CHAPTER 1

RECENT SUPREME COURT DECISIONS AND THE ARBITRATION PROCESS

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Dean Harry Shulman made a wise and valid statement concerning arbitrators' opinions that should have been observed by the U. S. Supreme Court in its opinions in the United Steelworkers and Enterprise,[1] American Manufacturing[2] and Warrior and Gulf[3] cases.

It was pointed out by Shulman that:

> The Arbitrators' opinions may . . . be a valuable means of stating a reason in labor relations. But the opinions must be carefully restrained. I venture to think that the greater danger to be guarded against is that too much will be said rather than too little. If the opinion wanders too far from the specific problem in order to rationalize and guide, it runs great risk of error and subsequent embarrassment to the Arbitrator himself. Even more unfortunately it may lead the parties to distrust him because he has gone beyond the necessities of the case and has assumed to regulate their affairs in excess of their consent.[4]

I have no quarrel with the decisions of the Court on the specific issues submitted to it for decision in the cases noted. However, I believe the Court's opinions reflect much that Shulman cautioned

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1 United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 34 LA 569 (1960).

2 United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564, 34 LA 559 (1960).

3 United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 34 LA 561 (1960).

4 Shulman, "Reason, Contract, and Law in Labor Relations," 68 Harv. L. Rev. 999, 1021-1022 (1955). Reprinted in *Management Rights and the Arbitration Process* (Washington: BNA Incorporated, 1956), p. 169.

against. The Court went "beyond the necessities of the case" and, it could be argued," has assumed to regulate their (the parties') affairs in excess of their consent." [5] This latter concern raises many possible problems in the area of labor relations which should be considered. But first let us note briefly the cases and the actual basis of decision in each of them.

The Enterprise Case

The arbitrator's award had ordered reinstatement of some discharged employees with back pay less ten days' wages. The discharges had taken place during the life of the agreement, but the arbitration award was made after the agreement had expired. The District Court ordered enforcement of the award. The Court of Appeals modified the District Court's order by holding that there could be no enforcement of the award insofar as it provided reinstatement or back pay *after* the expiration of the Agreement.

The agreement specifically provided that if an arbitrator found that an employee had been discharged in violation of the agreement "the Company shall reinstate the employee and pay full compensation of the employee's regular rate of pay for the time lost." And the agreement provided that differences as to the meaning and application of the agreement should be submitted to arbitration and that the arbitrator's decision should be final and binding.

The Supreme Court held that the award was enforceable. It affirmed the judgment of the District Court with a minor modification requiring that the specific amounts due the employee should be definitely determined by arbitration. The real basis for the Court's decision was that the arbitrator had not exceeded the submission; that it is for the arbitrator to interpret the agreement.

The American Case

An employee claimed that the Company had violated the seniority provisions of the agreement by refusing him reemployment. The agreement provided for arbitration to determine disputes as to "the meaning, interpretation and application of the agreement."

The Court held that a claim "which on its face is governed by the contract," [6] is subject to arbitration, regardless of whether the

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[5] *Supra* note 4, at 1022.
[6] *Supra* note 2, at 568.

Court believes the claim to be frivolous or baseless. It is the arbitrator and not the Court to decide whether a claim is frivolous or baseless.

The Warrior Case

The Union charged a violation of the agreement because the Company had contracted out some work. The Company had refused to arbitrate, relying in part on the agreement which read in part: ". . . matters which are strictly a function of management shall not be subject to arbitration. . . ." Otherwise the agreement provided for arbitration of differences "as to the meaning and application of the provisions of (the) Agreement"; or as to any "local trouble of any kind." [7]

The Court pointed out that the arbitration clause was extremely broad; the management clause was vague as to possible exclusions of certain subjects from arbitration. Under such circumstances the Court said: "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." [8] And that wherever there is a doubt as to whether a claim is arbitrable, the doubt should be resolved in favor of coverage. The Court concluded that in this case there was a broad arbitration clause and "the grievance alleged that the contracting out was a violation of the collective bargaining agreement. There was therefore a dispute 'as to the meaning and application of the provisions of this agreement' which the parties had agreed would be determined by arbitration." [9]

Summary As To Decisions

The Court clearly separated the role of courts and arbitrators in cases involving arbitrability or enforcement of awards.

On arbitrability: The Courts are limited to finding whether there is a collective bargaining agreement in existence; whether there is an arbitration clause; and whether there is an allegation that a provision of the agreement has been violated. If the arbitration clause is broad enough to include the alleged "dispute," then arbitration must be ordered.

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[7] *Supra* note 3, at 576-577.
[8] *Supra* note 3, at 585.
[9] *Supra* note 3, at 585.

On enforceability of awards: If the arbitrator stays within the submission and makes his award on his construction of the contract, then the award must be enforced.

In either arbitrability or enforcement cases the courts are not to get into the merits of the cases; they are not to substitute their judgment for that of the arbitrator; they shall not refuse to act because they believe a claim frivolous or baseless.

In short, the Court holds that when parties agree to arbitration that is the procedure which they have determined to use in settling their disputes. The courts may act on the preliminary question of arbitrability if that should arise, and they may act at the conclusion of the arbitration if a problem of enforceability develops. But between the beginning and ending of the arbitration process itself, the Courts have no business to participate or interfere. Further, they are prohibited from sneaking into that area by way of the determination of arbitrability or of proper enforcement clauses.

These decisions of the Court are important in establishing and maintaining the integrity of the arbitration process. On principle they are sound. If parties agree to arbitrate, then such agreements should be given the broadest application possible. And the awards should be enforced. If the parties desire to restrict their commitment to arbitration, that becomes a matter of negotiation and of draftsmanship of the arbitration clause.

If the Court had limited itself to deciding the specific issues submitted to it, I, for one, would have no further comment. But the Court went on to commit itself on a number of aspects of the collective bargaining process, the collective bargaining agreements and the function of arbitration and arbitrators—all of which require careful examination.

The Collective Bargaining Process

The Court in the *Warrior Case* says: "The grievance procedure is . . . a part of the continuous collective bargaining process." [10] I have no disagreement with this statement. But the functions which the Court assigns to the grievance procedure as it relates to the collective bargaining agreement and to the function of the arbitrator require one to analyze the collective bargaining process,

[10] *Supra* note 3, at 581.

and to place the grievance procedure in its proper perspective within that process.

The collective bargaining process involves the use of certain techniques designed to attain the objective of establishing a collective bargaining relationship between unions and employers. That objective is attained when the parties settle upon the substantive terms of their relationship, incorporate them in a collective bargaining agreement, and settle differences arising out of the interpretation and application of the agreement by means of their grievance procedure including arbitration.

The techniques used by the parties to attain the objective of settlement include negotiation, mediation, arbitration, economic pressures, legal and administrative action, and even political action. All of these techniques are available and may be used singly or in combination when the parties seek to settle the substantive terms of their relationship.

But in the operation of the grievance procedure, ordinarily only two of the techniques available in the collective bargaining process are used—negotiation and arbitration.

Thus the collective bargaining process incorporates two basic functions, the *creation* of the agreement and the *administration* of the Agreement.

The grievance procedure is concerned with the administration of the agreement. It interprets and applies the *status quo* as evidenced in the agreement. It is true that in the course of administering the agreement changes in fact are made in the agreement. But such changes are usually minor. The primary use of the grievance procedure is to interpret and apply the agreement as originally made by the parties.

The Court seems to recognize this fact, up to a point. But then the Court tells us that the agreement is more than an agreement—that it is a code, that it brings into being a new common law, that it is an effort to erect a system of industrial self-government. We shall examine these characterizations. Assuming the Court's concept of the agreement, the grievance procedure will have to be concerned with far more than administration. It will have to take on the function of creation. That is, the agreement itself could be

and in fact is to be constantly in a state of change or flux, even during its term.

The grievance procedure and the agreement itself are, however, intended to supply stability and quietude for the term of the agreement. Some of the Court's suggestions as to the nature of the agreement would seem to make this impossible. The creation of the agreement and its administration occur at different stages of the collective bargaining process. They bring into play the use of different techniques. They are functions that are best kept separate and distinct as much as possible.

The Court's Collective Bargaining Agreement

Certainly the Court is correct when it states that Federal policy is "to promote industrial stabilization through the collective bargaining agreement." [11] Stabilization must assume that the agreement is to remain unchanged for its term, unless the parties themselves decide to change its provisions.

But the Court does not conceive of the agreement as even relatively stable. It has it continuously pulsating if not quivering by describing it as more than an agreement—a code; by appending to it a common law—known and unknown; by assigning to it the duty of erecting an industrial self-government with the arbitrator given the task of molding a system of private law for that government.

Assigning such characteristics or duties to the collective bargaining agreement does not coincide with reality. The parties, once they make their bargain, want it to remain unchanged for its term unless they themselves desire to change it.

It is correct to say that the agreement may contain omissions and gaps, both known and unknown; ambiguities, even purposeful ones; and inept and sometimes deliberately misleading draftsmanship. These characteristics when present reflect the problems inherent in the use of the techniques necessary to create the agreement; they reflect the relative economic power of the parties in the collective bargaining process; they reflect the skill or lack of skill of the parties' representatives.

However, the agreement emerges as the product of the parties' efforts operating within the collective bargaining process. Neither

[11] *Supra* note 3, at 578.

the Courts nor arbitrators have license to change it, remold it, or add to or subtract from its substantive terms, unless the parties specifically seek such a service.

The Court tells us that "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," [12] and that "many of the specific practices which underlie the agreement may be unknown except in hazy form, even to the negotiators." [13]

Thus, every agreement is to include by reference the practices of the industry—both those known and those "unknown except in hazy form." This is a concept that will hardly assure industrial stability. On the contrary it would be a constant source of turmoil and would misconstrue the role of industrial common law in the collective bargaining process.

The agreement itself is a codification of much of the industrial common law, i.e., the practices of the industry or plant. Some agreements specifically provide whether or not remaining unrecorded practices are to be recognized as additional and substantive parts of the agreement.

Where the parties have not made such specific provisions, then, to the extent that the unrecorded industrial common law does not negate or is not inconsistent with the written agreement, it becomes a substantive part of the agreement for the purpose of interpreting that writing. Thus industrial common law, i.e., practices, is used in the grievance procedure to aid in resolving ambiguities in the written agreement, but not to add new or contradictory terms to the agreement. If these are the limits that the Court had in mind in its discussion of industrial common law, then it recognizes the realities of the collective bargaining process.

The Court's Arbitration Process

The Court in *Warrior* says: "Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." [14] There can be no quarrel with this statement if it

[12] *Supra* note 3, at 582.
[13] *Supra* note 3, at 581.
[14] *Supra* note 3, at 581.

is meant to describe grievance arbitration used to interpret and apply the agreement, though the prose used is a little formidable.

The Court in *Enterprise* points out that the arbitrator is confined to interpreting and applying the collective bargaining agreement; that "he does not sit to dispense his own brand of industrial justice." "He may," the Court goes on, "look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." [15] I trust that this statement may be read to explain the excerpt from *Warrior* noted above.

But the Court keeps one in suspense on this point. Thus in *Warrior* the Court quotes Dean Shulman with approval:

> A proper conception of the Arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obligated to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of the system of self-government created and confined to the parties . . .[16]

But the Court has left out of its opinion the very next sentence of that quotation from Shulman which reads:

> He (the arbitrator) serves their (the parties') pleasure only *to administer the rule of law established by their collective agreement.*[17] (Emphasis added.)

It would be far more comforting if the Court had omitted its glittering generalities concerning arbitration and arbitrators, and had retained only those of its statements which seem to make it clear that grievance arbitration is limited to interpreting and applying the written collective bargaining agreement, and that the arbitrators' authority to act must be found in the submission and arbitration agreement. Such views reflect the actual and proper use of grievance arbitration If the parties want something different, they can specifically agree upon such differences.

Concluding Comments

To the Courts: Heed the admonitions of Dean Shulman when writing opinions dealing with labor relations.

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[15] *Supra* note 1, at 597.
[16] *Supra* note 3, at 581.
[17] *Supra* note 4, at 1016.

Do not romanticize within the area of labor relations. The Federal Courts are now in the process of creating by way of common law a "statute" for the enforceability of arbitration agreements and awards. The three decisions of June 20, 1960, are important parts of that law.

Continue to maintain the integrity and independence of the arbitration process. It is up to the parties to place limitations on the process, if they desire any, by way of their arbitration agreement or submission.

Do not permit arbitrators to exceed the specific authority given them by the parties. Do not by your statements in your opinions give arbitrators the notion that they have a free hand to rewrite the parties' agreement or that they can substantively bind the parties to an industrial common law without their consent.

There is no mystery surrounding collective bargaining agreements. They should not be treated as sacred cows. In dealing with such agreements, courts can and have taken into account such special characteristics as such agreements may in fact possess. You do so now in different types of commercial contracts.

To the Parties to the Collective Bargaining Process: The arbitration clause must be carefully tailored to specify its coverage and the authority of the arbitrator.

Management prerogative clauses, too, must be very specific as to their inclusions or exclusions.

The parties should recognize that the problem of "industrial common law" has now been raised, and negotiate it in or out of their agreement.

They should review all the terms of their agreement to make them as clear and as explicit as possible.

They should seek to settle their grievances primarily at the negotiation level of the grievance procedure.

Arbitration should be used sparingly—truly as a last resort.

Select an arbitrator for grievances who will "interpret and apply" your agreement, not the agreement the arbitrator thought you should have made, or might have made, but didn't.

Insist that the arbitrator base his decision on the record made at the hearings, and give the arbitrator a complete record from which he can make his decision.

To the Arbitrators: Act within the authority that the parties give you—no more, no less.

In grievance arbitration, "interpret and apply" the agreement in accordance with its terms. Unless the parties specify otherwise, use the industrial "common law" only as one of the available aids to resolve ambiguities.

Write your opinions as suggested by Dean Shulman.

Above all, remember that you represent only one of the techniques used in the collective bargaining process, and that the collective bargaining agreement itself represents the outer limits or objectives of the process. It is the parties who have the right to determine within what orbit they want arbitration to operate—a wide or a narrow one. It is your responsibility to remain within the orbit delineated by the parties.

Discussion——

JESSE FREIDIN*

Sam Kagel's paper, it seems to me, is not addressed to the basic issue raised by the *American, Warrior* and *Enterprise* cases. He has accepted the three decisions and taken exception only in the most general terms to the opinions that accompanied them. And the focus of his exceptions relates to what an arbitrator should do when the dispute is before him for decision.

He has missed the real question presented, certainly in *Warrior*—what disputes *are* submissible under the arbitration clause of the collective agreement. This he disposes of quite simply by suggesting that the question provides its own answer (1) if there is a collective bargaining agreement; (2) if it contains an arbitration clause, and (3) if there is an allegation of breach. I would take strong exception to a test so general in its terms and so unresponsive to the particular facts of particular cases.

Mr. Kagel has given, I think, a rather imperfect description of the *Enterprise* and the *Warrior* decisions.

In *Enterprise,* I read the Court's decision to sustain the award

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as based not on a finding that the arbitrator did not exceed his powers under the submission, but on its conclusion that the *award* did not *itself* indicate that the arbitrator had gone beyond his authority.

And in *Warrior,* the Company did not rely only on the management clause, but on the history of the subcontracting issue in the bargaining relationship between the parties which the Company forcefully argued, disclosed a deliberate intention on the part of both sides to omit from the contract any restraint on the Company's practice of subcontracting. And when I say restraint, I include the potential restraint of an arbitrator's power of veto.

The Court's language, to which Sam demurs, reaches the extreme only in terms of the issue drawn by the facts. Let me try to exemplify the issue by a hypothetical case that combines the elements of both the *Warrior* and the *Enterprise* cases.

At the A E W Foundry Company there has for many years been in effect a shop rule that employees are to furnish and to wear safety shoes during working hours. During a long history of collective bargaining, the Union, at successive negotiations, has sought a contract provision that would have required the Company to bear the cost of the safety shoes required by the shop rule. The Company has consistently rejected this proposal and the succession of contracts agreed upon over the years has omitted any such provision or any other reference to the subject. As a consequence, the employees have continuously purchased their own safety shoes.

A grievance is filed claiming that the Company is bound to provide the safety shoes. The grievance claims a breach of the no lockout clause. The Union's argument is that under the shop rule the men can't work without safety shoes; in refusing to supply them, the Company is refusing to permit the men to work; therefore, the Union contends, the Company is locking out the employees.

The Union's position in the *Warrior* case was that the claim is within the arbitration clause of the contract which covers "disputes involving a claim of breach or a question of interpretation and application." Since the grievance alleges a breach of the no lockout clause, which the Company denies, and since "Every grievance in a sense involves a claim that management has violated some

provision of the agreement," there was, therefore, a dispute "as to the meaning and application of the provisions of this agreement which the parties had agreed would be determined by arbitration." [1]

The issue goes to arbitration. Before the award the contract terminates and is not renewed. Using the extraordinary inventiveness which the Court deems an essential and omnipresent tool in every arbitration kit, the arbitrator, untroubled by the fact that there is no longer an agreement to govern the future relations of the parties, addresses himself to the problem of morale and concludes not that the Company should have supplied the shoes during the term of the contract just expired, but that the requirement for shoes should be abandoned and the shop rule canceled during the succeeding no-contract period.

The award is challenged on the ground, among others, that it creates rights and imposes obligations that are to be effective beyond the life of the contract. But under *Enterprise* the award is unimpeachable because it does not itself reflect that it was not based on the contract.[2]

The composite result of the Union's argument in the *Warrior* and *Enterprise* cases may, in short, be put like this: Any claim is arbitrable if the Union does no more than *say* that it is based on the contract; every award is enforceable unless the Arbitrator says it is *not*.

Now, I submit, that in entering into a collective agreement, in the negotiations for which as much care and deliberateness were exercised in respect to the omission as to the inclusion of various restraints and obligations, neither party agreed to submit to an arbitrator the question of whether it should be subjected to the very restraint or obligation which in negotiations the parties, by omitting it from the contract, agreed the contract should *not* subject it to. Nor did either agree that such a question was to be so submitted based simply on the *ipse dixit* of the other party. The *assertion* that a fact exists has never been taken in law or in human relations as proof that it does. The assertion that a promise was given has never been taken as proof of the promise.

1 *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 34 LA 561, 565.
2 *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 34 LA 569, 570.

The obligation to arbitrate rests on proof of a promise to arbitrate, not on the simple assertion that the promise was given.

When a Union files a grievance it makes a claim that the Company has breached some obligation embodied in the contract. Arbitration is provided to determine whether in fact that obligation has been breached. The contractual promise to arbitrate can be no broader than the contractual obligation claimed to have been breached. If it is clear that the obligation was not assumed, it is equally clear that there can be no promise to arbitrate its breach. The difficulty with the Union's position in the *Warrior* case is that it denies to the Court, whose enforcement powers it has invoked, the right to determine whether its claim that there is a promise to enforce is genuine or synthetic.

In fact, the *Warrior* decision will be read by some as going even further. The facts were, as you will recall, much like my safety shoes case. For many years the Company had subcontracted various kinds of work. For many years the Union had sought in negotiations some contractual prohibition or limitation on this practice. The Union's proposals had been consistently rejected and the contracts had, over the entire period of the bargaining relation, wholly omitted any reference to the subject. The Union, nevertheless, insisted that its claim that continuance of the practice violated the no lockout clause represented an arbitrable grievance.

A careful reading of the opinion suggests the possibility that some will read it as holding that even had the contract explicitly provided, in its substantive covenants, that the Company might subcontract as its business needs justified, the same claim of lockout would have yielded the same decision of arbitrability. For, said Justice Douglas, in resolving the question of arbitrability, admittedly the Court's duty, the Court will not review the substantive provisions of the agreement to determine whether the claim of breach and, therefore, or arbitrability is precluded by the agreement, but will confine itself to an examination of the arbitration clause alone. If the subject of the claimed breach is not clearly excluded from the arbitration clause itself, the claim will be deemed arbitrable if only the Union refers to some, it doesn't matter which, substantive provision of the contract.

The Court still avows, as of course it must, that the arbitration of a particular issue is a matter of voluntary agreement. But the inquiry, it says, is not whether the contract reflects such an agreement, but whether the contract reflects an agreement *not* to arbitrate.

I should think it quite plain that this burden of proving a negative is strange indeed in the history and conception of grievance arbitration. It rests on the palpable fiction that the parties have agreed to arbitrate any claim that they have *not* agreed *not* to. And this, as it seems to me, misconceives two things about the process of arbitrating grievances.

The first, as Professor Hays observed in his superb paper before the American Bar Association, is the failure to distinguish between a frivolous grievance that is within the scope of the agreement and, therefore, arbitrable (i.e., that an employee fired for planting an axe in the foreman's skull was not fired for just cause), and a frivolous claim that a grievance is within the scope of the agreement (i.e., that the parties agreed to arbitrate whether the Company or the employees shall pay for safety shoes).

The second has to do with the nature of the collective agreement. Make-or-buy decisions are an important and essential duty of management, a part of the continuing and acknowledged duty, in the management of the enterprise, to initiate and effectuate decisions. The collective agreement embodies the restraints and obligations which the parties have agreed shall condition these decisions.

If the collective agreement is to restrain or condition management's right to fulfill the duty, the restraints or conditions must be those expressly, or by fair implication, embodied in the agreement. They must, in short, be agreed to, not imposed by virtue of an arbitrator's notion of what will reduce tension, heighten morale and increase productivity. And a Union ought not, by distorting language commonly and knowingly dedicated to other purposes (a recognition clause, a seniority, or a no lockout clause) read into the agreement a restraint or a condition that the parties themselves have omitted. If the restraint or condition is not fairly apparent in the agreement, the assertion that the Company has promised to arbitrate the claim that a nonexistent restraint

has been breached is a frivolous claim of a right to arbitrate, not a frivolous grievance.

For a claim that a grievance is within the contractual promise to arbitrate, where the arbitration clause is admittedly limited to matters growing out of the substantive covenants of the agreement, is a claim that an obligation imposed by the agreement has been repudiated. The first step, then, in determining whether the claim of arbitrability is fairly founded, is to determine whether the contract contains the obligation claimed to have been breached. To take as final proof that it does, the mere assertion of the moving party, is offensive to every known principle, not alone of contracts but of fair dealing between civilized men.

To accept a no lockout clause as a voluntarily assumed restraint on a Company's right to continue to decide whether to make or buy a given part or product, particularly after the parties have deliberately determined to omit any such restraint from their contract, is a distortion of the common use of familiar language and of the common principles of contract construction.

I do not speak here, in referring to management's duty to initiate and carry out make-or-buy decisions, in terms of management prerogative or residual rights, for such phrases do not, I think, help. For management rights and residual rights are, by and large, no more than those rights that have not been surrendered to the contract. They are what is left unrestrained after determining what has been restrained by agreement. I speak, rather, of a fair construction of the promises embodied in an agreement and in the belief that this requires attention to what has been omitted from, as well as to what has been included in, the contract. For, as so profound a scholar as Harry Shulman observed, the authority of an arbitration clause "comes not from above but from their own [the parties'] specific consent."

Far from adding to the integrity of the arbitration process, my own feeling is that the process is jeopardized by insisting that an agreement to arbitrate *be* enforced without first fairly determining whether there is an agreement *to* enforce. Arbitration still applies only to matters to which the parties have in truth agreed it should apply. And in deciding whether they have agreed "there is no reason for jettisoning principles of fairness and justice that are as

relevant to the law's attitude in the enforcement of collective bargaining agreements as they are to contracts dealing with other affairs." [3]

I think it likely that some of the Court's random observations on arbitrability, particularly its unnaturally confined view that unless explicitly omitted from the arbitration clause itself, every grievance is arbitrable because "in a sense [it] involves a claim that management has violated some provision of the agreement" [4] will create problems in the negotiation and the administration of contracts. In the latter respect, arbitrators may find themselves carrying the responsibility of determining whether, on the basis of the particular facts in a particular case, a particular claim may fairly be held to fall within the agreement to arbitrate. And if this is to be an increasingly frequent function of arbitration I would commend to the Academy Ben Aaron's suggestion made at the 1959 meeting, that the arbitrator rule on the question of arbitrability "with the understanding that even if he rules that the grievance is arbitrable, he will have no jurisdiction to decide the case on its merits."

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Several of David Feller's remarks invite comment. He refers to the question of subcontracting in *Warrior* and argues that the question had to be decided and could only be decided in one of three ways—by the Court, by an arbitrator, or by no one. I suggest that he has left out a fourth—that the parties had themselves decided it when in negotiations they had agreed to omit from the contract any restraint or prohibition of the Company's right to subcontract.

Dave, it seems to me, concedes the point when he says that except as restricted by the agreement, management is free to act. And "free to act" must, of course, mean, free of any *positive* restraint by the contract and free of any *possible* restraint by an arbitrator's veto. His argument in the *Warrior* case that when the parties agreed to exclude from the contract the Union's *explicit* proposal to restrict subcontracting, they simultaneously agreed

[3] Mr. Justice Frankfurter dissenting in *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 475, 45 LRRM 2719, 2726.

[4] *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, op. cit.

in the no lockout clause to an *implicit* restriction, is, I submit, a plain contradiction of his own premise.

Take, for example, his call-in pay question. The case he puts is this—the contract provided for four hours call-in pay. Employees called in, for whom no work was provided, filed a grievance claiming they were entitled to eight hours pay. Dave says the claim is arbitrable. Let me borrow a fact from *Warrior,* add it to Dave's hypothetical case, and then ask him a question.

Suppose that during negotiations, the Union had asked for eight hours call-in pay, the Company had refused, and final agreement was reached on four hours. Will Dave tell me that in renewing the arbitration clause of the contract (providing for the arbitration of disputes arising out of the agreement or involving its interpretation and application) the Company agreed to submit to an arbitrator whether call-in pay was to be four or eight hours? Is this not a patently frivolous claim? Was this not the precise question the parties dealt with *and* resolved in their negotiations?

Is the integrity of the arbitration process advanced by treating as a solemn dispute a question which by solemn agreement had been foreclosed from dispute? Does the Union add to the usefulness of the arbitration process by claiming that the employees are *not* to be paid what the parties agreed they *should* be paid, and by insisting that the very contract which embodies that agreement authorizes an arbitrator to decide that they *should* be paid what the parties agreed they should *not?*

Dave says that it is important to the morale of the employees in the shop that they should have the opportunity of presenting their claim to the arbitrator—that this is part of the system of industrial justice which the contract was intended to provide. I suggest to him that the fellows on the second floor may have a morale problem too—they do not want to be committed to an agreement they haven't fairly assumed. They do not want to re-try before an arbitrator an issue tried and resolved in negotiations. If morale is, as I assume it to be, something that influences one's attitude toward the entire collective bargaining relationship, one's interest in the question ought to take account of the attitudes of both parties to the relationship.

I do not think it is an adequate answer for Dave to say: "Let the arbitrator decide the case. Everybody recognizes that he ought to decide that the men are entitled only to four hours." It's inadequate because when one says that this is the way an arbitrator *ought* to decide, one means that an arbitrator *could* decide differently. And it is this very possibility that the agreement was intended to foreclose when four, not eight, hours pay was agreed upon; when in *Warrior,* agreement was reached to omit any restraint on subcontracting from the contract; and when, in my safety shoes case, it was agreed that the contract should not oblige the Company to pay for them.

That the Union in *Warrior* should have offered the no lockout clause to support its claim that the arbitration clause covered subcontracting, recalls Mr. Justice Cardozo's biting comment regarding the claimed meaning of a statute: "The judgment of the Court rests upon the ruling that another purpose, not professed, may be read beneath the surface, and by the purpose so imputed, the statute is destroyed. Thus the process of psychoanalysis has spread to unaccustomed fields."

Discussion——

DAVID E. FELLER*

I am a little distressed as to the direction in which to take off. Sam Kagel has no objection to the tune called by the Supreme Court, although he does quarrel a bit with some of the words. Jesse Freidin apparently likes neither the words nor the tune. I have been asked to discuss Sam's paper, but because I believe that the song is good music I will risk not performing my proper function and address myself first to Jesse Freidin's discussion of Sam's paper.

In doing so, I wish it to be plainly understood that, contrary to the Chairman's intimation, I was not consulted by the Supreme Court on the opinions in these cases. Since I did not write them, I am under no compulsion to justify them. I do confess, eagerly, that much of the basic viewpoint which underlies the opinions derives from the arguments which we presented to the Court, and I firmly believe that this viewpoint is not only correct as a matter

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of law but, equally important, is pragmatically desirable for the preservation of the institution in which I assume all of us here believe.

Let me again restate what I believe to be the basic holding of the Court. That holding is simply that if a collective bargaining agreement provides that all questions of interpretation and application of the agreement are subject to arbitration, then any claim made by the Union that the Company has violated the agreement is arbitrable (and any award finding such a violation is enforceable). This conception, for which I should like to claim some originality, cuts through the core of the arbitrability question as usually presented.

We felt that the more usual argument that arbitrability is for the arbitrator simply could not be sold as a matter of law to the Court. Plainly, a Court which is asked to compel arbitration must inquire as to whether there is an agreement to arbitrate. That being so, it must also be true that the Court must look at the agreement to arbitrate and determine whether the grievance sought to be arbitrated comes within its terms. There are innumerable instances where the parties consciously limit the arbitration process. One example, which we adverted to in the argument of these cases, is in the automobile industry where questions as to the speed of the production line—"production standards"—are deliberately made non-arbitrable, and for the same reason, not subject to the no-strike provision.

Our view, which the Court adopted, was that arbitrability was therefore a question for the Court, rather than the arbitrator, in the usual case. But that was only half the answer. The other and more important half was how the Court should construe the agreement to arbitrate. It was our view that if, as in the typical case, the agreement provided that all questions of interpretation and application were subject to arbitration, then the fact that the Union claimed that the Company had violated the agreement brought the right to arbitrate into play. Obviously, almost by hypothesis, a claim that the Company has violated the contract involves a question of interpretation and application of that contract. That being so, the claim is arbitrable under the "standard" clause.

It is easy to do what Jesse has done, and what Paul Hays did before him—construct a case in which it is plain to him, to me, and I assume to all of you, that the question raised by the grievance is a frivolous one. Since it is plain that the Company, in the assumed case, has not violated the agreement, it seems rather ridiculous to assert that the Company should be compelled to arbitrate the grievance with the result that an arbitrator may find implicit in the agreement some limitation on Company action which the parties, by hypothesis, did not intend.

Indeed, Jesse's case is, with all due respect, not as ridiculous as the one which we discussed before the Supreme Court in the argument of these cases. The case we posed was as follows: Suppose that there is an agreement providing that an employee who reports for work as scheduled and finds that there is no work available shall be given four hours' reporting pay. Suppose further that an employee does so report and files a grievance claiming that under the language which requires the Company to pay four hours' pay he is entitled to eight. The Company refuses to pay the extra four hours' pay, and he files a grievance. Is it arbitrable?

The argument that this hypothetical case (and Jesse's hypothetical case) is not arbitrable rests, I submit, on an assumption which is untenable. The assumption is that there is some fixed or "correct" way of determining that a given grievance is frivolous or outside the intention of the parties. In the hypothetical cases we have both assumed, the foolishness of the grievance is so plain that we neglect to note that, implicit in the judgment that the grievance is not arbitrable, there is the assumption that someone, other than the arbitrator, is qualified to make that determination.

The absence of any authority uniquely qualified and ordained to decide whether a grievance is foolish is obscured when we take hypothetical cases which we all agree are foolish. But in real cases it is quickly apparent that there is no fixed star from which calculations can be based. There is no tribunal to which we can with certainty repair in order to determine these sometimes very difficult questions.

Now it is true that in the operation of our society generally we do assume that there is an authority which will decide rightly.

That is what courts are established for, and it is and must be a fiction of our society that the courts decide rightly and decide finally. The courts in fact do move and do decide wrongly, but in any discussion of a legal problem we must assume the contrary. This fiction, as I have called it, is essential for the operation of our entire system. If there is recourse beyond the courts as to the proper meaning of a contract, or a statute, the certainty which is required for our society to operate is absent.

When we approach the question of arbitration and arbitrability, however, this assumption that the judge is or ought to be the final determiner is not necessarily true. It is natural in discussing these matters before courts to assume that the source of ultimate guidance and rectitude, the locus of authority to determine what is plain and what is not plain, is the Court. But I submit this assumption is simply not justified. The question which Jesse's comment raises, really, is not whether a negotiated decision should be reversed by "interpretation." We all agree it shouldn't. The question is who should decide in a particular case whether a grievance seeks to accomplish that result. Jesse assumes that it should be the Court.

The real function of the Supreme Court's opinion in these three cases is to negate that assumption, to say in effect that the question of whether a grievance is foolish can and ought to be decided by the arbitrator rather than by the courts.

This result is required because the parties have agreed to it by saying that all questions of interpretation and application must be decided by the arbitrator. Indeed, there is no reason why there should be an arbitrary separation between the question of whether a grievance is foolish (arbitrability) and the question of whether a grievance is meritorious (the merits). Either the Company violated the agreement or it didn't. There is only one question, not two, and the parties have said the arbitrator should decide it.

More important, perhaps, than this literal answer—because sometimes the language of the arbitration provision is unclear—is the additional fact that, on the whole, arbitrators are more competent than judges to decide these questions. In any system there must be an assumption that someone is to decide, and it is more

reasonable to assume that the parties intended the arbitrator to decide than it is to assume that the source of ultimate rectitude is the Court. The plain fact is that when we deal with real cases, and not with cases which are constructed so as to hide the implicit assumption that some authority other than the arbitrator is more competent than the arbitrator to determine what is covered by the agreement and what is not, it becomes quickly apparent that on the whole arbitrators are better equipped to come out with right answers in this area than are courts.

Why is this so? It is not because arbitrators are better lawyers than judges. The reason is inherent in the nature of the process. And this brings me back around to Sam Kagel's paper.

Sam would agree, I think, with what I have said thus far. His only quarrel is with the rather broad and generous language with which the Court described the arbitration process. While it would be foolish of me to claim that each word in each of the three opinions is, or should be, graven in stone, I do think that his criticism misses the point of the opinions.

Before getting to that point, I would like to straighten one thing out. Some of the language with which Sam disagrees has been, I think, torn out of context. It is perfectly plain, it seems to me, that the Court was not saying that an arbitrator was at large and free to render decisions wholly apart from the language of the contract in accordance with what he thought was right or proper, or would better improve relationships between the parties. To the contrary, the Court quite explicitly said in the *Enterprise* case that:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

If this is the Court's view, as plainly I think it is, then Sam may ask why did the Court get into the lengthy discussion in the other two cases as to the functions and qualities of an arbitrator? Why did it stress the relevance to an arbitrator of considerations such as morale and productive efficiency? Would it not have been

better if this somewhat extravagant description of the competence of arbitrators were omitted?

The answers to these questions is, I think, plain when we consider the reason why the Supreme Court writes opinions. The Court, under our system, takes relatively few of the large number of cases which it is asked to review. And, because this fact is known, it is asked to review only a small fraction of the cases which would otherwise be taken to it. The Court cannot, in the very nature of things, limit itself to the bare decision which Sam urges. If it did, the system would collapse. The purpose of the Court's opinions is not only to set forth the reason why the particular case is decided as it is, but also to provide guidance to the lower courts so that they can decide a multitude of cases without the requirement of additional review by the Supreme Court. The Court, indeed, chooses the cases it will hear, at least in part, in accordance with its view as to whether those cases will serve the purpose of guiding the lower courts. And the opinions of the Court must therefore be read in light of the function which they must perform.

What was the function in these three cases? Plainly, it was not simply to say that the grievances in *American* and *Warrior* were arbitrable, or in the *Enterprise* case, to say that the award should be enforced. The function was, at least equally, to provide guidance to the lower courts in the hundreds of other cases which the Supreme Court would not be able to review. What was the problem requiring such guidance? The problem was the demonstrated fact that the lower courts, following what I think is the natural bent in any judicial system, had assumed and probably would continue to assume that they as judges were better able to decide which grievances are foolish and which subjects are covered by the collective bargaining agreement than arbitrators. They had, frankly, to be hit over the head.

The notion that arbitrators are better judges in this area than courts was not an easy one for the courts to accept. And so the Supreme Court, of necessity, had to spell out, perhaps in somewhat extravagant terms, exactly why arbitrators are better able to make decisions in this area than the courts. That I think was essential to the opinions, and I think the results in the lower

courts subsequent to these three opinions justify what the Court did.

What the Court said was not extreme. Contrary to the Chairman, who half seriously suggested that the opinions raise the question of whether arbitrators are to be more than judges, I think that what the Supreme Court was doing, in describing the functions which arbitrators perform, was setting forth the reasons why arbitrators are entitled to be treated not as something different from judges, but as judges.

One of the great anomalies in this area is the difference between the treatment which those who accept Jesse Freidin's viewpoint apply to judges in the construction of statutes and the treatment they apply to arbitrators in the construction of collective bargaining agreements. All that the Supreme Court was saying, really, was that in dealing with collective bargaining agreements arbitrators are entitled, and indeed expected, to take into consideration factors which, in this realm, are quite comparable to the factors which judges take account of in construing statutes.

The distinction between "creation" and "administration" which Sam Kagel makes is a familiar one in statutory construction. It is standard doctrine that courts have no authority to amend statutes or write new ones. That is the function of Congress, just as the writing of collective bargaining agreements is the function of the parties.

But this surely does not mean that courts in construing statutes look only to the words. I surely need not cite examples to show that courts in construing statutes frequently look to legislative purpose and examine the differing constructions tendered by the parties in terms of their consequences in relation to that purpose. A statute must be filled in and given substance through the process of interpretation and application.

Sometimes courts go far indeed in interpreting statutory language. I need cite only *Markham* v. *Cabell,* in which, first, Learned Hand for the Second Circuit,[1] and then the Supreme Court [2] construed the words "October 6, 1917," in the Trading with the Enemy Act which was passed in World War I as meaning

[1] *Cabell* v. *Markham,* 148 F2d 1737 (1945).
[2] *Markham* v. *Cabell,* 326 U.S. 404 (1945).

"December 8, 1941," when the same statute was applied in World War II. As Judge Hand said in that case: ". . . it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." [3]

In these arbitration cases what the Supreme Court was saying, essentially, is that under the private system of law established by the grievance and arbitration machinery the parties usually expect the same kind of sympathetic and imaginative discovery, but in terms of the peculiar conditions and objectives of the collective bargaining relationship; and, further, that arbitrators rather than the courts are chosen for the task of construing collective bargaining agreements because they are far more likely than courts to be competent to do the job.

This had to be spelled out explicitly and emphatically. As the decisions under review indicated, as well as the decisions in other circuits and in state courts, the courts are loathe to concede that in this area, unlike others, they are not the final authority as to the meaning of language. The point had to be made strongly if it was to have the desired effect of avoiding the necessity of taking up case after case in order to reverse the clear tendency of lower court decisions.

Now, in analogizing the function of an arbitrator, in applying a collective bargaining agreement to the myriad unforeseen particular situations which arise during its term, to the function of a court in similarly applying a statute, I do not mean to say that there is no difference between the two. There is. And this brings me back, finally, to Jesse Freidin and his view of the proper relationship between court and arbitrator.

Jesse's view, I take it, is not really that a frivolous grievance is not arbitrable, although he comes close to saying that. I think he would concede, if pressed, that a grievance which claimed vacation pay because the grievant was on the payroll in June would be arbitrable under a clause saying that only those who are on the payroll in May were entitled to a vacation. The grievance

[3] 148 F2d at 1739.

would be frivolous, but it would be governed by a term in the collective bargaining agreement. The argument he makes is that different considerations apply when the question is whether management's conduct is governed by the agreement at all, whether, in other words, the statute which has been jointly enacted covers the subject matter of the grievance. If it is plain to him or can be made plain to a court on the basis of language or the history of the negotiations that the agreement does not cover the question, then the grievance is not arbitrable.

If this is his view, he has good company. This is the view which was articulated by Judge Magruder of the First Circuit and which has had the qualified support of Archie Cox. This is a much more sophisticated position than the simple *Cutler-Hammer* view that the Court must decide whether a grievance is arguable before it will allow an arbitrator to decide it. Under this theory the Court must determine only whether the subject matter is covered by the agreement, not whether the grievance is meritorious. Or, in the Cox formulation, the Court must determine whether the contention that the grievance is covered by the agreement is arguable.

While superficially more attractive, this view has the same vices and contradictions as the broader *Cutler-Hammer* view. On the conceptual level, it *does* involve the Court in construing the terms of the agreement, if only to see whether a substantive term of that agreement is applicable or arguably applicable, which is a function that the parties have assigned to the arbitrator under the standard clause making all questions of interpretation and application subject to arbitration. And, on the practical level, it is equally true, or perhaps even more true, when the question is whether the agreement implicitly imposes some standards which are not spelled out in words, that decision requires expertise and understanding which the courts are not likely to have.

Certain it is that the courts have gone off badly in applying the Magruder view. I give you two examples. An agreement sets out a scale of rates applicable to particular job classifications. It says nothing about the job classifications themselves. An employee on a new job files a grievance complaining that he is not being paid the rate required by the agreement. Is this grievance arbitrable if the real controversy is over the proper classification of the new job? Suppose it is an old job and the Company simply re-

classifies it so as to reduce the pay. The Court said that such grievances were not arbitrable because it could find no provision in the agreement governing the proper classification of jobs.[4]

Similarly suppose you have a general seniority provision covering promotions, demotions, etc. A senior employee is transferred to the night shift while a junior employee on the same job is left on days. He files a grievance claiming a violation of his seniority rights. Is it arbitrable? The Court said no because the agreement, as the Court read it, contained no provision covering shift transfers.[5]

The question in these two cases—mark you—was not whether the grievance should be granted, but whether it was arbitrable. They were found not arbitrable not because the Court thought they were plainly without merit under a particular clause but because the Court found that no clause in the agreement applied to them and hence there was no question of application of the agreement to decide. There was—in terms of the statutory analogy—no statute to apply.

The error in this approach lies in the difference between a statute and a collective bargaining agreement. A statute may be found simply not to cover a given situation. This means, in effect, that the question is ungoverned by law. But this is not true with respect to a collective bargaining agreement containing a no-strike clause. Every question relating to wages, hours, or working conditions is covered by such an agreement. Obviously the agreement governs if there is an explicit provision in the agreement limiting management's action. The converse, however, is not true. A conclusion that management's action is not limited by the agreement does *not* mean that the subject matter is not governed by the agreement. The agreement does govern because, by virtue of the no-strike clause, management is given a right which it did not have, the right to take action without being faced with a possibility of a strike or other concerted activity in support of the Union's view as to what should be done.

Except as restricted by the agreement, management is free to act. This freedom is not simply the absence of contract restric-

[4] *Local 149* v. *General Electric Co.*, 250 F. 2d 922, 41 LRRM 2247 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958).

[5] *Local 201* v. *General Electric Co.*, 262 F. 2d 265, 43 LRRM 2357 (1st Cir. 1959).

tion: when coupled with the no-strike clause it is an affirmative grant to management of a protection it would not have had in the absence of a contract.

That is the reason, of course, the fundamental reason, why the critical question so often is whether there are implicit, although not expressed, restrictions on management's conduct. If it is concluded that there is no restriction in a given area, the Union cannot do what it could have done if there were no contract at all—shut the plant down and contest the issue in economic terms. It has, by the contract, forfeited that right.

That is why the Supreme Court said, in the language to which Sam Kagel objects, that the collective bargaining agreement is not merely a statute but a code. Of course it is! It is a code because it covers the universe of discussion. On all matters on which the Union has the statutory right to bargain and strike, it either limits management's action or, if it does not, confers upon management the right to be free of activity which would otherwise be protected by the National Labor Relations Act.

Once this is realized, as the Court realized it in these cases, the view which Judge Magruder (and Jesse Freidin) expound loses all validity. Clearly when a court rules that the agreement is silent on an issue and there is therefore no substantive provision governing management's conduct, it is not saying that there is no statute, but that under the code enacted by the parties management has a right to be free of strikes on the issue. And the Court was absolutely correct in saying that on any such issue, just as in the case where there is an explicit agreement provision, the question is arbitrable under the standard form of arbitration clause *and,* if the clause is non-standard and ambiguous as in *Warrior,* doubts should be resolved in favor of arbitrability.

To put the matter in other words, the question whether there is any collective bargaining agreement restriction on management's conduct in a particular area must be resolved. There appear to be three choices. It may be resolved by the Court. It may be resolved by the arbitrator. Or it may be resolved by no one.

For the reasons which the Court set forth, I think the arbitrator is better qualified than the judge to make the decision. But

it is equally important to recognize that, if no one decides, then the very absence of decision constitutes a decision in favor of the employer. If the contract contains a no-strike clause, and if the issue raised by a grievance is not arbitrable, then the employer wins on the merits because there is no decision. There is no middle ground.

If this is so, then it seems to me that there is no basis whatsoever for treating differently a contention that a particular grievance is frivolous under an admittedly governing provision and a contention that it is frivolous to argue that there is a provision governing the grievance. Both cases involve interpretation and application of the agreement and, in the face of a standard clause, should be arbitrable.

One final note. I find clearly apparent in Jesse Freidin's discussion, and to a lesser degree in Sam Kagel's paper, a reflection of what Paul Hays said at the American Bar Association meeting last August.[6] Hays did a masterful job of picking at individual phrases and words in the decisions while overlooking, I believe, the essential rightness of the decisions and the situation which called for their strong language. In commenting on the language he reserved his strongest barbs for the high regard which the Court obviously had for the arbitration process. The picture of that process given by the Court, he said, "sounds more like the praise of arbitration one might hear . . . at a public function of an arbitration group."

This is a public function of an arbitration group. You are the profession. The Supreme Court has said, in no uncertain terms, that in the areas of your special competence you have qualities which judges don't have and that the courts should defer to that competence and assume that you are at least as good as judges. I hope that you think as much of yourselves as the Supreme Court thinks of you—and that you act accordingly. I am confident you will.

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[6] *BNA Daily Labor Report* No. 172 (1960): Special Supplement.