1-1-1988

Riding on the Horns of a Dilemma: The Law of Contract v. Public Policy in the Enforcement of Labor Arbitral Awards

Mary A. Bedikian
Michigan State University College of Law, bedik@law.msu.edu

DETROIT COLLEGE OF LAW REVIEW

VOLUME 1988 FALL ISSUE 3

RIDING ON THE HORNS OF A DILEMMA: THE LAW OF CONTRACT v. PUBLIC POLICY IN THE ENFORCEMENT OF LABOR ARBITRAL AWARDS

Mary A. Bedikian†

PRECIS

The labor arbitration process has long been heralded as the hallmark of industrial democracy by providing a method of resolving "grievances of the shop" through meaningful and peaceful resolution. Characterized by scholars as a "uniquely American phenomenon," the process is firmly embraced by the United States Supreme Court as a viable substitute for litigation.

The primary source of judicial support for the process is the Steelworkers' Trilogy, a series of cases decided in 1960 in which the Supreme Court consummated a strong national policy favoring arbitration of labor-management disputes. Since then, the process has become essentially entrenched in American labor law, and is considered to be an integral part of the collective bargaining process.

Arbitrators deciding the legitimacy of labor-management disputes are given tremendous latitude in formulating remedies. Universally viewed as private judges chosen by the parties to decide

† B.A., Wayne State University, 1971; M.A., Wayne State University, 1975; J.D., Detroit College of Law, 1980; Regional Vice President, American Arbitration Association. Ms. Bedikian is Co-Chair of the Michigan State Bar Committee on Arbitration and Alternate Method of Dispute Resolution, and is active in the ABA Committee on Labor and Employment Law. In addition, she serves as a mediator for the 46th District Court in Southfield, Michigan. Ms. Bedikian's published works have appeared in numerous legal periodicals.

matters of contract, the role of the courts in reviewing arbitrators' decisions is narrowly circumscribed. Arbitrators render awards. Only if necessary will courts enforce them. Rarely will courts reverse them.

This finality aspect is one of the most salient features of the labor arbitration process and is predicated on two factors: a) the parties' desire to accept the arbitrator's decision as written and, b) the premise that broad judicial review would undermine and discourage the use of the process. Indeed, the level of respect accorded to labor arbitration by parties, courts and society is the primary reason it has survived, expanded and continues to be widely utilized.

However, recent federal appellate court and Supreme Court decisions appear to have diminished the finality aspect of arbitration. These decisions address circumstances where public policy considerations may justify the non-enforcement of an arbitrator's award. At issue is the meaning and scope of public policy. What are permissible public policy grounds for judicial intervention and its impact on the labor arbitration process is the subject of this article.

TABLE OF CONTENTS

"The arbitrator is still king, the designated contract reader, and finality is his sceptre."

Gerald D. Skoning in arguments before the United States Supreme Court *U.S. Postal Service v. Letter Carriers.*

No. 87-59 (February, 1988)

INTRODUCTION

Structured labor arbitration, a process by which parties to a collective bargaining agreement designate an impartial third-person to decide a labor dispute, was an advent of World War II, even though embryonic stages of the process could be discerned prior to World War I.[1] Its survival between 1918 and 1945 cannot be ascribed to judicial support, but rather to the desire on the part of employer and union to retain control of the collective bargaining relationship, and not delegate fundamental or ancillary obligations of the relationship to the courts.[2]

The growth of labor arbitration accelerated dramatically after

1. In early American history, arbitration procedures were provided in contracts where disputes of intent and interpretation occurred. The use of arbitration was largely confined to the business sector.

2. One of the major themes propounded by organized labor supporters was that courts were not "institutionally capable of formulating or implementing a workable labor policy." 1 THE DEVELOPING LABOR LAW 3-4 (C. Morris 2d ed. 1983) [hereinafter MORRIS]. Morris attributes this difficulty to two principal factors: "the process of case-by-case adjudication was an inadequate instrument for the formulation of a cohesive policy or rational substantive norms of conduct" and court procedures were too rigid and formal. *Id.* Perhaps more important than these two factors was the milieu in which labor found itself during this period of development. Courts were quick to indict for criminal conspiracy employees who engaged in concerted activity. Keeping labor-management issues outside the aegis of the court system was by design deliberate.

World War II. Pundits of history attribute this growth to three factors: a) the passage of the United States Arbitration Act of 1925; b) the impermissibility of the strike weapon to compel compliance with the collective bargaining agreement, and c) the steady proliferation of labor organizations in the late 1930's and early 1940's.[3]

Judicial support for the process remained elusive in the early stages of its development. Interestingly, David Feller, in his article, "The Impact of External Law Upon Labor Arbitration" suggests that whatever judicial support now exists for the labor arbitration process was fostered by congressional policies favoring arbitration, policies whose origins may be perceived as more obscure than most of us have come to believe. The Wagner Act of 1935[4] omitted any reference to arbitration, and the Norris-La Guardia Act of 1932[5] spoke only in terms of interest arbitration, a process used to create rights, not interpret them.

I. Setting The Scene

A. Passage of the United States Arbitration Act - Legislative Endorsement of the Process

The first of the major legislative enactments enhancing the use of labor arbitration was the United States Arbitration Act, passed in 1925.[6] Though several states had passed their own statutes enforcing arbitration agreements to replace the common law modules precluding the use of judicial process to compel compliance with an arbitration clause, this congressional enactment sought to provide a uniform procedure for recognizing agreements to arbitrate present and future disputes, and to establish parameters for the

---

3. Feller, *The Impact of External Law Upon Labor Arbitration in America*, Future of Labor Arbitration in America (1976).

4. Wagner Act, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-166 (1970 & Supp. V 1987)).

5. Norris-LaGuardia Act, 47 Stat. 70 (1932)(codified at 29 U.S.C. §§ 101-115 (1970 & Supp. V 1987)).

6. United State Arbitration Act, 9 U.S.C. §§ 1-14, was first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233). Chapter 2 was added July 31, 1970 (84 Stat. 692). The Act was passed primarily as a response to the union movement within the private sector. Its passage was expedited by the increased refusal on the part of employers and labor organizations in industries affecting commerce to abide by agreements to arbitrate labor disputes or to honor arbitration awards.

scope of judicial review.

No sooner had this legislation gone into effect did it become clear that its reach was not as expansive as initially contemplated. Even though some federal courts were relying on the statute to specifically enforce arbitration clauses in collective bargaining agreements, it was questionable whether the courts were vested with such authority. Section 1 of the Act expressly excluded contracts of employment.[7] This language fostered confusion as to whether collective bargaining agreements constituted such contracts. Progressive courts managed to circumvent this problem by theorizing that contracts of employment meant individually negotiated contracts, not collective bargaining agreements.[8] The problem would not become moot until years later.

B. Passage of § 301 of the Labor Management Relations Act of 1947

A combination of external forces prompted further legislation. What was then viewed as excessive pro-union sentiment coupled with the recognition that courts were not "institutionally capable" of developing "workable labor policies" culminated in the Labor Management Relations Act (LMRA) of 1947.[9] Faced with a spate of potentially crippling strikes, numerous versions of this labor reform bill were prepared by House and Senate committees. The final draft produced by the Conference Committee was vetoed by President Truman out of concern that "[t]he bill taken as a whole would reverse the basic direction of our national labor policy, in-

---

7. This section specifically provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1970 & Supp. V 1987).

8. This issue was addressed in Pietro Scalzitti Co. v. International Union of Operating Engineers, Local No. 150, 351 F.2d 576 (7th Cir. 1965). The employer asserted that the collective bargaining agreement was a contract of employment within the meaning of Section 1 of the Act. Ergo, the arbitration provisions were inapplicable. The court held that facts concerning the merits of a particular controversy must be found by the arbitrator. The exclusion, on the other hand, specifically related to workers engaged in interstate or foreign commerce. *See* International Ass'n. of Mach. and Aerospace Workers v. General Elec. Co., 406 F.2d 1046, (2d Cir. 1969); Local 19, Warehouse, Processing & Distributive v. Workers Buckeye Cotton Oil Co., 236 F.2d 776, 781, (6th Cir. 1956).

9. Labor Management Relations Act of 1947, 61 Stat. 136 (codified at 29 U.S.C. §§ 151-167 (1970 & Supp. V 1987)). *See supra* note 5. In addition to the cited two factors precluding the development of a cohesive labor policy was the reluctance of the courts to invade legislative turf. Judicial activism was benign.

ject the government into private economic affairs on an unprecedented scale, and conflict with important principles of our democratic society."[10] Congress overrode the veto, and the bill went into effect in August of 1947.

Section 301(a) of the Act provides, in relevant part: "Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ."

The natural tension between the United States Arbitration Act and Section 301 of the Labor Management Relations Act became evident. The issue of which legislative enactment served as the source of law compelling enforcement of labor arbitration agreements was ultimately addressed in the celebrated *Textile Workers Union of America v. Lincoln Mills* case.[11] On the issue of substantive law, the Supreme Court held that the LMRA is "federal law which the courts must fashion from the policy of our national labor laws."[12] The court proceeded to note:

> The Labor Management Relations Act . . . points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.[13]

Thus, *Lincoln Mills*, through Section 301 permitted the enforcement of agreements to arbitrate and the concomitant award. Fed-

---

10. President's Message on Veto of Taft-Hartley Bill (June 20, 1947), 20 L.R.R.M. (BNA) 22 (1947). For a more detailed explanation of the historical evolution of the Taft-Hartley Bill, *See* MORRIS, *supra* note 2.

11. 353 U.S. 448 (1957).

12. *Id.* at 456.

13. *Id.* at 460. Much has been said about the famous Frankfurter dissent in this case. According to Frankfurter, the majority's decision to enforce labor arbitration agreements was reached primarily by reliance upon § 301 of the Labor Management Relations Act, not the United States Arbitration Act, thus constituting a silent rejection of the inapplicability of the Arbitration Act. A better analysis of the decision may be that the Court's use of and reliance upon the non-statutory body of federal substantive law, lacking in § 301, was sufficient to reach the desired goal of enforcing the arbitration provision. *See* Rushfield, *Federal Discovery in Aid of Labor Arbitration*, 459 AR. IV-3 at 2 (1976) (unpublished article in the Library of the American Arbitration Association (AAA)); Kramer, *In the Wake of Lincoln Mills*, 9 LAB. L.J. 835 (1958); Smith & Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties*, 52 VA. L. REV. 831 (1966).

eral courts were permitted to borrow from state law in an effort to fashion a body of federal law consistent with the national law policies inherent in Taft-Hartley.

C. The Steelworkers' Trilogy - Judicial Recognition of the Arbitration Process Crystallizes

It was not until the United States Supreme Court's decision in the Steelworkers' Trilogy in 1960 that judicial support for the process was cemented.[14] The Court, speaking through Justice Douglas, virtually eulogized the process, acknowledging its inherent superiority over litigation:

> Arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.[15]

Three general propositions grew out of the *Trilogy* cases, propositions which would essentially govern the future of the labor arbitration: (1) judicial review is limited to whether a particular grievance is susceptible to the arbitration clause; (2) any doubts as to whether a grievance falls within the parameters of the arbitration clause must be resolved in favor of arbitration (commonly referred to as "the presumption favoring arbitrability"); and (3) an arbitrator's award must draw its essence from the collective bargaining agreement. If an arbitrator has not exceeded his/her authority, the courts must enforce the award as written, despite any judicial misgivings.

With this strong arsenal in hand, labor arbitration expanded significantly after the *Trilogy*, and began to percolate into the public sector. Its most substantial period of growth occurred between 1960 and 1975, with hundreds of thousands of cases being ushered through the process.[16]

---

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

15. Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

16. The American Arbitration Association, a non-profit organization which provides arbitration services, compiles case statistics for labor cases initiated and closed during this period. A breakdown follows: 1944 - 1950, 6,759; 1951 - 1960,22,245; 1961 - 1970, 45,051;

The *Trilogy* shriveled judicial review, imposing on courts the responsibility of exercising truncated powers. Only if an arbitrator's award exceeded contract language would it be overturned. Otherwise, the award would be given deference.

Thus, the lines of authority between courts and arbitrators so carefully postulated through Justice Douglas in the *Trilogy* set the early stages of the scope of judicial review conflict. One major dimension of the conflict is the interface between statutory (external) and contract law. The arbitrator's function is limited to a reading of the contract and a review of past practice if germane. While the final result of the arbitrator may well be an assimilation of his own experiences, the arbitrator is still required to apply a contractual standard. What occurs, however, when statutory law is implicated, or begs application to the contractual dispute? Are arbitrators required to consider this law in their decision-making process? Or is this a mandate of the courts, as protectors of our public laws? Simply put, should an arbitrator ignore the law and remain within the four corners of the collective bargaining agreement, or invoke the law where authority to do so is hazy, and risk award vacatur? From the *Trilogy* emanated a virtual collision course between arbitrators, the National Labor Relations Board and the courts.

D. The Adoption of the Deferral Doctrine

This collision course prompted the National Labor Relations Board to look for a way to accommodate the federal policy favoring grievance arbitration. It achieved this accommodation, with varying degrees of consistency, by adopting the deferral doctrine to adjudicate employee rights covered by contract and the National Labor Relations Act. Through *Spielberg Manufacturing Co.*,[17]

1971 - 1980, 125,548.

17. Spielberg Mfg. Co., 112 N.L.R.B. 1080, 36 L.R.R.M. (BNA) 1152 (1955). The public policy anchored in *Spielberg* was highlighted some years later in International Harvester Co., 138 N.L.R.B. 923, 51 L.R.R.M. (BNA) 1155 (1962), wherein the Board cogently observed: "Experience has demonstrated that collective bargaining agreements that provide for final and binding arbitration of grievances and disputes arising thereunder, as a 'substitute for industrial strife,' contribute significantly to the attainment of [the Act's] statutory objective [of promoting industrial peace and stability]."

The history concerning the deferral doctrine is far too expansive to cover in this article. Since the doctrine does affect the direction of the scope of judicial review conflict, it will be

criteria for deferral was established: "Arbitration proceedings must be fair and regular, all parties must agree to be bound to the award, and the arbitral decision cannot be repugnant to the purposes and policies of the Act."

This criteria did not authorize the Board to peer into the arbitrator's mind — the Board could only determine whether the procedures used to reach the arbitrator's decision were relatively consistent with its own procedures. The Board's power, like that of the courts, was deliberately curtailed.

A fourth requirement was later imposed. In 1963, in *Raytheon Co.*[18] the Board held that deferral would be acknowledged if the arbitrator had considered the unfair labor practice charge.

In the ensuing thirty years, *Spielberg* was refined, remolded, and expanded. In 1974, in *Electronic Reproduction Service Corp.*,[19] the Board deferred to an arbitration, despite the failure of the parties to present the unfair labor practice issue to the arbitrator. The Board concluded that it was enough for the arbitrator to have been given an opportunity to review it — the burden to present the issue was on the grievant, and failure to argue the issue would no longer preclude deferral.[20]

Several years later, in 1980, the Board overruled *Electronic Reproduction Service Corp.* In *Suburban Motor Freight*,[21] the Board said that the statutory issues had to be addressed by the arbitrator, and the burden of so proving rested on the party demanding deferral.

Suburban Motor Freight was sustained in *Propoco, Inc.*,[22] and carried one step further. It was no longer enough for the statutory

---

given broad treatment. For a more detailed explanation, refer to MORRIS, *supra* note 2. *See also* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS (4th ed. 1985); O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION (2d ed. 1983); Buckley, *Implications of State Wrongful Discharge Actions on the Grievance Arbitration Remedy*, 11 LAWYERS' ARB. LETTER 2 (1987); Edwards, *Labor Arbitration at the Crossroads: The Common Law of the Shop v. External Law*, 32 ARB. J. 2 (June, 1977); Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*. 80 COLUM. L. REV. 267 (1980); Scheinholtz & Miscimarra, *Issues of External Law in Arbitration hould Arbitrators Consider tatutory Claims For Defenses*? Dept. of Educ. & Training, Am. Arb. Ass'n. Summer Workshop for Arbitrators & Practitioners (July 20, 1984)(Hershey, Pa.).

18. 140 N.L.R.B. 833, 52 L.R.R.M. (BNA) 1129 (1963).
19. 213 N.L.R.B. 758 (1974).
20. *Id.* at 761.
21. 247 N.L.R.B. 146, 103 L.R.R.M. (BNA) 1113 (1980).
22. 263 N.L.R.B. 136, 110 L.R.R.M. (BNA) 1496 (1982).

and the contractual issues to be factually parallel and the arbitrator to be presented generally with facts relevant to resolving the unfair labor practice issue. Each issue had to be separately addressed.

In 1984, the Board overruled *Propoco*, adopting the standard now used to defer to the arbitration machinery:

(1) the contractual issue must be factually parallel to the unfair labor practice issue, and

(2) the arbitrator must be presented generally with the facts relevant to resolving the unfair labor practice.[23]

To avoid deferral, the grievant has to demonstrate that the arbitrator's award is repugnant to the policies of the Board. The arbitrator has to be palpably wrong in reaching his decision, i.e., the decision is incapable of withstanding an interpretation consistent with the Act.

The accommodation of Board authority came full circle in *Collyer Insulated Wire*.[24] The standard articulated in *Collyer* authorized pre-arbitration deferral of a section 8(a)(5) failure to bargain charge, with the caveat that review would again occur, subject to *Spielberg* considerations, if the aggrieved party so requested.[25] Critical to the board's analysis was the recognition that requiring an exhaustion of the collective bargaining agreement not only provided full effect to the parties' own voluntary agreements but also precluded a waste of administrative agency resources by not mandating duplication of proceedings in multiple fora.

Collyer, like *Spielberg*, underwent several permutations. In 1972, in *National Radio Co.*,[26] the Board extended the parameters of the deferral policy to include discriminatory and coercive conduct of the type cognizable under sections 8(a)(1) and (3) and 8(b)(2). Several years later, in *General American Transportation Corp.*,[27] the Board retreated from the policy articulated in *National Radio Co.*,[28] and revived *Collyer* in its original form.

It was not until 1984 that the Board had another opportunity to

---

23. *Id.* at 138, 110 L.R.R.M. at 1499.
24. 192 N.L.R.B. 837, 77 L.R.R.M. (BNA) 1931 (1971).
25. Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955).
26. 198 N.L.R.B. 527, 80 L.R.R.M. (BNA) 1718 (1972).
27. 228 N.L.R.B. 808, L.R.R.M. (BNA) 1718 (1984).
28. 198 N.L.R.B. 524, 80 L.R.R.M. (BNA) 1718 (1972).

revisit the issue of deferral. In *United Technologies Corp.*[29] a case involving discipline under section 8(a)(1), the Board reactivated the principles enunciated in *National Radio*, observing that the arbitration process worked well and that the statutory purposes of encouraging the practice and procedure of collective bargaining is ill-served by permitting the parties to ignore their agreement and to petition this Board in the first instance for remedial relief.

E. *Gardner-Denver* Carves Out an Exception for Individual Rights

While the deferral doctrine was undergoing transformation at the Board level, the courts were becoming involved in a similar dilemma. In 1974, in the celebrated case of *Alexander v. Gardner-Denver*,[30] the United States Supreme Court held that an adverse decision under a collective bargaining agreement does not preclude a grievant from independently pursuing statutory remedies under Title VII.

Arbitrators could continue to construe contractual violations; however, identical claims which represented statutory violations could only be resolved by the courts. In the opinion of the Court, Title VII represented an additional source of rights relating to employment discrimination, and an individual could not be expected to forfeit a private cause of action merely by pursuing his contractual remedies under the grievance mill of the collective bargaining agreement. The Court succinctly characterized the distinction between contractual and statutory rights as follows:

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties.[31]
>
> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.

---

29. 268 N.L.R.B. 83, 115 L.R.R.M. (BNA) 1049 (1984).
30. 415 U.S. 36 (1974).
31. *Id.* at 53.

> And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.[32]

Deferral was seemingly emasculated by this seminal decision. The Board, in developing its deferral doctrine, was content with the policy of coextensive jurisdiction. Even if the National Labor Relations Act provided an additional source of rights for employees, deference would still be given to an arbitrator's decision. *De novo* review would be available under limited circumstances. In *Gardner-Denver*, the Court unequivocally rejected the employer's argument in favor of deferral, and held that statutory claims could be heard by federal courts *de novo*.

In the years following *Gardner-Denver*, confusion and criticism among legal scholars and commentators abounded. By holding that election of remedies was not necessarily applicable to cases involving employment discrimination claims, the Court *appeared* to retreat from the well-established, nearly sacrosanct federal policy favoring arbitration of labor disputes.[33]

---

32. *Id.* at 49-50.

33. Though *Gardner-Denver's* application was initially limited to Title VII cases, it was ultimately expanded to federal statutory claims generally. In Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1980), a group of truck drivers sought additional compensation for pre-trip inspections. When the grievances were rejected in arbitration, the drivers then moved for entitlement in federal district court, seeking compensation under the Fair Labor Standards Act. Also alleged was a breach of the duty of fair representation. Both the district court and the Eighth Circuit Court of Appeals concluded that the duty had not been breached. The U.S. Supreme Court disagreed, distinguishing between the union's statutory obligation as the exclusive bargaining agent for a group of employees and individual employee rights provided by a source other than the collective bargaining agreement. The Court held that statutory rights vesting in individuals were nonwaivable, and should be processed in a forum other than arbitration *de novo*. *Barrentine* was expanded several years later in McDonald v. City of West Branch, 466 U.S. 284 (1984). McDonald filed a grievance subject to the terms of his collective bargaining agreement, contesting his termination. After the arbitrator concluded that the grievant's discharge was for just cause, McDonald then proceeded in federal court, this time alleging violation of his constitutional rights of free speech and free association. The jury returned a verdict in favor of McDonald. The Sixth Circuit Court of Appeals reversed on the theory that res judicata and collateral estoppel barred the claim, and the U.S. Supreme Court again reversed. In a painstaking analysis of statutory versus contractual claims, the Supreme Court said, in essence, that arbitration as conceived and used in the industry can only address contractual claims. "[I]t cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard. As a result, according preclusive effect to an arbitration award in a subsequent § 1983 action would undermine that statute's efficacy in protecting federal rights." 466 U.S. at 2911. Despite the expansive extensions of *Gardner-Denver* to non-employment discrimination cases, and the Court's definitive separation of contractual and statutory rights, the Court did not denude the deferral doctrine

The confusion and criticism emanating from *Gardner-Denver* sparked an interesting academic debate, one whose focus has sharpened in recent years. At the core of the debate is whether an arbitrator, brought into a dispute as a "contract reader" should be required to examine the surrounding law to ensure a result compatible with the law. And if the arbitrator does not review "external" law because it is not within his purview, and the ultimate award conflicts with the law, does a reviewing court have the right to intercede, and consider the correctness of the arbitrator's decision?

Two recent United States Supreme Court decisions have fueled this debate. In *W.R. Grace v. Rubber Workers Local Union 759*,[34] the Supreme Court carved out a specific exception to the general doctrine of enforcement of labor arbitration awards. The Court held:

> If the contract as interpreted by [the arbitrator] violates some specific public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be 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.[35]

The Court's holding was not accompanied by a definition of public policy. Federal appellate courts have since grappled with the public policy exception, but have failed to articulate any monolithic pronouncement on its scope or meaning. While some courts have held that the exception comes into play when an arbitrator directs that a party engage in unlawful conduct, others have invoked it to avoid an unconscionable result.

In February of 1987, the United States Supreme Court granted certiorari in *United Paperworkers International Union v. Misco, Inc.*[36] At issue was the public policy exception, and the extent to which deference to an arbitral award can be justified. The Court's deliberations confirmed that at least in labor arbitration, the arbitrator may well be king.

---

completely. Commentators have focused on footnote 21 of *Gardner-Denver* where the Court states that if fundamental due process is provided to grievants in the arbitral forum, and "an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight." 415 U.S. at 60 n.21.

34. 461 U.S. 757 (1983).
35. *Id.* at 766 (citations omitted).
36. 108 S. Ct. 364 (1987).

It is therefore timely and appropriate to undertake an assessment of the conflict — to what extent, if any, should a labor arbitrator resort to external law to decide matters of pure contract, and the implications of resorting to the public policy exception where arbitrators have reviewed the law, but decided the merits differently from that of a reviewing court, or where arbitrators have declined to consider the law, and rendered decisions strictly by the terms of the collective bargaining agreement.

II. The Nature of the Academic Debate

A. The Extremist Views of the Controversy: The Meltzer-Howlett Dichotomy

In 1975, the year following *Gardner-Denver*, prominent legal scholars and practitioners participated in the Wingspread Conference, devoted to addressing the legal problems affecting labor arbitration. Of the many diverse views expressed, one was of particular significance to labor arbitration — the development of laws affecting the employment relationship would ultimately diminish the primacy of the collective bargaining agreement, and "that the greatest danger that the system of arbitration faces in the future is the accelerating trend to remove more and more elements of the employer-employee relationship from the exclusive control of the collective bargaining agreement."[37]

This forecast prompted two additional inquiries: a) how would the labor arbitration process respond when public laws were invoked, and b) how would the adjudicative bodies, namely the courts, view their role as the guardians of the public law, and treat decisions achieved through arbitration.[38]

The problem was heatedly debated. Resurrected from the legal tombs was the Meltzer-Howlett controversy. In 1967, when the National Academy of Arbitrators met at their annual conference, Bernard Meltzer responded to this problem by noting that arbitrators are private decision-makers who should not consider the public law when rendering decisions, because:

> There is . . . no reason to credit arbitrators with any competence, let alone any special expertise, with respect to the law. . . . A good many

37. Feller, *supra* note 3.
38. Feller, *supra* note 3.

> arbitrators lack any legal training at all, and even lawyer-arbitrators do not necessarily hold themselves out as knowledgeable about the broad range of statutory and administrative materials that may be relevant in labor arbitrations. Indeed, my impression — and it is only that — is that non-lawyer arbitrators are more willing to rush in where lawyers fear to tread. . . . Arbitrators should . . . leave to the courts or other official tribunals the determination of whether the agreement contravenes a higher law. Otherwise, arbitrators would be deciding issues that go beyond not only the submission agreement but also arbitral competence.[39]

Some participants suggested that this view was unequivocally rooted in the *Trilogy* — the Court's deference to the arbitral process was based not on its perceptions of the arbitrator's ability to decide issues of statutory construction, but rather the arbitrator's expertise in evaluating the "common law of the shop." A contrasting view, however, was articulated by Robert Howlett, who suggested that arbitrators are obligated to consider relevant public laws, particularly if the labor agreement is not compatible with the law.[40] Howlett supported his position by noting that "[a]rbitrators, as well as judges, are subject to and bound by law, whether it is the fourteenth amendment to the Constitution of the United States or a city ordinance."[41]

B. The Moderate View Outgrowth

Not all legal scholars and practitioners shared these extreme views. Over the years, a reconciliation of these hard lines occurred, producing a more tempered and judicious moderate position. The proponents of this view hold that arbitrators may consider external public law in appropriate circumstances. Known as the Mittenthal analysis, "an arbitrator's award may not require conduct forbidden by law. . . ." Followers of this school of thought believe this view to

---

39. Jones, *Proceedings of the Twentieth Annual Meeting, National Academy of Arbitrators* (1967) (Bureau of National Affairs (BNA)).
This is a view consistent with many of the established arbitrators of the time. The late Dean Shulman had said: "The arbitrator . . . is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement." Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955).

40. Jones, *supra* note 39, at 67.

41. Jones, *supra* note 39, at 83.

be more consistent with the special role of arbitrators sanctioned by the *Trilogy*.[42] Thus, an arbitrator would not be able to affirmatively require a party to engage in unlawful conduct under the guise of interpreting a contract clause.

The academic debate shaped the real issues. Would the courts treat arbitral excursions into public law as an infringement on their mandate, resurrecting much of the judicial rivalry dominating the early history of arbitration? Would courts conclude that a labor arbitrator was not competent to assess and define the parameters of the parties' legal rights and obligations? Or would courts hold that only the most egregious arbitral actions or prejudicial conduct would permit them to open the door to Pandora's box? The next part of the article examines the treatment given by the courts to cases involving the public policy exception, and draws some preliminary conclusions about the impact on the labor arbitration process.

III. Transformation of the Debate: A Problem for the Courts

A. Division or Consistency Among the Circuits

No adequate discussion of the public policy conundrum can occur without some prefatory comments about public policy generally. Black's Law Dictionary defines public policy as the following:

> That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. The term "policy," as applied to a statute, regulation, rule of law, course of action, or the like, refers to its probable effect, tendency, or object, considered with reference to the social or political well-being of the state. Thus, certain classes of acts are said to be "against public policy," when the law refuses to enforce or recognize them on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality.[43]

From this definition it is relatively clear that many of the philosophies and thoughts germinating from the Wingspread Conference were confined to instances where arbitrators had to weigh contrac-

---

42. Edwards, *Labor Arbitration At The Crossroads: The 'Common Law of the Shop' v. External Law*. 32 The Arb. 2, 66 (June, 1977).

43. Black's Law Dictionary 1041 (5th ed. 1979).

tual structures against statutory claims. As the public policy cases unfolded, it became apparent that public policy was more ill-defined than most imagined. Public policy was invoked when positive law violations were alleged, and where courts believed there was a discernible public policy.

Restrictive Views on Public Policy

1. Second Circuit

One of the earliest and most significant cases decided by this circuit was *Local 453 v. Otis Elevator.*[44] Here, an employee was terminated following conviction for processing policy slips on employer's premises during working hours. The arbitrator found that the employee had been discharged without just cause, in view of his long time service and other mitigating factors. He reinstated the employee without back pay. On appeal, the district court reversed the arbitrator's award, holding that the arbitrator's award was "void and unenforceable" because it was violative of an "overriding public policy."[45] The court further noted that the award "indulges crime, cripples an employer's power to support the law, and impairs his right to prevent exposure to criminal liability."[46]

The union moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This motion was denied by another district court judge who basically reaffirmed the first judge's holding that the "misconduct involved here is not just an infraction of a company rule. It is a misdemeanor under [New York Penal Law]. . . . [T]he responsibility for the observance of this law rests upon the owner of the premises and exposes him to criminal prosecution. The award should not be complied with."[47]

The union appealed from this decision. In a thorough evaluation of the facts and law, the Second Circuit concluded:

> - The parties' collective bargaining agreement does not define "just cause" for termination; neither does it identify criteria governing the propriety of a discharge;

---

44. 314 F.2d 25 (2d Cir. 1963), *cert. denied*, 373 U.S. 949 (1964).

45. 314 F.2d at 26 (quoting Local 453 v. Otis Elevator Co., 201 F. Supp. 213, 218 (S.D.N.Y. 1962)).

46. *Id.*

47. Local 453 v. Otis Elevator Co., 206 F. Supp. 853, 855 (S.D.N.Y. 1962).

- An arbitrator can supply the definition of just cause where the parties have provided the arbitrator with a grant of general authority;
- If the employer wanted the absolute right to discharge an employee in the face of a criminal conviction, such language could have been incorporated into the parties' contract;
- The "precise nature of the public policy which the award was thought to offend is not made clear by either opinion in the [d]istrict [c]ourt."[48] The district court's analysis of the public policy issue is considered inadequate;
- In suits brought under Section 301 of the Labor Management Relations Act, "the power of the federal courts to enforce the terms under the collective bargaining agreements is subject to the restrictions and limitations of the public policy of the United States. Thus, when public policy is interposed as [an issue], a court must evaluate its asserted content;"[49]
- And, while there is a public policy which condemns gambling by an employee on the premises of the employer, the policy may have already been vindicated by the method prescribed by the State Legislature, i.e., a criminal conviction and a judicial penalty. Moreover, there may have been even greater vindication than the drafters of the penal code envisioned because the arbitrator's award permitted a seven month layoff without compensation or accrual of seniority benefits.[50]

In retrospect, the court in *Otis* was not unduly concerned about protecting the arbitration process. Reaching a decision which did not disturb the arbitrator's award was triggered more by the court's preoccupation with the meaning and scope of public policy. The Second Circuit was not reluctant to carefully scrutinize public policy to determine its impact on arbitration proceedings where such issues were implicated. Cases undergirded by public policy considerations required serious judicial review.

---

48. 314 F.2d at 28.
49. *Id.* at 29 (citation omitted).
50. *Id.*

2. *Ninth Circuit Responds*

A case of early origin addressing the public policy exception was *World Airways, Inc. v. International Brotherhood of Teamsters, Airline Division.*[51] The court of appeals affirmed the vacating of a labor arbitration award which required the retraining of an airline pilot whose judgment had deteriorated sufficiently to create a risk of harm to the general public.[52] The court commented on the statutory duty of air carriers to assume their responsibilities with the highest degree of care, as required by the Federal Aviation Act, and then noted: "[A]lthough the federal policy of resolving labor differences by arbitration is strong, there is also a strong federal policy in ensuring the safety of air travel. In weighing these concerns, we cannot overlook the horrible toll in human life that air crashes can take."[53]

The Ninth Circuit confirmed that the public policy exception could not be resorted to cavalierly in *Amalgamated Transit Union v. Aztec Bus Lines.*[54] An employee was discharged for operating a bus that he knew had faulty brakes. In arbitration proceedings to determine the status of the employee, the arbitrator found that he "exhibited extremely poor judgment."[55] Characterizing it as an isolated incident, however, the arbitrator concluded that the circumstances did not warrant dismissal.

The district court upheld the arbitrator's award, and the court of appeals affirmed. In affirming, the court stated that there was no California statute which made it "illegal to employ bus drivers who have previously shown bad judgment."[56] Thus, the plaintiff, by employing the defendant, was not breaking a law. A public policy issue does not require substitution of judicial judgment for arbitral

---

51. 578 F.2d 800 (9th Cir. 1978).

52. *Id.* at 800-01.

53. *Id.* at 803-04. The court of appeals used the pre-emption doctrine to reach its decision, basically concluding that when two federal laws collide, each must be carefully weighed to assess which law has the greatest impact. The arbitrator who does not take this conflict into consideration may risk award vacatur. It is efficacious to note, however, that in this case, the arbitrator had concluded that the airline acted with cause when it demoted the grievant. The arbitrator then read into the award an order to retain and requalify the pilot. This result likely strained the language in the collective bargaining agreement, and caused the appellate court to conclude that the arbitrator exceeded his authority.

54. 654 F.2d 642 (9th Cir. 1981).

55. *Id.* at 643.

56. *Id.* at 644.

judgment.

One of the most significant cases to be decided by this circuit, solidifying further the notion that courts must defer to arbitration awards, was *Garibaldi v. Lucky Food Stores.*[57] The grievant was discharged for refusing to deliver spoiled milk, instead notifying the local health department. Garibaldi was discharged and grieved, but the arbitrator concluded that he had been terminated for cause. Garibaldi then filed a claim in California state court, alleging that his termination was violative of public policy and whistleblowing statutes, and entitled him to damages for intentional infliction of emotional distress.

The employer removed the case to federal court, citing pre-emption by Section 301 of the Labor Management Relations Act.[58] Characterizing the action as an appeal of an arbitrator's award, thus time-barred, the employer successfully moved to dismiss the wrongful termination claim. The tort action was remanded to the state court, and Garibaldi appealed.

The court of appeals, in a cogently prepared opinion, held that pre-emption did not apply in instances where California law was protective of the very interest at the heart of Garbaldi's claim.[59] Not only did California permit actions for wrongful discharge where the discharge violates public policy, but in 1985, it passed the whistleblowers' statute, precluding retaliation such as discharge where a grievant attempts to curb violations of the law.

Since the state law protected interests different than those intended by federal labor law, Garibaldi's claims were given recognition. "The state law may protect interests separate from those protected by the NLRA provided the interests do not interfere with the collective bargaining process."[60]

The notion of limited judicial review and deference to arbitra-

---

57. 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985).

58. 726 F.2d at 1368.

59. *Id.* at 1371. The court acknowledged that the issue of whether a claim for wrongful termination based on a violation of state public policy is pre-empted by federal law was one of first impression. Using a traditional analysis, i.e. whether the exercise of state authority 'frustrate(s) effective implementation of the Act's processes, the court determined that where the state has a substantial interest in the regulation of conduct, "and the State's interest is one that does not threaten undue interference with the federal regulatory scheme," pre-emption would not apply.

60. *Id.* at 1375-76.

tion was strengthened in *Bevles Co. v. Teamsters Local 986.*[61] Two employees were discharged from plaintiff company after failing to satisfy the company that they were in the country legally. The arbitrator ruled that the company was in violation of the collective bargaining agreement because it would not have been subject to criminal liability if it had failed to discharge the employees.[62]

On the grounds that there was neither a clearly defined public policy violation nor a manifest disregard for the law, the arbitrator's award was affirmed by the district court. Congress has not adopted provisions in the INA to make it unlawful for an employer to hire an alien who is present and working in the United States without appropriate authorization. Absent the intention of Congress for the INA to provide exclusive federal regulation in the employment of illegal aliens, the undocumented workers are protected by the provisions of the collective bargaining agreements.

3. D.C. Circuit

An attempt to expand the public policy exception or broaden the scope of judicial review was avoided in *American Postal Workers Union v. United States Postal Service,*[63] a case combining aspects of criminal law with traditional collective bargaining. The grievant was terminated after he confessed to stealing postal funds. The union grieved the matter to arbitration, and the arbitrator reinstated the grievant. The arbitrator's award was predicated on the fact that the employer had failed to provide the grievant with a Miranda warning. The arbitrator viewed the confession as tainted, and set aside the discharge.[64]

In a meticulous opinion authored by district court Judge Harry Edwards for the three-person court of appeals, it was held that:

> - Where the parties have agreed to submit labor grievances to arbitration, the courts have a very circumscribed role to play.
> - The arbitrator's interpretation was supported by a conceivable reading of the collective bargaining agreement.

---

61. 791 F.2d 1391 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 500 (1987).
62. 791 F.2d at 1392.
63. 789 F.2d 1 (D.C. Cir. 1986).
64. *Id.* at 3.

- The standard of review on which a court can rely is not expanded because of an alleged mistake of law.
- The arbitrator's award must be reinstated because it drew its essence from the collective bargaining agreement.
- Though it is well-understood that courts will not enforce an arbitrator's award if it violates established law or seeks to compel unlawful action, the public policy exception is extremely narrow. "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy.[65]

An identical construction of the public policy exception occurred in *Northwest Airlines v. Air-Line Pilots Association.*[66] In this case, the Northwest Airlines System Board of Adjustment had ordered reinstatement of a pilot if he could abstain from alcohol for at least two years, and who was later recertified by the Federal Aviation Administration. The employer appealed, and the federal district court sustained the employer's objection, holding that the award conflicted with public policy. On appeal, the appellate court reversed the decision of the lower court stating "[i]t would be the height of judicial chutzpah for us to second-guess the present judgment of the FAA. . . . At its core, Northwest's argument seeks just such a result, which would require this court to impose its 'own brand of justice in determining applicable public policy.' "[67]

4. Seventh Circuit

Narrow constructions akin to those of the Second, Ninth and D.C. Circuits, were achieved through decisions of the Seventh Circuit. In *International Association of Machinists District No. 8 v. Campbell Soup Co.*,[68] the Seventh Circuit held that an arbitrator's award, reinstating an employee to a position from which he had been discharged for a gambling violation, was enforceable in light of the fact that the arbitrator's function and power were expressly limited by the collective bargaining agreement and because public policy did not require that an employee convicted of such a viola-

65. *Id.* at 8.
66. 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1751 (1988).
67. 808 F.2d at 83.
68. 406 F.2d 1223 (7th Cir.) *cert. denied*, 396 U.S. 820 (1969).

tion be discharged.

Similarly, in *E.I. Dupont de Nemours & Co. v. Grasselli Employees Independent Association of East Chicago*,[69] the court confined its scrutiny to whether "positive law had been violated." In this case, an employee was discharged on the basis that he assaulted fellow workers and destroyed company property. The union grieved, and the matter went to arbitration. The arbitrator concluded that the grievant's conduct was triggered by a nervous/mental breakdown, not the use or abuse of drugs, and consequently since he was not at fault for his conduct, just cause for the discharge could not be established. Grievant was reinstated to his position.

The district court vacated the arbitrator's decision, concluding that the arbitrator failed to weigh the public interest consideration of safety in the workplace, instead "enforcing his own notions of equity instead of the collective bargaining agreement."[70] On review, the court of appeals observed that while the question of whether the award violates public policy is ultimately one for resolution by the courts, this public policy must be well-defined and dominant to justify a refusal to enforce the award on such grounds.[71] Here, the arbitrator considered the public policy of safety in the workplace, making a factual finding that a recurrence of a future breakdown for the grievant was remote. For the court to review this matter would require a *de novo* review, with the court re-finding facts already found by the arbitrator.

The court declined the invitation to review anew the merits because "even under the less deferential clearly erroneous standard of review the arbitrator's factual finding that the likelihood of a future breakdown by [the worker] is remote must be accepted."[72]

Expansive Views on Public Policy

5. Fifth Circuit

A broader public policy exception was carved out in this circuit.

69. 790 F.2d 611 (7th Cir.), *cert. denied*, 107 S. Ct. 186 (1986).
70. 790 F.2d at 613.
71. *Id.* at 615.
72. *Id.* at 617.

In *General Warehousemen & Helpers v. Standard Brands*,[73] plaintiff filed suit to enforce an arbitration agreement which ordered that all employees of a Dallas plant be given "superseniority" and receive "compensation and other benefits" upon the transfer to defendant's newly constructed plant in Denison.[74] Prior to the arbitration award, the National Labor Relations Board certified IAM as the exclusive bargaining agent for the Denison employees. Teamsters, the union for the Dallas employees, sought to protect the contractual rights of the Dallas employees.

The district court concluded that the arbitrator's award conflicted with the NLRB certification and therefore could not be enforced. Following a three-pronged test for the enforcement of arbitration awards, the court found that it failed to comply with the third criterion, because it is "repugnant" to the NLRA.[75] Thus, if the award was enforced, the employer would be required to violate the terms of the collective bargaining agreement with IAM. "When one contract conflicts with the overriding statutory policy of the NLRA, it cannot be enforced through specific performance."[76] Therefore, the appellate court vacated the arbitrator's award, remanding the case to the arbitrator to assess damages.

The Fifth Circuit affirmed its view of public policy in *Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO Local 540 v. Great Western Food Co.*[77] The grievant was discharged for "drinking intoxicating liquor while on duty or within four hours prior" and "for traveling at a speed greater than reasonably prudent."[78] The arbitrator ordered reinstatement. The employer refused to comply with the award, and the union sought enforcement in district court. The lower court upheld the arbitrator's award.

On appeal, the Fifth Circuit reversed. Though careful to articulate its support of limited judicial review, the court went on to state that enforcement of an arbitration award should be denied only if the dispute is not "arguably arbitrable." "A driver who imbibes the spirits endangers not only his own life, but the health

---

73. 579 F.2d 1282 (5th Cir.), *reh'g denied*, 588 F.2d 829 (5th Cir. 1978).
74. 579 F.2d at 1287.
75. *Id.* at 1293.
76. *Id.* at 1294.
77. 712 F.2d 122 (5th Cir. 1983).
78. *Id.* at 123.

and safety of all other drivers."[79] The court rationalized that this consideration was even more compelling

> when the driver is employed to course the highways in a massive tractor-trailer rig. The public interest must be protected. The public policy of preventing people from drinking and driving is embodied in case law, the applicable regulations . . . and "pure common sense." This policy is well-defined and definite, sufficient to preclude enforcement of the arbitrator's decision.[80]

This case, along with others from the several circuits, provided an opportunity for the United States Supreme Court to resolve what was becoming an irreconcilable conflict — what, in fact, was the meaning and scope of public policy? The court was presented with this opportunity in the seminal case of *W.R. Grace & Co. v. Rubber Workers, Local 759.*[81] In reaffirming the narrow standard of judicial review, first articulated in the Steelworkers' Trilogy, the Court held that public policy "must be 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 interest."[82] Thus, nebulously defined or esoteric public interests could not be used by the courts to substitute their judgment for that of arbitrators. External law had to be clear, and arbitrators' decisions had to comply with that law. Otherwise, the award could be overturned.

From the above recent cases analyses, it can be seen that generally, federal appellate courts since *W.R. Grace* have applied the narrow standard of review enunciated by the Supreme Court — public policy must emanate from clear statutory or case law. By and large, courts remain faithful adherents to *Trilogy* principles, refusing to delve into the merits of a case simply because a party alleges the intrusion to be proper.

This result is dictated by the federal public policy favoring arbitration of labor disputes. Courts do not appear to be tempted to act contrary to their prescribed role. And despite some rather gloomy prognostications in earlier years, labor arbitration does not appear to be floundering. One may even legitimately argue that ar-

---

79. *Id.* at 125.
80. *Id.*
81. 461 U.S. 757 (1983).
82. *Id.* at 766 (citing Muschang v. United States, 324 U.S. 49, 66 (1945).

bitration's favored status is derived from the knowledge that arbitral excesses, awards in direct contravention of public policy embodied in congressional or legislative mandates, is curtailed by the very process of judicial review.

But what types of awards converge with public policy? Reinstating a grievant who consumes alcohol is not in and of itself legally proscribed. But is it simply enough to state that so long as an arbitrator's award does not mandate illegal activity (enforcing a seniority plan which discriminates against minorities), it will be upheld? Arbitral awards which endanger the public interest may well fall within the parameters of the proscription umbrella. The most obvious example is the discharge case of the intoxicated pilot. Though the current arbitral thinking is that alcoholism is a disease which can be treated, it is not always curable. The public interest consideration looms on the horizon. Is the public interest the same when we are dealing with a machinist's inhalation of marijuana? Probably not. But how substantial must the public interest be to justify court review and award vacatur?

Paperworkers v. Misco,[83] the most recent decision of the United States Supreme Court, offered few enlightenments.

B. *Misco* and its Potential Ramifications

In *Misco* the grievant, an operator of dangerous machinery, was discharged from his job because he was found on company premises in an atmosphere of marijuana smoke in an alleged violation of a company rule proscribing operators from working under the influence of alcohol or other substances.[84] The arbitrator rendered a 33-page opinion in which he noted that though marijuana was indeed located in the car in which grievant was apprehended, there was no direct evidence indicating that grievant had smoked marijuana or had come under its influence.[85] As a result of these findings, the arbitrator reinstated the grievant to his former position, with full back pay and restoration of supplemental benefits.

The employer appealed this decision, and was successful in securing reversal of the arbitrator's decision. The district court found, in essence, that the arbitrator's award contravened public

83. 108 S. Ct. 364 (1987).
84. *Id.*
85. *Id.* at 366.

policy and could not be enforced.

The district court's decision was appealed to the Fifth Circuit Court of Appeals. Characterizing the opinion as whimsical at best, the court sustained the district court's decision, holding that the evidence the arbitrator was presented with would have been sufficient to sustain a civil verdict and probably a criminal conviction.[86] The court proceeded to elaborate on the hazards of combining marijuana and dangerous machinery, concluding that an arbitrator's award which contravenes the public policy of keeping the work place free from such dangers cannot be upheld.

Critical to the Fifth Circuit's analysis was that marijuana gleanings were found in the grievant's automobile after the discharge occurred. The arbitrator had refused to consider this evidence since it was not known to the employer at the time grievant was discharged. Nevertheless, the court weighed the public policy of enforcing an arbitrator's award with the public policy of protecting the safety of employees in the work place, and concluded that the grievant's "abstract procedural rights" were secondary to the public interest consideration.[87]

In a strongly worded opinion, a unanimous United States Supreme Court held that the lower appellate court had erred in vacating the arbitrator's award. The decision evidences the Court's support of arbitral finality, fundamental to the viability of the process, and reaffirms two principles of arbitral jurisprudence: (a) that absent fraud or dishonesty, a court cannot reconsider the merits of an award "since this would undermine the federal policy of privately settling labor disputes by arbitration without governmental intervention," and, (b) refusal to enforce an award on public policy grounds is justified only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law.[88] The nexus between marijuana gleanings in another employee's car and the grievant's use of drugs "is tenuous at best."[89] Improvident factfinding, if such were the case, is not a sufficient basis to disturb the arbitrator's award. The bright-line test, set out above, confirmed

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 367.

that the public policy exception was to be narrowly construed.

CONCLUSION

When *Gardner-Denver* was decided nearly fifteen years ago, proponents of the labor arbitration process believed it marked the beginning of a deplorable phenomenon — the gradual deterioration of the finality aspect of arbitration. The danger most feared was that the viability of the process would be threatened as courts would begin to interject their own judgment on what constituted industrial justice. Since arbitration was not designed to examine the efficacy of the industrial marketplace by assessing its ability to interface with political, social and economic institutions, it was thought courts would fill the void. Some even feared that the court had initiated the first of many sophistic misadventures, one which would dominate the collective relationship and shape its future.

These prognoses have not come to bear. Instead, the courts have remained essentially supportive of the arbitration process, with deference afforded in the majority of cases. Despite the philosophies underpinning the arbitral decision-making process, few arbitrators have authored opinions in blatant disregard of statutory issues or external law. Drawing their authority from the labor agreement, arbitrators have been conscious of their responsibilities primarily as contract readers and not reconcilers of public laws. But the two are not necessarily incompatible. When they become so, however, courts should be free to intervene. As suggested earlier, it may be the availability of judicial review in limited circumstances that keeps the process viable.

Arbitration of labor disputes has been lauded as a pragmatic institution. Its growth in the public and private sectors strongly intimates that its survival is not jeopardized by the mere existence of judicial review. Limited judicial intervention triggered by the public policy exception will not only serve to retain the relatively pristine nature of the process but bolster the values which give the collective bargaining relationship in either sector meaning and vitality. In the final analysis, such judicial excursions will not strip the arbitration process of its primary and fundamental aspect, finality, but enhance its utilization.