



## Case Western Reserve Law Review

---

Volume 39 | Issue 2

---

1989

# Resolving the Tension: Arbitration Confronts the External Legal System

Sylvester Garrett

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

---

### Recommended Citation

Sylvester Garrett, *Resolving the Tension: Arbitration Confronts the External Legal System*, 39 Case W. Res. L. Rev. 557 (1988-1989)  
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol39/iss2/10>

This Symposium is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# RESOLVING THE TENSION: ARBITRATION CONFRONTS THE EXTERNAL LEGAL SYSTEM

*Sylvester Garrett\**

ONE STATED THEME of this Symposium is that the character of modern grievance arbitration was derived from theory, practice, and procedure put into place by the National War Labor Board (NWLB). The narrower topic assigned to me is "Resolving the Tension: Arbitration Confronts the External Legal System." This evening I would like to address both of these topics from an historical perspective by recollecting some of my experiences and impressions.

Regarding the notion that modern arbitration was derived from NWLB directives, allow me to stress that it is wrong to assume that grievance arbitration was virtually unknown prior to World War II and that it was essentially created by the NWLB. In fact, a number of industries already followed such a procedure. A Board of Conciliation and Arbitration had existed in the anthracite coal industry since about 1910. Long before the War, Impartial Chairmen functioned in the needle and printing trades, the full fashioned hosiery industry, the textile industry, and the mass transit industry. The Railroad Adjustment Board system was established in 1934. By 1938, General Motors had established its umpire system in agreement with the United Auto Workers (UAW). Arbitration was also firmly in place in the West Coast Shipping Industry.

As of December 7, 1941, George Taylor, Harry Millis, John Lapp, William Leiserson, Wayne Morse, and Jacob Billikopf were already well-recognized giants in the field of arbitration. William

---

\* Distinguished Visiting Professor, Indiana University of Pennsylvania; Chairman, Iron Ore Industry/USW Board of Arbitration; Chairman, Arbitration Panel, Newport News Shipbuilding and USWA; Chairman, Region III War Labor Board, 1942-1945. The writer acknowledges with deep gratitude the major contribution of his Associate, Arbitrator Kathleen Doepken, to the research and analysis reflected in this paper.

Simkin, Allen Dash, and David Cole had already launched what were to become illustrious careers. It is also my impression that by this time both the American Arbitration Association (AAA) and the United States Conciliation Service maintained rosters of labor arbitrators.

Clearly, the NWLB did not create grievance arbitration — it simply adopted and nurtured an established institution. The United States Supreme Court decisions in *Lincoln Mills*,<sup>1</sup> the Steelworkers Trilogy,<sup>2</sup> *Boys Market*,<sup>3</sup> and many other cases, including the relatively recent *Misco* decision,<sup>4</sup> have also enhanced the status of grievance arbitration. The National Labor Relations Board (NLRB) decisions in *Spielberg*,<sup>5</sup> *Collyer*,<sup>6</sup> *Olin*,<sup>7</sup> and their progeny have also had this effect. For my purposes, therefore, one significant and basic question for us this evening is: Why did the NWLB, and ultimately the courts and the NLRB, seek so vigorously to promote grievance arbitration?

With respect to external law, a cogent second question is: Once an arbitration award has been issued, how much deference should a reviewing court give to it? This question involves a major aspect of the tension which purportedly exists between arbitration and the external law. Let me confess at the outset that I believe that this relationship generally is *not* confrontational. External law, in balance, tends to support and advance grievance arbitration. One potentially significant area of confrontation, however, involves the scope of judicial review. It is well beyond my present capacity, at least in terms of available time, to critique all of the judicial and NLRB rulings which address this question and provide such a rich field for scholarly review. My more modest hope is to consider a few significant cases and to recall some historical background which may be useful in evaluating the proper scope of judicial review from a practical, rather than a theoretical, perspective.

Returning to the question of why the NWLB, the courts, and

---

1. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

2. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

3. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

4. *United Paperworkers Int'l Union v. Misco, Inc.*, 108 S. Ct. 364 (1987).

5. *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

6. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

7. *Olin Corp.*, 268 N.L.R.B. 573 (1984).

the NLRB sought to promote arbitration, it is my impression that an evolutionary process was at work. Let me reach back to the Fall of 1939 and my first personal exposure to this developing system. On June 1, 1939, William ("Billy") Leiserson became one of the three members of the NLRB, replacing Donald Wakefield Smith. At the time of his selection, Billy was serving with great distinction as Chairman of the National Mediation Board (NMB), and presumably could have stayed there indefinitely. Many of us who were young attorneys at the NLRB in 1939 speculated as to why Leiserson left his comfortable NMB niche to move onto the NLRB battlefield, where a major part of the bitter war between the American Federation of Labor (AFL) and the Committee for Industrial Organization (CIO) was being fought. One major front in this on-going AFL-CIO war involved the NLRB's determination of what were "appropriate units" for purposes of union certification as collective bargaining representatives. The AFL was convinced that the only appropriate NLRB determination would be one which found that craft units were the appropriate collective bargaining unit. The CIO was equally certain that only a plant-wide "industrial" unit would be appropriate.

This dramatic confrontation was totally unexpected when the National Labor Relations Act (NLRA) was adopted by Congress in 1935. This issue presented the NLRB with its most vexing problems during the years before World War II. I am sure that Warren Madden had no inkling of what lay ahead when he left the Deanship of the Pittsburgh Law School to become the first NLRB Chairman. When Madden finally had to grapple with this explosive issue, he received very little help from his colleagues, one of whom was a left wing idealist and the other an intellectual lightweight. Ultimately, Madden settled on the so-called Globe Doctrine. In the *Globe Machine*<sup>8</sup> case, a craft union was seeking to carve out a craft unit from a proposed industrial unit; and under the Globe Doctrine, employees in the potential craft unit were given a choice on the ballot for their craft group between the competing industrial and craft unions. If a majority in the proposed craft unit voted for the craft union, then the separate craft unit would be certified.

In retrospect, the Globe compromise should have enabled the NLRB to ride out the storm of controversy rather handily. None-

---

8. *Globe Machine & Stamping Co.*, 3 N.L.R.B. 294 (1937).

theless, it did not satisfy the AFL leadership which continued to press for automatic unit determinations on a "craft" basis whenever they were sought by an AFL union. The AFL unions were already getting this consideration under the Railway Labor Act (RLA). In this respect, the NLRA differed from the RLA because under the NLRA there were no specific criteria for the Board to apply when determining appropriate units.<sup>9</sup> Under the RLA, bargaining units were to be established specifically on a "craft or class" basis. It may be that someone in the AFL hierarchy saw Leiserson, with his background, as an ideal NLRB appointee who could be counted on to embrace the "craft or class" approach because of his NMB experience. In any event, Leiserson was sold to the White House and joined the NLRB on June 1, 1939.

Billy Leiserson was, above all, a realist. He was an economist with a pronounced distaste for legalistic maneuvering and manipulation, and he had a long and illustrious background in mediation and arbitration. Thereby hangs the point of this story. To this day I vividly recall sitting in Billy Leiserson's NLRB office late in 1939, reviewing with him a case in which it appeared that even though there was an applicable grievance procedure and binding arbitration clause in place, charges of discrimination under the NLRA had been filed by the union. A complaint had been issued by the Board, a hearing had been held, and a proposed decision had been drafted for the Board members. All of this was done without any thought being given to the existing and agreed upon arbitration procedure. Upon learning this, Leiserson immediately phoned Chairman Madden to suggest that the Board simply refer the case back to the parties on the ground that the Board would not exercise its statutory jurisdiction because the discrimination claim was arbitrable. Leiserson's recommendation was not embraced, for better or for worse, perhaps because it came at such a late stage in the case. It does not appear, however, that the NLRB showed any serious disposition to defer to arbitration until

---

9. Section 9(b) of the NLRA provided:

The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self organization and to collective bargaining and otherwise effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

National Labor Relations Act, ch. 372, 49 Stat. 449, 453 (1935)(codified as amended at 29 U.S.C. §§ 151-166 (1986)).

*Spielberg*<sup>10</sup> was decided sixteen years later. Were Leiserson alive today he, no doubt, would feel vindicated by *Spielberg*,<sup>11</sup> *Collyer*,<sup>12</sup> and the related NLRB decisions which followed. He was a prophet before his time.<sup>13</sup>

Let us turn now to the NWLB and its role in enhancing the status of grievance arbitration. Here again, some personal history may be pertinent. Very early in 1943, when I was NWLB Regional Chairman in Philadelphia, our Board encountered a dispute case involving a grievance which had arisen during the life of an agreement between the disputing parties. The United States Conciliation Service had certified the case to our Board for disposition. By a happy coincidence, William Simkin was sitting with me as a Vice Chairman on the day the case was presented to our Board. Most of you, I am sure, are well aware of Bill Simkin's long and illustrious career as an arbitrator and mediator, including his service as Director of the Federal Mediation and Conciliation Service (FMCS) in the Kennedy and Johnson Administrations. Early in the hearing Bill said nothing, but quietly thumbed through the parties' existing agreement. He was immensely pleased to discover that it included a comprehensive grievance procedure culminating in arbitration. We then recessed at Bill's suggestion. In our executive session all Board members quickly agreed to direct the parties to arbitrate the problem which they had brought to us, since it clearly involved a dispute which came *under* their agreement.

In my experience, the tendency among unions to bring disputes to the NWLB which were arbitrable or should have been arbitrable was common. This was understandable for a couple of reasons. The Board was created on the assumption that strikes could not be tolerated during World War II, and that an alternative path to resolution of disputes should be provided by the NWLB. From a more pragmatic perspective, the NWLB provided a free service, as well as being tripartite.

This tendency to resort to the NWLB was a potential prob-

---

10. *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

11. *Id.*

12. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

13. It is an interesting footnote to history that Leiserson appears to have become more ready than Chairman Madden to embrace an industrial type unit and reject a separate craft claim. This is indicated by the fact that in *Bendix Products Corp.*, 15 N.L.R.B. 965, 972 (1939), the majority refused to direct a Globe election for a claimed Pattern Makers craft unit, and Madden dissented from the majority's ruling.

lem, and its magnitude first became apparent in Region III at Roebing Steel. The United Steelworkers (USW) local at Roebing began to flood our Board with claims of wage rate and incentive earnings inequities. In addition to disputes of this sort, the parties also began to flood us with mutually agreed-upon requests for approval of individual rate or incentive adjustments. The entire Roebing wage structure was in a chaotic condition, and hardly a week passed without a group of such cases being filed. There being no way for the Regional Board to develop sound decisions in such a morass, the Public Members devised a "show cause" order directing the parties to come to a hearing and explain why they should not develop a job classification program instead of flooding the Board with cases claiming wage inequities. The predictable result, perhaps, was a directive order by our Regional Board reciting that our Board would not process *any* Roebing wage inequity claims until the parties had devised and installed a complete job classification system at a total cost of not more than two cents per hour worked. This did the job. Of course, we had no authority to issue such a ukase, but we did so unanimously. We had the full concurrence of the Union members of our Board, including the USW District Director. Ultimately, on November 25, 1944, the National Board directed *all* of the major Basic Steel companies to eliminate inequities.

While the Roebing situation was in ferment, a larger problem was developing through many of the numerous Basic Steel plants in Region III.<sup>14</sup> At the time, there were no effective arbitration provisions in such plants. In U.S. Steel, for example, individual cases could be arbitrated only if both parties so agreed. As a result, many day-to-day grievances were pouring into Region III every week. These disputes were heard by Hearing Officers who could recommend decisions for review and approval of the Regional Board.<sup>15</sup>

---

14. Of eighty-five Steel Industry Companies ultimately involved in the NWLB Directive Order of November 25, 1944, about forty-seven had plants in Region III. See 3 THE TERMINATION REPORT OF THE NATIONAL WAR LABOR BOARD 1074-76 (1947). Region III included Pennsylvania, southern New Jersey, Delaware, Maryland, and the District of Columbia.

15. This flood may have been generated in good part by the NWLB refusal to establish a "Steel Panel" to hear all United Steelworkers cases, such as the Automotive Panel which had been set up in the Detroit Region. All told, the NWLB established 17 special panels or commissions for various industries and unions. 1 THE TERMINATION REPORT OF THE NATIONAL WAR LABOR BOARD 17 (1947). In March of 1945, the NWLB finally established a Steel Commission. *Id.* The Commission's jurisdiction was limited to "elimina-

Here again, our Board resorted to the "show cause" technique. The USW and major steel companies, where the problem was acute, were called to a hearing to show cause why they should not arbitrate disputes under their agreements. The result was a directive stating that the Regional Board would not entertain such grievance cases because the parties themselves should use their own arbitration procedures.

The efforts of our Board to shut down the flood of grievance cases may have been largely the result of the coincidence that Region III included so many Basic Steel Plants, and that the wage structure in most of the steel industry was in a chaotic condition. Other NWLB Regions, nonetheless, must have experienced somewhat similar problems, at least in terms of the inflow of cases which actually involved nothing more than interpreting or applying the terms of a collective bargaining agreement. On July 24, 1943, NWLB Chairman William H. Davis sent a memorandum to all Regional Board Chairmen noting that where the parties themselves had not established a grievance procedure culminating in binding arbitration, the NWLB was "likely to set up such machinery itself as the [dispute] cases come to the Board."<sup>16</sup> Later that same year, the NWLB adopted its formal Rules and Regulations, which included a statement that in dispute cases involving enforcement "of an arbitrator's award on a non-wage issue, the merits of the award will not be reviewed," and the Board's directive order in such a case will "direct that the terms and conditions of employment set forth in the arbitrator's award . . . shall govern the relations between the parties unless the Board . . . finds that the award is outside the scope of the reference or submission to arbitration."<sup>17</sup> The NWLB policy of encouraging resort to grievance arbitration ultimately found its fullest expression in the November 25, 1944 Directive Order in the Basic Steel Industry Dispute, which required the USW and major steel companies to establish binding arbitration procedures.

During World War II and in later years, some critics seemed to assume that the NWLB's promotion of grievance arbitration

---

tion of intraplant wage rate inequities." 3 THE TERMINATION REPORT OF THE NATIONAL WAR LABOR BOARD 1078 (1947).

16. *Instructions to Regional War Labor Boards: Importance of Grievance Machinery*, 9 War Lab. Rep. XXIV, XXIV (1944) (NWLB Memorandum Release issued July 24, 1943).

17. *National War Labor Board: Rules of Organization and Procedure*, 11 War Lab. Rep. X, XX-XXI (1944) (section 802.32 issued December 10, 1943).



was primarily an effort to accommodate organized labor in an area where there could be no inflationary wage cost impact. Such a view seems almost ludicrous to one familiar with the vast volume of disputes which otherwise would have confronted the Board.<sup>18</sup>

Thus, it is my basic thesis today, derived from personal experience, that the NWLB espousal of grievance arbitration simply was an eminently practical response to an urgent practical problem. Exposure to grievance arbitration under the auspices of the NWLB, nonetheless, made both management and labor receptive to its use. Shortly after the end of World War II, grievance arbitration was endorsed *unanimously* by the Executive Committee to the President's 1945 National Labor-Management Conference. This Conference was directed by George Taylor and included representatives of the United States Chamber of Commerce, the National Association of Manufacturers, the AFL, the CIO, the United Mine Workers (UMW), and the Railway Brotherhoods. The clear desirability of grievance arbitration was one of the few items upon which all the committee members could agree, and their endorsement was accepted by the Conference.<sup>19</sup>

The inclusion of Railway Brotherhood representatives in the 1945 Conference inevitably brought grievance arbitration into sharp focus. In 1934, Congress had embraced grievance arbitration in the Railway Labor Act (RLA) by requiring parties to utilize an arbitration system provided by the Railroad Adjustment Board. By 1936, the RLA was amended to contemplate "System Boards" for disputes over the interpretation and application of collective bargaining agreements in the airline industry agreements.<sup>20</sup> Finally, Section 203 of the "Taft-Hartley" Act (Labor Management Relations Act of 1947) affirmatively endorsed the final adjustment of disputes over interpretation and application of agreements by an agreed method.<sup>21</sup>

---

18. See Friedin & Ulman, *Arbitration and the War Labor Board*, 58 HARV. L. REV. 309 (1945).

19. See UNITED STATES DEPT. OF LABOR, THE PRESIDENT'S NATIONAL LABOR-MANAGEMENT CONFERENCE, NOVEMBER 5-30, 1945, at 41-49 (1946)(Division of Labor Standards Bull. No. 77).

20. Railway Labor Act, 45 U.S.C. § 151 (1986).

21. Section 203 of the Act provides: "It shall be the duty of the service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation." The Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136, 153 (1947)(current version at 29 U.S.C. § 173 (1986)).

The promotion of grievance arbitration by the United States Congress, the National War Labor Board, and the parties themselves ultimately produced full-scale judicial acceptance of arbitration in such landmark United States Supreme Court decisions as *Lincoln Mills*,<sup>22</sup> the Steelworkers Trilogy,<sup>23</sup> *Boys Market*,<sup>24</sup> and *Gateway Coal*.<sup>25</sup>

Meanwhile, the NLRB at long last began to rely upon grievance arbitration as a means of dealing with its persistent and substantial backlog problem. In 1955, Billy Leiserson was finally vindicated, at least partially, by the *Spielberg Manufacturing Co.* ruling.<sup>26</sup> In that case, an arbitrator had ruled upon a grievance, but the facts indicated that the NRLA may have been violated as well. The Board held that it would "defer" to the arbitrator's ruling in such a case and allow it to be dispositive of the potential unfair labor practice issue, where the arbitral proceedings appeared to have been fair and regular, the parties had agreed to be bound, and the arbitrator's decision was not clearly repugnant to the purposes and policies of the Act.

Between the years of 1955 and 1984, the NLRB's deferral policy underwent various changes, a few of which need to be noted here. In 1971, the *Collyer Insulated Wire*<sup>27</sup> decision marked the Board's first refusal to proceed with a potential unfair labor practice case where the dispute had not gone to arbitration, but it appeared that it could have gone to arbitration under the arbitration procedure agreed upon by the parties. Since *Collyer*, a substantial number of cases have been deferred to arbitration in this manner, particularly those involving claims of discrimination due to union activity and claims of an illegal refusal to bargain.

In the 1984 decision of *Olin Corporation and Oil Chemical and Atomic Workers*,<sup>28</sup> the Board carried the *Spielberg*<sup>29</sup> doctrine further by requiring that a party opposing deferral affirmatively establish that the Board's standards for deferral had not been met

---

22. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

23. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

24. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

25. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

26. *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

27. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

28. *Olin Corp.*, 268 N.L.R.B. 573 (1984).

29. 112 N.L.R.B. 1080 (1955).

because of defects in the arbitral process or in the award. Indeed, the Board went so far as to say, "[u]nless the award is 'palpably wrong,' i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the [NLRA], we will defer."<sup>30</sup>

While *Olin*, in particular, has drawn vigorous criticism,<sup>31</sup> some earlier critics even questioned the wisdom of the narrower *Collyer*<sup>32</sup> policy. Of particular interest here, perhaps, is the comment of David Feller as to *Collyer*:

I think the Board has a very foolish notion that if a labor dispute arises where there is a collective bargaining agreement which may involve some question under the collective bargaining [agreement], the Board should refer the matter to an arbitrator. I do not think that is particularly exceptional if the Board defers to an arbitrator to decide what the contract means, that is, to use that arbitration decision as a datum for the purpose of then deciding whether or not there is an unfair labor practice. However, the Board's position, at least up until fairly recently, was that when a dispute is taken to arbitration, the party that is claiming a violation of the National Labor Relations Act must make that claim before the arbitrator, and if that party fails to do so, he has waived his opportunity, and the Board will not decide whether or not there has been a violation of the Act.<sup>33</sup>

As most of the critics of the NLRB deferral policy emphasize, there is no assurance that an arbitrator, interpreting or applying a collective bargaining agreement, will reach a conclusion which would be consistent with an NLRB ruling applying Section 8(a)(3) or 8(a)(5) of the Act to the same facts. That may be conceded. For my purposes, however, the more pertinent question is whether the deferral policy is sound *from an administrative viewpoint*, particularly given the policy enunciated in Section 203 of the 1947 Labor Management Relations Act and the heavy volume of cases which has plagued the NLRB throughout its life.

As both the NWLB and NLRB experiences demonstrate, cogent practical considerations support reliance upon private grievance arbitration as opposed to governmental or administrative intervention into the established collective bargaining relationships.

---

30. 268 N.L.R.B. 573, 574 (1984) (footnote omitted).

31. See Gates & Elder, *Olin Must Not and Will Not Survive*, 38 LAB. L.J. 723 (1987).

32. 192 N.L.R.B. 837 (1971).

33. Feller, *Relationship of the Agreement to External Law*, in LABOR ARBITRATOR DEVELOPMENT 33 (1983).

One such consideration is the urgent need to deal as efficiently as possible with an otherwise unmanageable caseload. Equally important is the need for the parties to develop their own relationship without bureaucratic intervention. There should be no doubt that similar practical considerations have influenced the key United States Supreme Court decisions on grievance arbitration which followed the 1957 *Lincoln Mills*<sup>34</sup> decision.

The courts' involvement in grievance arbitration has been inevitable. The fact that numerous federal and state enactments require arbitration of grievances within specific statutory frameworks makes it most unlikely that any individual arbitrator can fail to consider and give due weight to some aspect of external law for very long. Indeed, it is sometimes the case that the arbitrator is forced by the parties to apply external law to the best of his ability. In most instances, however, neither the parties nor the law itself imposes such an obligation. Therefore, the arbitrator may properly conclude that, while some aspect of external law may be relevant or indirectly involved, the grievance properly should be dealt with only under the relevant provisions in the parties' agreement. Often the decision on which course to pursue will be governed by the arbitrator's own background, training, experience, and confidence.

In my own view there is little useful purpose to be served by scholarly endeavors to delineate what *all* arbitrators *should* or *should not* do with respect to interpreting, applying, or rejecting external law. There are too many variables to permit dogmatism in this area, but it should be clear that the arbitrator's source of authority is normally the agreement of the parties.

There remains one major aspect of external law with respect to grievance arbitration which warrants analysis as part of this Symposium, and that is the appropriate scope of judicial review of an arbitration award which has been issued.

Consideration of this topic should begin with the opinion in *Enterprise Wheel*.<sup>35</sup> *Enterprise* was a vitally important case in the Steelworkers Trilogy<sup>36</sup> since it addressed the critical issue of to what extent courts may review and set aside arbitral decisions

---

34. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

35. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

36. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

which interpreted and applied collective agreements. The importance of *Enterprise Wheel*<sup>37</sup> for this purpose cannot be overstated. Shortly after the Court's *Lincoln Mills*<sup>38</sup> decision in 1957, Ben Aaron assessed the potential impact of that decision at the 1959 meeting of the National Academy of Arbitrators.<sup>39</sup> He viewed with grave misgiving the *Lincoln Mills*<sup>40</sup> ruling that under Section 301 of the LMRA of 1947 courts could order resort to arbitration when arbitration was contemplated in the parties' agreement. Aaron's concern was that with the courts directly involved in the arbitration process, there easily could be a return to the unsound *Cutler-Hammer*<sup>41</sup> doctrine, which had been substantially discredited by 1957. Thus, Aaron cogently stated:

Some of the decisions involving arbitrability, however, are based on reasoning not dreamt of in any arbitrator's philosophy, and the list of Horrible Examples grows longer and longer. From *Cutler-Hammer*<sup>42</sup> to *Warrior & Gulf Navigation Company*<sup>43</sup> the story is the same: Under the guise of determining arbitrability, the court disposes of the merits of the case, usually by finding the relevant language of the collective agreement so clear in meaning and so ineluctable in effect that, it would seem, only idiots and arbitrators could profess to see in it a lurking ambiguity giving rise to an arbitrable issue.<sup>44</sup>

As Dave Feller pointed out when commenting on Ben Aaron's 1959 presentation,<sup>45</sup> the Steelworkers Trilogy<sup>46</sup> was already making its way to the U.S. Supreme Court. The subsequent impact of the Trilogy decisions have been evaluated so thoroughly over the years since 1960 by commentators, learned or otherwise, that no further exposition is warranted here beyond noting that the key significance of the *Enterprise Wheel*<sup>47</sup> opinion was that

---

37. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

38. 353 U.S. 448 (1957).

39. Aaron, *On First Looking Into the Lincoln Mills Decision*, 12 PROC. NAT'L ACAD. ARB. 1 (1959).

40. 353 U.S. 448 (1957).

41. *International Ass'n of Machinists v. Cutler-Hammer, Inc.*, 271 A.D. 917, 67 N.Y.S.2d 317, *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947).

42. *Id.*

43. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

44. Aaron, *supra* note 39, at 8.

45. Feller, *supra* note 33.

46. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

47. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

courts were not, by virtue of Section 301, to intrude upon the arbitrator's determination of the merits of any given grievance. The narrow, permissible limits of judicial review were carefully spelled out in the opinion of Justice Douglas, which included these cautionary sentences:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, *yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.* When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.<sup>48</sup>

Given the *Enterprise* opinion,<sup>49</sup> in combination with the other two Trilogy opinions,<sup>50</sup> the fears of many observers that the *Lincoln Mills*<sup>51</sup> decision would revive the *Cutler-Hammer*<sup>52</sup> doctrine were largely defused.<sup>53</sup> In 1983, the Supreme Court restated and clarified the substance of the *Enterprise* opinion in *Grace v. Rubber Workers*:

Under well-established standards for the review of labor arbitration awards, a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one. When the parties include an arbitration clause in their collective bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. *Unless the arbitral decision does not "dra[w] its essence from the collective bargaining agreement, a court is bound to enforce the award, and is not entitled to review the merits of the contract dispute.* This remains so even when the basis for the arbitrator's decision may be ambiguous."<sup>54</sup>

By the time this case was decided in 1983, the Supreme

48. *Id.* at 597 (emphasis added).

49. *Id.*

50. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

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

52. *International Ass'n of Machinists v. Cutler-Hammer, Inc.*, 271 A.D. 917, 67 N.Y.S.2d 317, *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947).

53. See Morris, *Twenty Years of Trilogy: A Celebration*, 33 PROC. NAT'L ACAD. ARB. 331 (1981).

54. *W.R. Grace & Co. v. International Union of United Rubber*, 461 U.S. 757, 764 (1983)(emphasis added).

Court had ruled that under Section 301 of the LRMA it was proper to enjoin a strike and order arbitration where the parties' agreement included a no-strike pledge and provision for binding arbitration. This rule emerged from the 1970 *Boys Market*<sup>55</sup> decision. In 1974, the Supreme Court reiterated the indication set forth in its 1962 *Lucas Flour* decision<sup>56</sup> that a no-strike commitment could be "implied" by the Court when an agreement provided for binding arbitration of grievances, so as to warrant enjoining a strike and directing arbitration.<sup>57</sup>

Perhaps the most interesting recent Supreme Court decision, for present purposes, is the *Misco* case.<sup>58</sup> In this case an arbitrator reinstated an employee who had been charged with possession of marijuana on the plant premises. The reinstatement was set aside by a federal district court on the ground that the award was contrary to "public policy." The ruling was affirmed by the Fifth Circuit. The Supreme Court reversed in an opinion by Justice White, who forcefully delineated the Court's view as to the narrow scope of judicial review of an award in grievance arbitration. As for "public policy," White wrote:

In *W.R. Grace*, we recognized that "a court may not enforce a collective-bargaining agreement that is contrary to public policy," and stated that "the question of public policy is ultimately one for resolution by the courts." We cautioned, however, that a court's refusal to enforce an arbitrator's *interpretation* of such contracts is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" In *W.R. Grace*, we identified two important public policies that were potentially jeopardized by the arbitrator's interpretation of the contract: obedience to judicial orders and voluntary compliance with Title VII. We went on to hold that enforcement of the arbitration award in that case did not compromise either of the two public policies allegedly threatened by the award. Two points to follow from our decision in *W.R. Grace*. First, a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy. Second, it is ap-

---

55. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

56. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

57. *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95 (1962).

58. *United Paperworkers Int'l Union v. Misco, Inc.*, 108 S. Ct. 364 (1987).

parent that our decision in that case does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy. Although we discussed the effect of that award on two broad areas of public policy, our decision turned on our examination of whether the award created any explicit conflict with other "laws and legal precedents" rather than an assessment of "general considerations of supposed public interest." At the very least, an alleged public policy must be properly framed under the approach set out in *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced.<sup>59</sup>

Despite the *Misco* opinion,<sup>60</sup> judicial assertions of "public policy" considerations have continued to play a troublesome role in some federal district and circuit court decisions.<sup>61</sup> The most significant such case, for present purposes, appears to be *S.D. Warren Co. v. United Paper Workers*.<sup>62</sup> This case was one of two companion cases which were first heard by Judge Gene Carter, a highly regarded judge on the Federal District Court for Maine. In this case, three employees had been discharged for possession of marijuana on company premises. They were clearly guilty of the charge, but the arbitrator reduced the discharges to suspensions of four, seven, and nine months respectively. In so doing, the arbitrator ruled, on the basis of careful evaluation of extenuating circumstances and earlier applications of rules embodied in Mill Rule 7, that there was not "proper" cause for discharge but that substantial suspensions were warranted. In the district court, the company argued to Judge Carter that under the parties' agreement, possession of marijuana alone was defined as a "proper" cause for discharge. Judge Carter rejected this argument, but the First Circuit reversed.<sup>63</sup> Given the subsequent and somewhat remarkable developments in this case, it is useful to note its salient facts.

Under both the Management and Seniority provisions in the parties' agreement, it was clear that discharge could be imposed

---

59. *Id.* at 373.

60. *Id.* at 364.

61. *See, e.g.,* Iowa Elec. Light & Power Co. v. International Bhd. of Elec. Workers, 834 F.2d 1424 (8th Cir. 1987); Professional Adm'rs Ltd. v. Kopper-Glo Fuel, Inc., 819 F.2d 639 (6th Cir. 1987); Local One Amalgamated Lithographers v. Stearns & Beale, 812 F.2d 763 (2d Cir. 1987); United States Postal Service v. National Ass'n of Letter Carriers, 663 F. Supp. 118 (W.D. Pa. 1987), *rev'd*, 839 F.2d 146 (3rd Cir. 1988).

62. 632 F. Supp. 463 (D. Me. 1986)(Warren I).

63. *S.D. Warren Co. v. United Paperworkers Int'l Union*, 815 F.2d 178 (1st Cir. 1987).



only for *proper* cause. The company relied on Mill Rule 7(a) in urging that "possession, use, or sale" of marijuana on Mill property *automatically* established "proper" cause for discharge. Mill Rule 7, as a whole, is critically important in the circuit court's opinions. It warrants quotation here:

*Mill Rule 7 — Causes for Discharge*

In any organization, certain rules of conduct must be observed by the members for the good of all.

*Violation of prescribed rules are cause for disciplinary action of varying degrees of severity.*

Violations of the following rules are *considered causes* for discharge.

- a) Possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs. . . .
- b) *Smoking* upon Company's premises except in authorized smoking areas, as provided under "Smoking."
- c) Unauthorized destruction or removal of the Company's property.
- d) *Refusal to comply with Company rules.*
- e) *Willful disobedience* or insubordination.
- f) *Neglect of duty.*
- g) *Disorderly conduct.*
- h) Dishonesty.
- i) *Obvious sleeping* on duty.
- j) *Deliberate waste of Company time* and/or material.
- k) Leaving the Mill while on duty except by permission of Foreman . . . .
- l) Violation of certain rules specifically noted in the Mill Safety Rules.
- m) Incarceration after being sentenced.
- n) *Giving or taking a bribe of any form* to obtain work, retain a position, or *obtain any preferential treatment whatsoever.*

The First Circuit reversed Judge Carter's refusal to set aside the arbitrator's award because, in its view, Carter was wrong both in ruling that the contract allowed the arbitrator to review the degree of punishment to be given the employee, and in ruling that the arbitrator's award did not violate public policy.<sup>64</sup> On certiorari, the United States Supreme Court reversed, and remanded<sup>65</sup> the case for further consideration "in light of" the *Misco*<sup>66</sup> case

64. *Id.* at 180.

65. 108 S. Ct. 497 (1987).

66. *United Paperworkers Int'l Union v. Misco, Inc.*, 108 S. Ct. 364 (1987).

which had been decided only thirteen days earlier.

In *Misco*,<sup>67</sup> of course, the Court reversed the Fifth Circuit in a case in which both the federal district court and the Fifth Circuit had set aside, on the grounds of "public policy," an arbitrator's reinstatement of an employee allegedly in possession of marijuana. On the broader subject of the scope of judicial review, the opinion of Justice White was clear:

*Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract. So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined.*<sup>68</sup>

At another point, Justice White added, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."<sup>69</sup>

Despite these cogent observations in *Misco*,<sup>70</sup> when the case was remanded, the First Circuit again ruled that the arbitrator's decision to not discharge the employees should be set aside.<sup>71</sup> While recognizing that its earlier public policy pronouncement no longer could stand following *Misco*,<sup>72</sup> the First Circuit proceeded to develop its *own* interpretation of the controlling collective-bargaining agreement, and then concluded that the arbitrator had ig-

---

67. *Id.*

68. *Id.* at 370-71.

69. *Id.* at 371.

70. *Id.* at 364.

71. *S.D. Warren Co. v. United Paperworkers Int'l Union*, 845 F.2d 3 (1st Cir. 1988).

72. 108 S. Ct. 364 (1987).

nored the "plain language" of the agreement. On its face, the court's opinion unmistakably reflects that the court disagreed with the arbitrator's interpretation of the agreement, and despite the strictures set forth in Justice White's *Misco*<sup>73</sup> opinion, the First Circuit refused to accept the arbitrator's interpretation.

Obviously, arbitrators have different views regarding the possession or use of illegal drugs in the work place. It may be that some arbitrators would feel, as the First Circuit court obviously did, that discharge is the appropriate penalty for such an offense. Nonetheless, the reasoning of the First Circuit court is astonishing to one familiar with the realities of collective bargaining. An experienced negotiator readily would see Mill Rule 7 as an almost classical example of studied ambiguity. On its face the rule is a "grab bag." It covers fourteen categories of offenses which range from the very serious (use or sale of drugs in the plant) to the potentially trivial (neglect of duty, sleeping, or "waste" of company time). Obviously, not all of these offenses would be regarded as cause for automatic discharge without prior resort to corrective or progressive discipline. At the same time, Mill management undoubtedly desired to stress the *potential* seriousness of violating plant rules by including in Rule 7 the possibility of discharge. Hence Rule 7, at the outset, speaks of "causes" for discharge and says only that violations in any one of the fourteen categories of offenses are "considered" causes for discharge. There is nothing to suggest that any single rule violation in any of the fourteen categories of offenses, in and of itself, invariably would constitute "proper" cause for discharge. While a typical union bargaining committee easily could agree to the ambiguous Rule 7 as written, in recognition of management's need to stress the potential seriousness of rule violations, it hardly would be able, politically, to agree that any offense in any of the fourteen categories listed under Mill Rule 7 automatically would constitute proper cause for discharge.

Against this background, the First Circuit nonetheless concluded that, given Mill Rule 7, "[n]othing is left to the arbitrator's judgment except determining whether the rules are violated."<sup>74</sup> Shades of *Cutler-Hammer*!<sup>75</sup> This judicial overreaching

---

73. *Id.*

74. 845 F.2d at 8.

75. *International Ass'n of Machinists v. Cutler-Hammer, Inc.*, 271 A.D. 917, 67 N.Y.S.2d 317, *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947).

nicely illustrates the need for eternal vigilance by the Supreme Court in assuring sound administration of the federal judicial system. Absent any clear federal "public policy," it would seem likely that this decision will be reversed by the Supreme Court.<sup>76</sup> Any other result could only undermine the Court's clear policy of minimizing resort to the judiciary in an effort to avoid compliance with an unpalatable arbitral award.

In conclusion, it is my impression that the interaction between grievance arbitration and external law is generally cooperative. For practical reasons the NWLB, the NLRB, and the courts supported and advanced the development of grievance arbitration. This relationship has continued, as evidenced by the strict limits on judicial review of arbitration decisions which are expected to remain in place.

---

76. Ed Note: Since this paper was prepared, the Drug-Free Workplace Act of 1988, was embraced by Congress in late 1988. Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 4181, 4304 (to be codified at 41 U.S.C. §§ 701-705 & 707).

