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With an estimated ninty-five per cent of the 125,000 collective agreements reported to be in force in this country containing clauses calling for the arbitration of grievances, one is impelled to ask why this method of settling disputes arising during a contract's term has grown so tremendously in the last two decades.

For, after all, these grievances arise under contracts and involve their interpretation or application. And contract interpretation is grist for the mill of the courts. Parties to collective bargaining agreements were free to say to one another "We have made a contract. If one of us believes the other has broken it, he is free to bring an action at law. The courts and the proper forum for a determination of rights and obligations under contracts, including those between management and labor." Yet American management and labor have chosen not to do this. Why?

One part of the answer lies in those characteristics of a labor agreement that set it off from the ordinary commercial contract. A labor agreement, while assuredly a contract and enforceable at

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law, has certain unique characteristics. In the ordinary transaction between buyer and seller the parties are free to disagree and make a deal elsewhere. In the labor agreement the parties are under heavy pressure to come to an agreement. They cannot go elsewhere. They must in the end come to terms. The alternatives, the strike or the lockout, may be too costly. Professor (now Solicitor General) Cox states that this partially explains the gaps and deliberate ambiguities in collective bargaining agreements which create distinctive problems of interpretation. We all know of cases where the parties, faced with a deadline and stuck on a knotty problem, agree on the wording of a clause each knowing that the other places a different meaning on it. At the moment it is more important to secure a strike-averting agreement than it is to secure a firm understanding on the sticky point. That can come later, if they are lucky, by not having to face the issue during the agreement's life; if they are not so lucky, by a gamble on an arbitrator's ruling. It was a problem such as this which once prompted Dean Harry Shulman, in a decision he rendered as umpire under the Ford Motor Company-UAW contract, to write about as follows:

> "Each side states that the other's negotiators knew the true intent of the clause but that it assented to the language employed to save the other side's face. The parties are not in agreement on whose face is to be saved but they apparently do agree that the umpire's face is expendable."

The second unique feature of collective bargaining agreements is that the pressure to have some agreement rather than none, with all that implies in terms of economic conflict, means that the decider or the arbitrator can rarely say that the parties' minds did not meet on the question put to him and that as a consequence there was no contract. The parties have a continuing relationship which they thought they stabilized. They do not relish having to do the job again.

These characteristics of labor agreements that set them off from commercial contracts account in part for the development of arbitration as the chief means of settling disputes as to the meaning and application of contracts between managements and unions. The arbitration process, to the extent that it has developed a corps of men familiar with industrial relations problems and with some feel for the actual operating problems of a plant and a local union, is more conducive to realistic interpretation of vague or ambiguous

labor agreements than are the courts. This is not said in derogation of the talents of judges; it is just that their experience has for the most part been in a different sphere.

But there are a number of other reasons that account for the development of arbitration under collective agreements. Parties may choose arbitration to avoid the cumbersomeness and formality of the law. They may choose it in order to have the dispute decided promptly, finally and near its locus. They may wish to have it decided by one familiar with industrial relations problems so that the resolution of ambiguities in their contract can be realistically related to actual conditions of the plant and of the local union. They may wish to have a hand in the selection of the decider. They may wish the dispute decided informally and quickly without making a "federal case" of it with all that that implies in terms of exacerbated feelings and diversion from the actual goal of production. They may recognize that the language of their contract, conceived in the crisis atmosphere of an imminent or actual strike, expresses inelegantly or imperfectly their intent and they do not conceive of the established judicial tribunals as having the orientation or interest necessary to properly establish their intent. Or, as is sometimes the case, one party may accede to arbitration of grievances not because it is convinced of the efficacy of this method of settling disputes at all, but because the alternative is a strike and an agreement is not possible without yielding on this point.

To say the foregoing is not to say that the law and the courts have no interest and carry on no activity in grievance and contract administration. Prior to the passage of the Labor-Management Relations Act of 1947, the laws of nearly half the states gave arbitration a statutory base which made promises to arbitrate enforceable by the courts and placed the judicial system behind the enforcement of compliance with awards.

But when one party goes to court to compel arbitration, the other has the right to claim that the problem involved is not covered by the promise to arbitrate. And when one party goes to court to compel compliance with an award, the other may properly raise the defense that the arbitrator has exceeded his powers. The arbitrator can decide on the scope of his powers only if specifically authorized by the parties to do so. If not so authorized, the courts have generally held that an agreement to arbitrate is based on contract and

that it is for the court to decide whether the contract contains a promise to arbitrate the dispute tendered.

With this thesis one could scarcely quarrel. Both management and labor should be free, unless they plainly otherwise contract, to have the existence of a contractual obligation to arbitrate passed upon. If they did not in fact agree to arbitrate a particular kind of dispute — i.e. one not involving the application or interpretation of the agreement — they should not be compelled to submit to that forum. And unless they had agreed in advance to have the arbitrator decide the scope of his own powers the court remains the proper forum for such determination.

One of the interesting but scarcely noted features of industrial relations is that a number of the largest corporations and unions have contracted to keep wholly away from the courts when it comes to handling disputes arising under their labor agreements. Thus, as an example, the contract between Ford Motor Company and the UAW, and also the one between General Motors and the same union, contain the following provisions:

> "It shall be the function of the umpire, and he shall be empowered . . . . to make a decision in cases of *alleged* violations of the terms of this Agreement . . . . of *alleged* improper classification of employees, of *alleged* violations of negotiated rates and upon the scope of his powers. (Emphasis added)
>
> "There shall be no appeal from an umpire's decision. It shall be final and binding on the union, its members the employee or employees involved and the Company. The Union will discourage any attempts of its members and will not encourage or cooperate with any of its members in any appeal to any court or labor board from a decision of the umpire."

Also contained in these agreements are specific limitations on the powers of the umpire. He is denied power to add to or subtract from, or modify any of the terms of the agreement. He may not establish wage scales, rates on new jobs or change any wage except as specifically empowered in the agreement. He has no power to rule on cases arising under the articles dealing with either health and safety or production standards. On the other hand, the no-strike clause is specifically *not* applicable to disputes over production standards, health and safety grievances or rates on new jobs

and, after having followed certain specified procedures, employees may legally strike over such matters during the life of the contract.

The Aluminum Company of America contracts contain similar provisions.

The parties to these agreements—the giants of American industry and labor—have made their own delimitations between the areas subject to arbitral review and the areas where they prefer to rely solely on their own devices. Disputes over whether a subject falls within either area or within one or the other of them they have empowered their umpire to decide.

Provisions such as these, however, are the exception and not the rule. Most agreements do not empower the arbitrator to rule on his own jurisdiction. Nor do they pledge the parties not to challenge his jurisdictional holdings in the courts. And most contain an unconditional no-strike clause.

Despite that fact, however, the percentage of arbitration awards challenged in the courts were relatively small, perhaps a few hundred per year of the scores of thousands of issues submitted to arbitration. But in a significant number of the cases litigated, the courts have shown a propensity, under the guise of determining whether an agreement to arbitrate the particular dispute had indeed been made, to hold for arbitrability or (more often) for non-arbitrability because of the judge's views on the merits. Where this occurred, the courts assumed the very function which the parties by contract had agreed to have performed by an arbitrator.

With the passage of the Labor-Management Relations Act and its interpretation by the Supreme Court in 1957 in *Lincoln Mills,*[1] agreements to arbitrate were deemed enforceable under federal law. *Lincoln Mills* charged the federal courts with the duty to develop a body of labor law from federal labor policy and judge-made law in the state courts. In three landmark decisions the Supreme Court did just that in the matter of the enforceability of agreements to arbitrate. These decisions not only limited the role of the courts in passing on arbitrability but also set forth the court's views as to the nature and character of collective agreements and the obligations of arbitrators thereunder that have set the industrial relations fraternity a'buzzing.

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

United Steelworkers v. American Mfg. Co.[2] is the first of the three. In this case the union brought a suit to compel the company to arbitrate the grievance of one Sparks, filed when the company refused to reinstate him following an industrial injury as a result of which he had received a compensation rating of twenty-five per cent permanent partial disability. The company pleaded to the court that it was not obligated to arbitrate because 1) Sparks is estopped from claiming reinstatement by virtue of his settlement of the workmen's compensation claim on the basis of a permanent partial disability, 2) Sparks is not physically able to do the work, 3) this type of dispute is not arbitrable under the agreement.

The agreement contained the standard form of arbitration clause and the usual no-strike, no lockout clause. The lower court refused to compel arbitration on the basis that the grievance is "A frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement." This conclusion was arrived at on the basis of a review of the evidence as to Sparks' disability and an evaluation of the employer's claim that no opening was available for one so disabled.

The Supreme Court reversed the lower court and ordered arbitration. This is a result with which one can scarcely disagree, for it is obvious that the lower court's reasoning was not that it was frivolous to claim that the agreement called for an arbitrator to decide whether or not the claim for reinstatement lacked merit, but that it was frivolous to press the claim itself. Hence the court, not an arbitrator, decided the merits of the claim, contrary to long-established principles obliging the courts to enforce agreements to arbitrate and to refrain from themselves passing on the merits.

The second case involved *United Steelworkers v. Warrior & Gulf Nav. Co.*[3] This company transports steel by barge. At its terminal it performs maintenance and repair work on its barges, those doing that work constituting the bargaining unit represented by the Steelworkers. Between 1956 and 1958 the company laid off employees, reducing the unit from forty-two to twenty-three men. This reduction was due in part to the fact that the company contracted out the maintenance work previously done by its people to neighboring contracting companies. These companies used Warrior

[2] 363 U.S. 564 (1960).
[3] 363 U.S. 574 (1960).

and Gulf's supervisors to lay out the work and hired some of Warrior and Gulf's laid off employees at reduced wages. In fact some of those hired were assigned to work on Warrior and Gulf's barges.

The result was a grievance "protesting the Company's actions of arbitrarily and unreasonably contracting out work . . . . that previously has been performed by Company employees . . . . the Company is in violation of the contract by inducing a partial lockout of the number of employees who would otherwise be working were it not for this unfair practice."

The contract had a no-strike, no lockout clause and a grievance procedure reading in part as follows:

> "Issues . . . which are strictly a function of management shall not be subject to arbitration. . . .
>
> "Should differences arise . . . as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, . . . the matter shall be handled in a five-step grievance procedure the last step of which is referral to an umpire whose decision is final."[4]

The company refused to arbitrate the grievance and the union sued to compel it. The district court dismissed the suit "after hearing evidence much of which went to the merits of the grievance." That court said that the agreement did not "confide in an arbitrator the right to review the defendant's business judgment in contracting out work"; that "the contracting out of repair and maintenance work, as well as construction work, is strictly a function of management not limited in any respect by the labor agreement involved here." The court of appeals affirmed by a divided vote, the majority holding that the agreement had withdrawn from the grievance procedure "matters which are strictly a function of management" and that contracting out was embraced by this withdrawal.

The Supreme Court, holding that because federal policy is to promote collective bargaining agreements and because a provision for grievance arbitration in agreements is a major factor in achieving industrial peace, any doubt about the scope of an arbitration clause should be resolved in favor of coverage, said that:

> "The grievance alleged that the contracting out was a violation of the collective bargaining agreement. There was there-

[4] *Id.* at 576.

fore a dispute as to the meaning and application of the provisions of this Agreement which the parties had agreed would be determined by arbitration."[5]

Mr. Justice Whittaker in a strong dissent pointed out that the employer had contracted out for nineteen years, and that the absence of union demurrer was acquiescence in the principle that it was "strictly a function of management." He also stressed that the union had tried unsuccessfully to get a clause banning sub-contracting into the agreement. He pointed to a line of judicial decisions which say that arbitration will not be compelled by the courts unless the writing manifests a clear intent to submit the particular class of question. He found that in this case the parties' conduct over the years was an acquiescence in the proposition that contracting out of work was strictly a function of management and, by the terms of the arbitration clause, not subject to arbitration.

Although this case is assuredly a closer one than *American Mfg.*, I can find little to criticize in its result. The issue before the court was, not did the subcontracting violate the agreement, but does the agreement require arbitration of that question. These parties signed a very broad arbitration clause. They agreed to arbitrate not only differences "as to the meaning and application of the provisions of this Agreement" but also "any local trouble of any kind." True, they also said "matters which are strictly a function of management shall not be subject to arbitration." To say that the question whether a claim that the subcontracting here complained of violated the agreement is not arbitrable, one would have to decide that it was strictly a function of management.

But there is subcontracting and subcontracting. Some kinds of subcontracting may well have been regarded over the years by these parties as "strictly a function of management." If in the past the company had subcontracted only its surplus work, or only work requiring specialized skills its people didn't possess, or work requiring access to equipment the contractor had and the company did not have, and if now it is contracting out the *very* work the bargaining unit people used to do, at lower rates of pay while they are on layoff in massive numbers, a viable question is created wherether the agreement *as a whole* is not violated thereby. And where there is an apparent conflict between the exercise by management of its

[5] *Id.* at 585.

functions and the meaning and application of the agreement, an arbitrable question surely exists.

For all agreements rest upon an implied covenant of good faith and fair dealing. Subcontracting in the ordinary course of business—"make or buy" decisions based on considerations dealing with the need for flexibility in business operations, or on the need for gaining access to items or techniques not available in the plant or on the need to meet time schedules and the like—may assuredly be a function or reserved right of management under a contract which does not plainly bar it. But subcontracting undertaken to evade the very wage standards the collective agreement was drawn to defend may well raise a lively question about the integrity of that agreement. Professor Archibald Cox has expressed this thought better than I can:

> "The notion that ordinary commercial contracts spell out their obligations is a silly canard. Every contract, whether a typical commercial contract or a labor agreement contains 'an implied covenant of good faith and fair dealing.' One who sells a retail milk business impliedly promises that he will not solicit former customers. A lease of coal lands in exchange for a schedule of royalties implies an obligation to mine the coal diligently. Under the Coca-Cola-type contract there should be no hesitation in setting aside a discharge aimed at circumventing seniority or defeating a grievance even though the contract says nothing about discharges because such a discharge destroys the right of the employees to have the fruits of their bargain. Upon this familiar principle of contracts one might fairly conclude in the absence of other evidence that the provisions of a collective bargaining agreement establishing wages and labor standards imply an obligation not to seek a substitute labor supply at lower wages or inferior standards. The implied promise would prohibit subcontracting for this purpose. But there are limitations to the covenant of honesty and fair dealing. A manufacturer who sells goods when the price is high is not precluded from doubling his output because this would impair the value of the buyer's purchase. A collective bargaining agreement does not imply a promise that the employer will not deprive the union and the employees of its benefits by closing an obsolete plant or dropping an unprofitable line of business. Similarly, the implied covenant of good faith and

fair dealing can hardly be supposed to reach subcontracting which is based upon business considerations other than the cost of acquiring labor under the collective agreement. In such a case either management is free to act or some limitation must be found in the very nature of a collective bargaining agreement."[6]

I do not mean to infer that the union necessarily has a good case on the merits in *Warrior & Gulf*. All subcontracting cases are uphill fights for unions. Where the agreement does not limit contracting, the presumptions strongly favor management. I mean to say only that it presents a legitimate question whether the particular contracting was a substantial nullification of the agreement. That kind of question is arbitrable.

The third case, *United Steelworkers v. Enterprise Wheel & Car Corp.*,[7] dealt with the enforcement of an award. An arbitrator reinstated with back pay certain employees discharged for participation in a walkout. After the walkout but before the award the contract expired and was not renewed. The back pay award did not stop at the expiration date; it covered the period thereafter. The company refused to comply, saying the arbitrator, by causing his award to be effective for a period beyond the contract's expiration, exceeded his powers.

The Court held that the arbitrator premised his award on his construction of the contract and that it was not the Court's function to interpret the contract differently. It ordered enforcement.

With this holding I find myself in sharp disagreement, as I suspect most arbitrators are. Most of us have proceeded on the basis that our powers are coextensive with the agreement and lapse therewith. In this case, once the agreement lapsed the reinstated men were employees at will. Their right to back pay flowed from the agreement and ended with it. In my opinion the Court had ample grounds for saying that the arbitrator exceeded his authority in causing back pay to run beyond the date rights continued to accrue to the employee. I should add that I distinguish this case from one where, for example, vacation pay is earned *under* an agreement but does not fall due until *after* its expiration. In that case the arbitrator

[6] See, Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1496 (1959).

[7] 363 U.S. 593 (1960).

would be called upon to rule on a claim for the enforcement of a right accruing under the agreement though payable at a later date.

Thus we see that the *results* of the three Supreme Court decisions are in themselves not startling. The *American* decision is in the orthodox tradition. The *Warrior & Gulf* finding, while more controversial, has a broad body of opinion to back it. Only *Enterprise* is not easy to digest. What is there about these cases then, that has caused such a furor in legal and industrial relations circles, especially among lawyers specializing in industrial relations law for management?

Two things. First, in its desire to limit judicial intervention in arbitration, the Supreme Court has said that a claim is arbitrable so long as it *alleges* a violation of some agreement provision. Thus many functions of management believed by industry to be beyond arbitral review may now be subjected to arbitral scrutiny for signs of conflict with the agreement's provisions. This has caused deep concern in the ranks of management although it is worthy of note that the grants of industry had by contract long ago empowered their arbitrators to rule on *alleged* violations of the agreement and to pass on their own jurisdiction within plainly delimited areas.

Second, the decisions by their tone, may raise expectations that arbitrators should or will broaden the scope of their powers beyond the limits envisioned by the parties when they drew their agreement.

For the Court appears to have engaged in extravagant dicta which make arbitrators look nine feet tall. Thus in the *American* case the Court said:

> "Arbitration is a stabilizing influence only as it serves as a vehicle for handling *every* and *all* disputes that arise under the agreement. . . .
>
> "The processing of even frivolous claims may have therapeudic values which those who are not a part of the plant environment are not aware." (Emphasis added.)[8]

And in *Warrior*:

> "Apart from matters that the parties specifically exclude, *all* of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. . . .

[8] 363 U.S. at 567, 568.

> "The parties expect that his [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect on productivity of particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished." (Emphasis added.)[9]

This last quote, when literally applied by an arbitrator, nearly always brings on him the wrath of one of the parties and often both. It has been my experience that American labor relations have achieved that state of maturity in which the parties want me or my colleagues to decide only what the contract says, or to give them a fair construction of what it says unclearly or implicitly. They most emphatically do not seek my views on what will raise productivity. Nor do they ask me to make that decision which will be best for morale. Whose morale? Some of our decisions cause worker morale to soar, while acting as a terrific depressant on the morale of managers, and vice-versa. Some of our decisions cause not only tensions but hyper-tension in bargaining unit ranks while they at the same time lower management's blood pressure to near-normal, at least for a while.

The decisions have imputed to arbitration and to arbitrators a mystique, a degree of divination bordering on the oracular and a responsibility for shaping the parties' destinies that few arbitrators relish and fewer possess or exercise. Their general tenor seems to put arbitrators *above* the parties and *above* their contract.

Most of us conceive our role as confined within the four walls of the contract. We strive to apply its terms where they are clear; to interpret them when they are imperfectly expressed; to construe them to cover cases falling in the gaps between the stated terms; and to refuse to venture outside those walls which represent the limits of our jurisdiction. Of course we consider past practice (the Court calls it the common law of the shop). We form judgments as to the parties' probable intent, where it is unclear, on the basis of reason and logic in the light of the parties' joint objectives. We sometimes look to practice in the industry or area. But we strive to apply these concepts within the limits of the logic imposed by that which the parties themselves negotiated.

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[9] 363 U.S. at 581.

The tone of the Court's decisions implies an opposite course for arbitrators. The Court's philosophical approach appears to be based on an extreme exposition of a philosophy which was useful in an earlier day in certain specific types of industrial relations situations but which is not generally in accord with today's labor relations scene.

It is true that there is other language in the decisions which conceive of the arbitrator as playing a more traditional and conservative role in industrial relations. Thus in *Enterprise* the opinion states:

> "Nevertheless an arbitrator is confined to interpretation and application of the 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 ward."[10]

But the above does not strike the dominant note in these cases.

What are the practical implications of the Supreme Court's decisions for collective bargaining? Those in management who panic may rush in to insist on tightening the so-called standard arbitration clauses to sharply delimit arbitration. They are bound to meet with sharp resistance from union negotiators especially when they get into the supremely sensitive areas such as subcontracting and the like.

And if managements push for limitations on the scope of the arbitration clause the unions will undoubtedly counter with proposals for limitations on the no-strike clause. It might be said that this would be a fair deal—restrict the scope of arbitration but preserve the right to strike or lock out over those matters outside the scope of arbitral review.

This formula is all right for the large companies and large unions who meet more or less on equal terms and whose multi-plant facilities permit them to weather these crises without crushing losses. But what about the smaller single plant employer who just can't afford a strike during the contract's life? Or what about the weak

[10] 363 U.S. at 597, 598.

union unable to mount strikes between contract terminations? The balance of forces between the giants encourages settlements without arbitration and without strikes. The imbalance to be found in the smaller enterprises may lead to more strikes than the parties or the economy can afford.

It seems to me that strong campaigns undertaken to secure drastic revisions of arbitration clauses would be ill-advised at this time. I suspect that a rash of strikes over this issue is not likely. It must be remembered that of the scores of thousands of grievances arbitrated each year, only a few hundred ever get into courts. And a fair number of these involve a few companies or unions who never did have confidence in the arbitration process, in contrast to the overwhelming majority of American companies and unions among whom arbitration, at first tried with reluctance, has won an enduring place.

In my view, it would be well for contract negotiators to do little for the time being about this subject; to let the dust settle.

I doubt that these decisions will prompt arbitrators to arrogate to themselves powers they have not hitherto exercised. Nor do I believe that the unions will urge them to do so. For the full implications of these decisions could be as restrictive of union prerogatives as of management prerogatives. If I am wrong, and self-restraint is not shown, there will be time to draw tighter arbitration clauses.

Observers may differ about the efficacy of the institution of collective bargaining as a wage-setting device; as a distributor of power; as an influence on prices and on the economic process. But few disagree over the proposition that arbitration of disputes arising under agreements has proved its worth in stabilizing shop relations, in minimizing work stoppages and in imparting to worker and manager alike a new sense of dignity in their relationship. It is now up to management and labor to distill from these Supreme Court decisions those positive values which will serve to protect and strengthen the arbitration process.