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Judicial Intervention in Arbitration Enforcement Cases - The Tenth Circuit Expands upon the Limited Judicial Review Standard of Enterprise Wheel

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JUDICIAL INTERVENTION IN ARBITRATION ENFORCEMENT CASES— THE TENTH CIRCUIT EXPANDS UPON THE LIMITED JUDICIAL REVIEW STANDARD OF *ENTERPRISE WHEEL*

INTRODUCTION

The use of arbitration as a means of dispute resolution can be traced to before the development of English common law.[1] Likewise, arbitration has been used in America since the early colonial period; for example, George Washington specified that arbitration be used to settle any disputes concerning the intent of his will.[2] Today one of the more common applications of arbitration is as a last step dispute resolution mechanism in the grievance procedure of a collective bargaining agreement. As a product of labor-management negotiations, arbitration serves both to interpret and enforce the collective bargaining agreement, thus playing an important role in the industrial self-government system.[3]

This self-government system, however, has not operated free of outside influences. Throughout recent history both the legislature and the judiciary have intruded upon the labor-management relationship. Judicial interference has taken the form of "review" of arbitration awards, whereby courts would apply traditional contract principles to determine whether an arbitrator had properly interpreted the collective agreement. Quite often the courts concluded that the arbitrator had exceeded the clear and express language of the contract, thus, the entire arbitral decision was void.[4] In response to this judicial interventionism, Congress enacted legislation establishing arbitration as the preferred method of labor-management dispute resolution.[5] The Supreme Court formally recognized this legislative mandate in *United Steelworkers of America v. Enterprise Wheel and Car Corp.*,[6] establishing a "hands off" judicial standard toward arbitration review, whereby a court was not to replace the arbitrator's judgment with its own merely because the court disagreed with the arbitrator's interpretation of the collective agree-

1. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 2 (3d ed. 1973) (referring to Murray, *Arbitration in the Anglo-Saxon and Early Norman Periods*, 16 ARB. J. 193 (1961)).

2. ELKOURI, *supra*, at 2-3 citing American Arbitration Association, Arbitration News, No. 2 (1963).

3. *See infra* text accompanying notes 53-54.

4. *See infra* text accompanying notes 31-32.

5. 29 U.S.C. § 173(d) (1982). *See infra* text accompanying notes 23-24.

6. 363 U.S. 593 (1960). Note that the Court's holding has been almost universally praised by experts in the field of labor-management relations. As one commentator has declared: "Ideally, the roles of judge and arbitrator are separate and distinct. Arbitrators interpret collective bargaining agreements, while judges interpret substantive law." Siwica, *Defining the Relationships Between Judges, Arbitrators, and Employee Rights*, 33 LAB. L.J. 417, 418 (1982).

ment.[7] However, this standard recently has been altered by some lower federal court decisions in which the courts replace the arbitrator's definition of justness with their own.[8]

This article examines the relationship between the judge and arbitrator with regard to the *Enterprise* standard and the enforcement of arbitration awards. It also looks at the extent to which the lower courts have expanded the limited judicial review standard of *Enterprise*, thereby thwarting the Supreme Court's clear intent in deciding the *Steelworkers Trilogy*,[9] to bar judicial interference in the labor-management arena. Part I provides an overview of arbitration and judicial intervention prior to the Supreme Court's decisions in the *Trilogy* cases. The *Trilogy* is analyzed in Part II, with particular emphasis placed on the manner in which each case furthered acceptance of arbitration as the preferred means of dispute resolution. To determine what standard of review the Tenth Circuit Court of Appeals applies in light of the *Enterprise* standard, Part III surveys post *Trilogy* decisions of both the Tenth Circuit and the Colorado Federal District Court. Part IV briefly examines the Sixth Circuit Court of Appeals' expanded definition of judicial review and compares that circuit's position with that of the Tenth Circuit's.

I. ARBITRATION AND JUDICIAL INTERVENTION—ARBITRATION LAW PRIOR TO THE *STEELWORKERS TRILOGY*

Arbitration plays an important role in the settlement of labor-management disputes, particularly when compared with the "principle alternat[ive] method of settling day-by-day disputes, i.e., work stoppages."[10] Thus, arbitration has developed as the standard adjunct to collective bargaining. To understand how arbitration acquired its preeminent role in labor dispute settlement, it is necessary to look back to the 1920's and the attitudes which then existed toward collective bargaining and the labor agreement and then to review how Congress and the Supreme Court interpreted and applied those attitudes.

In the 1920's and 1930's the collective bargaining agreement was idealized as representing an entirely consensual arrangement between labor and management—an arrangement which was not to be intruded upon by external forces, particularly the judiciary.[11] The Norris-La-

7. *See infra* text accompanying notes 66-70.

8. *See infra* Parts III and IV.

9. The three cases which comprise the Steelworkers Trilogy (hereinafter referred to as the Trilogy) are: United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

10. Taylor, *Effectuating the Labor Contract Through Arbitration*, in THE PROFESSION OF LABOR ARBITRATION, SELECTED PAPERS FROM THE FIRST SEVEN ANNUAL MEETINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 1948-1954 24 (J.T. McKelvey ed. 1957).

11. Morris, *Twenty Years of* Trilogy*: A Celebration*, in DECISIONAL THINKING OF ARBITRATORS AND JUDGES, PROCEEDINGS OF THE THIRTY-THIRD ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 331, 333 (J.L. Stern and B.D. Dennis eds. 1981) (cited hereinafter as Morris, *Twenty Years of Trilogy*).

Guardia Act of 1932[12] represented the embodiment of this non-intervention philosophy since it greatly limited the power of the federal courts to issue injunctions in labor disputes.[13] In fact, the Act required that a claimant come to court with "clean hands" or evidence that "every reasonable effort" had been made to settle the dispute, either by negotiation, mediation, or voluntary arbitration.[14] The principles expressed in the Act were founded on the belief that "if courts—particularly the federal courts—would no longer issue injunctions in labor disputes, the parties and the public would benefit from the agreements which labor and management would reach by themselves through the interplay of voluntary negotiations and the use of traditional economic means."[15] Clearly the intent of the Act was to allow the parties to negotiate in an environment free from intrusion by authorities which neither knew nor appreciated the special needs of labor and management.

This laissez-faire principle was rather short-lived. By the mid-1940's, the general political climate viewed the Norris-LaGuardia and Wagner[16] Acts as having imposed stringent fair labor practice obligations upon employers while leaving labor unions unfettered by any corresponding obligations.[17] Furthermore, almost every major industry had been successfully organized, thus, the unions were viewed as wielding massive economic power to which little if no federal restraint could be applied.[18] In response to these growing fears Congress passed the Taft-Hartley Act of 1947.[19]

The Taft-Hartley Act imposed several restrictions upon union practices. The Act made it an unfair labor practice for a union to refuse to bargain collectively with an employer.[20] The Act also gave the federal courts specific power to enforce collective bargaining agreements by granting the courts jurisdiction over suits by and against labor organiza-

12. Anti-Injunction (Norris-LaGuardia) Act of 1932, 29 U.S.C. §§ 101-15 (1982). This Act was intended to prevent abuse of injunctions in labor disputes. Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co., 353 U.S. 30, *reh'g denied*, 353 U.S. 948 (1957).

> The . . . Act forbids the federal courts from issuing injunctions in labor disputes except under strictly limited conditions. Before an injunction may be issued, it must be shown, among other things, that there were prior efforts to settle the dispute peaceably, that law enforcement officials are unable or unwilling to safeguard the employer's property, and that a denial of an injunction will entail greater loss to the employer than granting it will cause to the union. No injunctions may be issued against peaceful picketing.

H. ANDERSON, PRIMER OF LABOR RELATIONS 6 (1980).

13. 29 U.S.C. § 101.

14. *Id.* at § 108.

15. Morris, *Twenty Years of* Trilogy, *supra* note 11, at 333 (citing generally I. BERNSTEIN, THE LEAN YEARS 391-415 (1960)).

16. National Labor Relations (Wagner) Act of 1935, 29 U.S.C. §§ 151-69 (1973). The Wagner Act was directed at protecting the employees' right to organize and, toward that end, it made unlawful employer practices which interfered with that right. The Wagner Act did not impose restrictions on union practices.

17. 1 C. MORRIS, THE DEVELOPING LABOR LAW 875 (1983).

18. *Id.*

19. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C.).

20. Taft-Hartley Act, § 101, 29 U.S.C. § 158(b)(3) (1982).

tions.[21] Thus, the courts were granted substantial authority to intervene in labor-management disputes.

Arbitration, however, continued to be the preferred method of dispute resolution.[22] In fact, Congress raised arbitration to the level of national labor policy by enacting section 203(d) of the Taft-Hartley Act.[23] Congress stated: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."[24] Thus, Congress appeared to state a national policy of deference to and enforcement of arbitration settlements.

The Supreme Court formally recognized settlement by arbitration as a national labor policy in *Textile Workers Union v. Lincoln Mills*.[25] The decision followed a decade of attempts by various circuit courts to interpret section 301 of the Taft-Hartley Act.[26] *Lincoln Mills* involved an employer's refusal to honor a collectively bargained grievance procedure providing for arbitration of union grievances. The Court held that sec-

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21. 1 C. MORRIS, THE DEVELOPING LABOR LAW 875 (1983).

22. *See generally* Siwica, *supra* note 6.

23. 29 U.S.C. § 173(d) (1982).

24. *Id.*

25. 353 U.S. 448 (1957).

26. 29 U.S.C. § 185 (1982). Section 301 of the Taft-Hartley Act provides in relevant part:

> **Suits by and against labor organizations.**
>
> (a) **Venue, amount and citizenship.** Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) **Responsibility for acts of agent—entity for purposes of suit— enforcement of money judgments.** Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.
>
> (c) **Jurisdiction.** For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

For pre-*Lincoln Mills* circuit court opinions construing § 301, see United Steelworkers of Am. v. Galland-Henning Mfg. Co., 241 F.2d 323 (7th Cir., *rev'd per curiam*, 354 U.S. 906 (1957)); Signal-Stat Corp. v. Local 475, United Elec., Radio & Mach. Workers of Am., 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957); ILGWO v. Jay-Ann Co., 228 F.2d 632 (5th Cir. 1956); *See also* Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 210 F.2d 623 (3d Cir. 1954), *aff'd on other grounds*, 348 U.S. 437 (1955); United Elec., Radio & Mach. Workers v. Oliver Corp., 205 F.2d 376 (8th Cir. 1953); Milk & Ice Cream Drivers v. Gillespie Milk Prod. Corp., 203 F.2d 650 (6th Cir. 1953); Textile Workers of Am. v. Arista Mills Co., 193 F.2d 529 (4th Cir. 1951); Mercury Oil Ref. Co. v. Oil Workers Union, 187 F.2d 980 (10th Cir. 1951); Schatte v. International Alliance of Theatrical Stage Employees, 182 F.2d 158 (9th Cir., *cert. denied*, 340 U.S. 827 (1950).

tion 301 granted the federal courts jurisdiction to fashion a body of federal law which would enforce arbitration provisions contained in collective bargaining agreements.[27] Grievance arbitration was declared to be the "*quid pro quo* for an agreement not to strike."[28] Citing the legislative history behind section 301 of the Act, the Court stated that "[i]t seems . . . clear to us that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes."[29] Therefore, the Court interpreted section 301 as authorizing federal court enforcement of arbitration agreements. As one method of enforcement, the Court recognized federal courts as having the power to decree specific performance of contract arbitration clauses.[30]

Lincoln Mills, however, was not a decision made in a vacuum. Prior to *Lincoln Mills*, the law surrounding arbitration was based primarily on state court applications of common law concepts.[31] Common law was more restrictive as to the duty of arbitrate and the enforcement of arbitration awards. Under the common law, either party to a submission could withdraw at any time prior to the rendering of an award. Even if an award was rendered, a party could extricate itself by claiming that the award was unenforceable due to fraud, partiality or mistake by the arbitrator, misconduct on the part of the arbitrator, or procedural irregularities.[32] The courts accepted these common law principles as an invitation to intervene in the arbitration process and replace the arbitrator's judgment with their own.[33]

Lincoln Mills cancelled that invitation. Justice Douglas concluded that "the substantive law to apply in suits under [section] 301(a) is federal law, which the courts must fashion from the policy of our national labor laws."[34] Thus, courts could no longer use the old common law tenets as a means to veto the decision of the arbitrator.

Lincoln Mills, however, was only the opening round in the fight over arbitrability[35] and enforcement of arbitration awards. Three years after

27. *Lincoln Mills*, 353 U.S. at 456.

28. *Id.* at 455. Use in this context *quid pro quo* means, "one necessitates the other."

29. *Id.* at 456.

30. *Id.* at 458.

31. Morris, *Twenty Years of* Trilogy, *supra* note 11, at 336.

32. *Id.* (citing Jones, *Judicial Review of Arbitral Awards—Common Law Confusion and Statutory Clarification*, 31 S. CAL. L. REV. 1 (1957)). *See generally*, St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progency*, in ARBITRATION—1977, PROCEEDINGS OF THE THIRTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 29 (B.D. Dennis & G.C. Somers eds. 1978).

33. Morris, *Twenty Years of* Trilogy, *supra* note 11, at 336.

34. *Lincoln Mills*, 353 U.S. at 456. Justice Douglas found the necessary jurisdictional prerequisite in § 301(a) which provides that agreements between employers and labor organizations are enforceable in "any district court of the United States having jurisdiction of the parties. . . ." *See supra* note 26. The Court reaffirmed this position in Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) (holding that a state court must apply federal substantive law when called upon to enforce a union contract in a business affecting interstate commerce). Also, the Court has declared that federal and state courts have concurrent jurisdiction. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

35. Arbitrability addresses the question of whether the issue in dispute is one which the parties, via the collective bargaining agreement, have voluntarily conferred to the jurisdiction of the arbitrator. An issue may not be arbitrable for one of a number of reasons;

the *Lincoln Mills* decision Justice Douglas authored the *Trilogy* decisions. These decisions directly addressed the question of what standard of judicial review the courts should apply to arbitral awards. Moreover, they further defined the scope of the collective bargaining agreement and the arbitrator's authority inherent in such agreements.

II. THE *STEELWORKERS TRILOGY*

The three Supreme Court decisions which constitute the *Trilogy*[36] established the fundamentals of the federal common law governing the arbitrability of labor-management disputes. The first of these, *United Steelworkers of America v. American Mfg. Co.*,[37] involved the discharge of an employee following the settlement of a workmen's compensation action against his employer. In response, the union filed a grievance charging that the employee was entitled to return to his job by virtue of the seniority provision of the collective bargaining agreement. Based upon a statement by the employee's physician which concluded that the employee was "permanently partially disabled," the employer contended that the employee was unable to work and therefore refused to reinstate him or to arbitrate the grievance.[38]

The union filed suit in federal district court to compel arbitration of the grievance.[39] The district court granted summary judgment for the employer holding that, because he had accepted the worker's compensation settlement on the basis of permanent partial disability, the employee was estopped to claim any employment rights.[40] On a different basis the appellate court affirmed, holding that the grievance was " 'a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement.' "[41] The Supreme Court reversed the lower courts, rejected the frivolous grievance analysis of the appellate court, and ordered arbitration. This decision specifically rejected New York's *Cutler-Hammer*[42] doctrine which had been applied by courts in denying arbitrability.

In overruling this doctrine, Justice Douglas noted the "crippling effect" of the lower court's "preoccupation with ordinary contract law."[43]

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for instance, the issue in dispute may not involve any of the types of disputes defined in the contract's grievance or arbitration clause, or the necessary conditions precedent to arbitration may not have been met.

36. *See supra* note 9.

37. 363 U.S. 564 (1960).

38. *Id.*

39. *Id.* at 566.

40. *Id.*

41. *Id. (quoting American Mfg.*, 264 F.2d 624, 628 (6th Cir. 1959).

42. International Ass'n of Machinists Local No. 402 v. Cutler-Hammer, Inc., 271 A.D. 917, 67 N.Y.S.2d 317, *aff'd* 297 N.Y. 519, 74 N.E.2d 464 (1947). The *Cutler-Hammer* doctrine held that "[i]f the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." *Cutler-Hammer*, 271 A.D. at 918, 67 N.Y.S.2d at 318. The holding of this case has since been repudiated by statutory amendment. *See* N.Y. CIV. PRAC. LAW § 7501 (McKinney 1980).

43. *American Mfg. Co.*, 363 U.S. at 566-67.

According to Justice Douglas, where the agreement provides for arbitration, questions of contract interpretation are for the arbitrator, not the courts. "The moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."[44]

Instead, Justice Douglas deemed the function of the court to be a limited one:

> confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract . . . . The courts . . . have no business weighing the merits of the grievance . . . . The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.[45]

Thus, it was not the function of courts to construe a collective bargaining provision that was subject to arbitration. While *American Manufacturing* represented a significant departure from the established judicial doctrine of *Cutler-Hammer*, the scope of its holding was in fact rather limited. *American Manufacturing* stands primarily for the proposition that if a union's complaint constitutes a grievance as defined in the collective agreement, that grievance must be heard on its merits by an arbitrator.

United Steelworkers of America v. Warrior and Gulf Navigation Co.,[46] the second *Trilogy* case, served to broaden the applicability of the *American Manufacturing* decision. *Warrior and Gulf* concerned the arbitrability of a union grievance over a company's contracting-out work. The employer challenged the grievance on the ground that contracting-out was strictly a management function and therefore non-arbitrable under a provision in the collective bargaining agreement exempting management functions from the arbitration process.[47] The Supreme Court held that the grievance was arbitrable on the ground that the provision's exclusionary language covered only management functions generally and not contracting-out specifically.[48]

In reaching its holding, the Court laid down three important principles to be applied by the courts when determining the arbitrability of a grievance:

> (1) An order to arbitrate the particular grievance shall not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.[49]
>
> (2) Doubts [regarding the coverage of the arbitration provision] should be resolved in favor of coverage.[50]
>
> (3) Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore

44. *Id.* at 568.
45. *Id.*
46. 363 U.S. 574 (1960).
47. *Id.* at 576.
48. *Id.* at 584-85.
49. *Id.* at 582-83.
50. *Id.* at 583.

> come within the scope of the grievance and arbitration provisions of the collective agreement.[51]

These three principles supplied the guidelines which courts should apply in implementing the rule established in *American Manufacturing* regarding substantive arbitrability—a dispute is arbitrable if it falls within the grievance definition of the collective bargaining agreement. Thus, the Court established the mechanisms for giving full effect to the congressional preference for arbitration as stated in section 203(d) of the Taft-Hartley Act.[52]

A second important effect of the *Warrior and Gulf* decision was that it significantly enhanced the role of the arbitrator and diminished the role of the court in interpreting collective bargaining agreements.[53] Justice Douglas believed that the collective agreement constituted "a system of industrial self-government" with the grievance procedure at the very heart of that system.[54] Justice Douglas stressed that the arbitrator's role in the collective bargaining process was both creative and interpretive:

> Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.[55]

This dual role of the arbitrator was reinforced in the *Alexander v. Gardner-Denver Co.*[56] decision where the Court said:

> 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.[57]

Thus, the arbitrator's expertise and the conditions under which he operates are to be recognized and deferred to in arbitration enforcement cases. As Justice Douglas concluded in *Warrior and Gulf*: "[t]he ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."[58]

The last of the *Trilogy* cases, *Enterprise Wheel*,[59] established general guidelines for the enforcement and review of arbitral awards. *Enterprise* completed the explicative focus of the *Trilogy* by defining the collective

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51. *Id.* at 581.
52. 29 U.S.C. § 173(d) (1982).
53. Morris, *Twenty Years of* Trilogy, *supra* note 11, at 346.
54. *Warrior and Gulf*, 363 U.S. at 580.
55. *Id.* at 581.
56. 415 U.S. 36 (1974) (holding that submission of a grievance claim to final arbitration did not foreclose the discharged employee's right to trial de novo under the Civil Rights Act).
57. *Id.* at 53.
58. *Warrior and Gulf*, 363 U.S. at 582.
59. 363 U.S. 593 (1960).

agreement, by identifying the limits of arbitral authority, and by determining the standard which courts are to apply in reviewing arbitration awards. However, because *Enterprise* requires that the arbitrator draw the "essence" of the award from the collective agreement,[60] the decision has been the center of continuing controversy and has fostered much subsequent litigation.

In *Enterprise Wheel*, the union sued for the enforcement of an arbitrator's award which ordered reinstatement of several discharged employees who had walked off their jobs to protest the discharge of a fellow employee. A union official had advised the employees to return to work, but the company took the position that the employees were no longer employed "until this thing was settled one way or the other."[61] A grievance was filed and arbitration was held under a district court order. After the employees' discharge, but before rendering of the arbitrator's award, the collective bargaining agreement expired.[62] The arbitrator found that although the work stoppage was improper, the discharges were not justified. Rejecting the contention that expiration of the agreement barred reinstatement, the arbitrator held that the agreement imposed an unconditional obligation on the employer to abide by the arbitrator's determination.[63] He ordered ten day suspensions and reinstatement with back pay. The company refused to comply with the award.

The district court directed the employer to comply, but the court of appeals reversed, holding that an award of reinstatement with back pay granted subsequent to the termination of a collective bargaining agreement could not be enforced.[64] The Supreme Court reversed, sustaining the arbitrator's award, with some modifications in the back pay provisions, stating that "the courts have no business overruling [the arbitrator] because their interpretation of the contract is different from his."[65] By sustaining the award, the Court reinforced the role of the arbitrator as interpreter of the collective agreement and strengthened the enforceability of arbitral awards.

Anticipating that the courts continually would be asked to review arbitral decisions, *Enterprise* also delineated the standards for reviewing an award. The Court defined the limitations of an arbitration award as follows:

[A]n arbitrator is confined to interpretation and application of

60. *Id.* at 597.
61. *Id.* at 595.
62. *Id.*
63. *Id.* The specific provision cited by the arbitrator stated that:
> Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost.

Id. at 594.
64. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 269 F.2d 327, 331 (4th Cir. 1959).
65. 363 U.S. at 599.

> the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[66]

Implicitly this standard requires that the award must relate to the agreement. This standard is based on the recognition by the Court that "[i]t is the arbitrator's construction which was bargained for."[67]

However, awards are challenged, and the courts are asked to review them. The task of review has been difficult because "the word 'essence' is not a word of precision, especially when read with the Court's numerous references to the multiple sources to which an arbitrator might look in order to determine the proper meaning of the agreement with regard to the issue in dispute."[68] It therefore has been argued that the so-called "essence" standard of *Enterprise Wheel* and its avoidance of the conventional standards of judicial review does not provide courts with sufficient direction.[69] However, Justice Douglas apparently anticipated such arguments in his concluding rationale for the "essence" standard. Expressly rejecting a wide scope of judicial review and endeavoring to keep the concept of the collective agreement as described in *Warrior and Gulf* uppermost in the mind of the reviewer, Justice Douglas stated:

> It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.[70]

Thus, Justice Douglas allowed the arbitrator wide latitude in interpreting the parties' collective bargaining agreement. Judicial intervention was proper only in the limited instance where the arbitrator strays from the "essence" of the agreement.

The questions left unanswered by the decision are, when and to what degree arbitrators will be allowed to stray. In light of the Supreme Court's reluctance to further define the guidelines provided in the *Trilogy* and, more specifically, *Enterprise Wheel*, the circuit courts of appeals have been left to posit their own answers. The cases below represent a survey of decisions from the Tenth Circuit Court of Appeals which addressed questions concerning arbitral interpretation and application of the *Enterprise* standard. In addition, they raise legitimate concerns that the Tenth Circuit's standards for enforcement of arbitral awards may be beginning to stray from the dictates of *Enterprise Wheel*, allowing the court to substitute its judgment for that of the arbitrator.

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66. *Id.* at 597.

67. *Id.* at 599.

68. Morris, *Twenty Years of* Trilogy, *supra* note 11, at 352.

69. *Id.* at 353. For a review of the conventional standards of judicial review in arbitration cases, see Jones, *supra* note 32, at 16.

70. *Enterprise Wheel*, 363 U.S. at 599.

III. Judicial Review in the Tenth Circuit[71]

A survey of Tenth Circuit cases reveals that the *Enterprise Wheel* standard of limited judicial review has been generally accepted and applied. In more recent cases, however, the court has broadened somewhat its standard of review, exhibiting a reluctance to abide by the Supreme Court's "hands off" review policy. However, even with these decisions, the Tenth Circuit is not viewed as having gone as far afield as the Sixth Circuit with regard to allowing greater court intervention.[72] The Sixth Circuit's position will be discussed in more depth following this survey of Tenth Circuit cases.

Included in this survey are three United States District Court cases from Colorado. Although district courts look to their immediate appellate courts for guidance, these cases are of particular value because they reflect the impact that varying circuit court decisions have on the lower courts. Because the Supreme Court has held that state courts have concurrent jurisdiction to enforce section 301[73] and that they must apply that law fashioned by the federal courts,[74] no state court cases are included in this survey.

Before beginning the survey it is important to note why some experts believe "the case law regarding enforcement of the *Enterprise* standard in the Tenth Circuit is troubling."[75] There are two troubling aspects associated with the case law. First, in some of the decisions the court substitutes its own judgment for that of the arbitrator, reflecting a failure by the court to strictly abide by the *Trilogy*. In essence, some of the cases represent the court "second guessing" the arbitrator. Second, by enlarging upon *Enterprise* the court may be inundated with arbitration review cases. If this should occur, the court will have taken a significant step toward preventing arbitration from being the final and binding determination that the Supreme Court intended.[76] Thus, it is necessary to view the following cases from two perspectives: one, to note what aspects of the *Trilogy*, and especially *Enterprise*, have been retained; the other, to what extent has judicial intervention been expanded.

Following *Enterprise Wheel*, the Tenth Circuit accepted the Supreme Court's direction and adopted a standard of limited judicial review in arbitration cases. In *Amalgamated Butcher Workmen Local 641 v. Capitol Packing Co.*[77] the Tenth Circuit narrowly defined its scope of review by holding that "[i]t is settled law that an award of an arbitrator under an

71. For a survey of arbitration cases from each circuit, see Morris, *Twenty Years of* Trilogy, *supra* note 11, at 355-72.

72. Morris, *Twenty Years of* Trilogy, *supra* note 11, at 367-72.

73. Labor-Management Relations (Taft-Hartley) Act, 29 U.S.C. § 185 (1982). For the text of section 301, see note 26 *supra*.

74. *See* Charles Dowd Box v. Courtney, 368 U.S. 502 (1962); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). *See also* note 34 and text therein.

75. Morris, *Twenty Years of* Trilogy, *supra* note 11, at 365.

76. The concept that arbitration is final and binding, if the parties have so intended, is found throughout the *Trilogy* decisions. *See supra* notes 22-29 and accompanying text.

77. 413 F.2d 668 (10th Cir. 1969) (hereinafter cited as *Capitol Packing Co.*).

arbitration provision in a collective bargaining agreement, which provides the arbitrator's decision shall be final and binding on the parties, is not open to review on the merits."[78] In this case the company had laid off all of its employees and subsequently notified them that the plant was closed with no plans to reopen. The union filed grievances seeking pro-rata vacation benefits. The arbitrator ordered payment of the pro-rata benefits, despite the fact that the collective bargaining agreement did not contain a provision requiring such payments. The arbitrator supported his decision by finding that the parties' bargaining history evidenced an intent to treat vacation benefits as a form of deferred earnings. The court, after reviewing the arbitrator's findings, held that case law had settled the issue of the finality of an arbitrator's award and that its finding was in accord with the express policy of Congress.[79]

Retail Store Employees Union Local 782 v. Sav-On Groceries,[80] decided in 1975, represents the first case in which the Tenth Circuit appears to stray slightly from the *Enterprise Wheel* standard. In this case the parties' submitted the following issue to the arbitrator: "Did the Company exercise fairness in judging the qualifications of [the employee] by not allowing her to displace less senior employees who engage in stocking and checking duties?"[81] The arbitrator ordered reinstatement with back pay and prohibited the company from assigning the grievant "impossible heavy tasks."[82] The court determined that *Enterprise* was "not controlling"[83] because the question of back pay was not submitted as an issue and the assignment order was a *per se* violation of Title VII of the Civil Rights Act.[84] The court adopted the rule of *Warrior and Gulf* that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[85] Hence, the arbitrator was restricted to determining only the issue submitted and, in this case, was without authority to make an award of back pay. It is interesting to note that the court did not apply *Enterprise Wheel* but did rely on *Warrior and Gulf* as the basis for its decision.[86]

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78. *Id.* at 672.

79. *Id.* at 672-73. The congressional policy referred to by the court was that expressed in § 203(d) of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 173(d) (1982) which states:

> **Functions of the Service.**
> (d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

80. 508 F.2d 500 (10th Cir. 1975).

81. *Id.* at 501.

82. *Id.*

83. *Id.* at 503.

84. *Id.* 42 U.S.C. § 2000e (1982).

85. *Id.* at 502 (quoting *Warrior and Gulf*, 363 U.S. 574, 582-83 (1960)).

86. One reason this omission is important is that the cases in the *Trilogy* are not applied independently when questions of arbitrability and scope of arbitration are raised. They are intertwined sufficiently that the three cases must be viewed together to obtain their full import. Morris. *Twenty Years of* Trilogy, *supra* note 11, at 342-55.

In another 1975 case, *Local 2-477 Oil, Chemical and Atomic Workers v. Continental Oil Co.*,[87] the court again held that an arbitrator exceeded his authority. The issue in this case concerned the consolidation of two separate grievances into the same hearing, even though only one case had been formally submitted to the arbitrator. The court, citing *Save-On Groceries*, disallowed the award for the second grievance.[88] The court found that the submission had not been properly made under the terms of the collective agreement, thus the arbitrator was in error for hearing the grievance over the protests of the company.[89]

By relying on *Sav-On Groceries* and, thus by inference, *Warrior and Gulf*, the Tenth Circuit, for the second time, applied isolated principles of the *Steelworkers Trilogy* to find that a "defect of jurisdictional nature"[90] would evidence an abuse of arbitral authority sufficient to deny enforcement of an arbitrator's award. The court essentially was applying the common law rubric of "want of jurisdiction"[91] as a means of reversing the arbitrator's determination on the merits. Although language in *Warrior and Gulf* supports the proposition that parties cannot be required to submit an issue to arbitration,[92] it is important to remember that *Enterprise Wheel* is generally held to be the basis for judicial review of arbitration awards and, per *Warrior and Gulf*, "doubts [as to arbitrability] should be resolved in favor of [arbitration]."[93] In holding that the arbitrator lacked jurisdiction, the court appears to have misconstrued the clear import of *Warrior and Gulf*.

The Tenth Circuit Court employed the *Enterprise* standard in deciding *Campo Machining Co. v. Local Lodge 1926, International Ass'n of Machinists*.[94] In this case the collective bargaining agreement required "good and sufficient cause" for imposing discharge or other discipline.[95] Under this provision the company discharged the grievant for leaving the plant without permission following a heated discussion with a supervisor. Although the company rules expressly made such an action a dischargeable offense, the arbitrator decided that the circumstances surrounding the incident did not justify discharge. He ordered reinstatement with back pay and allowed the company to retain the right to suspend the grievant for one month. The court reviewed *Enterprise* and found that "the arbitrator's decision records that he did confine himself to interpreting and applying the collective bargaining agreement"[96] and affirmed the award. The court's holding demonstrated that deference would be given an award which draws its "essence" from the collective

87. 524 F.2d 1048 (10th Cir. 1975), *cert. denied*, 425 U.S. 936 (1976).
88. *Id.* at 524 F.2d at 1050.
89. *Id.*
90. *Id.*
91. 6 C.J.S. *Arbitration* § 150 (1975).
92. *Warrior and Gulf*, 363 U.S. at 582.
93. *Id.* at 583.
94. 536 F.2d 330 (10th Cir. 1976).
95. *Id.* at 331.
96. *Id.* at 332-33.

agreement regardless of the express nature of a company's rules.[97]

Within one year, however, the Tenth Circuit decided a case which has been construed as enlarging the scope of judicial review beyond the limited review standard of *Enterprise Wheel*.[98] In *Mistletoe Express Serv. v. Motor Expressmen's Union*,[99] the court refused to enforce an award which it saw as contravening an express provision of the parties' collective bargaining agreement. The court stated that the arbitrator is not at liberty to substitute "his views of proper industrial relationships for the provisions of the contract."[100] Because *Mistletoe* is the seminal case for the Tenth Circuit standard for judicial review of arbitration awards, it is appropriate to explore it in more depth.

The case involved an employee's violation of a company rule requiring collection of cash or a cashier's check for C.O.D. shipments and a subsequent violation of a collective bargaining agreement provision which expressly provided that "failure to settle bills and funds collected for the company within twenty-four (24) hours" was just cause for discharge.[101] The arbitrator determined that, although the grievant had broken both rules, he had corrected his error and did not cause the company any monetary loss. Further, the arbitrator found that there had not been previous uniform enforcement of the company rule. He then concluded that there was sufficient just cause for discipline but not for discharge and ordered reinstatement with a suspension. The court, after reviewing the *Steelworkers Trilogy* and *Campo Machining Co.*, looked to the Third Circuit's test expressed in *Ludwig Honold Mfg. Co. v. Fletcher*[102] and decided that "[t]he award does not draw its essence from the agreement if 'viewed in the light of its language, its context, and any other indicia of the parties intention'; it is without rationale support."[103] The court, focusing upon the contract provision, observed that "[e]mployees *may* be discharged for just cause"[104] and determined that the arbitrator had erred in his interpretation of the ambiguity presented by the word "may". The court decided that, based upon its review of the case, the provision gave the employer the option to discharge or not to discharge and that the employer had exercised that option by discharging the grievant. Thus, the Tenth Circuit "implie[d] that arbitral notions of 'justness' must yield to contract language which is apparently clear and

97. *Id.* at 333.

98. Morris, *Twenty Years of* Trilogy, *supra* note 11, at 366.

99. 566 F.2d 692 (10th Cir. 1977).

100. *Id.* at 695.

101. *Id.* at 694.

102. 405 F.2d 1123 (3d Cir. 1969). The court in *Ludwig* held that the arbitrator had considered the contract as a whole and, although an express provision existed which restricted eligibility for promotions to persons not promoted within a six month period, the arbitrator's interpretation "gave a reasonable and effective meaning to the manifestations of intention of the parties considered against the backdrop of practices of industry and the shop." *Id.* at 1132-33.

103. *Mistletoe*, 566 F.2d at 694 (quoting Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1969)).

104. *Mistletoe*, 566 F.2d at 694 (emphasis added).

proscribes certain conduct of an employee."[105]

Initially this standard does not appear to run counter to *Enterprise Wheel*. However, the *Enterprise* standard clearly is premised on the assumption that the parties contracted for the arbitrator's interpretation of their collective agreement and that the courts have no business imposing their interpretation of the contract on the parties simply because it differs for the arbitrator's.[106] Given these arguments, the question becomes, did the court merely replace the arbitrator's interpretation with its own. The court's holding says, in essence that "if the arbitrator finds as a fact that the employee committed the alleged act and that act is contractually deemed 'sufficient' to warrant discipline, all determinations relative to 'justness' are within the company's discretion."[107]

By this holding the court restricts the arbitrator to adjudicating only whether the act was committed. Hence, the arbitrator is not to "interpret and apply the contract in accordance with the . . . various needs and desires of the parties"[108] or to bring to bear his expertise and competence.[109] Thus, the court evidences the first of two troubling aspects present in the Tenth Circuit's case law. The court seems to "second guess' the arbitrator by not relying on his expertise or interpretation of the facts presented to him and thereby substitutes its judgment for the arbitrator's.

The court appeared to modify the position taken in *Mistletoe* when, in 1978, it stated, "we are obliged to give great deference to any award given" when the arbitrator interprets and applies the collective agreement "so that his award is rooted in the agreement."[110] In *International Brotherhood of Electrical Workers v. Professional Hole Drilling, Inc.*,[111] an arbitration committee found that the company's joint venture with non-signatories to the collective bargaining agreement did not preclude the committee from exercising its jurisdiction. The committee found the agreement wholly applicable to employees of the joint venture and also found that the salaries paid those employees were based on a lesser scale than the agreement called for, thus violating the contract. The court determined that the award was not open to review. In doing so it applied the "positive assurances" test stated in *Local 1912, Int'l Ass'n of Machinists v. United States Potash*.[112] In *Professional Hole Drilling* the Tenth

105. Hogler, *Industrial Due Process and Judicial Review of Arbitration Awards*, 31 LAB. L.J. 570, 571-72 (1980).

106. *See supra* notes 66-70 and accompanying text.

107. Hogler, *supra* note 105, at 574.

108. Alexander v. Gardner-Denver, 415 U.S. 36, 53 (1974). *See also supra* note 56.

109. *Warrior and Gulf*, 363 U.S. at 582.

110. International Bhd. of Electrical Workers v. Professional Hole Drilling, Inc., 574 F.2d 497, 503 (10th Cir. 1978).

111. *Id.* at 497.

112. 270 F.2d 496 (10th Cir. 1959) (where the court, in a pre-*Trilogy* case, held that the contract left room for interpretation regarding the applicability of an arbitration clause to a subcontracting dispute although no specific provision concerning such disputes existed in the contract. The court cited the inconsistency in existing court decisions on the issue of subcontracting as the basis for this being a legitimate issue for an arbitrator to make a determination).

Circuit Court stated that "where there is a broad arbitration provision in the contract, as in this case, we will not interfere with an arbitrator's decision unless it can be said with positive assurance that the contract is not susceptible of the arbitrator's interpretation."[113] Thus, the case would appear to have strengthened the concept of deferring to the arbitrator's authority and expertise.

In upholding the award, however, the court relied on the fact that the arbitration committee restricted itself to deciding the union's submitted dispute and that the union's allegations were confined to specific wage and benefit provisions in the contract.[114] Further, the committee's decision was applicable only to the signatories of the collective agreement and did not adversely affect the rights of the joint venture.[115] Thus, *Professional Hole Drilling* may be distinguished from *Mistletoe* where the arbitrator interpreted the meaning of a provision rather than directly applying the sanction prescribed in the contract. Therefore, the court did not really alter its position taken in *Mistletoe*.

The United States District Court in Colorado applied the Tenth Circuit's "express provision" rule in deciding *Litvak Packing Co. v. Amalgamated Butcher Workmen Local 641*[116] in 1978. In this case the contract provision provided, in pertinent part, that "[n]o employee covered by this Agreement shall be suspended, demoted or dismissed without just and sufficient cause. Sufficient cause for discharge shall include, among other reasons . . . insubordination."[117] Following an exchange between the grievant and his supervisor, the grievant refused to obey the supervisor's order to recommence work and the grievant was discharged for insubordination. The arbitrator found that there was no question the grievant was insubordinate. However, he also determined that the offense was minor, at least partially provoked by the supervisor, and that the harsh penalty was at least in part motivated by personal dislike for the grievant.[118] The arbitrator further found that there was evidence of past practice where lesser penalties were imposed under like circumstances. Therefore, he converted the discharge to a two month suspension without pay and ordered reinstatement. On appeal, the District Court cited *United States Potash* as well as *Mistletoe* and found that the latter "dictates the outcome of this litigation."[119] Thus, the court held that the contract's clear language restricted the arbitrator to "not rewrite the labor contract,"[120] and in such situations the courts have the right to intervene.

The district court's decision, following the Tenth Circuit Court's lead, presents the second troubling aspect present in the Tenth Circuit's

113. *Professional Hole Drilling*, 574 F.2d at 503.
114. *Id.*
115. *Id.*
116. 455 F. Supp. 1180 (D.C. Colo. 1978).
117. *Id.*
118. *Id.* at 1180-81.
119. *Id.* at 1181-82.
120. *Id.* at 1180.

case law. That is, arbitration will not serve as the final and binding determination of bargaining agreement disputes as envisioned by the Supreme Court in the *Trilogy*. Instead, arbitration may once again become simply the first step on the way to the courthouse, as under the common law.

The Tenth Circuit did distinguish *Mistletoe* when it decided *Fabricut, Inc. v. Tulsa General Drivers Local 523*[121] in 1979. In this case an arbitrator found that several employees violated the collective bargaining agreement when they left the plant and ignored an overtime assignment. The arbitrator also stated that while some discipline was appropriate, there was not just cause for discharge because the agreement was not clear about whether discharge was required in these circumstances. On review, the court found that the labor contract was "not a model of clarity or consistency" and affirmed the arbitrator's award.[122] It also agreed that there was no express penalty stated in the agreement which would limit the arbitrator's remedial authority. Thus, the court held that the arbitrator was within his authority to fashion a remedy which he deemed reasonable.[123] By so holding, the court apparently remains willing to defer to the arbitrator when ambiguous contract language needs to be interpreted by the arbitrator and there are no facts requiring an application of the *Mistletoe* "express provision" rule.

The court continued its reliance on *Mistletoe* when it decided *Union of Operating Engineers Local 670 v. Kerr-McGee Refining Corp.*[124] in 1980. Here, the court found that the arbitrator had "substituted his views for the express provisions of the contract, added a provision not in the agreement not bargained for, and in doing so 'violated the essence of the agreement'."[125] In this case the arbitrator had found that the company's discharge letter contained two charges and determined that "[i]f the evidence supporting either of these charges is not sufficient, then the discharge was not for just cause."[126] The grievant, who had a recorded high rate of absenteeism, had submitted a "sick note" for days ill. After checking the authenticity of the note, the company learned that the grievant had not been to see the doctor as the note stated. The collective agreement provided, "[a]ny . . . false statements made to obtain benefits [for sick leave] will be cause for discharge."[127] The company discharged the grievant for making false statements and for excessive absenteeism. The arbitrator found that the company had not proved the latter charge and ordered reinstatement with a five day suspension for making false statements.[128]

The Tenth Circuit, while clearly stating that it was not reviewing the

121. 597 F.2d 227 (10th Cir. 1979).
122. *Id.* at 229.
123. *Id.* at 230.
124. 618 F.2d 657 (10th Cir. 1980).
125. *Id.* at 660.
126. *Id.* at 658.
127. *Id.*
128. *Id.* at 659.

merits of the award, held that the arbitrator had ignored the express provisions of the contract and vacated the award.[129] The court stated, as it had in *Fabricut*, that "the award may not be contrary to the express language of the agreement, and must have rational support."[130] It determined, per *Mistletoe*, that discharge was expressly provided for once the grievant was found to have violated the contract; accordingly, by making false statements to obtain a benefit, discharge should have been imposed.[131] Thus, the Tenth Circuit reinforced the broader judicial intervention begun in *Mistletoe*, namely, that it will intrevene when express contract language exists and when the arbitrator's decision does not draw its rational "essence" from the agreement.

Two United States District Court cases decided in 1980 distinguished *Mistletoe* on differing grounds. In *Griess v. Climax Molybdenum Co.*[132] an employee had returned to work, subject to a probationary period, under a settlement agreement for an earlier discharge. Upon completion of the probationary period, the employee was found by the employer to have preformed unsatisfactorily and was again discharged. The arbitrator affirmed the discharge, citing express language in the collective agreement allowing the company to discharge probationary employees at will. The district court upheld the arbitrator's award, however, the court did not rely on *Mistletoe* for its decision. Instead, it cited *Capitol Packing Co.*[133] and *Campo Machining Co.*[134] stating that "courts give utmost deference to the arbitrator's decision where the collective bargaining agreement provides that such decisions shall be final and binding upon the parties."[135]

The other 1980 district court case distinguishing *Mistletoe* was *Food and Commercial Workers Local 634 v. Gold Star Sausage Co.*[136] This case involved an employee who was discharged for fighting in violation of a generally understood, but unwritten, rule which allowed the company to fire any employee, whether aggressor or defender, who was involved in a fight on company premises.[137] The arbitrator found that the grievant was not the aggressor and that the grievant had been fired without just cause. Finding that the terms of the collective agreement implied a just cause provision, the arbitrator ordered reinstatement with back pay.[138]

The company challenged the award on the basis that it did not draw its essence from the contract and that the arbitrator had exceeded his authority by finding an implied just cause requirement for discharges. The district court found the case to be distinguishable from *Mistletoe* on

129. *Id.* at 659-60.
130. *Id.* at 659 (quoting *Fabricut*, 597 F.2d at 229).
131. *Id.* at 660.
132. 488 F. Supp. 484 (D.C. Colo. 1980).
133. 413 F.2d 668 (10th Cir. 1969). *See* text accompanying note 81 *supra*.
134. 536 F.2d 330 (10th Cir. 1976). *See* text accompanying note 94 *supra*.
135. *Griess*, 488 F. Supp. at 488.
136. 487 F. Supp. 596 (D.C. Colo. 1980).
137. *Id.* at 597.
138. *Id.*

the basis that the arbitrator did not modify an express provision[139] and the court could not say with positive assurance that the award did not draw its essence from the agreement.[140] It also found that, although the contract did not contain any direct reference to the company having the power to discharge with or without just cause, the arbitrator was within his authority to interpret the contract and infer that the parties had contemplated that any discharge would be for cause based upon other provisions of the contract.[141] Therefore, the court affirmed the award and in so doing reaffirmed *Mistletoe's* "express provision" rule as the standard for judicial review.

The preceeding survey demonstrates that the Tenth Circuit has indeed stretched the principles stated in the *Steelworkers Trilogy* and, in particular, *Enterprise Wheel* regarding judicial intervention in arbitration enforcement cases. The case law indicates that the practitioner is faced with varying tasks depending upon which side of the issue he sits. The union's advocate, when attempting to have an award enforced, must prove that the challenged contract language is ambiguous and that the arbitrator merely interpreted that ambiguous language. Likewise, the company's advocate must argue that the language is express and unambiguous and that the arbitrator has exceeded his authority by modifying that express language. However, these positions are nearly the exact reverse of the parties' positions when the contract was originally bargained. Normally it is the union which presses for more explicit language in the contract in order to narrow the day-to-day flexibilty of management while it is the company which seeks more ambiguous language in order to allow itself room to exercise management flexibility and prerogative.

More important than the above paradox is the fact that *Mistletoe* represents a willingness on the part of the Tenth Circuit to second guess the arbitrator's thought process. The court's position is troubling because it can allow a disgruntled party to circumvent a contractual agreement that arbitration will be final and binding. As the following section will reveal, continued adherence to the *Mistletoe* doctrine may inundate the court with arbitration review cases.

IV. Judicial Review in the Sixth Circuit

Evidence of how far a doctrine such as *Mistletoe* may take a court can be found in the decisions of the Sixth Circuit Court of Appeals. *Detroit Coil Co. v. International Ass'n of Machinists*[142] is a leading case demonstrating the Sixth Circuit's refusal to abide by the Supreme Court's admonition in the *Steelworkers Trilogy*. This case, decided in 1979, involved a contract provision which provided that, unless the union notified the company "within eight (8) working days from the date" when the union

139. *Id.* at 599 n.2.
140. *Id.* at 600.
141. *Id.*
142. 594 F.2d 575 (6th Cir. 1979), *cert. denied*, 444 U.S. 840 (1979).

made the decision to arbitrate, "the grievance or grievances shall be considered settled."[143] The union decided to arbitrate on April 6, 1977 and notified the company by letter dated April 15, which was not received until April 30. The company maintained that it considered the grievance settled but, nevertheless, agreed to submit to arbitration the question whether the union's request for arbitration was timely. The arbitrator ruled that the case should be heard on its merits, despite the union's failure to meet the specific notification requirements in the contract. He identified several factors in support of his ruling,[144] including taking note of the existing good relations between the parties, and expressed his opinion that a denial of arbitrability would result in a deterioration of that relationship. The court concluded that the arbitrator's reliance on the parties' relationship amounted to "dispensing his own brand of industrial justice"[145] and vacated the award.

By this decision the Sixth Circuit Court ignored the morale factor stated in *Warrior and Gulf*[146] as a proper item for arbitral consideration when arbitrability was an issue presented. Thus, the court was willing to expand the *Enterprise* standard but not apply the overriding rational presented in *American Manufacturing* and *Warrior and Gulf* which supported the Supreme Court's "hands off" posture.

In another 1979 decision, *Storer Broadcasting v. American Federation of Television and Radio Artists*,[147] the Sixth Circuit further expanded the limited scope of review standard laid down in the *Trilogy*. Central to the court's decision was its conclusion that there was "absolutely no evidentiary support" for the arbitrator's decision.[148] This conclusion allowed the court to substitute its interpretations of fact and contract language for the arbitrator's. The court then proceeded to announce two exceptions to the Supreme Court's "hands off" policy towards judicial review of the merits of an arbitrator's award:

> First, 'the arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without au-

143. *Id.* at 577.

144. The arbitrator also identified the following factors as arguments supporting a decision to hear the case on its merits: 1) the notification letter was dated, although not mailed, within the eight day period; 2) there was no evidence that the union considered the grievance settled; 3) there was no past practice of using untimely notification as a basis to deny a grievance; 4) the union had not demanded a company response within forty-eight hours as the agreement provided; and, 5) the union waived a time requirement at an earlier stage of the grievance procedure in order to allow the company owner time to respond. *Detroit Coil*, 594 F.2d at 578. The arbitrator felt that these factors evidenced the good relationship between the parties and their desire to peaceably resolve existing disputes. *Id.* at 579.

145. *Detroit Coil*, 594 F.2d at 581 (citing *Enterprise Wheel*, 363 U.S. at 597).

146. "The parties expect that [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 . . . its consequence to the *morale* of the shop, his judgment whether tensions will be heightened or diminished." Warrior & Gulf, 363 U.S. at 582 (emphasis added).

147. 600 F.2d 45 (6th Cir. 1979).

148. *Id.* at 48.

> thority to disregard or modify plain and unambiguous provisions'. . . . Second, 'although a court is precluded from overturning an award for errors in the determination of factual issues, "[n]evertheless, if an examination of the record before the arbitrator reveals no support whatever for his determination, his award must be vacated." '[149]

Thus, the court imposed a rigid "plain meaning" rule for the review of arbitration awards. The question then becomes who shall be the final decision maker—the arbitrator, who the parties agreed would issue a final and binding award, or the courts. If it is the courts, then they risk defeating the very purpose of arbitration and perhaps more importantly, they risk inundating themselves with arbitration review cases.

V. CONCLUSION

The *Steelworkers Trilogy* decisions delineated the scope of judicial review in section 301 suits under the Taft-Hartley Act. In these decisions the Supreme Court held that a court is not to overturn an arbitration award merely because it disagreed with the arbitrator's interpretation of the labor contract. Rather, courts are to defer to the arbitrator on questions of interpretation and application of the labor contract. While embracing the arbitrator as interpretor of labor contract rights, the Court did allow that an award could be set aside if the arbitrator did not draw the "essence" of the award from the collective bargaining agreement.

However, the Court left the determination of the substantive federal common law called for in *Lincoln Mills* to the lower federal courts. This failure to provide more concrete direction for interpreting the *Trilogy* and, in particular, *Enterprise Wheel* has created a split of opinion in the lower federal courts. In some instances the lower federal courts have strayed from the "hands off" standard outlined in the *Trilogy*, developing instead more expansive standards of judicial review which may prevent arbitration from being the final and binding determinor of labor contract disputes.

A survey of Tenth Circuit arbitration decisions reveals that, while generally in accord with the *Enterprise* standard of review, the court will allow judicial intervention if it believes the arbitrator has modified express provisions in the labor contract. This position reflects a trend in the lower federal courts towards a more interventionist philosophy regarding judicial review of arbitration awards. Whether this trend continues and standards such as those adopted in the Sixth Circuit become the norm, is an unanswered question. The very fact that the arbitration process works as a voluntary dispute resolution mechanism will mitigate against adoption of such standards on a broader scale. Further, there is a strong public policy, recognized by both Congress and the Supreme Court, favoring arbitration.

Clearly, the Sixth Circuit position expressed in *Storer* opens the

149. *Id.* at 47.

courthouse doors to numerous cases by parties seeking judicial review of arbitration awards. Should this actually occur, arbitration will become merely the initial step along a broad path to the courts rather than the final determination provision agreed to by the parties in good faith. It is also evident that, although the Tenth Circuit has expanded the Supreme Court's standard for judicial review of arbitration awards, it has not gone as far as the Sixth Circuit. However, given the right set of circumstances, the Tenth Circuit could decide to loosen the limited review strictures of *Enterprise Wheel* even further. The answer will only come in time from the Tenth Circuit, and the other circuits, as the Supreme Court has been reluctant to provide further direction for interpreting the *Steelworkers Trilogy* and *Enterprise* in particular.

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