. *Id.* at 1095.

13. *See infra* Part II.A.

14. *See, e.g.*, Robert G. Howlett, The Arbitrator, the NLRB, and the Courts, in NAT'L ACAD. OF ARBITRATORS, THE ARBITRATOR, THE NLRB, AND THE COURTS: PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING 67, 78–79 (Dallas L. Jones ed., 1967) (stating that arbitrators should decide on statutory issues where relevant instead of being bound by the four corners of the contract).

15. *See, e.g.*, Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. CHI. L. REV. 545, 557 (1967) (stating that an arbitrator commenting on requirements of enacted legislation would exceed the scope of his duties).

16. *See* Philip Baldwin, *The External Debate on External Law in Labor Arbitration: Where We Stand Five Decades After Meltzer v. Howlett*, 16 PEPP. DISP. RESOL. L.J. 31, 31 (2016); Martin H. Malin, *Revisiting the Meltzer-Howlett Debate on External Public Law in Labor Arbitration: Is It Time for Courts to Declare Howlett the Winner?*, 24 LAB. LAW. 1, 5 (2008).

17. *See* Dennis R. Nolan, *Disputatio: “Creeping Legalism” as a Declension Myth*, 2010 J. DISP. RESOL. 1, 11 (arguing that the “enormous outpouring” of post-Civil Rights Act employment legislation made it nearly impossible to avoid conflicts between contracts

Empirical study of labor arbitration like ours can offer a starting point for proposals about whether and how to modify other types of arbitration, such as securities or employment arbitration, to ensure that the law is considered and followed when statutory claims or common law claims are at issue. For instance, if, as our data indicates, labor arbitrators consider external law more often when attorneys represent the parties, then representation could be legislatively required in other settings. If, as after some sifting of our data indicates, labor arbitrators cite external authority more often for statutory claims, examination of external authority and written reasoning could be required for those claims.

Before setting out our detailed empirical findings, we provide background about labor arbitration in Part I. In Part II, we set out the problem arbitrators face of whether to consider external law, detail the debate over whether they should, and report on the few other empirical studies of citation to external authority. In Part III, we describe our research question and methodology, and then report our empirical findings in Part IV before concluding.

I. BACKGROUND

Labor arbitration in the U.S. has a long history, and recent calls to prohibit mandatory adhesive arbitration have generally excluded labor arbitration. This Part briefly explains the history of labor arbitration, the process of the grievance arbitration system, the types of written awards in labor arbitration, and the perception of fairness of their results.

A. *History of Labor Arbitration*

Labor arbitration was used by employers and unions to resolve disputes about the meaning of their collective bargaining agreements long before the more recent rise in arbitration of statutory employment law claims. As early as the 1880s, labor arbitration “was familiar enough . . . to be recognized in the laws of a number of states.”¹⁸ The state laws “simply authorized the courts to appoint local boards of arbitration upon the joint request of employers and employees.”¹⁹ The form of labor arbitration common today, where a neutral umpire decides

and external law); Malin, *supra* note 16, at 15 (stating that arbitrators cannot avoid considering the Family and Medical Leave Act (FMLA)).

18. DENNIS R. NOLAN & RICHARD A. BALES, LABOR AND EMPLOYMENT ARBITRATION IN A NUTSHELL 5 (3d ed. 2017).

19. *Id.*

the dispute, “was routine in the unionized sector of the American economy”²⁰ by 1940, when General Motors and the United Automobile Workers “substantially revised their arbitration procedure.”²¹ Arbitration often substituted for strikes as a way to resolve workplace disputes, leading to less of a breakdown in commerce,²² and also substituted for lawsuits over contractual claims.²³

When employees choose union representation, the union is authorized to bargain with the employer over the terms and conditions of employment.²⁴ The parties negotiate a contract that covers workplace issues such as pay, schedules, attendance, leave, benefits, and non-discrimination.²⁵ The contract is known as a collective bargaining agreement (CBA).²⁶ Most CBAs contain a clause that guarantees that discipline, including discharge, will be only for a just cause.²⁷ Because outside of the union setting most employees are employed at will and can be discharged for any reason or no reason at all, just cause is a significant contractual protection for union-represented employees.²⁸ Labor arbitrators have been settling disputes over workplace grievances and the interpretation of CBAs for hundreds of years as part of a grievance-arbitration system in unionized workplaces.

B. *The Grievance Arbitration System*

Most CBAs also include a grievance arbitration provision.²⁹ The grievance arbitration process is typically designed to resolve workplace

20. *Id.* at 6.

21. *Id.*

22. *Id.* at 5–6 (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).

23. Robert G. Howlett, *The Role of Law in Arbitration: A Reprise*, in NAT'L ACAD. OF ARBITRATORS, DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION: PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING 64, 68–69 (Charles M. Rehmus ed., 1968) (quoting Clyde W. Summers, *Labor Arbitration: A Private Process with a Public Function*, 34 REV. JUR. U.P.R. 477, 494 (1965)).

24. DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW 155 (3d ed. 2011).

25. *Id.* at 183.

26. NOLAN & BALES, *supra* note 18, at 1.

27. WARE & LEVINSON, *supra* note 4, at 218.

28. See RAY ET AL., *supra* note 24, at 33–35.

29. WARE & LEVINSON, *supra* note 4, at 181; see also Mario F. Bognanno et al., *The Conventional Wisdom of Discharge Arbitration Outcomes and Remedies: Fact or Fiction*, 16 CARDOZO J. CONFLICT RESOL. 153, 154 (2014).

disputes efficiently with less formality than litigation.³⁰ Many involve a stepped procedure.³¹ An example of a hypothetical but representative process follows: at the first step of the process the aggrieved employee, the grievant, meets with an immediate supervisor to try to resolve the issue.³² If the issue is not thereby resolved, a shop steward—an employee who volunteers to represent the union, disseminate union communications, foster solidarity, and resolve grievances—files a formal written grievance on behalf of the grievant and discusses the issue with a higher-level supervisor.³³ If that meeting does not resolve the dispute, then the union business representative and a manager meet.³⁴ A business representative is employed by the union to represent the employees in contract negotiations and the grievance arbitration system.³⁵ Finally, the company president and union president meet.³⁶ If the dispute is not resolved through these internal steps, which often occur on a tight time frame, then the union can advance the dispute to arbitration.³⁷

Different CBAs provide for different methods of selecting an arbitrator or panel of arbitrators. Some CBAs provide for use of a service provider, such as the American Arbitration Association (AAA) or the Federal Mediation and Conciliation Service (FMCS), to select an arbitrator or a panel of three arbitrators.³⁸ The service provider gives the parties a list of names,³⁹ and the parties indicate their preferences, which the service accounts for in assigning an arbitrator.⁴⁰ Some CBAs may provide that the parties obtain a list from a service provider, but then take turns striking arbitrators from the list until one arbitrator remains.⁴¹ CBAs can specify the names of several arbitrators and the parties may rotate through them or pick by striking arbitrator

30. RAY, ET AL., *supra* note 24, at 290 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57–58 (1974)).

31. WARE & LEVINSON, *supra* note 4, at 206.

32. WARE & LEVINSON, *supra* note 4, at 206.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*; see also Douglas E. Ray, *Protecting the Parties' Bargain After Misco: Court Review of Labor Arbitration Awards*, 64 IND. L.J. 1, 1 n.2 (1988).

38. WARE & LEVINSON, *supra* note 4, at 207–08.

39. *Id.* at 207.

40. *Id.* at 208.

41. *Id.*

names for each dispute.⁴² CBAs might also specify one particular arbitrator for all disputes, and some may simply provide for the parties to pick an arbitrator on a case by case basis.⁴³

CBAs may contain an additional step before arbitration, which is the joint arbitration board.⁴⁴ This board is usually composed of an equal number of employer or industry representatives and union representatives.⁴⁵ They are normally not attorneys.⁴⁶ If the dispute is resolved by the joint arbitration board, the decision is binding as an arbitration award.⁴⁷ In some CBAs the joint arbitration board constitutes the final step of arbitration.⁴⁸

Even those arbitrators who are selected using a service provider or are included as a named arbitrator or panel of arbitrators in a CBA may not have JDs.⁴⁹ Some have PhDs in labor relations or related fields, while some have accrued expertise working in a particular unionized industry.⁵⁰

C. Labor Awards and the Perceived Fairness of Labor Arbitration

Just as the level of formality of judicial opinions varies from court to court and judge to judge, the level of formality of labor awards varies

42. *Id.* at 207–08.

43. *See id.* at 208 (stating that because arbitration is contractual, CBAs can specify a variety of processes for selecting an arbitrator).

44. *See, e.g.*, Cemetery Stone Handlers, Local No. 106, 1954 Lab. Arb. LEXIS 55, at *3 (1954).

45. *See, e.g.*, Drywall Tapers v. Xtreme Drywall & Acoustics, No. 16-CV-5172, 2017 WL 3088912, at *2 (S.D.N.Y. May 8, 2017); Cemetery Stone Handlers, 1954 Lab. Arb. LEXIS 55, at *3.

46. *See generally* Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 255 n.83 (2002) (“Non-lawyers have a long history of serving as arbitrators in this country.”).

47. *See, e.g.*, Drywall Tapers, 2017 WL 3088912, at *2. *But see* Cemetery Stone Handlers, 1954 Lab. Arb. LEXIS 55, at *3–4 (finding a joint board decision unenforceable where a party had right to invoke arbitration thereafter).

48. *See, e.g.*, Drywall Tapers, 2017 WL 3088912, at *2 (noting that the CBA at issue contained no right to appeal).

49. Michel Picher, Ronald L. Seeber & David B. Lipsky, *The Arbitration Profession in Transition: A Survey of the National Academy of Arbitrators*, in NAT'L ACAD. OF ARBITRATORS, ARBITRATION 2000: WORKPLACE JUSTICE AND EFFICIENCY IN THE TWENTY-FIRST CENTURY: PROCEEDINGS OF THE FIFTY-THIRD ANNUAL MEETING 12 (Steven Briggs & Jay E. Grenig eds., 2001) [hereinafter NAT'L ACAD. OF ARBITRATORS, ARBITRATION 2000] (stating that 61.4% of NAA arbitrators in 1999 had a law or JD degree).

50. *See id.*

across arbitrators. Many arbitrators who are members of the National Academy of Arbitrators (NAA) or who appear on the rosters of service providers author written opinions supporting their award in each case.⁵¹ They often follow a traditional format where they begin by stating the issue, describe each party's position and arguments on the issue, discuss the reasons supporting their resolution, and conclude with the award, which specifies who prevails and what remedy, if any, is awarded.⁵² Some arbitrators, however, will write shorter opinions and awards.⁵³ Joint arbitration boards may announce awards orally and memorialize them in a short document or letter.⁵⁴

Whatever the process, it is worth noting that recent calls to prohibit adhesive arbitration have generally excluded labor arbitration, which is often perceived to be fairer than employment arbitration. For example, both the Arbitration Fairness Act⁵⁵ and the more recent Restoring Justice for Workers Act⁵⁶ proposed a prohibition on enforcement of pre-dispute arbitration agreements in the employment and consumer settings.⁵⁷ Despite the concern that arbitration fails to provide adequate

51. AM. ARBITRATION ASS'N, LABOR ARBITRATION RULES 17 (2013), <https://www.adr.org/sites/default/files/Labor%20Rules.pdf> [<https://perma.cc/3FWT-MCY2>] ("The parties shall advise the AAA whenever they do not require the arbitrator to accompany the award with an opinion."); Weidemaier, *supra* note 10, at 1102.

52. See JAY E. GRENIG & ROCCO M. SCANZA, FUNDAMENTALS OF LABOR ARBITRATION 75 (2011); see, e.g., Pub. Sch. Emps. of Wash. v. W. Wash. Univ. (2007) (Duffy, Arb.), <http://www.duffyadr.com/pdf/decision1a.pdf> [<https://perma.cc/6WRN-N7XP>]; Int'l Bhd. of Teamsters, Local 305 v. Unified W. Grocers, Inc. (2007) (Duffy, Arb.), <http://www.duffyadr.com/pdf/decision2.pdf> [<https://perma.cc/U45Q-FQHG>]; Attachment to Complaint, Am. Postal Workers Union v. United States Postal Serv., No. 05-1430, 2006 WL 2787836 (D.D.C. Sept. 26, 2006), <https://www.bloomberglaw.com/product/blaw/document/XH92302TG091V8JO6VOUDFURO8?documentName=1.pdf&fmt=pdf>.

53. In our data set, 26% of awards decided by a single neutral arbitrator selected without assistance of a service provider included some explanation of their thinking but did not include a full opinion. Of the awards decided without assistance of a service provider (which includes joint boards and panels of neutral arbitrators), 31% included some explanation of their thinking but did not include a full opinion.

54. See, e.g., Attachment to Counterclaim at 28, 31, 34, 37, 40, 43, 46, 49, 52, Merryman Excavation, Inc. v. Int'l Union of Operating Eng'rs, Local 150, No. 06-C-5160, 2010 WL 187241 (N.D. Ill. Jan. 14, 2010), <https://www.bloomberglaw.com/product/blaw/document/X3JRS7P5O5193E8HMP4OMG18D21?documentName=8.xml>.

55. S. 2591, 115th Cong. (2018).

56. H.R. 7109, 115th Cong. (2018).

57. S. 2591 § 402(a); H.R. 7109 § 402(a)(1)-(2).

protection for workers, both of these proposed federal laws exclude labor arbitration from their scope. This exclusion is no mere oversight; both explicitly permit arbitration provisions in CBAs 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.⁵⁸ The exclusion of labor arbitration from the prohibition indicates general satisfaction with the use of labor arbitration to resolve some workplace disputes, yet it also reflects concern or dissatisfaction with the use of labor arbitration to enforce discrimination and other constitutional and statutory claims.

II. THE EXTERNAL AUTHORITY DILEMMA

Labor arbitrators are faced with a basic choice between restricting their analysis to interpreting the CBA on its own terms⁵⁹ or considering additional authority.⁶⁰ For example, given that many employment law claims involve statutes, arbitrators might wish to consult and cite to them. Common examples of applicable federal employment law statutes include the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Fair Labor Standards Act.⁶¹ In fact, a debate among labor arbitrators has long raged over whether they should consider statutes, particularly to ensure that their decisions comply with governing law.⁶² Generally, if a CBA contains an anti-discrimination clause, a worker can both grieve a discriminatory discharge as a contract violation and bring an employment discrimination suit based on a statutory violation.⁶³ Since the Supreme Court’s decision in *14 Penn Plaza v. Pyett*⁶⁴ in 2009,

58. S. 2591 § 402(b)(2); H.R. 7109 § 402(d)(2). By inclusion of this provision, the legislation would overturn *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251 (2009).

59. See Meltzer, *supra* note 15, at 557.

60. See Howlett, *supra* note 14, at 78–79.

61. See Malin, *supra* note 16, at 4–7, 15.

62. *Id.* at 5–6.

63. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51–52 (1974) (stating that both courses of action “have legally independent origins and are equally available to the aggrieved employee”).

64. 556 U.S. 247 (2009).

CBAs can clearly and unmistakably waive the right to go to court and require the statutory claim be brought in arbitration.⁶⁵

A labor arbitrator might consider other sources of law, such as administrative regulations, or court decisions interpreting a statute or common law.⁶⁶ These sources can assist the arbitrator with both statutory and non-statutory claims. Furthermore, the arbitrator might consult or cite one or more secondary sources to edify her understanding of governing legal principles.

External authority can be useful outside the context of statutory claims. For example, labor arbitrators might look at external authority for guidance on how to interpret or otherwise give meaning to a certain CBA provision, such as a good faith or just-cause requirement.⁶⁷ Or labor arbitrators might look at external authority because the CBA specifically incorporates external law or a choice-of-law provision.⁶⁸

A. *The Debate over the Binary Choice*

Labor arbitrators have long debated the relevance of external law to their decisions. The disagreement crystallized in a debate between Bernard Meltzer and Robert Howlett at the NAA annual meeting in 1967.⁶⁹ Meltzer called for arbitrators to interpret the contract, without regard to external law, in cases where there is “an irrepressible conflict” between the CBA’s requirements and those of external law.⁷⁰ In other

65. *Id.* at 251 (2009). An area ripe for further research would be to update the findings of this Article with more recent awards to determine if *Pyett* had any significant impact on the citation of external authority by labor arbitrators.

66. See Margaret Oppenheimer & Helen LaVan, *Arbitration Awards in Discrimination Disputes: An Empirical Analysis*, 34 *ARB. J.* 12, 13 (1979); see also Benjamin W. Wolkinson & Dennis H. Liberson, *The Arbitration of Sex Discrimination Grievances*, 37 *ARB. J.* 35, 43–44 (1982) (analyzing the congruency between decisions of arbitrators, the courts, and the EEOC in sex discrimination cases).

67. Cf. Meltzer, *supra* note 15, 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 NAT’L ACAD. OF ARBITRATORS, *ARBITRATION 2004: NEW ISSUES AND INNOVATIONS IN WORKPLACE DISPUTE RESOLUTION: PROCEEDINGS OF THE FIFTY-SEVENTH ANNUAL MEETING* 185, 188 (Charles J. Coleman ed., 2005) (footnote omitted) (“Everyone seems to agree, including the Supreme Court, that an arbitrator may look to the law for guidance in interpreting a contractual provision.”).

68. See Wolkinson & Liberson, *supra* note 66, at 44.

69. See Baldwin, *supra* note 16, at 31.

70. Meltzer, *supra* note 15, at 557.

words, “respect the agreement and ignore the law.”⁷¹ For an arbitrator to do otherwise would require exceeding the granted contractual authority to interpret the contract,⁷² and it would potentially require nonlawyers to interpret the law.⁷³ Finally, Meltzer reasoned that if arbitrators considered the law in cases where the law appeared to conflict with the requirements of the contract, “they would be impinging on an area in which courts or other official tribunals are granted plenary authority,” rendering “limited judicial review” wholly inappropriate.⁷⁴

Howlett argued, in contrast, that arbitrators should consider external law in addition to the contract language in order to avoid issuing awards that require unlawful action.⁷⁵ Some background about the National Labor Relations Act⁷⁶ (NLRA) and the National Labor Relations Board (NLRB) is necessary to fully appreciate Howlett’s argument. The NLRA prohibits employers and unions from committing unfair labor practices.⁷⁷ For instance, an employer cannot discriminate against an employee for engaging in union activity or collective action to improve working conditions,⁷⁸ and employers must bargain in good faith with the union before making changes to working conditions.⁷⁹ A CBA may, and often does, contain parallel protections, such as a clause prohibiting anti-union discrimination.⁸⁰ Alternatively, sometimes the CBA limits legal protections, such as by permitting an employer to change certain working conditions without bargaining with the union.⁸¹ In these circumstances, a single factual dispute can give rise to both a grievance under the CBA and an unfair labor practice charge filed with the NLRB.⁸²

Howlett’s article presented at the twentieth annual NAA meeting suggested that arbitrators should probe for statutory NLRA issues that

71. *Id.*

72. *Id.*

73. *Id.* at 558.

74. *Id.* at 558–59.

75. Howlett, *supra* note 14, at 78–79; *see also* Howlett, *supra* note 23, at 69 (“As a substitute for the courts, [arbitrators] apply the law as well as the language of a document being construed or interpreted.”).

76. 29 U.S.C. §§ 151–69 (2018).

77. *See* § 158.

78. § 158(a)(1), (3).

79. § 158(a)(5).

80. WARE & LEVINSON, *supra* note 4, at 182.

81. *See* RAY, *supra* note 24, at 305–06 (4th ed. 2014).

82. *Id.*

need resolution.⁸³ Howlett reasoned that while “in theory” the roles of the arbitrator and the NLRB are “mutually exclusive,” in reality “‘disputes are often difficult to classify’ and in some controversies a ‘blurred line . . . often exists.’”⁸⁴ He argued that arbitrators are bound by the law, and that all contracts include “all applicable law.”⁸⁵ If an award fails to consider the external law that circumscribes CBA’s, it risks resulting in an error.⁸⁶ Howlett was unconcerned with the prospect of nonlawyers addressing legal issues; after all, many NLRB agents who must interpret and apply the law are not attorneys.⁸⁷

In a follow-up paper, Howlett argued that, as to non-NLRA legal issues, arbitrators have the time and energy to research the law and their expertise in labor disputes makes them more knowledgeable than judges.⁸⁸ Moreover, while labor arbitration is viewed as a substitute for a strike, it is also a “substitute for the courts.”⁸⁹ If involving arbitrators in legal decisions results in more extensive judicial review of arbitral decisions (traditionally limited to lack of jurisdiction, fraud, or corruption), Howlett embraced the change to prevent mistakes.⁹⁰

B. *The Proposed Middle Ground*

Soon after this debate took shape, Richard Mittenthal proposed a “middle ground” position⁹¹—that an award may “*permit* conduct forbidden by law but . . . not *require* conduct forbidden by law.”⁹² He began by explaining that where the parties have incorporated statutory provisions into their contract, an arbitrator’s proper response is to refer to the relevant legislation.⁹³ In addition, when a CBA uses general language, an arbitrator should consider relevant materials such as a

83. Howlett, *supra* note 14, at 92.

84. *Id.* at 70 (quoting *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 268–69 (1964)).

85. *Id.* at 83.

86. *Id.*

87. *Id.* at 105.

88. Howlett, *supra* note 23, at 68.

89. *Id.* at 68–69 (quoting Clyde W. Summers, *Labor Arbitration: A Private Process with a Public Function*, 34 REV. JUR. U.P.R. 477, 494 (1965)).

90. *Id.* at 73.

91. Richard Mittenthal, *The Role of Law in Arbitration*, in NAT’L ACAD. OF ARBITRATORS, DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION: PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING, 42, 42.

92. *Id.* at 50.

93. *Id.* at 42–43.

statute.⁹⁴ If terms of the CBA are vague, the arbitrator should interpret them in a way that harmonizes the contract with the law.⁹⁵

However, Mittenthal refuted Howlett's claim that the law is implied in every CBA. First, he asserted that that premise rests on a fiction, because judges first determine the meaning of a contract and only then fashion the remedy to comply with law.⁹⁶ Second, arbitrators derive their authority from the parties' contract and not from public law, as judges do, and so should follow the intent of the parties over the requirements of the law.⁹⁷ Reference to governing law could prove particularly problematic where the CBA makes no mention of potentially conflicting law.⁹⁸ Mittenthal argued that in these cases the arbitrator should be able to resolve the contractual issue without consideration of the law.⁹⁹

Consider, for example, a dispute where the CBA requires seniority in a layoff based on actual time worked but governing law requires seniority for veterans during a layoff. Under Mittenthal's approach, the arbitrator would deny the veteran's grievance because the employer had followed the CBA, and the veteran could pursue his statutory remedy separately in federal court.¹⁰⁰

Despite this conclusion, Mittenthal stopped short of agreeing with Meltzer that an arbitrator should follow only the contract and ignore the law.¹⁰¹ Pragmatically, parties can pick arbitrators with legal expertise when law is an issue, quashing Meltzer's concern that arbitrators lack legal expertise.¹⁰² Moreover, Mittenthal asserted that ignoring the law undermines the contract because contracts routinely are formed with reference to external law.¹⁰³ Parties generally "do not wish to be bound by an invalid provision" and often include a separability or saving clause in their CBA.¹⁰⁴ Furthermore, wholly ignoring legal mandates potentially invites noncompliance with the award (on the part of an

94. *Id.* at 43.

95. *Id.*

96. *Id.* at 43–44.

97. *Id.* at 46.

98. *Id.* at 50.

99. *Id.* at 54.

100. *Id.* at 54–55.

101. *Id.* at 48–49.

102. *Id.* at 48.

103. *Id.* at 49.

104. *Id.* at 49. These clauses direct the separation of any unlawful provision from the agreement and the enforcement of the remaining lawful portions. *Id.*

employer who is reluctant to violate the law),¹⁰⁵ and such noncompliance interferes with parties' desire that arbitration awards be final and binding.¹⁰⁶ For example, in the scenario described above, if the company had retained the veteran, and the non-veteran with more seniority had grieved, it would be problematic for the arbitrator to strictly follow the CBA thereby requiring the employer to violate the veteran-preference law.

C. Others Weigh In

This debate has continued to the present. David Feller supports Meltzer's view, arguing that "[e]xternal law is irrelevant even where the collective bargaining agreement has terms that look very much like a statute."¹⁰⁷ Ted St. Antoine also sides with Meltzer,¹⁰⁸ but he acknowledges that "[c]ases of a truly *irreconcilable* conflict between contract and law are probably quite rare."¹⁰⁹ He reasons that court decisions do not "*prohibit* arbitrators from looking at external law in their decisions" but rather prohibit "relying solely on external law instead of the contract."¹¹⁰ Indeed, one of the few grounds upon which a court can reverse a labor arbitration award is where the award is not grounded in the language of the CBA.¹¹¹

In contrast, Marty Malin has sided with Howlett.¹¹² He argues that because of developments since the 1967 debate, arbitrators must be able to, and should, rely on external public law.¹¹³ Malin discusses three relevant developments, the first being that "a significant minority" of courts now require employees to rely on their CBA's grievance and

105. *Id.* at 50.

106. *Id.*

107. David E. Feller, *Arbitration and the External Law Revisited*, 37 ST. LOUIS U. L.J. 973, 975 (1993).

108. Theodore J. St. Antoine, *The Use and Abuse of Precedent in Labor and Employment Arbitration*, 52 U. LOUISVILLE L. REV. 431, 438 (2014) [hereinafter St. Antoine, *Use and Abuse of Precedent*]; see also Theodore J. St. Antoine, *Presidential Address: Contract Reading Revisited*, in NAT'L ACAD. OF ARBITRATORS, *ARBITRATION 2000*, *supra* note 49, at 1, 15–16 (asserting that an arbitrator should follow the contract rather than external law where a conflict between the two arises).

109. St. Antoine, *Use and Abuse of Precedent*, *supra* note 108, at 439.

110. *Id.* at 440.

111. *Id.* at 439–40.

112. See generally Malin, *supra* note 16, at 3 (urging courts to endorse Howlett's position on enforcing arbitration awards that rely on external law).

113. *Id.* at 14 (emphasizing how changes in employment law and labor arbitration have spurred the need to rely on external law).

arbitration procedure to bring public law claims.¹¹⁴ Second, even more courts are relying on an arbitration award “unfavorable to the employee as a basis for granting summary judgment against the employee in subsequent public law claims litigation.”¹¹⁵ Finally, following its enactment in 1993, labor arbitrators must now consider the FMLA.¹¹⁶ The FMLA grants a right to leave for a serious health condition and prohibits employers from using the leave adversely in employment actions. Accordingly, arbitrators frequently resolve disputes over discipline or discharge resulting from attendance infractions and must consider plans that are required to comply with the FMLA.¹¹⁷

Dennis Nolan agrees with Malin that today arbitrators simply cannot ignore the law.¹¹⁸ Parties “incorporated statutory law into their agreements either expressly or impliedly.”¹¹⁹ In more instances, both parties, rather than just one, “began to argue legal questions,” making it much more difficult for an arbitrator to refuse to consider external law.¹²⁰

D. The Most Recent Proposal

Most recently, Philip Baldwin argued that Meltzer’s position has become indefensible in light of new developments in labor and employment law.¹²¹ Baldwin points to a “proliferation of employment law statutes,”¹²² a shift in Supreme Court jurisprudence toward strongly deferring to arbitrators’ statutory interpretations,¹²³ and an increase in the proportion of arbitrators who are educated in law.¹²⁴ Baldwin aims to help labor arbitrators by “articulating an approach that allows for measured consideration of external law to an extent that was wholly

114. *Id.*

115. *Id.* at 14–15.

116. *Id.* at 15.

117. *Id.* at 25–26.

118. Nolan, *supra* note 17, at 11 (“[T]he enormous outpouring of laws regulating employment . . . made it almost impossible to avoid potential conflicts between contracts and external law.”).

119. *Id.*

120. *See id.* at 11–12.

121. Baldwin, *supra* note 16 at 31.

122. *Id.* at 31, 39 (stating many employment statutes had either just been promulgated, or had yet to be promulgated, at the time of the 1967 debate).

123. *See id.* at 40 (noting that the perception of arbitral incompetency that supported the “traditional” approach is no longer endorsed by the Court).

124. *See id.* at 46 (highlighting that studies have found that labor arbitrators are as competent as judges to handle legal questions).

unorthodox” at the time of the Meltzer-Howlett debate.¹²⁵ Baldwin proposes four guidelines for labor arbitrators to use to “reconcile the collective bargaining agreement with external law”:¹²⁶

1. Labor arbitrators should consider external law rather than interpreting the CBA in isolation.¹²⁷
2. Labor arbitrators should interpret the CBA using an extremely strong “presumption of legality.”¹²⁸
3. Labor arbitrators should not consider external law *sua sponte*, instead addressing external law only when raised by a party.¹²⁹
4. Labor arbitrators should not assume every requirement of an external law is incorporated in the CBA.¹³⁰

Baldwin’s article explains that even when a CBA “expressly incorporate[s] a statute,” arbitrators should assume only the broad goals of the statute, and not every detail of the statute, have been incorporated.¹³¹ Arbitrators should not require illegal conduct, but should rely on the CBA over external law if the CBA permits, rather than requires, illegal conduct.¹³²

E. The Inquiry into What Labor Arbitrators Actually Consider

While labor law scholars and labor arbitrators have extensively debated whether arbitrators should consider external authority, much less has been written about whether labor arbitrators *do* actually consider external authority. And much of what has been written on the latter inquiry is not recent.

In a 1975 study, Harry T. Edwards sent a questionnaire to the members of the NAA, and 200 of the 409 recipients responded.¹³³ The

125. *Id.* at 31.

126. *Id.* at 50.

127. *See id.* at 51–52 (noting that arbitrators must supplement the contract with external law to carry out the parties’ true intentions).

128. *See id.* at 52 (asserting that arbitrators should take extra care to issue an award that complies with the law).

129. *Id.* at 54 (noting that the arbitrator as a neutral adjudicator should wait for a party to raise the issue, even if he or she notices a potential conflict).

130. *Id.* at 56.

131. *Id.* (quoting Richard I. Bloch, *The Changing Face of Just Cause: One Standard or Many?*, in NAT’L ACAD. OF ARBITRATORS, ARBITRATION 2000, *supra* note 49, at 37).

132. *Id.* at 57 (noting that if illegal conduct is simply permitted rather than required, the arbitrator “is not forcing anyone to be a two-time loser or law breaker”).

133. Harry T. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in NAT’L ACAD. OF ARBITRATORS, ARBITRATION—1975: PROCEEDINGS OF THE TWENTY-EIGHTH ANNUAL MEETING 59, 70 (Barbara D. Dennis & Gerald G. Somers eds., 1976).

study “attempted to determine . . . the extent to which arbitrators are competent to handle ‘legal’ issues in employment discrimination cases.”¹³⁴ The survey found that 77% of the respondents had read judicial opinions involving Title VII discrimination claims, 16% had never read judicial opinions involving discrimination claims, and 7% declined to answer.¹³⁵ Additionally, 52% indicated that they read “labor advance sheets, a type of secondary source,¹³⁶ to keep abreast of current developments under Title VII,” while 40% indicated they did not, and 8% declined to answer.¹³⁷

Overall, the survey found that close to two thirds of arbitrators who responded believe that an arbitrator’s role in a contractual grievance dispute does not include applying or interpreting statutes.¹³⁸ Nearly all of the subset of respondents “conceded that there were certain exceptions to this rule.” Of the subset, 85% agreed that an arbitrator may consider public law “to avoid compelling” a party “to do something that is *clearly* unlawful.”¹³⁹ Ninety-five percent “agreed that an arbitrator” may refer to governing law if “the parties have intentionally adopted a contract clause . . . with the object of incorporating the body of public law into the contract.”¹⁴⁰ Additionally, 97% agreed that an arbitrator should “should consider public law when the parties have, by submission, conferred jurisdiction” upon the arbitrator “to decide the contract issue in light of the applicable federal or state law.”¹⁴¹ One-third of the overall respondents believed that “a collective bargaining agreement must be read to include by reference all public law applicable thereto.”¹⁴²

In 1979, Margaret Oppenheimer and Helen LaVan examined labor arbitration awards in disputes involving employment discrimination.¹⁴³ The data set consisted of all employment “discrimination cases from

134. *Id.* at 71.

135. *Id.*

136. Advance sheets would summarize recent court and administrative decisions. See UNIV. OF IDAHO COLL. OF LAW, *Employment & Labor Law*, <https://www.uidaho.edu/-/media/UIDaho-Responsive/Files/law/library/legal-research/guides/employment-labor-law.pdf> [<https://perma.cc/6URW-XKD2>] (describing advance sheets as a common feature of employment and labor law reporters).

137. *Id.*

138. *Id.* at 79.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Oppenheimer & LaVan, *supra* note 66, at 12.

March 1973 through November 1975” published in the Bureau of National Affairs (BNA) *Labor Arbitration Reports*, a total of 86 cases.¹⁴⁴ Arbitrators cited “federal or state law or EEOC guidelines” 60% of the time, judicial decisions 40% of the time, and other arbitration awards 35% of the time.¹⁴⁵ Of these three categories of citation to external authority, 17% of the arbitrators cited all three in their awards, while an additional 28% cited two of the three.¹⁴⁶ 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.¹⁴⁷ There was no significant relationship between these types of cases and citation to judicial decisions and other arbitration awards, except for a low correlation to an award of back pay.¹⁴⁸ Although roughly two-thirds of the arbitrators were lawyers, it had no effect on the variables used to reach a decision and was not related to the means by which arbitrators justified their decisions.¹⁴⁹ The article concludes that arbitrators who are attorneys may not be more qualified to hear discrimination cases based on a legal background alone, and that other qualifications such as “familiarity with the industry and discrimination law . . . may be more relevant.”¹⁵⁰

Benjamin Wolkinson and Dennis Liberson reviewed labor arbitration cases involving certain types of sex discrimination cases from the BNA *Labor Arbitration Reports* from 1975 to 1980.¹⁵¹ They concluded that many arbitrators adopted Howlett’s position “that every agreement implicitly incorporated all applicable law”¹⁵² and cited to judicial decisions and EEOC guidance.¹⁵³ The article 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.”¹⁵⁴

144. *Id.* at 13.

145. *Id.*

146. *Id.*

147. *Id.* at 15.

148. *Id.*

149. *Id.* at 16.

150. *Id.*

151. Wolkinson & Liberson, *supra* note 66, at 36.

152. *Id.* at 44.

153. *Id.*

154. *Id.*

Perry A. Zirkel examined “a random sample of 100 arbitration awards” from the BNA Labor Arbitration Reports from 1972 to 1982.¹⁵⁵ He found that only 5% of awards involved “interpretation of legal and other precedent.”¹⁵⁶ These five awards did not correlate with arbitrators being attorneys or representatives being attorneys.¹⁵⁷ He determined that, in addition to these five cases, in seven other cases, court decisions and other authority played a secondary role, and he determined that court decisions or a statute played a secondary role in two additional cases.¹⁵⁸ He concluded that “external law and arbitral authority played at least a secondary role in almost half . . . of the cases.”¹⁵⁹ He also concluded that “a solid third of the cases do not involve any trace of the law, even merely in terminology or technique.”¹⁶⁰

Patricia Greenfield examined arbitrators' treatment of external law in 106 arbitration awards decided between 1980 and 1985.¹⁶¹ The cases were selected because at least one of the parties had filed an unfair labor practice charge, meaning the statute at issue was the NLRA.¹⁶² Her study found that fifty-five of the 106 cases “cite statutory issues” in the discussion section of the opinion, rather than only in the section reciting the parties' positions.¹⁶³ Arbitrators were more likely to cite statutory issues when the arbitrator was aware of a related unfair labor practice charge and/or when at least one of the parties argued a statutory issue.¹⁶⁴ In addition, the type of case significantly impacted the likelihood of the arbitrator addressing a statutory issue.¹⁶⁵ In cases alleging discrimination against an employee because of union activity, termed “Section 8(a)(3) cases” because of the applicable section of the NLRA, arbitrators were more likely to address statutory issues.¹⁶⁶ They

155. Perry A. Zirkel, *The Use of External Law in Labor Arbitration: An Analysis of Arbitral Awards*, 1985 DET. C.L. REV. 31, 38.

156. *Id.* at 41.

157. *Id.* at 42.

158. *Id.* at 43.

159. *Id.* The sample size was 44.

160. *Id.* at 45.

161. Patricia A. Greenfield, *How Do Arbitrators Treat External Law?*, 45 INDUS. & LAB. REL. REV. 683, 687 (1992).

162. *Id.* at 684.

163. *Id.* at 688–89.

164. *Id.* at 690.

165. *Id.* at 691 (differentiating between 8(a)(3) charges of discrimination on the basis of union activity and 8(a)(5) charges of failure to bargain).

166. *Id.*

did so in thirty-five of forty-nine, or 71.4%, of the Section 8(a)(3) cases.¹⁶⁷

Arbitrators were significantly less likely to cite statutory issues in cases alleging a refusal by an employer to bargain with the union, termed “Section 8(a)(5) cases.”¹⁶⁸ Arbitrators addressed the statutory issue in only twelve of the thirty-one, or 38.7%, of the Section 8(a)(5) cases.¹⁶⁹ Of the fifty-five cases raising statutory issues, fourteen cited NLRB decisions,¹⁷⁰ which would be approximately 25% of the cases raising statutory issues and approximately 13% of the total 106 awards studied. One of the primary conclusions of the article is that the majority of the awards studied did not “create a record adequate for review” by the NLRB, which had deferred its decision to the arbitrator.¹⁷¹ Despite some exceptions, many arbitrators and NLRB Administrative Law Judges dispose of cases after failing to address statutory issues sufficiently, if at all.¹⁷²

Dale Allen and Daniel Jennings surveyed the 641 members of the NAA in 1987 and received 296 usable questionnaires.¹⁷³ The questionnaire asked the arbitrators to rank the importance of different decision-making criteria.¹⁷⁴ Of the seven factors, arbitrators ranked state and federal law lowest.¹⁷⁵ Allen and Jennings noted 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.”¹⁷⁶ Further, 88% of the arbitrators do not consult published labor awards “in the majority of decisions,” and 64% “state that the use of precedent is not significant except for about one-third of the cases.”¹⁷⁷

Ted St. Antoine reported the results of a survey of NAA arbitrators about their use of external authority in a 2004 article.¹⁷⁸ He opened the article with the still valid observation that, “Meltzer and . . . Howlett

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 692.

171. *Id.* at 693.

172. *Id.*

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

174. *Id.* at 428.

175. *Id.* (noting that many respondents had difficulty ranking this factor).

176. *Id.*

177. *Id.*

178. St. Antoine, *supra* note 67, at 189.

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?"¹⁷⁹ 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.¹⁸⁰ St. Antoine requested via the NAA's unofficial email list that the approximately 240 members complete a questionnaire, and fifty-two members responded.¹⁸¹ The results indicated that:

- About half of the arbitrators will cite external law only if the parties have cited legal authorities.¹⁸²
- About 30% of the arbitrators will cite external law, even if the parties have not, "when it seems especially pertinent."¹⁸³
- Around 60% of respondents noted 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."¹⁸⁴
- When the contract and external law irreconcilably conflict, "almost twice as many arbitrators said they would follow the contract, unless the parties instructed them otherwise, as said they would follow the law."¹⁸⁵
- Almost 60% "would *not* order a party to violate external law as part of their award."¹⁸⁶

These responses indicate labor arbitrators' varied approaches to resolving disputes with external law.

A 2005 article by Malin and Jeanne Vonhof addresses how arbitrators should deal with parties' expectations that prior FMLA-protected leave should not be subject to attack in an arbitration regarding a later attendance violation.¹⁸⁷ While Malin and Vonhof do not specifically address how often arbitrators cite external authority, such as the

179. *Id.* at 185.

180. *Id.* at 186.

181. *Id.* at 189.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 190.

186. *Id.* at 189–90.

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

FMLA, they note that “parties’ expectations are evolving” because of the “pervasive influence of the FMLA.”¹⁸⁸ Further, they noted 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 contract as written and what the law requires.¹⁸⁹ Malin also noted 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.”¹⁹⁰

In a 2012 article, Mark Weidemaier explored how often labor awards published by BNA cited external authority.¹⁹¹ He examined 208 randomly selected awards¹⁹² and found that approximately 48.6% of the awards cited to either a judicial opinion or another arbitration award.¹⁹³ Of those arbitrators, 76.2% cited “at least one arbitration award,” 35.6% cited arbitration awards but not judicial opinions, and 14.9% cited only judicial opinions.¹⁹⁴ Looking more closely at a subset of twenty-five awards, the study indicates that the average number of citations to 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.¹⁹⁵ The awards cited an average of “two or more unique precedents per page of legal analysis.”¹⁹⁶ Of these citations, an average of 2.3 “discussed the cited source in some detail or explicitly indicated reliance on the source.”¹⁹⁷ In other words, the arbitrators “did more than pepper their awards with string citations.”¹⁹⁸

In a 2013 article, Levinson explored how often labor arbitration awards in discrimination cases published by BNA *Labor Arbitration Reports* relied on different forms of external authority.¹⁹⁹ From a total of 111 awards involving statutory claims, forty “cited only the relevant

188. *Id.* at 200.

189. *Id.*

190. Malin, *supra* note 16, at 26 (quoting FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 520 (Alan Myles Rubin ed., 6th ed. 2003)).

191. Weidemaier, *supra* note 10, at 1101.

192. *Id.* at 1104–05.

193. *Id.* at 1111.

194. *Id.* at 1126.

195. *Id.* at 1120–21.

196. *Id.* at 1121.

197. *Id.* at 1121–22.

198. *Id.* at 1121.

199. See Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims*, 46 U. MICH. J.L. REFORM 789, 830 (2013).

statute or no legal authority.²⁰⁰ Seventy-one cited to external authority other than the statute involved.²⁰¹ Fifty-two cited judicial opinions, thirteen cited EEOC guidelines or regulations, and twenty-six cited other arbitral awards.²⁰² Seventeen awards cited a treatise or other secondary source.²⁰³ Thus, approximately 64% of the awards cited to external legal authority of some kind, and 47% to judicial opinions.

III. AN EMPIRICAL STUDY OF ARBITRATION AWARDS

In this article, we investigate whether labor arbitrators actually are considering statutes and other external authority, and to what extent. Then, to the extent possible, we explore whether they did so in certain types of cases. For instance, are arbitrators more likely to consider external authority in cases involving statutory claims than those for breach of the CBA? Are they more likely to consider external authority in cases involving breach of just-cause provisions than in other breach of CBA claims?

Perhaps attributes of the particular arbitrator affect whether or not they consider external authority. Some labor arbitrators do not have a JD, so might not consult external law because they do not have formal legal training. While data on the topic is sparse, as of 2000, 61.4% of NAA arbitrators had JDs,²⁰⁴ and a study of eighty-one labor arbitrators' awards issued between 1982 and 2005 found approximately 64.2% had JDs.²⁰⁵ Our data set includes decisions made by joint arbitration boards, which are groups of union and employer representatives, who are unlikely to have JDs.²⁰⁶ While we cannot ascertain precisely from the awards whether a particular arbitrator does or does not have a JD, we

200. *Id.* at 831.

201. *Id.* at 830.

202. *Id.*

203. *Id.*

204. Picher, Seeber & Lipsky, *supra* note 49, at 12; *see also* Allen & Jennings, *supra* note 173, at 423 (reporting that a 1987 survey of 296 NAA members found that 51% of respondents possessed a law school education); J. Timothy Sprehe & Jeffrey Small, *Members and Nonmembers of the National Academy of Arbitrators: Do They Differ?*, 39 *ARB. J.* 25, 27-28 (1984) (reporting that a 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).

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

206. *See* Nolan-Haley, *supra* note 46, at 255 n.83.

know the service provider, such as AAA or FMCS, and therefore whether there is a higher likelihood a particular arbitrator has a JD.²⁰⁷

Relatedly, perhaps having attorney representation of the parties in the arbitration increases the likelihood of the arbitrator citing external authority. Attorneys may be more likely than other union or management representatives to cite external authority to the arbitrator, and so the arbitrators are more likely to cite it themselves.

To address these and other questions, we created a new database of labor arbitration awards. This is our first article examining the awards in the newly created database. Prior studies examining labor arbitration awards and their use of external authority have primarily used awards published in *BNA Labor Arbitration Reports*.²⁰⁸ Other studies have surveyed members of the NAA.²⁰⁹ We intend to use the data from our distinct set of awards to supplement the findings of others based on different data sets. Our data set includes AAA awards, awards from other services providers, and those from other selection processes. While some of the cases may have been published by BNA, some most likely were not.²¹⁰

Our labor arbitration awards are drawn from the Public Access to Court Electronic Records federal court electronic docket (PACER). 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.

A research assistant examined each docket in all of the resulting cases from the years 2000 to 2006 and the docket in each fourth case in our results for the years 2007 to 2011 to ascertain whether the case

207. Because our data set contains the names of the arbitrators, a follow-up study could research whether each arbitrator had a JD and compare the use of external law specifically to educational background.

208. See, e.g., Levinson, *supra* note 199, at 810; Oppenheimer & LaVan, *supra* note 66, at 13.

209. See, e.g., Edwards, *supra* note 133, at 70; Picher, Seeber & Lipsky, *supra* note 49.

210. BNA only publishes awards that arbitrators send them with the permission of both parties. Levinson, *supra* note 199, at 811.

involved an arbitration award and whether the arbitration award at issue in the case was available.²¹¹ Due to limited time and resources, we used sampling for results from 2007 to 2011 because there were over 200 cases in each of those years. A case was considered off point if it involved arbitration but not an award, such as a case where arbitration was compelled by the court's decision, or a case that involved arbitration of a non-employment-related issue. The research assistants coded each available award in the on-point cases for different information, including citation to external authority. For this article, we narrowed the database to include only labor arbitration awards, excluding employment arbitration awards, by including only those cases where the party opposing the employer²¹² was a union or where the claim type was a breach of a CBA. Our new database of labor arbitration awards consists of 602 awards.

No dataset of awards is perfectly representative. Because arbitration is a private process, obtaining all labor arbitration awards for a certain period or obtaining a truly randomly-selected sample is not possible. Instead, if we want to provide any empirical evidence about labor arbitration, and arbitration more generally, we must use a non-representative sample and acknowledge the limitations of the data set. Because arbitration plays an increasingly important role in legal dispute resolution, we believe having empirical data and acknowledging its limitations is preferable to having no data at all, and that research using such data can still yield valuable results.

Our new data set overcomes some of the acknowledged limitations of the samples of arbitration awards used by previous authors, but has limitations of its own. Data published by BNA *Labor Arbitration Reports* has been a main source used in the study of labor arbitration.²¹³ But BNA only publishes awards when the arbitrator obtains the permission of the parties and sends BNA the award.²¹⁴ Some arbitrators elect not

211. 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.

212. Per our coding, the union might also oppose a trust fund or other entity, guaranteeing that we had all arbitration awards involving unions.

213. See, e.g., Levinson, *supra* note 199, at 811 (using BNA reports for a study on employment discrimination claims in labor arbitration); Oppenheimer & LaVan, *supra* note 66, at 13 (using BNA reports for a study on discrimination disputes in labor arbitration).

214. Levinson, *supra* note 199, at 811.

to publish their awards or to publish only certain awards.²¹⁵ Unlike BNA, our database includes awards that the parties did not elect to publish, including awards by joint arbitration boards. Our data come from PACER, a system for all federal district court cases in the nation that provides access to every document electronically filed in each case.²¹⁶ Our database does not include any awards that were not involved in a court case, indicating that we do not have many of the awards where both parties were satisfied and complied with the award. We do, however, have a significant number of uncontested awards. Some of our awards were confirmed without opposition so the parties were satisfied. Other awards were used as support for an argument, sometimes by other parties, and so likely were complied with by the parties involved in the arbitration without litigation.

Many parties file a case in federal district court when they are dissatisfied with an award in an effort to vacate it, although the standard for vacating an arbitration award is a difficult one to satisfy.²¹⁷ The narrow grounds upon which a labor award can be vacated are when: (1) “the award results from procedural unfairness, such as fraud, corruption, or bias,” (2) the arbitrator clearly exceeded the 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.”²¹⁸ Because our data set likely overrepresents awards with which one party was dissatisfied, we might adjust our expectations accordingly. For instance, perhaps awards that cite external authority are less likely to be contested because the parties perceive them as more authoritative—or perhaps they are more likely to be contested because the parties believe external law should not have been relied on.

Our data set includes a substantial number of awards that the parties did not dispute. It contains 258 cases, approximately 42.86% of the cases, where the award was not challenged.²¹⁹ Sometimes unions make a regular practice of confirming labor awards because they are not self-

215. *Id.*

216. PACER, <https://www.pacer.gov> [<https://perma.cc/U2YG-QE4P>].

217. WARE & LEVINSON, *supra* note 4, at 190.

218. *Id.*

219. These cases were each coded as 0=no challenge indicated in response to the query for CHALLENGE=Grounds for challenge to arbitrator’s award. The resolution in these cases ranges from settlement to non-merits dismissal, confirmation of an award by default judgment, or confirmation of an award through a mechanism other than default judgment.

enforcing.²²⁰ In these cases, the union files in federal district court to confirm the award, and the employer either does not appear, so that a default judgment issues, or the employer stipulates to the confirmation.²²¹ Our data set also includes cases where one of the parties cites to an arbitration award as relevant authority. The prior award could deal with the same fact pattern and parties involved in the litigation. Or the award could simply be relevant to the court case but be between completely different parties than those involved in the court case, in the same way a decision from another district court, a state court, or an administrative agency might be relevant to the case. In the latter category of cases, arbitrators use the award in a manner similar to other persuasive authority, and the parties to the arbitration did not dispute the outcome of the award. In the former cases, the parties did not directly dispute the award either, which we know because no one is moving to vacate it; rather, they may disagree over whether the court should rule similarly to how the arbitrator ruled in the former dispute. These cases that use an award to support an argument include cases brought for unlawful employment discrimination under Title VII and other anti-discrimination statutes, wage and hour cases, FMLA cases, and a broad range of other types of labor and employment law disputes, such as those involving whistleblowers, wrongful discharge in violation of public policy, breach of duty of fair representation, due process, intentional infliction of emotional distress, 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. So, our data may demonstrate what was true of labor awards in the mid-2000s more reliably than what was true in the early 2000s.

We plan to write additional articles further examining the use of external law in the awards in the new dataset. One will examine the use of prior labor awards, and another will explore the relationship between the citation to external authority in the awards to the outcomes in the court litigation. A third will address the general issue of the lawlessness of arbitration.

220. See WARE & LEVINSON, *supra* note 4, at 136.

221. *Id.* at 125–26 n.169, 136, 153 n.79 (giving examples of various arbitration outcomes).

IV. THE RESEARCH FINDINGS

This Part first sets out our findings about how many awards cite to external authority, specifically statutes, cases, administrative authority, or secondary sources.²²² It then looks at whether certain attributes of the arbitration proceedings correlate with the citation to external authority. Finally, it discusses whether certain types of labor arbitration disputes are correlated more highly with citation to external authority.

A. Rates of Citation to External Authority

This section examines the number of awards that cite to external authority.

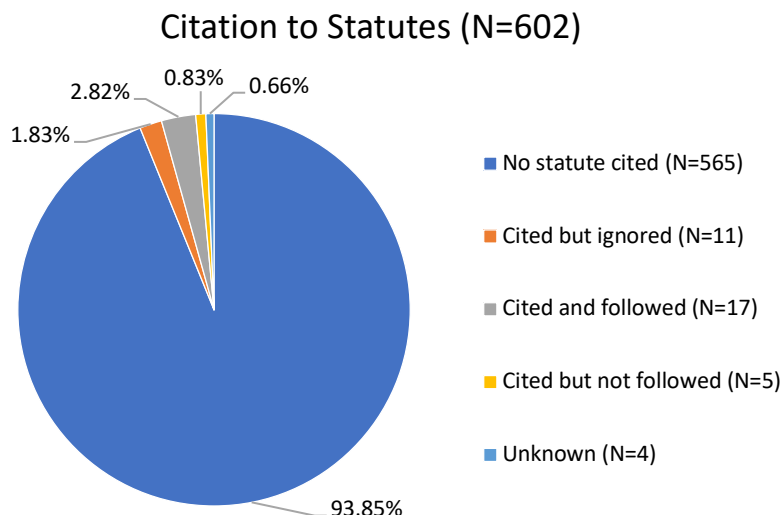
1. Citation to statutes

Of the 602 awards in the database, only seventeen cite to, or rely on, a statute. This is approximately 2.82% of the cases. Eleven additional awards mention a statute but do not address it in the analysis. Five awards explicitly decline to address a statutory issue. Overall, 565 awards, approximately 93.85%, do not mention a statute *at all*. Figure 1 represents the percentage breakdowns between awards that mention, cite to, or rely on a statute and those that do not.²²³

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

223. Four awards are not included in the count because we have only a part of the award, and so cannot know whether statutes were cited in the portions of the awards we do not have.

Figure 1



These findings are consistent with the survey responses of arbitrators indicating that in most cases they need not consider a statute, often because only a contractual breach is at issue.²²⁴ Despite the acknowledgement by labor arbitration authorities that reliance on statutes has increased over the years,²²⁵ our data indicate that during the 2000s, in the vast majority of cases, arbitrators did not cite to statutes. While other studies of awards have found much higher percentages of awards relying on statutes, those studies exclusively addressed situations of prohibited discrimination, such as on the basis of race or sex,²²⁶ or cases known to have raised an NLRA issue.²²⁷

224. See Allen & Jennings, *supra* note 173, at 428 (reporting responses to arbitrator questionnaires); St. Antoine, *supra* note 67, at 189–90 (examining arbitrators' questionnaire responses on using external law in determinations).

225. See Malin & Vonhof, *supra* note 187, at 232 (discussing the impact of the FMLA on labor arbitration); Wolkinson & Liberson, *supra* note 66, at 44 (analyzing arbitrators' willingness to incorporate Title VII in award determinations).

226. See Oppenheimer & LaVan, *supra* note 66, at 13 (finding 60% of 86 BNA labor arbitration awards from 1970 to 1975 that dealt with discrimination cited a federal or state statute or EEOC guidelines).

227. See Greenfield, *supra* note 161, at 689 (finding 51.9% of 106 labor arbitration awards related to NLRB cases from 1981 to 1985 cited "relevant statutory provisions" from the NLRA).

Our data also indicate that in very few awards, just five in total, arbitrators explicitly followed the Meltzer approach and declined to address a statutory issue.²²⁸ In another handful of cases, eleven awards mention a statute but do not apply it. One of the parties likely mentioned a statute, but the arbitrator did not address it in the award's reasoning. One possible reason is that the arbitrator decided not to apply external authority without explicitly so stating, but another is that the arbitrator could decide the case without needing to reach the statutory issue or that a party cited the statute as persuasive authority on a non-statutory issue.²²⁹

2. *Citation to cases*

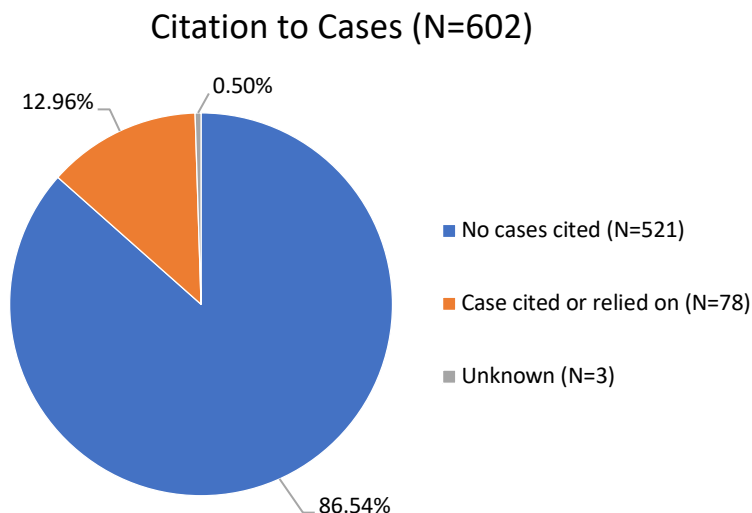
As shown in Figure 2, seventy-eight, or approximately 12.96%, of the awards cite or rely on at least one judicial opinion.²³⁰

228. See Meltzer, *supra* note 15, at 557 (asserting that arbitrators should follow the contract over external law).

229. An interesting follow-up would be to pull and read these eleven awards to determine why the arbitrators did not explicitly address the statute.

230. The coding for cases indicated whenever a case was cited or relied on by an arbitrator. For example, if an arbitrator used a well-known case name, such as *McDonnell Douglas*, that would be included in the count. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The same is true for administrative sources and secondary sources. We use the word "cite" as shorthand throughout the Article for the findings reporting whether awards cited or relied on these sources. Three awards are not included in the count because we have only a part of the award, and so cannot know whether opinions were cited in the portions of the awards we do not have.

Figure 2



We were initially surprised by the relatively low number of awards that cite to a court opinion because we had anticipated a percentage closer to 25% based on Weidemaier's study of 208 awards published in *BNA Labor Arbitration Reports*.²³¹ That study reported that 101 of the 208 cases (48.6%) cited to either an arbitration award or judicial opinion.²³² 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.²³³ The difference may reflect that published awards are more likely than unpublished awards to cite to judicial opinions or may be caused by different types of cases in the two data sets. Weidemaier's data set included 137 discipline or discharge cases (approximately 65.87%) and seventy-one other cases.²³⁴ Our data set includes 208 discipline or discharge cases²³⁵ (approximately 34.55%) and 394 other cases, and,

231. See Weidemaier, *supra* note 10, at 1112-14.

232. *Id.* at 1145 tbl.A-1.

233. See *id.*

234. See *id.* at 1105 tbl.1.

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

surprisingly, we did find that cases asserting a breach of a just-cause provision correlate with higher citation to external authority.²³⁶

The awards in our database that cite judicial opinions cite an average of 3.68 opinions each, with a median citation of two cases. The average is consistent with Weidemaier's finding that twenty-five BNA labor award cases citing external authority cited an average of 3.9 judicial opinions.²³⁷

Fifty of the seventy-seven,²³⁸ approximately 64.9%, cite more than one judicial decision, while twenty-seven, 35%, cite only one judicial opinion. The highest number of judicial opinions cited by an award in our dataset is twenty. We believe these statistics are consistent with Weidemaier's conclusion, based on a close review of citation practices, that citation to judicial opinions, while not widespread, "plays more than a trivial role" in labor arbitration.²³⁹

3. *Citation to administrative authority*

Figure 3 shows that of the 602 awards, twenty-three awards, approximately 3.82%, cite to administrative authority, such as EEOC regulations and NLRB decisions.²⁴⁰

236. See *infra* Table 9.

237. Weidemaier, *supra* note 10, at 1120, 1121 tbl.3.

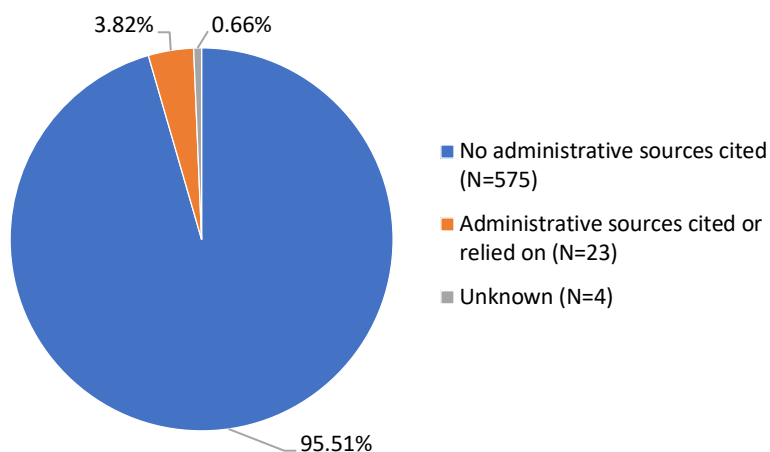
238. The number of awards that cite a judicial opinion is seventy-seven, rather than seventy-eight, because there is one partial award citing at least one judicial opinion where the actual number of opinions cited in the full award is unknown. This award is excluded from the count.

239. Weidemaier, *supra* note 10, at 1121.

240. Four awards are not included in the count because we have only a part of the award, and so cannot know whether administrative sources were cited in the portions of the awards we do not have.

Figure 3

Citation to Administrative Sources (N=602)



Scholars recognize that citation of administrative authority is an important indicator, like citation of statutes and judicial opinions, of whether arbitrators consider external authority.²⁴¹ Administrative authority relates to a wide variety of employment-related disputes in a similar way to judicial opinions, and our study provides a new data point as to how often labor awards cite to administrative authority.

Only two prior studies have looked specifically at the rate at which labor arbitration awards cite to administrative authority. Greenfield's study found that fourteen of the 106 awards, approximately 13%, cited to NLRB decisions,²⁴² and Levinson's study found that thirteen of 111 awards, approximately 11.71%, cited to EEOC guidelines.²⁴³ These studies focused on cases alleging discrimination or a violation of the NLRA, likely accounting for our finding that a lower percentage of labor awards, drawn from all types of cases, cite to or rely on administrative authority.²⁴⁴

241. See, e.g., Oppenheimer & LaVan, *supra* note 66, at 13 (presenting findings that 60% of arbitration awards in their study cited statutes or EEOC guidelines); Wolkinson & Liberson, *supra* note 66, at 44 (noting it is "not unusual" for arbitrators to adopt decisions of the EEOC in sex discrimination arbitration).

242. Greenfield, *supra* note 161, at 689 tbl.1, 692.

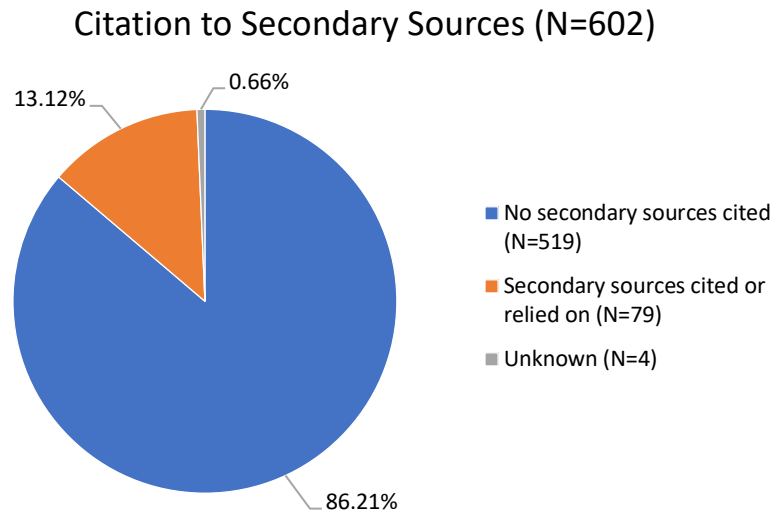
243. Levinson, *supra* note 199, at 830.

244. See Greenfield, *supra* note 161, at 689 tbl.1, 692; Levinson, *supra* note 199, at 830.

4. Citation to secondary sources

As shown in Figure 4, of the 602 awards, seventy-nine awards, approximately 13.12%, cite to a secondary source.²⁴⁵

Figure 4



Again, only two studies examine the use of secondary sources by labor arbitrators. Edwards' survey found that 52% of labor arbitrators reviewed labor advance sheets.²⁴⁶ Levinson found that seventeen of 111 labor arbitration awards, approximately 15.32%, cited secondary sources.²⁴⁷ That study focused on discrimination cases, and so the finding that a similar percentage of the current database of awards, of which many are solely breach of contract cases unrelated to any statutory claims,

245. Four awards are not included in the count because we have only a part of the award, and so cannot know whether secondary sources were cited in the portions of the awards we do not have.

246. Edwards, *supra* note 133, at 71. Advance sheets would summarize recent court and administrative decisions. See UNIV. OF IDAHO COLL. OF LAW, *Employment & Labor Law*, <https://www.uidaho.edu/-/media/UIIdaho-Responsive/Files/law/library/legal-research/guides/employment-labor-law.pdf> [https://perma.cc/6URW-XXD2] (describing advance sheets as a common feature of employment and labor law reporters).

247. Levinson, *supra* note 199, at 830.

has a similar percentage of awards with citations to secondary sources is interesting.²⁴⁸

We included citation to secondary sources because some courts rely on secondary sources for established principles of law, and arbitrators likely do also. We hypothesize 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.

We note that for the focus of this article on whether arbitration awards cite to authority external to the contract, as relevant to the debate over whether arbitrators should follow the law and not just the contract, we chose to focus on citation to statutes, judicial opinions, and administrative authority, rather than to other labor arbitration awards.²⁴⁹ The citation to secondary sources variable may be overinclusive because it includes secondary sources that summarize labor arbitration awards as well as those that summarize statutory law, including judicial opinions and administrative authority.

5. *Overall citation to external authority*

Of the 602 awards, ninety-nine awards, approximately 16.4%, cite to at least one statute, judicial opinion, or administrative authority. 503 awards, more than 83%, cite *no* external authority, other than possibly a secondary authority.

Our finding of 17% is substantially different from previous authors' findings. In 1979, Oppenheimer and LaVan found that 60% of labor arbitration awards in her sample cited a statute or regulation,²⁵⁰ and Greenfield found that 51.9% of labor arbitration awards addressed statutory issues.²⁵¹ Even Zirkel's study, which was not limited to awards involving discrimination, concluded that a third of the cases did not involve external authority,²⁵² a much lower percentage than the more than 83% we find cite no external authority. Again, because those studies focused on discrimination and cases alleging an NLRA violation,²⁵³ the lower number in our study may be due to the larger number of cases in the data set that are purely contractual disputes

248. *Id.*

249. *Cf.* Zirkel, *supra* note 155, at 31 nn.8–9.

250. Oppenheimer & LaVan, *supra* note 66, at 13.

251. Greenfield, *supra* note 161, at 689.

252. Zirkel, *supra* note 155, at 45.

253. Greenfield, *supra* note 161, at 689; Oppenheimer & LaVan, *supra* note 66, at 13.

that do not relate to statutory law. The 17% appears to be in line with the survey findings that most labor arbitrators do not find statutory law relevant in most disputes,²⁵⁴ and that some do not apply statutory law unless asked to do so by the parties.²⁵⁵ As reported, some likely do not consider external authority even in situations where the CBA conflicts with the law.²⁵⁶

Of the awards citing external authority—at least one statute, judicial opinion, or administrative authority—the majority cite only judicial opinions. Of the ninety-nine awards, sixty-seven awards, approximately 67.7%, cite only one or more judicial opinions, 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, and 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 point to Meltzer as the winner of the debate, at least as a positive matter; most arbitrators do not cite to external authority in the majority of the cases in our data set. Looking at sheer numbers does not disclose the subset of the cases, if any, in which the law would have required a different outcome than the contract, and does not answer the overarching question of whether arbitrators should consider external authority. There are only five cases in our data set where we know that the arbitrator explicitly declined to follow a statute mentioned in the award, and only another

254. Allen & Jennings, *supra* note 173, at 428 (stating that “[i]n the majority of arbitration cases,” the law has no bearing on the dispute, and many neutrals believe they should “restrict themselves merely to examination of the labor agreement”); Edwards, *supra* note 133, at 79 (“Nearly two thirds of the responding arbitrators . . . believed that an arbitrator has no business interpreting or applying a public statute in a contractual grievance dispute.”); St. Antoine, *supra* note 67, at 189 (explaining that around 60% of respondents noted 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”).

255. See Edwards, *supra* note 133, at 79 (“97[%] . . . agreed that an arbitrator should consider public law when the parties have, by submission, conferred jurisdiction upon [the arbitrator] to decide the contract issue in light of the applicable federal or state law.”); St. Antoine, *supra* note 67, at 189 (stating that roughly half of responding arbitrators cite to external law only if the parties have cited legal authorities).

256. St. Antoine, *supra* note 67, at 190 (stating that “almost twice as many arbitrators said they would follow the contract [when law and contract irreconcilably conflict] . . . as said they would follow the law,” unless otherwise instructed by the parties).

eleven mention a statute that was not relied on. So, we cannot conclude that arbitrators follow Meltzer “hands down.”

Indeed, awards are citing external authority in a significant minority of cases. And further examination of the data may disclose that the cases that do not cite external authority are the type that focus on contractual claims that are unrelated to statutory law and that the awards may use a sensible reasoning process to interpret the CBAs without citation to external authority. The data regarding the relatively low percentage of awards that cite external authority does not upend Weidemaier’s conclusion, upon his closer look at a subset of the awards, that “the awards do not remotely resemble what one would expect from a system of ad hoc, purely discretionary adjudication.”²⁵⁷ A closer analysis and further study are clearly warranted.

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

We are aware that some possibly large percentage of labor arbitrators do not have JDs,²⁵⁸ and that it may be less likely for someone who is not trained as an attorney to cite external authority. Only one study of labor arbitration, the Oppenheimer and LaVan study of discrimination cases from 1979, looked for a correlation between arbitrators having JDs and citing to external authority, and found that “[w]hether the arbitrator was a lawyer” was not “significantly related to whether the arbitrator cited law, judicial decisions, arbitration, or past practice.”²⁵⁹

Our data reflect whether there was a service provider, and, if so, which provider, for each award. A certain portion of labor arbitrations are decided by joint grievance boards, an arbitrator named in the contract, or an arbitrator selected by parties.²⁶⁰ These arbitrators are more likely to be laypeople with experience in the industry than JDs.²⁶¹ On the other hand, many labor arbitrations take place under the auspices of the AAA or the FMCS, and these services are likely to have a higher number of arbitrators who have JDs on their lists, though not

257. Weidemaier, *supra* note 10, at 1121.

258. Picher, Seeber & Lipsky, *supra* note 49, at 12 (finding 61.4% of NAA arbitrators in 1999 had a law or JD degree).

259. Oppenheimer & LaVan, *supra* note 66, at 16.

260. *See supra* Section I.B.

261. *See generally* Nolan-Haley *supra* note 46, at 255 n.83.

all have JDs.²⁶² Our data on service providers can serve as an imprecise proxy for whether an arbitrator has a JD.²⁶³

This section first sets out the data about whether using a service provider at all or using a particular service provider correlates with citation to external authority. Second, it examines whether arbitrations where one or both parties are represented by attorneys are more likely to result in awards that cite external authority.

1. Service provider relation to citation to external authority

Overall, the data set contains seventy cases decided by a AAA-appointed arbitrator, and eighty-seven cases decided by a FMCS-appointed arbitrator. The data set also contains one case decided by a JAMS-appointed arbitrator, thirty-eight cases decided by a state service-appointed arbitrator, one court-appointed arbitration, two National Mediation Board appointed arbitrators, and one arbitrator appointed by a privately-owned service in Hawaii. The data set contains 402 awards where no service provider is indicated.

Table 1 shows the breakdown of these numbers for service providers as between cases citing to external authority (a statute, judicial opinion, or administrative authority) and those citing no external authority.²⁶⁴

262. Weidemaier, *supra* note 10, at 1136 n.186.

263. We have all the names of the arbitrators, and a fruitful area for future research would be to look up each arbitrator and whether they have a JD to test the hypothesis that those with JDs are more likely to cite external authority.

264. The three partial awards that do not contain any citation to authority in the portions available are included in this count as citing no external authority.

Table 1

	External Authority		No External Authority	
No Service Provider (n=402)	47	47.47%	355	70.58%
AAA (n=70)	20	20.20%	50	9.94%
FMCS (n=87)	21	21.21%	66	13.12%
JAMS (n=1)	1	1.01%	0	0.00%
State Service (n=38)	8	8.08%	30	5.96%
Court ordered/annexed (n=1)	1	1.01%	0	0.00%
National Mediation Board (n=2)	1	1.01%	1	0.20%
Dispute Prevention & Resolution, Inc. (n=1)	0	0.00%	1	0.20%
Total (n=602)	99	100.00%	503	100.00%

Of 503 awards that cite no external authority (statute, judicial opinion, or administrative authority), 355 awards, approximately 70.58%, are awards with no service provider indicated. In sixty-six of the awards, approximately 13.12%, the FMCS was used, and in fifty awards, approximately 9.94%, the AAA was used.

Of the ninety-nine awards that cite to some type of external authority (statute, judicial opinion, or administrative authority), forty-seven awards, approximately 47.47%, have no service provider indicated. Twenty-one awards, approximately 21.21%, are FMCS cases, and twenty cases, approximately 20.20%, are AAA cases.

The data set has a large proportion of AAA cases and non-AAA cases, both those that do and do not cite to external authority. It includes FMCS awards, which, like AAA, has experienced arbitrators on the roster,²⁶⁵ but it also includes cases where no service provider was used, which should include some less-experienced arbitrators and joint

265. See *Information on Joining the Arbitration Roster*, FED. MEDIATION & CONCILIATION SERV., <https://www.fmcs.gov/services/arbitration/information-joining-arbitrator-roster> [<https://perma.cc/Q2SH-4Q6C>] (requiring arbitrators to submit recent arbitration award decisions or complete a class to become a FMCS arbitrator); AM. ARBITRATION ASS'N, *Qualification Criteria for Admittance to the AAA Labor Panel*, https://www.adr.org/sites/default/files/document_repository/Labor_QualificationsCriteria_AAAPanel.pdf [<https://perma.cc/D3C5-N7V8>].

arbitration boards of non-attorneys who work in the industry, as well as more experienced arbitrators.

When comparing the seventy AAA awards to the eighty-seven FMCS awards, we find no statistically significant difference between the rate at which the awards cite external authority, approximately 28.57% and 24.14% respectively. When comparing the 402 awards in the data base where no service provider is indicated to those that were authored by an arbitrator assigned by the AAA or FMCS, we find that a statistically significant greater number of awards authored by those assigned by one of the service providers cite to external authority. Only approximately 11.69% of the awards without a service provider cite to external authority.

Table 2 reflects the numbers and percentages of awards that do and do not cite external authority for the cases where no service provider was indicated in comparison to the cases with AAA-appointed and FMCS-appointed arbitrators. A two-tailed T-test run on STATA was used to determine whether the differences were statistically significant for each of the findings reported in this Article.

Table 2

	External Authority		No External Authority	
	No Service Provider (N=402)	47	11.69%	355
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.				

Approximately 30.10% of the awards where no service provider was used, 121 of 402 awards, were decided by joint boards or similar groups of industry experts rather than a traditional arbitrator or panel of arbitrators. Of those 121 awards, fifty-two, approximately 43%, contained only the award with no opinion or explanation. In contrast, of those 281 awards decided by a neutral arbitrator or a panel of arbitrators, only

eight, approximately 3%, contained only the award with no opinion or explanation. This difference contributes to the lower likelihood of citation to external authority in the non-administered cases. Even when we compare only the 281 awards decided by an arbitrator or a panel of arbitrators, and exclude the 121 decided by a joint board, the AAA and FMCS-appointed arbitrators are more likely than those not appointed by a service provider to cite external authority, as reflected in Table 3. Forty-five, approximately 16.01% of the awards indicating no service provider cite to external authority, whereas twenty, approximately 28.57% of the AAA awards, and twenty-one, approximately 24.14% of the FMCS awards, cite to external authority, reflecting statistically significant differences.

Table 3

	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).				

The higher rate at which AAA and FMCS-appointed arbitrators cite external authority may reflect that arbitrators with a legal education are more likely than industry experts and other arbitrators, without a J.D., to cite external authority. Other possible explanations for the greater likelihood of citation of external authority in awards indicating AAA or FMCS were used by the parties are the following. The parties using service providers are willing to pay more money, indicated by payment for the service of the provider, and are willing to compensate representatives and the arbitrator for time spent on legal research. The joint boards and some other awards where no service provider is

indicated may be used in situations that are industry and fact-specific or require a quick decision (such as in hours or days rather than weeks or months), so that legal authority reasonably is routinely not considered. The ethical and other requirements for appearing on the roster of a service provider may mean that those arbitrators are more likely to cite authority than others not bound by such rules or qualifications.²⁶⁶

2. *Attorney representation relation to citation to external authority*

Common sense suggests that awards resulting from hearings where attorneys represent one or more parties might contain more external authority references because attorneys have been trained to cite authority and regularly do so in administrative proceedings and court. They therefore are more likely than non-attorneys to cite statutes, case law, and administrative authority to the arbitrator. One of us, however, predicted no statistically significant differences based on attorney representation similar to the finding that legally trained and non-legally trained arbitrators have no difference in citation practice in discrimination cases.²⁶⁷ Additionally, a past study found that non-attorneys often effectively represented unions in labor arbitration of discrimination claims, which indicates they likely persuasively cite relevant authority.²⁶⁸ The author, who has practiced labor law and read many labor arbitration awards, believed that human resources officers and union business representatives are aware of and competently raise external authority when arguing their cases.²⁶⁹

According to the data, common sense was the better predictor than extrapolating from prior studies. As shown in Table 4, of the 384 awards where at least one party was represented by an attorney,²⁷⁰

266. See *supra* note 265.

267. Oppenheimer & LaVan, *supra* note 66, at 16; see also Zirkel, *supra* note 155, at 41–42 (stating that five awards involving legal authority did not correlate with either arbitrators or representatives being attorneys).

268. Levinson, *supra* note 199, at 846 (“The fact that unions pursued approximately 50[%] of these cases without an attorney indicates that union agents do understand legal claims well enough to pursue them through the grievance and arbitration processes unassisted.”).

269. *Id.* at 789; Ariana R. Levinson, U. LOUISVILLE, <https://louisville.edu/law/faculty-staff/faculty-directory/levinson-ariana> [<https://perma.cc/3LLE-ZYCN>].

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

eighty-three, approximately 21.61% cited to external authority, whereas of the 110 awards where no party was represented by an attorney,²⁷¹ only nine, approximately 8.18%, cited external authority. The difference is statistically significant, indicating the presence of an attorney does correlate with citation to external authority.

Table 4

	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 found that parties' citation to external authority increases the likelihood that an arbitrator will cite to external authority. Edwards' study suggested that, while the large majority of arbitrators believed in theory that they should not consider external authority, 97% agreed that they should consider external authority "when the parties have, by submission, conferred jurisdiction" to do so.²⁷² In other words, when both parties cite applicable law, then the arbitrator should consider it. St. Antoine's survey found that about half of the arbitrators will cite external law only if the parties have cited legal authorities.²⁷³ The current study builds on these findings and suggests that parties are more likely to cite to external authority when they are represented by attorneys, and the likelihood of citation to external authority by arbitrators thereby increases. Other possibilities exist; for instance, perhaps arbitrators cite more external authority when lawyers represent the parties because 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 types of cases in which external authority has relevance to the type of dispute.

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

272. Edwards, *supra* note 133, at 79.

273. St. Antoine, *supra* note 67, at 189.

C. Case Type Relation to Citation of External Authority

This section explores whether the type of case affects the likelihood that arbitrators cite to external authority. First, it discusses whether cases involving statutory issues are more likely to cite to external authority. Second, it breaks down cases by type in a more nuanced way to see if citation to external authority is more likely in certain types of claims than in others.

1. Statutory claims relation to citation to external authority

Because, by definition, a statutory claim involves statutory authority external to the CBA, we predicted that a higher percentage of those cases that do cite or refer to external authority than of those that do not would be statutory claims. Of the ninety-nine awards that cite to external authority, in nine instances, approximately 9.09% of the awards, a party asserted a statutory claim. Of the 503 awards that do not cite to external authority, in thirty-six instances, approximately 7.16% of the awards, a party asserts a statutory claim. As expected, the percent of cases of those that cite external authority where a party asserted a statutory claim is greater than of those that do not cite external authority where a party asserted a statutory claim. Surprisingly, however, the difference is not statistically significant, possibly because of the small number of statutory claims, totaling forty-five. Arbitrators addressing statutory claims are probably more likely than those who do not to cite to external authority.

Arbitrators who are not addressing statutory claims also cite external authority as demonstrated by the ninety-one out of 100 cases citing external authority that do not involve a statutory claim. Approximately, 91% of the cases citing external authority do not address a statutory claim, meaning the large majority of cases citing external authority involve claims of breach of CBA. This finding indicates that in some cases arbitrators are citing external authority as persuasive even when they are not addressing legal claims that depend on external authority.

Table 5 shows the breakdown between the number of cases citing or referring to external authority that involve statutory and non-statutory claims, as compared to the breakdown between the number of cases not citing or referring to external authority that address statutory and non-statutory claims.²⁷⁴

274. The three partial awards that do not contain any citation to authority in the portions available are included in the counts for tables in this section as citing no external authority.

Table 5

	Statutory Claim		No Statutory Claim	
External Authority (N=99)	9	9.09%	90	90.91%
No External Authority (N=503)	36	7.16%	467	92.84%

As shown in Table 6, we also examined the number of statutory claims that cite external authority compared to the number of non-statutory claims that cite external authority. We reasoned that perhaps the lack of a statistically significant difference reflected in Table 3 might be because another attribute, other than statutory claim, also correlated with citation to external authority.

Of the forty-five arbitrations where a party asserted a statutory claim, nine awards, approximately 20.00%, cite to external authority. Of the 557 cases where a statutory claim was not brought, ninety awards, approximately 16.61%, cite to external authority. While again, as expected, external authority is cited more often in arbitrations involving a statutory claim, the difference is not statistically significant, perhaps because of the small number of cases citing external authority, or perhaps because arbitrators are equally likely to cite external authority in discharge, or some other type of arbitration case, as they are in those involving statutory claims.

Table 6

	External Authority		No External Authority	
Statutory Claim (N=45)	9	20.00%	36	80.00%
No Statutory Claim (N=557)	90	16.16%	467	83.84%

Because of the small number of awards addressing a statutory claim (forty-five), we were unable to ascertain whether or not arbitrators of different types of statutory claims, such as Title VII versus ERISA, were more likely to cite external authority. No award citing external authority involved ERISA, however, and twenty-one of those which cite no 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 funds need only to prove the failure to pay and the amount owed, which does not require reliance on authority.²⁷⁵ Indeed, examples in this data set are several cases where a default arbitration award was entered by the arbitrator and at least one case where the employer did not appear, and the arbitrator entered an award based on the evidence provided by the Labor Management Cooperation Committee. As shown in Table 7, when we exclude these twenty-one ERISA cases from the thirty-six awards addressing statutory claims that do not cite authority, the likelihood of arbitrators citing external authority in cases involving statutory claims becomes statistically significant, consistent with our prediction.²⁷⁶

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%

Based on this analysis, we conclude, that labor arbitrators more often cite external authority in cases involving a statutory claim than in those involving a contractual breach. With a case involving a breach of a CBA, arbitrators need not cite legal authority because there is no analogous non-contract claim, particularly because most employees are employed at will without any contractual protections as to their conditions of employment. With a case involving a statutory claim, arbitrators will cite external authority because that type of claim by definition involves a statute and is a type of claim on which courts and administrative agencies will have ruled and provided authority. The analysis also reveals that in a large number of non-statutory cases, arbitrators are going beyond the necessary analysis to cite external authority.

275. See James P. Baker & Emily L. Garcia-Yow, *ERISA's New Playground*, 28 *BENEFITS L.J.* 1, 9 (2015) (alteration in original) (quoting *Heimeshoff v. Hartford Life & Accident Ins.*, 571 U.S. 99, 108 (2013)) (noting that once an ERISA plan is established, "the administrator's duty is to see the plan is 'maintained pursuant to [that] written instrument'").

276. *** Indicates statistically significant difference at the 1% level.

These 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.”²⁷⁷ Yet, in ninety of 557 awards that did not involve a statutory issue, approximately 16.16%, labor arbitrators cited external authority. That is a significant minority, supporting the theory of Mittenthal and, more recently, Malin, that arbitrators must, in some cases, consider external authority.²⁷⁸ The finding also supports St. Antoine’s findings that:

- About half of the arbitrators will cite external law only if the parties have cited legal authorities.²⁷⁹
- About 30% of the arbitrators will cite external law, even if the parties have not, when “it seems especially pertinent.”²⁸⁰
- Almost 60% “would *not* order a party to violate external law as part of their award.”²⁸¹

2. *Type of claims relation to citation of external authority*

We also examined whether certain types of claims, although not statutory, constitute a higher percentage of those cases that do cite to external authority than of those that do not. One of us expected that cases dealing with nondiscrimination provisions would be more likely to cite to external authority than those dealing with the contractually based right of just cause for discipline, for example. A large body of law dealing with Title VII and similar state anti-discrimination laws exists for arbitrators to draw upon;²⁸² whereas there are fewer cases addressing just cause outside of the labor context, and cause in the context of breach of individual contracts is less likely to be interpreted in the same way.²⁸³ Cases dealing with seniority provisions might also

277. Allen & Jennings, *supra* note 173, at 428.

278. Malin, *supra* note 16, at 14; Mittenthal, *supra* note 91, at 42.

279. St. Antoine, *supra* note 67, at 189.

280. *Id.*

281. *Id.* at 190.

282. See MARK A. ROTHSTEIN, ET AL., EMPLOYMENT LAW 859 (8th ed. 2015).

283. Only two U.S. jurisdictions, Montana and Puerto Rico have a good cause rather than an at-will default governing employment. See *id.* (“Montana is unique among the 50 states in its statutory requirement of just cause for termination.”); Fisher Phillips, *Employment Law in Puerto Rico: Employees’ Rights and Employers’ Obligations*, CROSS BORDER EMPLOYER BLOG (Apr. 21, 2011), <https://www.fisherphillips.com/Cross-Border-Employer/Employment-Law-in-Puerto-Rico-Employees-28099-Rights-and-Employer-28099-Obligations> [<https://perma.cc/5HGP-V3SS>] (“Employers in Puerto Rico are required to have ‘just’ or ‘good cause’ to discharge employees hired for an

be more likely to cite external authority to the extent that FMLA leave is implicated.²⁸⁴

As shown in Table 8, overall there were eighty-eight of the ninety-nine awards citing external authority that alleged a breach of a CBA, and 447 of the 503 awards not citing external authority that alleged a breach of a CBA, for a total of 565 breach of CBA cases in the database. We specifically coded for whether the breach alleged was a breach of a just-cause provision, a nondiscrimination provision, or a seniority provision. (The other awards addressed issues such as 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.)

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	28.95%	26	68.42%

Contrary to our expectations, and as shown in Table 9, none of the cases citing external authority involved a non-discrimination provision, and only four of those that did not cite external authority involved a non-discrimination provision. The data does not indicate external authority is more likely to be cited in breach of nondiscrimination clause cases than in other cases. Perhaps employees who are able are electing to bring administrative charges or lawsuits when they are discriminated against rather than pursuing a grievance for breach of a non-discrimination clause. Those cases alleging breach of a seniority clause were also equally likely to cite or not cite external authority, with three of the eighty-eight cases citing external authority involving a breach of a seniority provision, and seventeen of the 477 that did not cite external authority doing so. There was no statistical difference

indefinite period of time . . ."). Every state has an anti-discrimination law similar to Title VII. Rothstein, *supra* note 282, at 194.

284. See Malin & Vonhof, *supra* note 187, at 234.

between the approximately 3.41% and 3.56% of awards in these categories.

As also reflected in Table 9, the cases involving a breach of a just-cause provision were actually a greater proportion of the awards citing external authority than those that did not. One of us had 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. Most employees are employed at-will,²⁸⁵ so the union CBA guarantees a greater right to job security than that available to most other employees. Forty-three of the eighty-eight awards citing external authority, approximately 48.86%, involved a breach of a just-cause provision, while 165 of the 477 awards that did not cite external authority, approximately 34.59%, involved a breach of a just-cause provision. 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. 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, so arbitrators may wish to explain the outcome extremely thoroughly and rely on external authority to do so.

Table 9²⁸⁶

	Just Cause**		Nondiscrimination		Seniority		Other	
External Authority (N=88)	43	48.86%	0	0.00%	3	3.41%	49	55.68%
No External Authority (N=477)	165	34.59%	4	0.84%	17	3.56%	310	64.99%

285. See RAY ET AL., *supra* note 24, at 33–35 (noting that most employees are employed at will and can be discharged for any reason or no reason at all).

286. The totals in Tables 9, 10, 11, and 12 are greater than 565 because some awards addressing a breach of CBA included multiple claims such as a termination without just cause and an additional claim.

We performed additional analyses to be very sure that no correlation between non-discrimination and seniority cases and citation to external authority existed. As shown in Table 10, there was also no statistically significant difference between the rate at which non-discrimination cases and all other claims of breach of collective bargaining agreement cite or refer to external authority. There was also no statistically significant difference between the rate at which seniority cases and all other claims of breach of collective bargaining agreement cite or refer to external authority as shown in Table 11.

Table 10

	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%

Table 11

	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%

As shown in Table 12, additional analyses confirmed that breach of just-cause cases are more likely to cite or refer to external authority than other types of breach of collective bargaining cases. Forty-three of 208 just-cause cases, approximately 20.67%, cite to external authority while only fifty of 372, approximately 13.44%, of other types of breach of CBA cases cite to external authority. The difference is statistically significant at the 5% level.

Table 12

	External Authority**		No External Authority**	
Just Cause (N=208)	43	20.67%	165	79.33%
Other Collective Bargaining Agreement 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.				

We coded for cases that involved an adverse action, where an employee was punished, terminated, suspended, laid off, forced to resign, not promoted, not accommodated, not hired, or denied something to which the employee was entitled. Combined, these totaled 399 of the 602 awards. Seventy-five of the ninety-nine awards that cite external authority involved an adverse action. Of the awards that do not cite external authority, 324 of the 503 involved an adverse action.

We expected a greater percentage of cases citing external authority would involve harassment and refusals to accommodate. There is a wide array of statutory and case law, from Title VII, the ADA, and similar state laws, that can be drawn upon to help determine when harassment and refusals to accommodate are unlawful. Yet, as shown in Table 13, only one of the seventy-five cases citing external authority addressed harassment and only two addressed refusal to accommodate, approximately 1.33% and 1.85% respectively, of the total awards citing external authority. Six of the awards that cite no authority involved harassment, approximately 1.85%, and ten involved a refusal to accommodate, approximately 3.09%. These differences were not statistically significant, suggesting that these case types do not determine whether arbitrators cite external authority.

Table 13

	Harassment		Refusal to Accommodate	
	External Authority (N=75)	1	1.33%	2
No External Authority (N=324)	6	1.85%	10	3.09%

We performed further analyses which confirmed that there is no correlation between either harassment cases or refusal to accommodate and citation or reference to external authority. As shown in Table 14, there is no statistically significant difference between the rate at which harassment cases, approximately 14.29%, and all other adverse action cases, approximately 18.80%, cite or refer to external authority. Similarly, as shown in Table 15, there is no statistically significant difference between the rate at which refusal to accommodate cases, approximately 16.67%, and all other adverse action cases, approximately 18.69%, cite or refer to external authority.

Table 14

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

Table 15

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

CONCLUSION

This Article describes how we have amassed a new data set of labor arbitration awards drawn from the PACER database.²⁸⁷ Any subset of arbitration awards is not representative because the very nature of arbitration is that it is a private alternative to litigation. Unlike court documents, which are tracked and publicly available, an award is often simply sent to the parties, and so is not tracked in any manner and certainly not publicly available. Even the awards tracked by service providers like the AAA are not publicly available, and a researcher must obtain permission from the AAA to view the awards. Our new data set provides an opportunity to analyze hundreds of awards that are not selected from BNA published awards as most prior data sets exploring citation to external authority in labor arbitration awards have been.²⁸⁸ We have examined the awards to contribute to a long-standing debate over whether arbitrators do and should consider authority external to the CBA when deciding labor grievances.²⁸⁹ By extension, the examination of the data also bears on the larger and often-debated issue of whether arbitration is “lawless.”²⁹⁰

The data demonstrates that the overwhelming majority of awards do not cite to external authority, but only a small number of awards explicitly decline to address a statutory issue or do not address a statutory issue raised in the award in passing or by one of the parties.²⁹¹ In our data set, the largest number of awards that cite no external authority, and over 45% of those that do cite external authority, result from processes not administered by a service provider.²⁹² We find that using the AAA or FMCS correlates with a greater likelihood of awards citing to or referencing external authority than awards that results from a non-administrated process.²⁹³ We also find that representation, of one or both parties, by an attorney correlates with a greater likelihood of awards citing to or referencing external authority.²⁹⁴

After extensive analysis, we find the data demonstrates, as anticipated, that awards that address a statutory claim are more likely

287. *See supra* Section IV.

288. *See supra* Section II.E.

289. *See supra* Section III.

290. We address this issue in future articles.

291. *See supra* Section IV.A.1, 5.

292. *See supra* Section IV.B.1.

293. *See supra* Section IV.B.1.

294. *See supra* Section IV.B.2.

than those that do not to cite to or reference external authority.²⁹⁵ The data also indicates that awards addressing claims asserting a breach of a just-cause provision are more likely than other types of contractual claims to cite to external authority.²⁹⁶ While this result was surprising to one of us, one author expected this result, because “just cause” is a rather vague term that can benefit from external meaning and guidance.

In short, our study indicates that labor arbitrators often do not consult external authority. That said, reliance on external authority shows mild indications of nuance, and some factors are more likely to cause arbitrators to cite legal authority than others. Perhaps this nuance reflects the views of those scholars who believe that today’s labor arbitration does not enable or justify the total exclusion of external authority. It does seem, though, that Howlett’s views have, to date, not been fully embraced in the arbitration context we study here.

The new data set will provide an opportunity to examine many other issues raised by labor arbitration and more generally by arbitration, such as whether there is a repeat-player effect, whether attorney representation affects win rates, and whether the arbitrator’s and parties’ gender affects win rates. We will soon publish a second article exploring further the issues the data set raises about potential “lawlessness” in labor arbitration. Thereafter, we plan to write two articles that focus on the use of “precedent”—previous labor arbitration awards—in labor arbitration, and the connection between citation to authority and treatment of the awards by the courts.

295. *See supra* Section IV.C.1.

296. *See supra* Section IV.C.2.