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Theodore J. St. Antoine

The law did not look kindly on arbitration in its infancy. As a process by which two or more parties could agree to have an impartial outsider resolve a dispute between them, arbitration was seen as a usurpation of the judiciary's own functions, as an attempt to "oust the courts of jurisdiction."[1] That was the English view, and American courts were similarly hostile. They would not order specific performance of an executory (unperformed) agreement to arbitrate, nor grant more than nominal damages for the usual breach. Only an arbitral award actually issued was enforceable at common law. All this began to change in the 1920s, with the enactment of state statutes to govern commercial arbitration, the adoption of the first Uniform Arbitration Act, and the passage by Congress in 1925 of the Federal Arbitration Act (FAA).[2] Courts thereafter would enforce an agreement to arbitrate future disputes.

Arbitration as a voluntary method of settling labor disputes gained accep-

[1] See generally 6A Arthur L. Corbin, *Corbin on Contracts* §§1431–41, 381–425 (West Publishing Co. 1962); Paul L. Sayre, "Development of Commercial Arbitration Law," 37 *Yale Law Journal* 595, 603–5 (1928). It may not have been coincidental that English judges were largely dependent on case fees for a livelihood. Kulukundus Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983 (2d Cir. 1942).

[2] 9 U.S.C. §§1–14 (1994). Section 1 of the Federal Arbitration Act excludes "contracts of employment" from its coverage. The exact scope of that exclusion has never been definitively resolved, but it may remove collective bargaining agreements (which technically are *not* "contracts of employment") from FAA regulation. *Cf.* Paperworkers v. Misco, Inc., 484 U.S. 29, 40 n. 9 (1987); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n. 2 (1991).

tance in several significant industries at the beginning of this century, although its roots go back even further.[3] Unions and employers used both interest arbitration (the setting of the terms of a new contract) and rights or grievance arbitration (the interpretation and application of the terms of an existing contract). While disagreement exists concerning the extent to which labor arbitration was used prior to World War II, there is no doubt the National War Labor Board contributed substantially to the growth of grievance arbitration. When unions and employers could not agree on a contract during the war, the board would impose one, and it almost invariably insisted on arbitration as the final step in the grievance procedure. By 1944 the Bureau of Labor Statistics reported that 73 percent of the collective bargaining agreements in its files contained arbitration provisions. That figure was to grow to more than 95 percent by the early 1980s.[4]

About seventy thousand grievance and interest arbitrations are decided annually in this country.[5] Over the years only a tiny fraction of all arbitrations—varying from less than 1.0 to 1.5 percent—have become the subject of any sort of court proceedings.[6] Yet the law, especially in a litigious society like ours, is vitally important. Even persons who wish to avoid any resort to the courts must keep the law in mind in trying to determine their rights and obligations under an agreement to arbitrate, or under an arbitral award once it is issued.

[3] Historical overviews include Edwin E. Witte, *Historical Survey of Labor Arbitration* (University of Pennsylvania Press 1952); Robben W. Fleming, *The Labor Arbitration Process* 1–30 (University of Illinois Press 1965); Dennis R. Nolan and Roger I. Abrams, "American Labor Arbitration: The Early Years," 35 *University of Florida Law Review* 373 (1983); Dennis R. Nolan and Roger I. Abrams, "American Labor Arbitration: The Maturing Years," 35 *University of Florida Law Review* 557 (1983); Charles J. Morris, "Historical Background of Labor Arbitration: Lessons from the Past," in *Labor Arbitration: A Practical Guide for Advocates* (Max Zimny, William F. Dolson, and Christopher A. Barreca, eds., BNA 1990).

[4] U.S. Bureau of Labor Statistics, Bulletin No. 2095, *Characteristics of Major Collective Bargaining Agreements* 112 (1981).

[5] Mario F. Bognanno and Charles J. Coleman, eds., *Labor Arbitration in America: The Profession and Practice* 92–93 (Praeger 1992). Less than 5 percent of these are interest arbitrations, with the great bulk being rights or grievance arbitrations.

[6] Frank Elkouri and Edna Asper Elkouri, *How Arbitration Works* 23 n. 5 (4th ed., BNA 1985). There are some signs of an increasing willingness to challenge arbitral decisions, with one court objecting to the "exasperating frequency" of suits brought "under the delusion that, as a matter of course, the losing party is entitled to appeal to the courts any adverse ruling by an arbitrator." Posadas Associates v. Empleados de Casino, 821 F.2d 60, 61 (1st Cir. 1987). See also William B. Gould IV, "Judicial Review of Labor Arbitration Awards—Thirty Years of the *Steelworkers' Trilogy*: The Aftermath of *AT&T* and *Misco*," 64 *Notre Dame Law Review* 464, 472–75 (1989); David E. Feller, "Presidential Address: Bye-Bye *Trilogy*, Hello Arbitration!" in *Arbitration 1993: Arbitration and the Changing World of Work, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators* 1, 9–13 (Gladys W. Gruenberg, ed., BNA 1994).

The Legal Framework

State common or statutory law was the basis for enforcing the relatively few collective bargaining agreements that reached the courts during the nineteenth century and the first half of this century. Even when executory agreements to arbitrate became enforceable, however, the courts remained suspicious of the arbitral process. Perhaps typical was the attitude expressed in the famous *Cutler-Hammer* case.[7] The contract there provided that the company and the union would "discuss payment of a bonus" covering a specified six-month period and that they would arbitrate "any dispute" as to the "meaning . . . or application" of the contract. In the court majority's analysis, they found that the union was ultimately seeking to have an arbitrator set the amount of the bonus. The court denied arbitration, concluding: "If 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." Since *Cutler-Hammer* days in the late 1940s, nearly all labor arbitrations in industries affecting commerce have become subject to federal statutory regulation, and the results are radically different.

The Railway Labor Act of 1926 (RLA)[8] governs arbitration in the railroad and airline industries and the Labor Management Relations Act of 1947 (Taft-Hartley)[9] governs arbitration in almost all the rest of interstate industry. Under the RLA, the National Mediation Board serves as a mediating agency in interest disputes, and, if both union and employer concur, it handles the arbitration of the unresolved terms of a new contract. The National Railroad Adjustment Board (NRAB) deals with rights disputes and grievances under existing contracts. Either union or employer may demand arbitration of a grievance before the NRAB or one of the various system adjustment boards operating under it. If one party seeks arbitration, the other party is bound. NRAB members consist of an equal number of carrier appointees and union appointees. Impartial referees are designated by the partisan appointees or by the National Mediation Board to break any deadlocks that may occur.

Grievance arbitration in most other interstate industries is subject to the Taft-Hartley Act, and that is the primary focus of this chapter. State law, of course, continues to govern arbitration in small businesses wholly engaged in intrastate commerce. In addition, Taft-Hartley specifically excludes agri-

[7] Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S. 2d 317, aff'd, 297 N.Y. 519, 74 N.E. 2d 464 (1947).
[8] 45 U.S.C. §§151–88 (1994).
[9] 29 U.S.C. §§141–67, 171–97 (1994).

cultural workers, domestic help, and both federal and state governmental employees. Title VII of the Civil Service Reform Act of 1978[10] authorizes the arbitration of interest disputes and mandates the arbitration of grievances between federal agencies and unions representing their employees. Many states have statutes covering arbitration for state and municipal employees.

Section 301 of Taft-Hartley

Wage and price controls existed during World War II. The end of the war unleashed the pent-up demands of American labor for better pay and other contract improvements. A flood of strikes in such critical industries as coal mining, longshoring, autos, steel, and railroads threatened to engulf the country. Many of the strikes were in breach of contract. Yet suits against unincorporated associations like labor unions were often difficult to pursue in the state courts, since service of process had to be obtained on each individual member. In 1947 the Republican 80th Congress reacted by adopting Section 301 of the Taft-Hartley Act,[11] which permits suits in federal district court for breaches of contracts between employers and labor organizations, with the latter suable as legal entities.

Section 301 on its face reads as if it were a simple grant of jurisdiction over suits on labor contracts. But collective bargaining agreements, like other contracts between private parties, had always been regarded as subject to state substantive law. That created a problem. Under the U.S. Constitution, the federal courts may assume jurisdiction only when there is diversity of citizenship among all the parties or when there is a question of federal substantive law.[12] Unincorporated associations such as labor unions possess the citizenship of all their members. It would thus be rare for diversity to exist in an action between an employer and a union. As applied in most cases, therefore, section 301 would seem an unconstitutional effort to authorize the federal courts to enforce state contract law. That is exactly what one learned constitutional scholar, Justice Felix Frankfurter, thought was happening, as he explained in an exhaustive eighty-six-page judicial opinion ten years after the section adoption.[13]

Justice William O. Douglas was untroubled by these technical niceties. In the landmark *Lincoln Mills* decision, he declared on behalf of the Supreme

[10] 5 U.S.C. §§7101–35 (1994). See generally Henry B. Frazier III, "Labor Arbitration in the Federal Service," 45 *George Washington Law Review* 712 (1977); Craig A. Olson, "Dispute Resolution in the Public Sector," in *Public Sector Bargaining* 160 (Benjamin Aaron, Joyce M. Najita, and James L. Stern, eds., 2d ed., BNA 1988).

[11] 29 U.S.C. §185 (1994).

[12] U.S. Constitution, Art. III, §2.

[13] Textile Workers v. Lincoln Mills, 353 U.S. 448, 460–546 (1957) (dissenting opinion).

Court that section 301 should not be read "narrowly as only conferring jurisdiction over labor organizations."[14] Instead, it directed the federal courts to fashion a body of federal substantive law "from the policy of our national labor laws" to apply in section 301 actions.[15] This crafty maneuver not only disposed of the constitutional conundrum but also enabled the federal judiciary to develop what can aptly (if nontraditionally) be described as a body of federal common law for use in interpreting and applying collective bargaining agreements. Somewhat ironically, *Lincoln Mills* itself (like most subsequent section 301 cases) involved a suit by a union to compel an employer to comply with an agreement to arbitrate, rather than a suit by an employer to compel a union to comply with a no-strike clause—the latter being the more likely use contemplated for section 301 by its proponents.

Some esteemed academic commentators, Frankfurter protégés, feared that *Lincoln Mills* had imposed on the federal courts a task to which they were "enormously unequal."[16] They feared not only the sheer volume of litigation that might be generated by some 150,000 to 200,000 labor contracts across the country: even more fundamentally, the critics worried that the judiciary did not have the background and expertise to deal effectively with this unique, complex form of private bargain. That was thought especially true in the absence of any sort of legislative guidelines concerning the enforcement of union-management contracts. As it turned out, the justices proved wilier than the scholars. In the next set of major decisions on the subject, the Supreme Court neatly finessed the problem of an overtaxed judiciary, and in so doing provided the greatest impetus for labor arbitration since the National War Labor Board in World War II.

The Steelworkers Trilogy

The most famous Supreme Court cases on labor arbitration have become known as the *Steelworkers Trilogy.* They were decided in 1960, with majority opinions by Justice Douglas in all three. The first two, *Steelworkers v. American Manufacturing Co.*[17] and *Steelworkers v. Warrior & Gulf Navigation Co.*,[18] dealt with the enforcement of executory agreements to arbitrate. The third, *Steel-*

[14] *Id.* at 456.

[15] *Id.* The Court added that state law could be looked to for guidance, but it would become federal law insofar as it was adopted. The practical effect was to make the Supreme Court the ultimate authority on the whole new, theoretically uniform body of law being formulated to govern labor agreements in private industry affecting commerce.

[16] Alexander M. Bickel and Harry H. Wellington, "Legislative Purpose and the Judicial Process: The Lincoln Mills Case," 71 *Harvard Law Review* 1, 22–23 (1957).

[17] 363 U.S. 564 (1960).

[18] 363 U.S. 574 (1960).

workers v. Enterprise Wheel & Car Corp.,[19] dealt with the enforcement of an arbitral award.

The collective agreement in *American Manufacturing* contained a standard arbitration clause covering "any dispute" between the parties "as to the meaning, interpretation and application of the provisions of this agreement."[20] An employee settled a workers' compensation claim against the company on the basis that he was permanently partially disabled. Subsequently, the company refused to return him to his old job. The union insisted he was entitled to it under the contract's seniority provision. The Supreme Court held that arbitration should have been ordered because the function of the judiciary was said to be "very limited" in such circumstances.[21] The issue was whether the claim "on its face is governed by the contract."[22] The Court emphasized that judges "have no business weighing the merits of the grievance." It commented that "the processing of even frivolous claims may have therapeutic values."

In *Warrior & Gulf* the union claimed an employer's contracting out of maintenance work violated a no-lockout provision. The collective agreement contained a broad arbitration clause covering "differences" or "any local trouble of any kind," but there was an extra wrinkle. A separate provision excluded from arbitration "matters which are strictly a function of management."[23] The

[19] 363 U.S. 593 (1960). The *Steelworkers Trilogy* has had a significant influence on the judicial treatment of arbitration agreements and awards in the public sector, both federal and state. But courts appear more willing to find disputes nonarbitrable and awards unenforceable in the public sector, especially when financial interests are at stake. See, e.g., Charles B. Craver, "The Judicial Enforcement of Public Sector Grievance Arbitration," 58 *Texas Law Review* 329 (1980); Joseph R. Grodin and Joyce M. Najita, "Judicial Response to Public Sector Arbitration," in *Public Sector Bargaining* 229 (Benjamin Aaron, Joyce M. Najita, and James L. Stern, eds., 2d ed., BNA 1988); Anne C. Hodges, "The Steelworkers Trilogy in the Public Sector," 66 *Chicago-Kent Law Review* 631 (1990). *Cf.* John Kagel, "Grievance Arbitration in the Federal Service: Still Hardly Final and Binding?" in *Arbitration Issues for the 1980s: Proceedings of the 34th Annual Meeting, National Academy of Arbitrators* 178 (James Stern and Barbara Dennis, eds., BNA 1982); Jean McKee, "Federal Sector Arbitration," in *Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators* 187 (Gladys W. Gruenberg, ed., BNA 1992).

[20] 363 U.S. at 565.

[21] *Id.* at 567–68. In both *American Manufacturing* and *Warrior & Gulf*, Justice Douglas alluded to his notion, first mentioned in *Lincoln Mills*, that the arbitration clause is the quid pro quo of the no-strike clause, and thus to be favored in the interest of industrial stability. But Justices Brennan, Frankfurter, and Harlan expressly disavowed any necessary connection between the two provisions. *Id.* at 573. Since Justice Black did not participate in these cases, and Justice Whitaker dissented or concurred specially, there were apparently only four Justices subscribing to the quid pro quo theory at this time. A no-strike clause would certainly not be essential for the validity of the arbitration clause under standard contract doctrine. Any nonillusory promise on one side of a bargained-for exchange is legally sufficient to support all the promises on the other side.

[22] *Id.* at 568.

[23] *Warrior*, 363 U.S. at 576.

Supreme Court stated: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," adding tersely: "Doubts should be resolved in favor of coverage."[24] The "management function" exclusion was not sufficient: "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."[25]

Justice Douglas went on to explain the preference for arbitration over litigation by extolling arbitrators' "knowledge of the common law of the shop" and their capacity to take into account not only the express provisions of the contract but also the more intangible factors affecting worker morale and plant productivity. Nonetheless, despite all this stress on the values of arbitration and the congressional policy favoring it, management representatives uneasy about being dragged into arbitrating a myriad of matters they had never anticipated could take comfort from one key principle of *Warrior.* The Court declared that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit."[26] Ultimately, according to *Warrior,* it is the courts' task, not the arbitrators', to determine whether a reluctant party has breached a promise to arbitrate.[27]

Sound legal theory and practical common sense afford much more support for the Supreme Court's approach than might appear at first glance. Under the terms of most collective bargaining agreements, "any dispute"—not just any "reasonably arguable" dispute—concerning the interpretation or application of the contract is subject to arbitration. In ordering the arbitration even of frivolous claims, the courts are doing no more than requiring the parties to live up to their own voluntary commitments. As a practical matter, even the arbitration of nonmeritorious grievances may serve a worthwhile therapeutic purpose. It lets the union and employees, or employer, blow off steam, have their day in court, and perhaps undergo the

[24] *Id.* at 582–83.

[25] *Id.* at 584–85. The Court considered this especially true "where, as here, the exclusion clause is vague and the arbitration clause quite broad." The lower federal courts appear to be of different minds about the extent to which bargaining history may constitute evidence of an intent to exclude certain claims from arbitration. Compare IUE v. General Elec. Co., 332 F.2d 485 (2d Cir.), cert. denied, 379 U.S. 928 (1964), with Communications Workers v. Pacific Nw. Bell Tel. Co., 337 U.S. 455 (9th Cir. 1964).

[26] *Warrior,* 363 U.S. at 582.

[27] Later, in John Wiley & Sons v. Livingston, 376 U.S. 543 (1964), the Court distinguished between substantive arbitrability and procedural arbitrability. See *infra* text at n. 79. As indicated in *Warrior,* substantive arbitrability, dealing with the coverage of the claim by the arbitration clause, is a matter for the court, not the arbitrator, absent a contrary agreement by the parties.

instructive experience of watching their case collapse under the cool gaze of a disinterested outsider. In any event, the whole affair should be much less costly, in terms of time, money, and bruised psyches, than a court action over the same issue.

In *Enterprise Wheel*, the third case in the *Steelworkers Trilogy*, an employer had fired several workers for walking off their jobs to protest the discharge of another employee. An arbitrator reduced the dismissals to a ten-day suspension. Even though the collective bargaining agreement had expired in the meantime, the award included reinstatement and full back pay, subject to a deduction of ten days' pay and any earnings from other employment. A court of appeals refused to enforce reinstatement or the back pay award beyond the date of the contract's termination. The Supreme Court reversed, stating broadly: "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."[28]

Again writing for the Court, Justice Douglas sounded several interrelated themes in *Enterprise Wheel*. As the person commissioned by the parties to interpret and apply their agreement, the arbitrator must be allowed considerable flexibility, especially in formulating remedies for situations that were never anticipated. Yet even so, the arbitrator cannot "dispense his own brand of industrial justice."[29] An arbitral award is valid only if it "draws its essence" from the labor contract. Although the arbitrator may seek guidance from many sources, including the law, it would be exceeding the scope of the submission to base an award "solely upon the arbitrator's view of the requirements of enacted legislation."[30] But a court should not refuse to enforce an award whenever a "mere ambiguity" exists in the accompanying opinion concerning a possible misuse of law. Justice Douglas concluded that it is the "arbitrator's construction which was bargained for," and the courts "have no business overruling" it just because they interpret the contract differently.[31]

Elsewhere I have argued at length that the lesson of *Enterprise Wheel* is that we should treat an arbitrator as the parties' formally designated "reader" of the contract.[32] Naturally, I mean nothing so simple-minded as the notion that the arbitrator should be able to find the answer to all arbitral issues within

[28] *Enterprise Wheel*, 363 U.S. at 596.

[29] *Id.* at 597.

[30] *Id.* at 597–98.

[31] *Id.* at 599.

[32] Theodore J. St. Antoine, "Judicial Review of Labor Arbitration Awards: A Second Look at *Enterprise Wheel* and Its Progeny," in *Arbitration 1977: Proceedings of the 30th Annual Meeting, National Academy of Arbitrators* 29–30 (Barbara D. Dennis and Gerald G. Somers, eds., BNA 1978), reprinted as revised, 75 *Michigan Law Review* 1137, 1140 (1977).

the four corners of the document or in the "plain meaning" of the text. My point, rather, is that the arbitrator is the parties' joint alter ego or mutual mouthpiece, and thus, when the arbitrator speaks, the parties speak. That is the purport of the "final and binding" language of the standard arbitration clause. The arbitrator is the parties' surrogate for striking whatever supplementary bargain is necessary to handle the anticipated omissions of the initial agreement. What the award says *is* the parties' contract.

Important practical consequences flow from this analysis. First and foremost, a "misinterpretation" or "gross mistake" by the arbitrator is a contradiction in terms. As long as there is no fraud or exceeding of authority by the arbitrator, all he or she is doing is "reading" the parties' agreement as they meant it to apply to the new situation at hand. As *Enterprise* stated, the parties bargained for the arbitrators' construction, and that is what they are getting. For a court, it is the same as if the parties had entered into a written stipulation spelling out their own definitive interpretation of the labor contract. The court may have independent legal grounds for refusing enforcement of the arbitral award, just as it might have refused to enforce the contract itself, but arbitral infidelity to the terms of the agreement should not be among them.

A second, subsidiary conclusion follows from viewing the arbitrator as contract reader. In the debate over what an arbitrator should do when confronted with what seems an irreconcilable conflict between the parties' agreement and "the law,"[33] my analysis supports those favoring the contract. The reasons are simple. Unless the parties have agreed otherwise, expressly or impliedly, the arbitrator's commission is to interpret and apply their contract, not external law. *Enterprise Wheel* is in accord with that position. The parties may have divergent opinions about both the meaning and the legality of their collective agreement. They are entitled to the arbitrator's definitive determination of its meaning before they have to fight out its legality in the courts. Furthermore, the law is almost never perfectly clear. For example, on the highly significant issue of the validity of seniority systems perpetuating the effects of racial discrimination antedating the 1964 Civil Rights Act, the Supreme Court once overturned an unbroken line of three dozen decisions of the courts of appeals.[34] As a practical matter, however, the great debate over contract versus law is probably a tempest in a teapot. In the vast majority of cases, the arbitrator should be able to assume that the parties intended their agreement to

[33] See, e.g., Robert G. Howlett, "The Arbitrator, the NLRB, and the Courts," in *The Arbitrator, the NLRB, and the Courts: Proceedings of the 20th Annual Meeting, National Academy of Arbitrators* 67 (Dallas L. Jones ed., BNA 1967); Bernard D. Meltzer, "Ruminations about Ideology, Law, and Labor Arbitration," *id.* at 1; Richard Mittenthal, "The Role of Law in Arbitration," in *Developments in American and Foreign Arbitration: Proceedings of the 21st Annual Meeting, National Academy of Arbitrators* 42 (Charles M. Rehmus, ed., BNA 1968).

[34] Teamsters v. United States, 431 U.S. 324 (1977).

be interpreted consistent with applicable law (insofar as that can be discerned). Irreconcilable conflicts will rarely arise.

Reaffirmation of the Trilogy

Despite ominous signs that some lower courts have been less than fully faithful to the teachings of the *Steelworkers Trilogy* in recent years,[35] the Supreme Court itself provided a resounding reaffirmation in two unanimous decisions during the past decade. The first was *AT&T Technologies v. Communications Workers.*[36] Speaking through Justice Byron White, the Court set forth the following four principles refining and explicating the *Trilogy* doctrine on judicial enforcement of an executory agreement to arbitrate:

1. Arbitration is a matter of contract and a party need only submit a dispute it has agreed to submit.
2. Unless the parties clearly and unmistakably provide otherwise, the question whether the parties agreed to arbitrate a particular issue is to be decided by the court, not the arbitrator.
3. Whether "arguable" or not, and even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective agreement is to be decided, not by the court, but, as the parties have agreed, by the arbitrator.
4. When a contract contains an arbitration clause, there is a presumption of arbitrability and arbitration should 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. Doubts should be resolved in favor of arbitrability.

Significantly, as emphasized by Justice William Brennan in his concurrence, there was a colorable argument in *AT&T Technologies* that the question of arbitrability should have gone to the arbitrator, rather than being decided by a court, because the issue of arbitrability and the merits of the dispute were so "entangled" that there was a risk the court would be deciding the merits

[35] See *infra* text at nn. 194–96, 201–3. See generally Frank H. Easterbrook, "Arbitration, Contract, and Public Policy," in *Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting National Academy of Arbitrators* 65 (Gladys W. Gruenberg, ed., BNA 1992); David E. Feller, *supra* n.6; Stephen R. Reinhardt, Bernard D. Meltzer, and Abraham H. Raskin, "Arbitration and the Courts: Is the Honeymoon Over?" in *Arbitration 1987: The Academy at Forty, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators* 25, 39, 55 (Gladys W. Gruenberg, ed., BNA 1987).

[36] 475 U.S. 643 (1986).

under the guise of deciding arbitrability. A management functions clause apparently authorized the termination of employment, including certain layoffs, without review through arbitration. Nonetheless, for Justice Brennan and seemingly for the majority as well, that logic could lead to the conclusion that the arbitrability of almost any dispute could turn on the merits, with the arbitration clause being swallowed by the excepting exclusion.[37] This fear seems rather far-fetched, unless arbitrators are deemed much less timid than courts in upholding their own jurisdiction. More practically, it would appear that the Court was intent on maintaining the elegant symmetry of the *Trilogy*, and incidentally sustaining the one important employer victory there. The arbitration clause in a collective bargaining agreement is ultimately a contract, and for all its presumed expansiveness, the initial task of determining its scope lies with the courts, not arbitrators.

The second of these more recent Supreme Court decisions, *Paperworkers v. Misco, Inc.*,[38] reexamined the standards for judicial review of an arbitral award that has been issued. The specific question posed by the case was when a court may set aside an arbitration award as contravening public policy, an issue more thoroughly discussed later in this chapter.[39] In *Misco* the Fifth Circuit had refused to enforce an arbitrator's reinstatement of an employee whose job was operating a dangerous paper-cutting machine, and whose car had been found to contain marijuana while in the company parking lot. The Supreme Court reversed. Justice White, writing for the Court, declared that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."[40] A claim of "improvident, even silly, factfinding" would not be enough.[41]

The Court naturally recognized the general common law doctrine that a contract will not be enforced if it violates a law or public policy. But it cautioned that "a court's refusal to enforce an arbitrator's *interpretation* of [labor] contracts is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.' "[42] The Court majority, however, expressly declined to address the union's position that "a court may refuse to enforce an award on public policy grounds only when the award

[37] *Id.* at 654.
[38] 484 U.S. 29 (1987).
[39] See *infra* text at nn. 187–206.
[40] 484 U.S. at 38.
[41] *Id.* at 39.
[42] *Id.* at 43, quoting from W. R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983) (emphasis in the original).

itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law."[43] The latter observation plainly leaves open some substantial questions, and the lower federal courts have continued to disagree about the appropriate scope of their reliance on "public policy" in considering whether to enforce arbitral awards. We shall deal with this critical topic later.[44]

Strikes over Arbitrable Grievances

An arbitration clause may do more than facilitate an impartial third party's ruling on a disputed issue. It may also enable an employer to obtain an injunction against a strike during the term of a collective agreement, despite the anti-injunction ban of the Norris-LaGuardia Act.[45] That was probably not the result intended by Congress in passing section 301 of the Taft-Hartley Act. When Congress gave the federal courts jurisdiction over suits to enforce labor contracts, it deliberately rejected proposals to amend Norris-LaGuardia to take account of this new development.[46] The Supreme Court initially made the obvious, logical deduction. Even strikes in breach of contract remained covered by the prohibition of federal injunctions in peaceful labor disputes.[47] But there were evident policy deficiencies in this position. Most important, employers were deprived of what is ordinarily the most sensible and efficacious weapon against forbidden strikes.

In *Boys Markets, Inc. v. Retail Clerks Local 770*,[48] the Supreme Court managed to confound the logic of its earlier decision and do justice at last. An artful, if somewhat contrived, opinion by Justice Brennan reasoned that Congress's refusal to amend Norris-LaGuardia when enacting Taft-Hartley did not mean the injunction ban was left intact. It merely meant Congress was prepared to let the federal judiciary work out an appropriate "accommodation" between the two statutes. Justice Brennan's solution was to authorize federal injunctions against strikes when the underlying grievance is subject to a "mandatory grievance adjustment or arbitration procedure" in a collective bargaining agreement. While this approach may offend purists in statutory construction, there is much to commend it in elementary fairness. Norris-

[43] *Id.* at 45 n. 12.

[44] See *infra* text at nn. 187–206.

[45] 29 U.S.C. §§101–15 (1988).

[46] The House Conference Report expressly observed that a provision in the House bill lifting the Norris-LaGuardia ban in contract actions had been deleted. *H. Conf. Rep. No. 510 on H.R. 3020*, 80th Cong., 1st Sess. 66 (1947). Senator Robert Taft, who chaired the conference, informed the Senate: "The conferees . . . rejected the repeal of the Norris-LaGuardia Act." 93 *Cong. Rec.* 6445–46 (1947).

[47] Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962).

[48] 398 U.S. 235 (1970).

LaGuardia was designed to protect struggling unions against a biased, injunction-wielding judiciary, especially when a union is attempting to organize nonunion workers. When an established union has committed itself contractually not to strike and has been provided an effective alternative means of redress through arbitration, it is hardly a desecration of Norris-LaGuardia philosophy to grant the employer an injunction if the union goes back on its word and strikes.

The Supreme Court has applied the *Boys Markets* test for injunctive relief with surprising literalness in favor of labor organizations. Thus, in *Buffalo Forge Co. v. Steelworkers*,[49] the Court held that no injunction was available against a sympathy strike that was arguably a violation of the union's no-strike pledge. The key was that the strike was in support of other unions negotiating with the employer. The strike was not triggered by a dispute between the employer and the striking union, and hence the union had no grievance it could resolve through arbitration under its own contract. Remedies other than an immediate injunction were of course available to the employer, including resort to arbitration. Furthermore, it appears that if an arbitrator issues a cease-and-desist order against a sympathy strike, the employer could get a federal court to specifically enforce that award and thus halt the strike.[50] That would be true even though the strike was not directly subject to a federal injunction.[51]

As can be seen, what determines the availability of an immediate *Boys Markets* injunction, even before the issuance of any arbitral award, is the scope of the arbitration clause, not the scope of the no-strike clause. Indeed, even in the absence of any express no-strike provision, the courts will infer the existence of a no-strike commitment from the presence of a final and binding arbitration clause.[52] In establishing this principle in the *Lucas Flour* case,[53] the Supreme Court commented that a "contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral pro-

[49] 428 U.S. 397 (1976).

[50] See, e.g., New Orleans S.S. Ass'n v. Longshoremen's Local 1418, 389 F.2d 369 (5th Cir.), cert. denied, 393 U.S. 828 (1968); Pacific Maritime Ass'n v. Longshoremen's Ass'n, 454 F.2d 262 (9th Cir. 1971).

[51] The effect is to create one category of arbitral awards, that is, those ordering the halt of a union strike in breach of a no-strike commitment, which will have *greater* judicial enforceability than the parties' own contract. This apparent anomaly may be explained by the underlying Norris-LaGuardia policy against direct judicial intervention into labor disputes, since here the arbitrator serves as a buffer between the court and the parties.

[52] Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962).

[53] *Id.* at 105. See also LMRA §203(d), 29 U.S.C. §173(d)(1988): "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

cess as a substitute for economic warfare." That does not mean that a no-strike clause is meaningless. If there is no arbitration clause, or if the no-strike clause is broader than the arbitration clause, the no-strike clause may be the basis for a damage action against the union for breach of contract, or it may be the basis for disciplinary action against striking employees.

When the employer as well as the union is entitled to refer disputes to arbitration, the employer must pursue arbitration rather than suing directly for damages, even though the union has allegedly struck in violation of contract. *In Drake Bakeries, Inc. v. Bakery Workers Local 50*,[54] the Supreme Court declared that it could "enforce both the no-strike clause and the agreement to arbitrate by granting a stay [of the employer's action] until the claim for damages is presented to an arbitrator."[55] Suits in equity are treated differently from damage actions. The Court decided without discussion in *Boys Markets* that the employer could move directly for an injunction against the strike without first obtaining an arbitral award, as long as it was prepared to accept arbitration of the underlying dispute as a condition of the injunction.[56]

Section 301 Preemption

In *Lincoln Mills* and the *Steelworkers Trilogy*, the Supreme Court established that when a suit was brought under section 301 to enforce a labor contract, a federal court would apply federal substantive law. That left open a couple of important questions. Could state courts still take jurisdiction over actions on union-management agreements? If so, whose law—federal or state—would be applicable?

In the 1960s, the doctrine of federal preemption, or the displacement of state rights and procedures by federal law and federal tribunals, was at full tide, brooking few exceptions. Thus, in dealing with unfair labor practice issues, the basic principle was that if certain conduct was "arguably subject" to the protections of section 7 or the prohibitions of section 8 of the National Labor Relations Act, then state jurisdiction would be superseded.[57] Nonethe-

[54] 370 U.S. 254 (1962).

[55] *Id.* at 264. The union's right to arbitrate may survive even a prolonged strike in violation of its agreement. Packinghouse Workers Local 721 v. Needham Packing Co., 376 U.S. 247 (1964).

[56] 398 U.S. at 254. The injunction must also be warranted under the "ordinary principles of equity," such as the likelihood of irreparable injury. *Id.*

[57] San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); Street, Electric Railway & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971). Exceptions enabled state damage or injunction actions for violence or other imminent threats to public order, UAW v. Russell, 356 U.S. 634 (1958), and for matters of "merely peripheral concern" to the federal regulatory scheme, such as internal union affairs, Machinists v. Gonzales, 356 U.S. 617 (1958). The relationship between contract enforcement under §301 and the jurisdiction of other federal tribunals, like the NLRB and the EEOC, is discussed *infra* text at nn. 99–120.

less, in *Dowd Box*[58] the Supreme Court concluded that section 301 did not divest state courts of jurisdiction over a suit for violation of a contract between an employer and a labor union. To the argument that concurrent state court jurisdiction would lead to a disharmony of result incompatible with the *Lincoln Mills* concept of an all-embracing body of federal law, the Court responded: "The legislative history makes clear that the basic purpose of §301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations."[59]

That did not mean a state court could utilize state law as such in deciding controversies over labor agreements. The Supreme Court made clear in *Teamsters Local 174 v. Lucas Flour Co.*[60] that the "substantive principles of federal labor law must be paramount." Otherwise, the possibility of differing interpretations under federal and state law of the same contract terms would constitute a "disruptive influence" on the collective bargaining process and the industrial peace that federal labor policy aimed to promote.[61]

Section 301 preemption, if pushed too far, could have some serious adverse consequences for certain important state law rights of individual employees. At present the touchstone of preemption is apparently whether there has to be any significant interpretation of the labor contract in the course of entertaining the state law claim.[62] Only if the state claim can be considered wholly separate and apart from the contract, as in the case of an employee's action under the antiretaliation provision of a state workers' compensation statute, is preemption avoided. Otherwise, if evaluation of the state claim is "inextricably intertwined with consideration of the terms of the labor contract,"[63] including arguably an arbitration clause or a "just-cause" discharge requirement, the state law is preempted.[64]

I agree with Professor Michael Harper[65] that the Supreme Court has taken an overly simplistic view of contract preemption. Why, for example, should a union employee be denied the benefit of a state law right merely because a collective agreement might have waived the right or provided a private en-

[58] Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

[59] *Id.* at 508–9. The practical effect of *Dowd Box* may be considerably diminished, however, because §301 actions are subject to removal to federal court. Avco Corp. v. Machinists Aero Lodge 735, 390 U.S. 557 (1968).

[60] 369 U.S. 95, 103 (1962).

[61] *Id.* at 103–4.

[62] Compare Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985); with Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988).

[63] Lueck, 471 U.S. at 213.

[64] See, e.g., Barnes v. Stone Container Corp., 942 F.2d 689 (9th Cir. 1991).

[65] Michael C. Harper, "Limiting Section 301 Preemption: Three Cheers for the Trilogy, Only One for *Lingle* and *Lueck*," 66 *Chicago-Kent Law Review* 685 (1990). Harper finds support in the recent Supreme Court decision of Livadas v. Bradshaw, 114 S. Ct. 2068 (1994).

forcement procedure, and there would have to be a resort to contract interpretation to make that determination? Harper would substitute the following test: there should be no preemption of a state law action that exists independently of a collective agreement and can proceed without reference to rights secured or duties imposed by that agreement.

In the past the Supreme Court has exhibited considerable deference, despite preemption doctrine, to state law dealing with employment discrimination,[66] "minimum labor standards,"[67] and worker welfare[68] generally. Indeed, I should think there could be constitutional questions presented if unionized workers wound up *worse* off than nonunion employees under state protective legislation because they had exercised their federal rights to organize and bargain collectively. The Supreme Court ought to revisit this issue. Even a generally salutary principle like federal preemption can be carried to mischievous extremes.

Major Principles of Federal Arbitration Law

Contracts Covered

Section 301 of the Taft-Hartley Act speaks of suits for "violation" of "contracts" between employers and labor organizations, not "collective bargaining agreements." Accordingly, an action to enforce a "statement of understanding" between a union and an employer may be maintained under section 301, even if the contractual arrangement does not rise to the level of a true collective agreement and even if the union is only a minority representative.[69] The circuits are divided over whether a federal district court has jurisdiction under section 301 to determine the existence of a collective agreement or to order arbitration when the ultimate issue is the validity and not just the "violation" of a union-employer contract.[70] Denial of jurisdiction in such instances would seem an exercise in pettifoggery. In every instance of an alleged contract "violation," doesn't one first have to determine or assume that a contract exists?

Initially, in a much-cited decision from the First Circuit, it was held that section 301 would not support a suit to enforce an interest-arbitration agree-

[66] Colorado Anti-Discrimination Comm'n v. Continental Air Lines, 372 U.S. 714 (1963).

[67] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

[68] New York Tel. Co. v. New York State Dep't. of Labor, 440 U.S. 519 (1979).

[69] Retail Clerks Locals 128 & 633 v. Lion Dry Goods, Inc., 369 U.S. 17 (1962).

[70] Compare McNally Pittsburgh, Inc. v. Iron Workers, 812 F.2d 615 (10th Cir. 1987), and Board of Trustees v. Universal Enterprises, Inc., 751 F.2d 1177 (11th Cir. 1985) (sustaining jurisdiction); with Adams v. Budd Co., 349 F.2d 368 (3d Cir. 1985), and NDK Corp. v. Food & Commercial Workers Local 1550, 709 F.2d 491 (7th Cir. 1983) (denying jurisdiction).

ment, that is, an agreement to arbitrate the terms of a new contract.[71] The tide has since swung very definitely the other way, with several courts of appeals upholding jurisdiction over such actions.[72]

Individual contracts of employment are of course not covered by section 301. The more general Federal Arbitration Act,[73] which is primarily designed for the commercial sphere, contains an express exclusion of "contracts of employment." In light of the legislative history of the FAA, it is possible to argue that the intent was to exclude only collective bargaining agreements, or perhaps only the contracts of employment of workers engaged directly in interstate transportation.[74] In any event, the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.*[75] that an arbitration clause contained in a brokerage employee's securities registration application was not part of his employment contract, and was thus enforceable under the FAA. That opens the way for an effort by employers to enter into arbitration agreements with their employees, separate and apart from the hiring contract, which would be subject to the FAA.

Limitations Period

In *Hoosier Cardinal*[76] the Supreme Court held that, in the absence of an explicit statute of limitations to govern section 301 suits, the analogous state statute would apply. *Hoosier Cardinal* was a garden-variety contract action by a union to recover back wages allegedly due a group of employees. Subsequently, without overruling *Hoosier Cardinal*, the Supreme Court began to back away from some of the implications of this dubious reliance on variegated state law. In *DelCostello v. Teamsters*[77] an individual employee brought a "hybrid" action against both the employer for breach of contract and the union for breach of the duty of fair representation. To the Court there seemed no

[71] Boston Printing Pressmen's Union v. Potter Press, 141 F. Supp. 553 (D. Mass. 1956), aff'd, 241 F.2d 787 (1st Cir.), cert. denied, 355 U.S. 817 (1957).

[72] Builders Ass'n of Kansas City v. Kansas City Laborers, 326 F.2d 867 (8th Cir.), cert. denied, 377 U.S. 917 (1964); Pressmen's Local 50 v. Newspaper Printing Corp., 399 F. Supp. 593 (M.D. Tenn. 1974), aff'd, 518 F.2d 351 (6th Cir. 1975); Sheet Metal Workers Local 20 v. Baylor Heating & Air Conditioning, 877 F.2d 547 (7th Cir. 1989); Sheet Metal Workers Local 104 v. Simpson Sheet Metal, 954 F.2d 1506 (9th Cir. 1992).

[73] 9 U.S.C. §1 (1994).

[74] See, e.g., Samuel Estreicher, "Arbitration of Employment Disputes without Unions," 66 *Chicago-Kent Law Review* 753, 760–62 (1990). But *cf.* Matthew W. Finkin, "Commentary on 'Arbitration of Employment Disputes without Unions,'" 66 *Chicago-Kent Law Review* 799, 802–3 (1990).

[75] 111 S. Ct. 1647 (1991).

[76] UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966).

[77] 462 U.S. 151 (1983).

close analogy in state law. Instead it turned to the six-month limitations period prescribed by section 10(b) of the NLRA. The Court reasoned that the array of interests Congress was balancing there paralleled those presented in the employee's hybrid contract/fair representation suit.

DelCostello left unsettled the appropriate statute of limitations to apply in actions by unions or employers to compel arbitration, or to enforce or vacate an arbitral award. Lacking guidance from the Supreme Court, the courts of appeals have headed off in diverse directions. The trend, however, is to apply the NLRA's six-month period to suits to compel arbitration and the analogous state statute to enforce or challenge an award.[78] The distinction makes some sense. In getting to arbitration, there is a premium on quickly easing workplace tensions by determining how to resolve a dispute. Once an award is issued, rights are at least presumptively fixed and most state arbitration statutes have a directly applicable limitations provision.

Procedural Arbitrability

In *John Wiley & Sons v. Livingston*,[79] the Supreme Court introduced a distinction between substantive arbitrability and procedural arbitrability. Substantive arbitrability deals with whether the subject matter of the claim is covered by the arbitration clause. As set forth in the *Steelworkers Trilogy*, that is an issue for a court, not the arbitrator, unless the parties themselves agree otherwise. Procedural arbitrability deals with such questions as whether the moving party has fulfilled the prerequisites to arbitration, including timely submission of the grievance and appeal through all the necessary steps. Since the Court felt that issues of procedural arbitrability are likely to be linked closely to the merits of a claim, the Court ruled that they fall within the province of the arbitrator rather than a court, absent a contrary agreement by the parties. I have never been all that convinced by this "linkage" argument, but simply as a practical matter of conserving judicial resources, it seems advisable not to clutter up the courts with these procedural issues.

Extending *Wiley*, the Supreme Court held that whether a union grievance was barred by "laches" was a question for the arbitrator to decide when there was a broad arbitration agreement applicable to "any difference" not settled by the parties within forty-eight hours of the occurrence, even if the claim of laches was "extrinsic" to the procedures under the labor contract.[80]

[78] Patrick Hardin, ed., *The Developing Labor Law* 972 (3d ed., BNA 1992).
[79] 376 U.S. 543 (1964).
[80] Operating Engineers Local 150 v. Flair Bldrs., Inc., 406 U.S. 487 (1972).

Expired Contracts

An arbitration clause may have a significant legal impact even after the expiration date of a collective agreement. In *Nolde Bros.*[81] the contract provided for binding arbitration of "any grievance." After the termination date, the company announced it was permanently closing the plant. It paid the employees their accrued wages and vacation pay but refused to provide the severance pay called for in the labor agreement. The union sued to compel arbitration under section 301 and the Supreme Court held that the issue of severance pay was arbitrable. Said Chief Justice Warren Burger for the Court: "The dispute . . . , although arising *after* the expiration of the collective bargaining agreement, clearly arises *under* that contract. . . . By their contract the parties clearly expressed their preference for an arbitral, rather than a judicial, interpretation of their obligations."[82]

The Court qualified *Nolde* in the *Litton Financial* case.[83] An employer unilaterally modified its operations and laid off some of its most senior employees ten to eleven months after the expiration of a contract calling for layoffs according to seniority. The NLRB found a section 8(a)(5) refusal-to-bargain violation and directed bargaining but declined to order arbitration. A 5–4 Supreme Court majority agreed that, under *Nolde*, postexpiration arbitration is required only with respect to "disputes arising under the contract." That would involve facts occurring before the contract expired or "accrued or vested rights." The four dissenting justices believed that the majority had improperly examined the merits of the contractual dispute under the guise of determining arbitrability.

If an employer's obligation to arbitrate survives the expiration of the contract in certain circumstances, what about the union's obligation not to strike? A court of appeals has held that a no-strike clause did not bar a union's postcontract economic strike, even though the employer remained bound to arbitrate.[84] The NLRB has taken a different view.[85] Another court of appeals held an economic striker's discharge for picket line misconduct was arbitrable under a contract that went into effect after the strike ended.[86] The arbitrator would have to decide whether the striker was an employee on the effective date of the contract and thus subject to its just cause provision.

[81] Nolde Bros. v. Bakery & Confectionery Workers Local 358, 430 U.S. 243 (1977).

[82] *Id.* at 249, 253 (emphasis in the original).

[83] Litton Financial Printing Div. v. NLRB, 111 S. Ct. 2215 (1991).

[84] Steelworkers v. Fort Pitt Steel Casting Div., 635 F.2d 1071 (3d Cir. 1980), cert. denied, 451 U.S. 985 (1981).

[85] Goya Foods, Inc., 238 N.L.R.B. 1465 (1978).

[86] Oil, Chemical & Atomic Workers Local 4–23 v. American Petrofina Co., 820 F.2d 747 (5th Cir. 1987).

Successorship

Under certain conditions a "successor" employer may have an obligation to bargain with the union that represented the predecessor's employees,[87] or even to honor in whole or in part the predecessor's labor contract. In *John Wiley & Sons*[88] a small unionized publisher, Interscience, merged into a much larger nonunion firm, Wiley, and ceased to exist as a separate entity. The union claimed that Wiley was obligated to recognize certain "vested" rights of the Interscience employees under their contract, and sued Wiley under section 301 to compel arbitration. The Supreme Court held that arbitration could be ordered, assuming "substantial continuity of identity in the business enterprise before and after [the] change."[89]

Wiley was severely limited by the rationale, if not the holding, in the subsequent *Burns Security* case.[90] Burns replaced Wackenhut through competitive bidding to provide plant protection for Lockheed Aircraft, and hired a majority of the Wackenhut guards to handle the job. The Supreme Court, in a 5–4 decision, upheld the NLRB's order that Burns bargain with the union that had previously represented the Wackenhut employees. But the Court ruled unanimously that the NLRB had erred in requiring Burns to honor the collective bargaining agreement negotiated between the union and Wackenhut. Speaking for the Court, Justice White distinguished *Wiley* on the dubious grounds that it involved a section 301 suit to compel arbitration, not an 8(a)(5) refusal-to-bargain charge before the NLRB, and on the quite convincing grounds that there was "no merger or sale of assets, . . . no dealings whatsoever between Wackenhut and Burns."[91] Indeed, the latter seems so true that dissenting Justice William Rehnquist appears entirely correct in insisting that Burns was not a "successor" of Wackenhut at all, but rather, as the majority itself conceded, a *competitor* for the same Lockheed business. Without any formal nexus between the two employers, neither contractual nor bargaining rights should have carried over.

[87] See generally Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987). For a continuation of the union's bargaining rights, there must be (1) a substantial continuity of identity between the two enterprises in the nature of the business operations, the type of work performed by the employees, and the employers' production processes, products, and customers; (2) a majority of the successor's employees who had been employed by the predecessor; and (3) an appropriate bargaining demand by the union.

[88] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).

[89] *Id.* at 551. The union in *Wiley* was not claiming bargaining rights apart from the Interscience contract. If any employee majority was relevant to the contract claim, it would seem more logical that it was a majority of Interscience's employees coming *to* Wiley.

[90] 406 U.S. 272 (1972).

[91] *Id.* at 286.

In a later case, *Howard Johnson*,[92] Howard Johnson purchased the personal property used in a franchisee's restaurant, leased the realty, and resumed operations with only a small handful of the predecessor's workers. The union that had represented the former franchisee's employees sued under section 301 to arbitrate the extent of Howard Johnson's obligations under the predecessor's labor contract. The Supreme Court applied *Burns*, even though it dealt with an 8(a)(5) charge rather than a section 301 suit, and sustained Howard Johnson's refusal to arbitrate. The Court declared that *Wiley* "involved a merger, as a result of which the initial employing entity completely disappeared. . . . Even more important, in *Wiley* the surviving corporation hired *all* of the employees of the disappearing corporation."[93]

Wiley, *Burns*, and *Howard Johnson* are all reconcilable on their facts. They leave open the possibility that the contractual successorship doctrine developed by the Warren Court in *Wiley* might still apply when there is a genuine link between predecessor and successor *and* a majority of the former's employees remain with the latter.[94] What was more likely reflected in the division between the first case and the later pair, however, was a fundamental clash of values in the labor area. To the Warren Court a collective bargaining agreement was "not an ordinary contract" but a "generalized code" setting forth "the common law of a particular industry or of a particular plant."[95] A predecessor's labor contract could bind a successor employer when there was "substantial continuity of identity" without regard to actual consent. In *Burns* and *Howard Johnson*, the Burger Court refocused attention on traditional common law notions of the need for "consent" under "normal contract principles," and on the question of whether certain rights and duties were "in fact" "assigned" or "assumed."

The Warren majority was concerned about protecting employees against a sudden and unforeseen loss of bargaining and contract rights. There was also a concern about maintaining industrial stability and labor peace through reducing the number of representation elections and sustaining the life of labor agreements, including their provisions on arbitration. On the other hand, the Burger majority laid stress on the freedom and voluntary nature of the collective bargaining process, and on the importance of saddling neither unions nor employers with substantive contract terms to which they have not agreed. Stress was further laid on providing maximum flexibility in business arrange-

[92] Howard Johnson Co. v. Hotel & Restaurant Employees Detroit Local Joint Board, 417 U.S. 249 (1974).

[93] *Id.* at 257, 258 (emphasis in the original).

[94] It would of course be unlawful discrimination in violation of section 8(a)(3) of the NLRA for a successor employer to refuse to hire its predecessor's unionized employees in order to prevent such a majority. *Howard Johnson*, 417 U.S. at 262 n. 8.

[95] *Wiley*, 376 U.S. at 550.

ments, so that employers might respond to changing market conditions without being straitjacketed by the bargaining or contractual obligations that may have been assumed by imprudent predecessors. The future development of successorship law undoubtedly depends far more on the way the members of the Supreme Court ultimately balance these competing values than on any logical deductions from the decisions to date.

Seemingly distinct business entities may be bound by the same bargaining or contractual obligations not only on the basis that one is the "successor" of the other but also on the basis that one is the "alter ego" of the other or that they are in reality a "single employer."[96] Actual control of personnel rather than the corporate identity of the owners is the key to alter ego status.[97] An employer that sold all its stock to another company but operated as a going concern with the same management and the same employees was a "continuing" employer, not a successor at all, and thus remained bound by the preexisting labor contract.[98]

Overlapping Contract and Statutory Rights

The parties to a collective bargaining agreement may include a prohibition of coercion or discrimination because of union activity, thus paralleling section 8(a)(1), (a)(3), (b)(l)(A), and (b)(2) of the NLRA, or a prohibition of discrimination because of race, sex, age, or disability, thus paralleling provisions of various civil rights acts.[99] Disputes over the application of these contract terms would ordinarily be subject to arbitration. At the same time, an employer's unilateral change in the terms of employment without bargaining is a violation of section 8(a)(5) of the NLRA—and when a collective agreement is in existence, that agreement is obviously the standard of many, if not all, the employment terms in a unit. The inevitable result of all this is the possibility of an overlap, or even conflict, between contractual rights and procedures and statutory rights and procedures.

Pre-arbitration deferral. In a relatively early decision in the late 1960s, *NLRB v. C&C Plywood Corp.*,[100] the Supreme Court held that even though an em-

[96] See, e.g., Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942); *Howard Johnson*, 417 U.S. at 249 n. 5. Compare Telegraph Workers v. NLRB, 571 F.2d 665 (D.C. Cir.), cert. denied, 439 U.S. 827 (1978); with Alkire v. NLRB, 716 F.2d 1014 (4th Cir. 1983); with NLRB v. Campbell-Harris Elec., Inc., 719 F.2d 292 (8th Cir. 1983).

[97] NLRB v. Omnitest Inspection Serv., 937 F.2d 112 (3d Cir. 1991).

[98] EPE, Inc. v. NLRB, 845 F.2d 483 (4th Cir. 1988).

[99] See, e.g., Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e to 2000e-17 (1994); the Age Discrimination in Employment Act, 29 U.S.C. §§621–34 (1994); the Americans with Disabilities Act of 1990, 42 U.S.C. §§12101–13 (1994).

[100] 385 U.S. 421 (1967). See also NLRA §10(a), 29 U.S.C. §160(a) (1994): "This power [of the

ployer had an arguable contractual defense to certain unilateral action it had taken, the NLRB still had jurisdiction to deal with a union's 8(a)(5) charge of refusal to bargain. *C&C Plywood* was atypical in that the collective agreement did not provide for binding arbitration and it was possible that no contract provision covered the dispute. Nonetheless, the NLRB and the lower courts subsequently held that the board could exercise 8(a)(5) jurisdiction even in cases where there was an applicable arbitration clause and a specific contract provision governed the matter at issue.[101]

Not long after *C&C Plywood*, the NLRB headed off in a quite different direction. In *Collyer Insulated Wire*,[102] a sharply divided (3–2) board held that when an employer's unilateral action was based on a substantial claim of contractual privilege, and when an arbitral interpretation would likely resolve both the contract issue and the unfair labor practice issue, the board would withhold its processes and "defer" to arbitration. Accordingly, the board dismissed the complaint under section 8(a)(5), but retained jurisdiction to await developments in the arbitral forum. Later, after considerable vacillation on the question, another three-member majority extended the *Collyer* deferral doctrine to cover individual claims of coercion or discrimination under sections 8(a)(1), 8(a)(3), 8(b)(l)(A), or 8(b)(2).[103]

Collyer has much to commend it in 8(a)(5) cases but it is a good deal more dubious in discrimination cases. If a contract is the basis of a union's claim of unlawful unilateral action by an employer, collective rights that have been privately negotiated are generally at stake. Arbitrators are more likely than the board to have special expertise in this area. Initial resort to the parties' own agreed-on machinery for dispute resolution makes eminently good sense. But, sensitive preexisting statutory rights whose protection is the particular responsibility of the NLRB are involved in 8(a)(3), 8(b)(1)(A), and similar cases. Furthermore, in any given discrimination case, one should not assume that the union has waived an employee's statutory access to an administrative remedy just because the union has secured an additional contractual claim.[104]

Board to prevent unfair labor practices] shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ."

[101] C & S Industries, 158 N.L.R.B. 454 (1966); NLRB v. Huttig Sash & Door Co., 377 F.2d 964 (8th Cir. 1967).

[102] 192 N.L.R.B. 837 (1971).

[103] United Technologies Corp., 268 N.L.R.B. 557 (1984) overruling General American Transp. Corp., 228 N.L.R.B. 808 (1977), which in turn had overruled National Radio Co., 198 N.L.R.B. 527 (1972).

[104] See generally Charles B. Craver, "Labor Arbitration as a Continuation of the Collective Bargaining Process," 66 *Chicago-Kent Law Review* 571, 612–16 (1990); Harry T. Edwards, "Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB," 46 *Ohio State Law Journal* 23 (1985); Michael C. Harper, "Union Waiver of Employee Rights under the NLRA: Part II," 4 *Industrial Relations Law Journal* 680 (1981).

Nonetheless, despite certain misgivings, the District of Columbia Circuit has approved the NLRB's current approach to pre-arbitration deferral.[105] A newly constituted Labor Board may, of course, revisit the whole issue.

In *Gilmer v. Interstate/Johnson Lane Corp.*,[106] the Supreme Court held that a brokerage employee was obligated to arbitrate his discrimination claim under the Age Discrimination in Employment Act instead of bringing a statutory action directly in federal district court. In this instance the arbitration clause was contained in the employee's securities registration application rather than in a collective agreement or an individual contract of employment.[107] Also emphasized was the employee's agreement to arbitrate "any dispute, claim, or controversy," presumably including statutory claims, and not just the contractual claims traditionally subject to arbitration under a collective agreement. The Court's holding, however, was not concerned with the degree of deference a court would have to pay the arbitral award when it was issued.[108]

Postarbitration deferral. In the leading *Spielberg* case,[109] the NLRB set forth three general conditions under which it would accord "recognition" to an arbitrator's award affecting an alleged unfair labor practice: "[T]he proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." More recently, in *Olin Corp.*,[110] the board supplemented *Spielberg* by announcing that it would conclude the arbitral award was adequate if "(1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice case."

Both *Collyer* and *Spielberg-Olin* have obvious attractions for an underfunded NLRB struggling to handle an overflowing caseload. But one can surely ask whether at times they invite an abdication of the board's statutory duties. More specifically, unless the parties expressly authorize it, should the NLRB ever honor an arbitrator's award as a whole, or should it merely adopt any findings of fact or contractual interpretations that happen also to be essential parts of the unfair labor practice case? The latter approach would find support

[105] Hammontree v. NLRB, 925 F.2d 1486 (D.C. Cir. 1991) (*en banc*).

[106] 111 S. Ct. 1647 (1991).

[107] The action was grounded in the Federal Arbitration Act, 9 U.S.C. §1 (1988). Classifying the arbitration agreement as separate and apart from the employee's contract of hire enabled the Court to sidestep the question of the exclusion of "contracts of employment" from the coverage of the FAA.

[108] See *infra* text at nn. 117–20.

[109] Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955).

[110] 268 N.L.R.B. 573 (1984).

in the underlying notion that the primary function of the arbitrator is to interpret and apply contracts, and the primary function of the NLRB (or other government agency) is to interpret and apply a statute. At any rate, in spite of some judicial bridling,[111] the *Spielberg-Olin* doctrine has generally won acceptance in the courts.[112]

Occasionally, special "due process" considerations arise in deferral cases. For example, the NLRB has refused to defer to arbitration, or to honor an award, when the interests of the aggrieved employees were in apparent conflict with the interests of the union as well as of the employer.[113] But, the board has been prepared to abide by the awards of joint union-management committees, as long as the *Spielberg-Olin* standards are met.[114] In so doing, the board was following the lead of the Supreme Court, which has held that arbitration by an impartial third party is not essential to judicial enforceability under section 301.[115] Eminent critics have challenged equating the use of such joint bodies with arbitration by disinterested outsiders.[116] At least there is plainly a need for searching scrutiny of the fairness of these joint procedures, which too often are characterized by unseemly haste and even grievance-swapping.

In *Alexander v. Gardner-Denver Co.*,[117] the Supreme Court declined to extend the *Spielberg* analysis to civil rights cases. A black employee who was discharged for allegedly poor work processed a claim through the contractual grievance process. At the arbitration hearing he testified that the employer's action was racially motivated in violation of the collective agreement's anti-discrimination provision. The arbitrator nonetheless ruled that the grievant

[111] See, e.g., Taylor v. NLRB, 786 F.2d 1516 (11th Cir. 1986); NLRB v. Aces Mechanical Corp., 837 F.2d 570 (2d Cir. 1988).

[112] E.g., NLRB v. Ryder/P.I.E. Nationwide, 810 F.2d 502, 506 (5th Cir. 1987); Lewis v. NLRB, 779 F.2d 12 (6th Cir. 1985); Garcia v. NLRB, 785 F.2d 807, 809–10 (9th Cir. 1986); NLRB v. Babcock & Wilcox Co., 736 F.2d 1410 (10th Cir. 1984); Bakery Workers Local 25 v. NLRB, 730 F.2D 812, 816 (D.C. Cir. 1984).

[113] Kansas Meat Packers, 198 N.L.R.B. 543 (1972); Hendrickson Bros., 272 N.L.R.B. 438 (1984), enforced, 762 F.2d 990 (2d Cir. 1985); Mason & Dixon Lines, 237 N.L.R.B. 6 (1978).

[114] Ryder Truck Lines, 287 N.L.R.B. 806 (1987); Alpha Beta Co., 273 N.L.R.B. 1546 (1985), aff'd sub. nom. Mahon v. NLRB, 808 F.2d 1342 (9th Cir. 1987).

[115] Teamsters Local 89 v. Riss & Co., 372 U.S. 517 (1963) (award of joint labor-management committee was final and binding under collective agreement but procedure was not called "arbitration").

[116] See, e.g., David E. Feller, "A General Theory of the Collective Bargaining Agreement," 61 *California Law Review* 663, 836–38 (1973); Clyde W. Summers, "Teamster Joint Grievance Committees: Grievance Disposal without Adjudication," in *Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators* 130 (Walter J. Gershenfeld, ed., BNA 1985). *Cf.* Humphrey v. Moore, 375 U.S. 335, 351–55 (1964) (Goldberg, J., concurring).

[117] 415 U.S. 36 (1974).

had been terminated for "just cause." The Court held that the adverse arbitral award did not preclude the employee from later obtaining a trial de novo of his discrimination claim under Title VII of the 1964 Civil Rights Act. The Court stressed that the arbitrator was only empowered to resolve contractual claims, not statutory claims. Not even the moderate deference standards of *Spielberg* were applicable. In an important footnote, however, the Court observed that if an arbitral forum provides sufficient procedural safeguards, a court "may properly accord . . . great weight" to the arbitrator's determination of Title VII rights, especially as to factual issues.[118]

The Court emphasized in *Gardner-Denver* that a Title VII litigant vindicates the important congressional policy against employment discrimination, while a grievant processing a claim through grievance-arbitration procedures merely vindicates private contract rights. But the same might have been said of the congressional policy against antiunion discrimination under the NLRA. Surely an important practical distinction was the peculiar sensitivity of rights against race or sex discrimination, and the concern that a union in some instances might not be as zealous in defending Title VII rights as in defending NLRA rights.

A major change in the Court's attitude may be signaled by the *Gilmer* case,[119] holding at least that an employee must exhaust contractual arbitration procedures before pursuing an age discrimination claim in court. The precise issue in *Gilmer*, of course, did not deal with the weight to be accorded the eventual arbitral decision. Moreover, *Gilmer* involved an individual contract for arbitration, not a collective bargaining agreement as in *Gardner-Denver*. Even so, an overworked federal judiciary may be becoming much more receptive to the notion of alternative dispute resolution of claims under civil rights statutes. Three distinguished federal judges have already publicly extolled the advantages of arbitration over litigation in vindicating statutory rights against discrimination.[120] *Gilmer* plainly lends support to that approach, and may even encourage greater reliance on the arbitration of statutory claims pursuant to collective agreements.

[118] *Id.* at 60 n. 21.

[119] See *supra* text at n. 106.

[120] Harry T. Edwards, "Advantages of Arbitration over Litigation: Reflections of a Judge," in *Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators* 16, 27–28 (James L. Stern and Barbara D. Dennis, eds., BNA 1983); Betty Binns Fletcher, "Arbitration of Title VII Claims: Some Judicial Perceptions," in *Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators* 218, 228 (James L. Stern and Barbara D. Dennis, eds., BNA 1982); Alvin B. Rubin, "Arbitration: Toward a Rebirth," in *Truth, Lie Detectors, and Other Problems in Labor Arbitration, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators* 30, 36 (James L. Stern and Barbara D. Dennis, eds., BNA 1979).

Judicial Review

The Legacy of Enterprise

Two important points should be noted about the Supreme Court's approach to judicial review in *Enterprise Wheel.*[121] First, arbitrators are not limited in construing a contract to the four corners of the document. They are justified, for example, in "looking to 'the law' for help in determining the sense of the agreement."[122] The companion *Warrior & Gulf* decision is even more expansive: "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it."[123] Furthermore, insofar as the contract permits, the arbitrator is entitled to take into account "such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished."[124]

Allowing the arbitrator to look beyond the wording of the contract is consistent with the thesis that the arbitrator is a contract reader. Contracts are written with industrial practices and psychology in mind. To decipher a contract whose literal terms do not address the problem at issue, the reader must examine the implicit as well as explicit agreements embodied in the document.

The second point to be stressed about *Enterprise Wheel* is that, for all its extolling of arbitration and its rejection of plenary review, the Court exhibits an ambivalence about how far it wishes to go in embracing finality. In insisting that an enforceable award must "draw its essence from the collective bargaining agreement" and must not, for example, be based solely on "the requirements of enacted legislation," the Court plainly appears to authorize *some* substantive examination. This is a risky invitation, because a number of courts will inevitably seize upon any opening to intervene in cases of alleged "gross error" in construction.[125] As if aware of this danger, the Court, in the latter portions of its opinion in *Enterprise Wheel,* returned to the theme of finality and dismissed the argument that the arbitrator's decision was not based on the contract because his interpretation was demonstrably wrong under correct principles of contract law.[126] *Warrior & Gulf* was still more emphatic that "judicial inquiry under §301 must be strictly confined to the question whether

[121] Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). See *supra* text at n. 28.
[122] *Id.* at 596.
[123] Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581–82 (1960).
[124] *Id.* at 582.
[125] See *infra* text at nn. 149–55.
[126] *Enterprise Wheel,* 363 U.S. at 598–99.

the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator the power to make the award he made."[127]

Finality versus Rationality

As could be expected, the lower courts in applying *Enterprise Wheel* have reflected the Supreme Court's ambivalence toward finality. In *Safeway Stores v. Bakery Workers Local 111*,[128] an arbitrator awarded employees additional pay for twenty-four hours of unperformed work on the grounds the contract guaranteed forty hours' pay each week, even though the employer's payment for sixteen hours in one week resulted from a mere change in pay days and not from any loss of working time. The Fifth Circuit found that the award was based on the terms of the contract, observing bluntly: "[J]ust such a likelihood [of an 'unpalatable' result] is the by-product of a consensually adopted contract arrangement. . . . The arbiter was chosen to be the Judge. That Judge has spoken. There it ends."[129]

On the other hand, many courts feel compelled to test an arbitral award against some minimum standard of rationality. Thus, even the Fifth Circuit in *Safeway Stores* conceded an award should be set aside "if no judge, or group of judges, could ever conceivably have made such a ruling."[130] It has also been said that the award must in some "rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention,[131] that the award must not be a "capricious, unreasonable interpretation,"[132] and that it must be "possible for an honest intellect to interpret the words of the contract and reach the result the arbitrator reached."[133]

Despite the manifest difficulties of drawing lines between what is merely "arbitrary" or "unreasonable" and what is "actually and indisputably without foundation in reason or fact," I am reluctantly prepared to accept an additional exception to the finality doctrine worded somewhat along the latter lines. Besides assuming, in their agreement on final and binding arbitration, that the arbitrator would be untainted by fraud or corruption, the parties

[127] *Warrior & Gulf*, 363 U.S. at 582.
[128] 390 F.2d 79 (5th Cir. 1968).
[129] *Id.* at 84. See UAW v. White Motor Corp., 505 F.2d 1193 (8th Cir. 1974); Machinists Dist. 145 v. Modern Air Transport, Inc., 495 F.2d 1241 (5th Cir.), cert. denied, 419 U.S. 1050 (1974); IUE v. Peerless Pressed Metal Corp., 489 F.2d 768 (1st Cir. 1973); Butcher Workmen Local 641 v. Capital Packing Co., 413 F.2d 668 (10th Cir. 1969); Oil Workers Local 7–644 v. Mobil Oil Co., 350 F.2d 708 (7th Cir. 1965).
[130] 390 F. 2d at 82.
[131] Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1969).
[132] Holly Sugar Corp. v. Distillery Workers, 412 F.2d 899, 904 (9th Cir. 1969).
[133] Newspaper Guild v. Tribune Pub. Co., 407 F.2d 1327, 1328 (9th Cir. 1969).

presumably took it for granted that he would not be insane and that his decisions would not be totally irrational. Setting aside an irrational arbitral award is thus consistent with the contract reader thesis. In any event, I do not think it possible to keep courts from intervening, on one theory or another, when an arbitral award is so distorted as to reflect utter irrationality, if not temporary insanity. Indeed, in a number of cases,[134] the courts have indicated their willingness to intervene in such extreme circumstances. One can hope that this exception to the finality doctrine does not open the door to undue judicial interference with arbitral awards. Although unwilling to let go of irrationality or even capriciousness as a possible basis for vacating an award, the courts are obviously uncomfortable about relying on grounds that trench so closely on the merits. They much prefer to act, as I shall next discuss, on the basis of one or the other of the better-recognized exceptions to the deference doctrine.

Qualifications of the Deference Doctrine

Aside from the irrationality exception, courts have recognized two general limitations on the deference doctrine. The first limitation consists of jurisdictional or procedural defects. Arbitration proceedings are defective if arbitrators overstep their authority or compromise their neutrality or if one of the parties fails to carry out its responsibilities. The first five qualifications discussed below come under the rubric of procedural defects, broadly defined. The second general limitation is that a court will not enforce an arbitral award that conflicts with substantive law or public policy.

Two aspects of these qualifications of the doctrine merit attention. First, courts generally strive to enforce arbitral awards; they invoke an exception to the finality doctrine only when the circumstances are compelling. Second, with the possible exception of the "modification" or "gross error" qualification, these qualifications comport with the thesis that the arbitrator is a contract reader. To set aside an arbitral award because of a procedural defect is not equivalent to finding that the arbitrator misread the contract. Rather, it represents a determination that the premises which make the arbitrator's reading authoritative or reliable are not satisfied. Significantly, when a court refuses to enforce an arbitral award because of a procedural defect, the parties remain responsible for settling their initial dispute; the court ordinarily does not resolve it for them. And when a court declines to enforce an arbitral award that

[134] See, e.g., Gunther v. San Diego & A.E. Ry., 382 U.S. 257, 261, 264 (1965) ("wholly baseless and completely without reason"). See cases cited *supra* nn. 130–32. *Cf.* Amoco Oil Co. v. Oil Workers Local 7–1, 548 F.2d 1288, 1296 (7th Cir.) (Moore, J., dissenting), cert. denied, 431 U.S. 905 (1977).

violates law or public policy, it does not question the soundness of the arbitrator's reading of the contract; it rules that the contract as read is unenforceable.

Lack of Arbitral Jurisdiction or Authority

In *Warrior & Gulf*, the Supreme Court demanded an "express provision excluding a particular grievance from arbitration" or else "the most forceful evidence of a purpose to exclude the claim from arbitration" before the presumption in favor of the arbitrability of all disputes concerning the interpretation of the terms of a collective bargaining agreement could be overborne.[135] Nonetheless, the arbitrator remains the creature of the contract, and the parties retain the power to remove such disputes from his or her purview as they see fit. For example, the electrical industry has historically sought to restrict the ambit of arbitrable grievances. Thus, where an arbitration clause in an electrical manufacturer's contract explicitly excluded disputes over a merit-pay provision of the labor contract, an arbitrator was held to have exceeded his jurisdiction when he sustained a grievance based on that provision.[136] The parties themselves, of course, may decide whether they wish the question of substantive arbitrability to go to the arbitrator, instead of to the court.[137] If their choice is the arbitrator, the same limited standard of review applicable to decisions on the merits should apply to the ruling on arbitrability.[138]

An eminently practical approach for any respondent in arbitration (ordinarily the employer) that believes the arbitrator lacks jurisdiction is to preserve explicitly the respondent's challenge to jurisdiction and to declare that the challenge will be presented to a court if there is an adverse decision on the merits. Courts respect such reservations and do not accord the resulting awards the usual presumptions of legitimacy.[139]

An arbitral award is also subject to judicial vacation for want of authority if it reaches beyond the boundaries of the "submission," the statement of the issue as agreed on by the parties. For example, an arbitrator who is empowered to decide whether an employer has unreasonably increased assembly-line quotas is not authorized to order the parties to negotiate for engineering studies to guide future quota disputes.[140]

[135] 363 U.S. at 585.

[136] IUE Local 278 v. Jetero Corp., 496 F.2d 661 (5th Cir. 1974).

[137] See Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582–83 and n. 7 (1960).

[138] See Steelworkers v. United States Gypsum Co., 492 F.2d 713, 732 (5th Cir.) cert. denied, 419 U.S. 998 (1974).

[139] Bakery Workers Local 719 v. National Biscuit Co., 378 F.2d 918 (3d Cir. 1967); Trudon & Platt Motors Lines, Inc. v. Teamsters Local 707, 71 L.R.R.M. 2814 (S.D.N.Y. 1969).

[140] IUE Local 791 v. Magnavox Co. 286 F.2d 465 (6th Cir. 1961). See also Retail Store Employees

An arbitrator's authority to make whatever factual findings are necessary for the decision would seem inherent in the arbitral role. A court should therefore not set aside an arbitrator's findings of fact if there is any evidence to support them. In the *Misco* case,[141] the Supreme Court emphasized that judges "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." The Court added: "The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity to observe [the witnesses] and to be familiar with the plant and its problems."

Arbitrators are subject to the mandate of the parties not only with regard to subject matter jurisdiction, but also with regard to the capacity to fashion a particular remedy. Frequently, the arbitrator will find in disciplinary cases that the employee engaged in the misconduct alleged, but that the discharge or other sanction imposed is too severe. Most courts will hold the arbitrator can reduce the penalty in these circumstances, for example, to a suspension of specified length or to reinstatement without back pay. Often the rationale is that the arbitrator properly concluded that the heavier penalty was without "just cause."[142] But if the employer secures a contract clause denying the arbitrator the power to modify discipline, this will ordinarily be enforced by the courts.[143]

Perhaps the most dramatic illustration of a court's willingness to sustain an arbitrator's remedial powers, despite contractual limitations on his authority to "add to, detract from, or alter in any way the provisions of this contract," is provided by *Steelworkers v. United States Gypsum Co.*[144] Distinguishing Supreme Court precedent restricting NLRB remedies in analogous situations, the Fifth Circuit held that an arbitrator could award wage increases based on his projections of the wage settlement that would have been reached if the employer had not violated its duty to bargain under the wage reopener clause in a labor contract. But not all courts are so generous. In *Polk Brothers v.*

Local 782 v. Sav-On Groceries, 508 F.2d 500 (10th Cir. 1975); Arvid Anderson, "The Presidential Address: Labor Arbitration Today," in *Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators* 1, 6–7 (Gladys W. Gruenberg, ed., BNA 1989).

[141] Paperworkers v. Misco, Inc., 484 U.S. 29, 38, 45 (1987). See Tanoma Mining Co. v. UMW Local 1269, 896 F.2d 745, 747–48 (3d Cir. 1990); Meat Cutters v. Great Western Food Co., 712 F.2d 122, 123 (5th Cir. 1983).

[142] E.g., Campo Mach. Co. v. Machinists Local 1926, 536 F.2d 330 (10th Cir. 1976); Machinists Dist. 8 v. Campbell Soup Co., 406 F.2d 1223 (7th Cir. 1969); Lynchburg Foundry Co. v. Steelworkers Local 2556, 404 F.2d 259 (4th Cir. 1968).

[143] See, e.g., Amanda Bent Bolt Co. v. UAW Local 1549, 451 F.2d 1277 (6th Cir. 1971); Truck Drivers Local 784 v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964). But *cf.* Painters Local 1179 v. Welco Mfg. Co., 542 F.2d 1029 (8th Cir. 1976).

[144] 492 F.2d 713 (5th Cir.), cert. denied, 419 U.S. 998 (1974).

Chicago Truck Drivers,[145] the Seventh Circuit, in seeming defiance of *Enterprise Wheel*, set aside an arbitrator's award of reinstatement and back pay because it ran beyond the termination date of the collective agreement.

The most troubling current issue concerning an arbitrator's remedial authority—which has even broader implications for an arbitrator's interpretive authority generally—is illustrated by the successive decisions of the First Circuit in *S.D. Warren Co. v. Paperworkers Local 1069*.[146] An arbitrator reduced to suspensions the discharges of three employees for violating a plant rule against possession of drugs on company property. The arbitrator found that the discharges were not for "proper cause" under the contract because the employees had been pressured by an undercover agent into handling the drug. The court of appeals initially set aside the award on the grounds that it violated public policy. The Supreme Court vacated and remanded for reconsideration in light of *Misco*. Undaunted, the court of appeals on remand reaffirmed its holding, this time on the grounds that the arbitrator had exceeded her authority under the contract. The court pointed out that the contract gave the employer the "sole right" to discharge for "proper cause" and stated that violations of the rule against drugs were "considered causes for discharge." The court wholly ignored the notion that the mere listing of drug possession, among a number of specific offenses that could lead to dismissal, did not necessarily eliminate the requirement that they would still have to constitute "proper cause" for discharge under the facts of a given case. Nonetheless, a couple of circuits[147] are apparently aligned with the First Circuit on its approach, although several others are contrary.[148]

Arbitral "Modifications" or "Gross Error"

Collective bargaining agreements often provide that an arbitrator may not "add to, modify, or otherwise alter the terms of this contract." Such language paves the way for what is probably the most troublesome of all assaults on arbitral finality. *Torrington v. Metal Products Workers Local 1645*[149] is the classic case. Prior to the negotiation of a new contract, an employer unilaterally an-

[145] 973 F.2d 593 (7th Cir. 1992).

[146] 815 F.2d 178 (1st Cir. 1987), vacated and remanded, 484 U.S. 983 (1987); on remand, 845 F.2d 3 (1st Cir. 1988).

[147] Mistletoe Express v. Motor Expressmen, 566 F.2d 692 (10th Cir. 1977); Firemen and Oilers Local 935–B v. Nestle Co., 630 F.2d 474 (6th Cir. 1980). But *cf.* Eberhard Foods v. Handy, 836 F.2d 890 (6th Cir. 1989).

[148] Kewanee Machinery v. Teamsters Local 21, 593 F.2d 314 (8th Cir. 1979); F. W. Woolworth Co. v. Miscellaneous Warehousemen, 629 F.2d 1204 (7th Cir. 1980); Waverly Mineral Prods. Co. v. Steelworkers, 633 F.2d 682 (5th Cir. 1980); Arco-Polymers, Inc. v. OCAW Local 8–74, 671 F.2d 752 (3d Cir. 1982).

[149] 362 F.2d 667 (2d Cir. 1966).

nounced the discontinuance of a long-standing practice to pay employees for one hour away from work on Election Day. An arbitrator sustained the union's grievance, finding that the past practice could be terminated only by mutual agreement. The Second Circuit refused enforcement, declaring that "the mandate that the arbitrator stay within the confines of the collective bargaining agreement . . . requires a reviewing court to pass upon whether the agreement authorizes the arbitrator to expand its express terms on the basis of the parties' prior practice."[150] A dissenting judge argued that the court was improperly reviewing the merits and that the arbitrator was entitled to look to "prior practice, the conduct of the negotiation for the new contract and the agreement reached at the bargaining table to reach his conclusion that paid time off for voting was 'an implied part of the contract.' "[151]

The difficulty is that any time a court is incensed enough with an arbitrator's reading of the contract and supplementary data such as past practice, bargaining history, and the "common law of the shop," it is simplicity itself to conclude that the arbitrator must have "added to or altered" the collective bargaining agreement. How else can one explain this abomination of a construction? Yet if the courts are to remain faithful to the injunction of *Enterprise Wheel*, they must recognize that most arbitral aberrations are merely the product of fallible minds, not of overreaching power.[152] At bottom, there is an inherent tension (if not inconsistency) between the "final and binding" arbitration clause and the "no additions or modifications" provision. The arbitrator cannot be effective as the parties' surrogate for giving shape to their necessarily amorphous contract unless he or she is allowed to fill the inevitable lacunae.

"Gross error" is another accepted common-law ground for setting aside arbitration awards. In *Electronics Corp. of America v. Electrical Workers (IUE) Local 272*,[153] an award was vacated because "the central fact underlying an arbitrator's decision [was] concededly erroneous." There the arbitrator had assumed, contrary to the evidence as presented to the court, that an aggrieved employee had not been suspended previously by the employer. Similarly, in *Northwest Airlines, Inc. v. Air Line Pilots Association*,[154] the court refused enforcement of an award that was based on the arbitration panel's mistaken

[150] *Id.* at 680.

[151] 362 F.2d at 683 (Feinberg, J., dissenting). See also H. K. Porter Co. v. Saw Workers Local 22254, 333 F.2d 596 (3d Cir. 1964). *Torrington* was roundly criticized in Benjamin Aaron, "Judicial Intervention in Labor Arbitration," 20 *Stanford Law Review* 41 (1967); Meltzer, *supra* n. 33, at 9–11.

[152] See Robert A. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* 593 (West Publishing 1976).

[153] 492 F.2d 1255, 1256 (1st Cir. 1974).

[154] 530 F.2d 1048 (D.C. Cir. 1976).

belief that the meaning of "pilot seniority list," in a letter from the company to the union, was agreed to by both parties as not including furloughed pilots in addition to active ones. Other courts, however, have been more rigorous in adhering to the *Enterprise Wheel* and *Misco* standards. Thus the Third Circuit declared in *Bieski v. Eastern Auto Forwarding Co.*: "If the court is convinced both that the contract procedure was intended to cover the dispute and, in addition, that the intended procedure was adequate to provide a fair and informed decision, then review of the merits of any decision should be limited to cases of fraud, deceit, or instances of unions in breach of their duty of fair representation."[155]

Procedural Unfairness or Irregularity

Fraud and corruption are universal bases for invalidating an award.[156] So is bias or partiality, which may consist of improper[157] conduct at the hearing or an association with one party that is not disclosed to the other.[158]

Much less common is the vacation of an award because of an unfair and prejudicial exclusion or admission of evidence. Hearsay is ordinarily acceptable in arbitration proceedings, and arbitrators are accorded considerable latitude in their evidentiary determinations.[159] It is the excessively technical, unexpected, and hurtful ruling that is likely to trigger judicial intervention. In the interest of fostering finality, courts will rarely overturn an award on the basis of new evidence not introduced at the hearing.[160]

Individual Rights and Unfair Representation

It is well established that a union "may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."[161] If a union so violates its duty of fair representation, an adversely affected employee is relieved of the obligation to exhaust grievance and arbitration procedures, and any arbitral award loses the finality it would otherwise possess.

[155] 396 F.2d 32, 38 (3d Cir. 1968). See also Aloha Motors, Inc. v. ILWU Local 142, 530 F.2d 848 (9th Cir. 1976).

[156] See, e.g., Pacific & Arctic Railway and Navigation Co. v. Transportation Union, 952 F.2d 1144 (9th Cir. 1991).

[157] Holodnak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974), modified on other grounds, 514 F.2d 285 (2d Cir.) cert. denied, 423 U.S. 892 (1975).

[158] Colony Liquor Distrib., Inc. v. Teamsters Local 669, 34 App. Div. 2d 1060, 312 N.Y.S. 2d 403 (1970), aff'd, 28 N.Y. 2d 596, 268 N.E. 2d 645, 319 N.Y.S. 2d 849 (1971).

[159] See Gorman, *supra* n. 152, at 599–603, and cases cited in text.

[160] See *id.* at 601–2.

[161] Vaca v. Sipes, 386 U.S. 171, 191 (1967). See also Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965); Humphrey v. Moore, 375 U.S. 335 (1964).

A striking demonstration of this latter principle is *Hines v. Anchor Motor Freight, Inc.*[162] Trucking employees were discharged for alleged dishonesty in seeking excessive reimbursement for lodging expenses. The employer presented motel receipts submitted by the employees which exceeded the charges shown on the motel's books. Arbitration sustained the discharges. Later, evidence was secured indicating that the motel clerk, having recorded less than was actually paid and pocketing the difference, was the culprit. In a suit by the employees against the employer, the Supreme Court held that the employer could not rely on the finality of the arbitration award if the union did not fairly represent the employees in the arbitration proceedings. Such a rule can hardly be faulted as an abstract proposition. But the results could be mischievous if the courts become too quick to equate a halting, inexpert investigation or arbitration presentation by a lay union representative with "bad faith" or "perfunctoriness."

The Supreme Court ended a long debate over whether a union's negligence alone could constitute unfair representation when it declared in *Steelworkers v. Rawson*:[163] "The courts have in general assumed that mere negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation, and we endorse that view today." Previously, courts of appeals had made such statements as "the union representative is not a lawyer and he cannot be expected to function as one,"[164] and "intentional misconduct" is necessary for a violation; not even "gross" negligence will suffice.[165] But the Supreme Court suggested in *Vaca v. Sipes* that a union could breach the duty by processing a grievance in a "perfunctory manner."[166]

When an employer subject to the NLRA wrongfully discharges an employee and the union aggravates the harm by improperly declining to arbitrate the case, damages must be apportioned between the parties.[167] The union will be liable to the extent it increased the employee's losses. For example, the union may be responsible for the back pay that accrues after the date of the hypothetical arbitration decision that would have reinstated the employee. Punitive

[162] 424 U.S. 554 (1976). See also Bieski v. Eastern Auto Forwarding Co., 396 F.2d 32 (3d Cir. 1968). *Cf.* Roadway Express, Inc., 145 N.L.R.B. 513, 515 (1963); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955). But *cf.* Hotel Employees v. Michelson's Food Serv., 545 F.2d 1248 (9th Cir. 1976) (employee's mere objection to arbitration insufficient).

[163] 405 U.S. 362, 372–73 (1990).

[164] Freeman v. O'Neal Steel, Inc., 609 F.2d 1123, 1127 (5th Cir.), cert. denied, 449 U.S. 833 (1980).

[165] Dober v. Roadway Express, Inc., 707 F.2d 292 (1983).

[166] 386 U.S. 171 (1967).

[167] Bowen v. United States Postal Serv., 459 U.S. 212 (1983). *Cf.* Czosek v. O'Mara, 397 U.S. 25 (1970) (different rule applies under Railway Labor Act).

damages are not available against unions for breach of the duty of fair representation in processing grievances.[168]

Incomplete or Ambiguous Awards

Courts will not enforce arbitral awards that are so incomplete, ambiguous, or self-contradictory in their terms that they do not provide necessary guidance to the parties subject to their directions. An arbitrator must answer the question that has been submitted.[169] And an award must not defy understanding.[170] At the same time, a mere ambiguity in the opinion, as distinguished from the award, is not the sort of defect that should result in the vacation of the award.[171]

When an arbitrator has "imperfectly executed" his or her powers, and the award is incomplete or otherwise deficient, the solution ordinarily is not for the court to attempt to "correct" the error. The parties have bargained for the arbitrator's decision, and the case should be remanded to permit that disposition.[172] The Supreme Court in *Enterprise Wheel* was in accord with that approach. An award is not incomplete, however, just because the arbitrator has left it to the parties to work out the mathematics of the back pay or other amounts due.[173]

Violation of Law

As I have urged earlier,[174] and as I believe *Enterprise Wheel*[175] itself commands, an arbitrator confronted with an irreconcilable conflict between the terms of a collective bargaining agreement and the apparent requirements of statutory or decisional law should follow the contract and ignore the law. But the parties to *any* contract will not be able to secure judicial enforcement if their agreement is illegal or otherwise contrary to public policy. Similarly, the court will not enforce an arbitral award that either sustains or orders conduct violative of law or substantial public policy.

Such an approach involves no infidelity to *Enterprise Wheel.* When a legal challenge is mounted to an award, a court "is concerned with the *lawfulness*

[168] IBEW v. Forest, 442 U.S. 42 (1979).
[169] IAM v. Crown Cork & Seal Co., 300 F.2d 127 (3d Cir. 1962).
[170] Bell Aerospace Co. v. UAW Local 516, 500 F.2d 921 (2d Cir. 1974).
[171] Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).
[172] Steelworkers Local 4839 v. New Idea Farms, 917 F.2d 965, 968 (6th Cir. 1990).
[173] Retail Clerks Local 954 v. Lion Dry Goods, Inc., 67 L.R.R.M. 2871 (N.D. Ohio 1966), aff'd, 67 L.R.R.M. 2873 (6th Cir. 1967), cert. denied, 390 U.S. 1013 (1968).
[174] See *supra* text at n. 33.
[175] Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

of its enforcing the award and not with the *correctness of the arbitrator's* decision."[176] In effect, the court is assuming the soundness of the arbitrator's reading of the parties' agreement and is proceeding to test the validity and enforceability of the award just as if it were a stipulation by the parties as to their intended meaning.

In entertaining legal challenges to arbitral awards, the courts have had to consider the impact of a wide variety of federal and state laws. These have ranged from the Sherman Act[177] to the anti-kickback provisions of Taft-Hartley's section 302[178] to state protective legislation.[179] In years past, arbitral awards were most often attacked on the grounds they approved or directed the commission of an unfair labor practice in violation of the NLRA. Despite some forceful argument that a court in such cases should defer to the NLRB,[180] it is now the general view, I think rightly, that a court ought not to sanction illegal conduct, even though that means it must step boldly into the unfair labor practice thicket. After all, federal district courts make preliminary determinations of what constitutes an unfair labor practice in handling applications for injunctive relief under sections 10(j) and 10(1) of the NLRA.[181] In addition, federal courts of appeals routinely review NLRB decisions, and state courts are ultimately subject to Supreme Court oversight.

In passing upon unfair labor practices potentially lurking in arbitral awards, the courts have not even shrunk from tangling with the intricacies of NLRA section 8(e)'s hot cargo ban.[182] Probably more frequent, however, is the situation where the arbitral award would have a coercive or "chilling" effect on employees' protected activities.[183] The easiest case, naturally, is where the NLRB has already acted by the time the court is asked to vacate the award.

[176] UAW Local 985 v. W.N. Chace Co., 262 F. Supp. 114, 117 (E.D. Mich. 1966) (emphasis in the original), quoted in Botany Indus. v. New York Joint Bd., Amalgamated Clothing Workers, 375 F. Supp. 485, 490 (S.D.N.Y.), vacated on other grounds, 506 F.2d 1246 (2d Cir. 1974). See Newspaper Guild Local 35 v. Washington Post Co., 442 F.2d 1234, 1239 (D.C. Cir. 1971); Glendale Mfg. Co. v. ILGWU Local 520, 283 F.2d 936 (4th Cir. 1960), cert. denied, 366 U.S. 950 (1961).

[177] See Associated Milk Dealers v. Milk Drivers Local 753, 422 F.2d 546 (7th Cir. 1970).

[178] See Steelworkers v. United States Gypsum Co., 492 F.2d 713 (5th Cir.), cert. denied, 419 U.S. 998 (1974).

[179] See UAW Local 985 v. W.M. Chace Co., 262 F. Supp. 114 (E.D. Mich. 1966). But *cf.* UAW v. Avco Tycoming Div., 66 Lab. Cas. ¶11922 (D. Conn. 1971) (state law probably invalid under 1964 Civil Rights Act).

[180] See Michael I. Sovern, "Section 301 and the Primary Jurisdiction of the NLRB," 76 *Harvard Law Review* 529, 561–68 (1963) (citing Retail Clerks Locals 128 & 633 v. Lion Dry Goods, Inc., 369 U.S. 17 (1962)). But *cf.* Aaron, *supra* n. 151, at 53; Meltzer, *supra* n. 33, at 17 n. 40.

[181] 29 U.S.C. §160(j), 160(1) (1994).

[182] Compare Botany Indus. v. New York Joint Bd., Amalgamated Clothing Workers, 375 F. Supp. 485 (S.D.N.Y.), vacated on other grounds, 506 F.2d 1246 (2d Cir. 1974); with La Mirada Trucking, Inc. v. Teamsters Local 166, 538 F.2d 286 (9th Cir. 1976).

[183] See Dreis & Krump Mfg. Co. v. NLRB, 544 F.2d 320 (7th Cir. 1976); Hawaiian Hauling Serv. v. NLRB, 545 F.2d 674 (9th Cir. 1976), cert. denied, 431 U.S. 965 (1977).

Thus, in *Glendale Manufacturing Co. v. ILGWU Local 520*,[184] the court refused to enforce an arbitrator's bargaining order against an employer when, shortly after the award was issued, the union was defeated in an NLRB certification election.[185]

Absent a direct conflict with an outstanding order of a tribunal exercising its proper jurisdiction, and absent any prejudice to third party rights, a union and an employer should be bound by an arbitrator's interpretation even of external law if they requested that interpretation, explicitly or implicitly, in their submission agreement. The District of Columbia Circuit put it this way: "Since the arbitrator is the 'contract reader,' his interpretation of the law becomes part of the contract and thereby part of the private law governing the relationship between the parties to the contract. Thus, the parties may not seek relief from the courts for an alleged mistake of law by the arbitrator."[186]

Violation of Public Policy

A more nebulous ground for vacating an award is that it is contrary to "public policy." A court must resist the temptation to employ this rubric as a device for asserting its own brand of civic philosophy. Invariably cited as an example of such behavior is the McCarthy-era case of *Black v. Cutter Laboratories*.[187] Cutter fired a communist employee, allegedly because of her party membership. An arbitration panel held the real reason for the discharge was her union activity and ruled this was not "just cause." The California Supreme Court set aside the award, declaring that "an arbitration award which directs that a member of the Communist Party who is dedicated to that party's program of 'sabotage, force, violence, and the like' be reinstated to employment in a plant which produces antibiotics . . . is against public policy."[188]

IUE Local 453 v. Otis Elevator Co.[189] reflects a more enlightened attitude. An employee was discharged for violating a company rule against gambling after he had been convicted and fined for "policy" trafficking in the plant. The arbitrator found him guilty but reduced the discharge to reinstatement without back pay for seven months, emphasizing his good work record, family

[184] 283 F.2d 936 (4th Cir. 1960), cert. denied, 366 U.S. 950 (1961).

[185] *Cf.* Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964) (arbitration of scope of bargaining unit appropriate since dispute was not within the exclusive jurisdiction of the NLRB).

[186] American Postal Workers v. U.S. Postal Service, 789 F.2d 1, 2 (D.C. Cir. 1986). See also Jones Dairy Farm v. Food Workers Local P-1236, 760 F.2d 173, 176–77 (7th Cir.), cert. denied, 474 U.S. 845 (1985).

[187] 43 Cal. 2d 788, 278 P. 2d 905, cert. granted, 350 U.S. 816 (1955), cert. dismissed, 351 U.S. 292 (1956).

[188] 43 Cal. 2d. at 798–99, 278 P.2d at 911. See also Goodyear Tire & Rubber Co. v. Sanford, 92 L.R.R.M. 3492 (Tex. Ct. App. 1976).

[189] 314 F.2d (2d Cir.), cert. denied, 373 U.S. 949 (1963).

hardship, and other factors. In upholding the arbitral award, the Second Circuit observed that the suspension and criminal fine vindicated the state's anti-gambling policy and that the reinstatement was in accord with the public policy of criminal rehabilitation. *Otis Elevator* of course does not reject public policy as a basis for vacating arbitral awards, but it does caution against an overzealous resort to it.[190]

The Supreme Court's decision in *Misco*,[191] previously discussed,[192] should have ended the confusion among the lower federal courts over the effect of public policy on arbitral awards, but it did not. As will be recalled, the Court there declared that an arbitral award should not be set aside unless "the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.' "[193] Nonetheless, the courts of appeals have diverged widely in their responses to this instruction, and unfortunately the Supreme Court has not seen fit to step in and resolve the conflict. Thus, the First,[194] Second,[195] and Fifth[196] Circuits have taken it upon themselves to find an award at odds with their notions of public policy, even though the action ordered, such as reinstatement, would not have offended any positive law or binding public policy if taken by the employer on its own initiative. In my judgment, the Seventh,[197] Ninth,[198] Tenth,[199] and D.C.[200] Circuits have been far truer to the *Misco* mandate. In effect, they have enforced awards that did not sustain or order conduct

[190] See also Machinists Dist. 8 v. Campbell Soup Co., 406 F.2d 1223 (7th Cir. 1969).

[191] 484 U.S. 29 (1987).

[192] See *supra* text at n. 38.

[193] Paperworkers v. Misco, Inc., 484 U.S. 29, 43 (1987).

[194] U.S. Postal Service v. American Postal Workers, 736 F.2d 822 (1st Cir. 1984) (employee convicted of embezzling $4,325 worth of postal money orders).

[195] Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840 (2d Cir. 1990), cert. denied, 499 U.S. 922 (1991) (male printer sexually harassed female co-workers).

[196] Meat Cutters Local 540 v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983) (over-the-road truck driver drank while on duty); Delta Queen Steamboat Co. v. Marine Engineers Dist. 2, 889 F.2d 599 (5th Cir. 1989), cert. denied, 498 U.S. 853 (1990) (grossly careless riverboat captain nearly collided with barges).

[197] E.I. DuPont de Nemours & Co. v. Grasselli Independent Employees Ass'n, 790 F.2d 611 (7th Cir. 1986) (during psychotic episode chemical worker stripped naked, attacked fellow employee, and tried to start dangerous chemical reaction); Chrysler Motors Corp. v. Allied Indus. Workers, 959 F.2d 685 (7th Cir.) cert. denied, 506 U.S. 908 (1992) (male fork lift operator sexually harassed female co-worker by grabbing her breasts).

[198] Stead Motors v. Machinists Lodge 1173, 886 F.2d 1200 (9th Cir. 1989) (*en banc*), cert. denied, 495 U.S. 946 (1990) (auto mechanic repeatedly failed to tighten lug nuts on wheels of cars, endangering drivers and public).

[199] Communications Workers v. Southeastern Elec. Corp., 882 F.2d 467 (10th Cir. 1989) (electric utility lineman in isolated incident sexually harassed customer in her home).

[200] Northwest Airlines v. ALPA, 808 F.2d 76 (D.C. Cir. 1987) (alcoholic airline pilot who had been relicensed by the FAA).

that would have been forbidden to the employer acting unilaterally. The Third,[201] Eighth,[202] and Eleventh[203] Circuits have waffled on the issue.

The relationship of arbitral awards and public policy is probably the hottest current issue of judicial review. For me, three estimable critics have correctly assessed the problem and come up with the right solution. In various formulations, Judge Frank Easterbrook[204] and Professors Charles Craver[205] and David Feller[206] have concluded that if the employer (or the employer in conjunction with the union) has the lawful authority to take unilaterally the action directed by the arbitrator, such as reinstatement of a wrongdoing employee, the arbitral award should be upheld. That approach is entirely faithful to the underlying notion that the arbitrator is the parties' surrogate, their designated spokesperson in reading the contract, and what they are entitled to say or do, the arbitrator is entitled to say or order.

Conclusion

Arbitration, with its attendant safeguards against arbitrary action by management, may well be collective bargaining's greatest contribution to the welfare of American working people—even more than the economic gains secured by union contracts.[207] For employers, too, the advantages of arbitration are manifest. The alternatives are strikes and lost production, or prolonged, costly, and burdensome court litigation. Despite the natural unhappiness of any losing party to an arbitration, and despite disturbing signs

[201] Compare U.S. Postal Service v. Letter Carriers, 839 F.2d 146 (3d Cir. 1989) (postal worker shot at supervisor's car); with Stroehmann Bakeries v. Teamsters Local 776, 969 F.2d 1436 (3d Cir.), cert. denied, 506 U.S. 1022 (1992) (arbitrator held "industrial due process" standards had been violated and did not rule on merits of charge that driver sexually harassed female employee of customer).

[202] Compare Iowa Electric Light & Power Co. v. IBEW Local 24, 834 F.2d 1424 (8th Cir. 1987) (employee in nuclear power plant defeated safety lock on door to take shortcut to lunch); with Osceola County Rural Water System v. Subsurfro, 914 F.2d 1072 (8th Cir. 1990) (construction employee falsified safety test results).

[203] Compare U.S. Postal Service v. Letter Carriers, 847 F.2d 775 (11th Cir. 1988) (postal worker stole from the mails), and Delta Air Lines v. ALPA, 861 F.2d 665 (11th Cir. 1988), cert. denied, 493 U.S. 871 (1989) (alcoholic airline pilot who had been relicensed by the FAA); with Florida Power Corp. v. IBEW, 847 F.2d 680 (11th Cir. 1988) (employee in possession of cocaine drove while drunk).

[204] Easterbrook, *supra* n. 35, at 70–77.

[205] Craver, *supra* n. 104, at 604–5.

[206] David E. Feller, "Court Review of Arbitration," 43 *Labor Law Journal* 539, 543 (1992).

[207] See, e.g., Derek C. Bok and John T. Dunlop, *Labor and the American Community* 463–65 (Simon and Schuster 1970); Albert Rees, *The Economics of Trade Unions* 74, 89–90, 186–87 (2d ed., University of Chicago Press 1977); *cf.* Richard B. Freeman and James L. Medoff, *What Do Unions Do?* 103–10 (Basic Books 1984).

of an increasing willingness of certain lower courts to set aside arbitral awards on vague grounds of "public policy,"[208] it is significant that over 98 percent of all arbitration decisions are still accepted without resort to judicial review.[209]

Regrettably, the Supreme Court has been strangely willing of late to leave standing federal appellate rulings that appear unfaithful to its more salutary teachings.[210] Nonetheless, whenever the Court has spoken, it has issued ringing re-endorsements of the arbitration process.[211] As reflected in *Gilmer*,[212] the prospects are for a substantial expansion of arbitration or other forms of alternative dispute resolution in the field of nonunion as well as unionized employment.[213] The challenges for the future include curbing the impulse of some lower courts to substitute their judgment for that of the parties' chosen arbiter, and designing a suitable regulatory framework for arbitration as it moves into new, unfamiliar terrain. So far the law has shown signs that it is equal at least to the latter task.

[208] See *supra* text at nn. 187–96, 201–3.

[209] See *supra* text at n. 6.

[210] See cases cited *supra* at nn. 195–96, 203.

[211] See, e.g., *AT&T Technologies*, *supra* n. 36; *Misco, Inc.*, *supra* n. 38. *Gilmer*, *supra* n. 106, can fairly be considered as an extension of the hospitable treatment of private arbitration into the public arena of civil rights legislation.

[212] See *supra* text at nn. 106–8, 119.

[213] See [Dunlop] Commission on the Future of Worker-Management Relations, *Report and Recommendation* (U.S. Depts. of Labor & Commerce 1994) 25–35;"Report of the Committee to Consider the Academy's Role, If Any, with Regard to Alternative Labor Dispute Resolution Procedures," in *Arbitration 1993: Arbitration and the Changing World of Work, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators* 325, 326–28 (Gladys W. Gruenberg, ed., BNA 1994). A major future development could be state or federal legislation requiring good cause for the termination of nearly all employees, and providing for governmentally administered arbitration as the primary means of enforcement. See, e.g., Howard S. Block, "The Presidential Address: Toward a 'Kinder and Gentler' Society," in *Arbitration 1991: The Changing Face of Arbitration In Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators* 12, 21–24 (Gladys W. Gruenberg, ed., BNA 1992); Theodore J. St. Antoine, "The Making of the Model Employment Termination Act," 69 *Washington Law Review* 361 (1994); Paula B. Voos, "The Potential Impact of Labor and Employment Legislation on Arbitration," *infra* at chap. 9.