CHAPTER III

THE ROLE OF ARBITRATION IN STATE AND NATIONAL LABOR POLICY

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I.

There is an immediate and insurmountable difficulty in trying to think about *the* role of arbitration in the formulation and administration of labor policy in the United States. In one word, the difficulty is diversity. There is marked diversity of education and viewpoint among those who serve as arbitrators in the various regions and among the many industries of this vast country. There is considerable diversity of expectation among the participants as well as among those who are concerned about the quality of life among our citizens and of justice among disputants. There is diversity of responsibility among the forums and jurisdictions from whose labors emerge the dynamic crosscurrents of purpose and action that we choose to call "national labor policy."

Arbitration has become Argus, the watchful giant of Greek mythology, enshrouded in contemporary mythology, Argus of the 100 eyes and, today in America, several times over as many tongues.[1]

Consider the state of labor arbitration as we move into the decade of the 1970s. We are participating in what Professor Harry Wellington has aptly called "this quiet revolution." [2] Professor Bernard Meltzer remarked its "substantial invisibil-

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[1] We need not here speak of the circumstances of the creature's demise.

[2] Wellington, *Labor and the Legal Process* (New Haven: Yale University Press, 1968), 98.

ity." [3] But, none doubt its impact on the quality of justice in the United States. Professor Wellington accurately described arbitral decision-making in labor disputes as "one of the most rapidly developing segments of American jurisprudence." [4] But it would abort the significance of that observation were "jurisprudence" in that sense to be narrowly conceived as limited to what courts are deciding.

Dean Leon Green, one of the first and surely the most durable of the legal realists of the 1920s, conceived of "law" as "the power of passing judgment." [5] His view was and is sociologically sound. A modern legal sociologist, concerned to identify "law" in terms of legally sanctioned and enforceable decisions resolving disputes in contention between citizens, would not hesitate to encompass in that definition arbitral awards resolving labor disputes.

Numbers indicate the dimensions. For the six years 1964-1969 there was a purposeful research effort by the Academy's Law and Legislation Committee to identify and comment upon all the federal and state court decisions that dealt with pre-award and post-award labor arbitration.[6] Over the six years the total judicial output uncovered cumulated 765 court decisions rang-

[3] Meltzer, "Ruminations About Ideology, Law, and Labor Arbitration," in *The Arbitrator, the NLRB, and the Courts,* Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 1 at 19.

[4] *Supra* note 2, at 98.

[5] L. Green, *Judge and Jury* (1930), 41.

[6] The annual reports, covering the years 1964-1969, appear in the BNA volumes reporting the Academy's annual proceedings of the following years: 1965, at 219-240 (Jones and Gould); 1966, at 366-398 (Jones and Kranwinkle); 1967, at 381-404 (Jones and Anderson); 1968 at 201-266 (Jones and Anderson); 1969, at 187-212 (Jones and Finkel); 1970, at 213-252 (Jones and Peratis). In 1964 the Law and Legislation Committee report identified about 175 reported cases dealing with labor arbitration in which state and federal courts had been called upon to intervene either before or after an arbitral award had issued; 74 percent of those cases were federal and, interestingly, the New York Supreme Court, actually a trial court in these matters, held a monopoly of two thirds of all state decisions. In 1965 there were about 150 decisions in the courts, 64 percent being federal and the New York Supreme Court accounting for half the state decisions. In 1966 there were 120 court cases, 83 percent being federal and the New York Supreme Court again accounting for half the state decisions. In 1967, 130 court cases were counted, 83 percent federal, but the New York Supreme Court output dropped off to a quarter of the state decisions. In 1968 only 81 court cases were found, 86 percent being federal and only two decisions (surely there must have been more unreported) coming out of the New York Supreme Court. Finally, in 1969 there were 109 court cases, 78 percent being federal and, once again, the justices of the New York Supreme Court were back up at the plate swinging at 50 percent of the state decisions.

ing from the Supreme Court down to local trial courts, of which 75 percent were federal and 25 percent state in origin. The annual totals ranged from 81 (in 1968) to 175 (in 1964), averaging 120 court decisions a year.

In each of those six years only a handful of cases—almost literally—involved refusals by courts to order arbitration when requested. And in each year the overwhelming majority of suits to review arbitral awards resulted in confirmation. A consistent pattern of judicial self-restraint, preservative of the discretion of the arbitrator, was manifest throughout the six years.

In the fiscal year 1968 the National Labor Relations Board closed 1,414 unfair labor practice cases at various stages in the pipeline of decision,[7] from after a hearing had opened before a trial examiner to after the Supreme Court had taken some action. Of them, 1,111 were closed after a Board order had issued. That same year in the circuit courts of appeals, the federal appellate judges decided 301 proceedings on petitions for enforcement or review of Labor Board orders. The 11 circuit courts modified, set aside, or remanded in 41 percent of those cases. A reading of a number of those court decisions will support the conclusion that the federal judges have no hesitancy in making substantial changes in Board orders when they proceed to "modify" them, and that the differences reflect policy conflicts over which interests among employers, unions, and individual employees shall receive preferential protection.

Thinking only in terms of quantity, then, we have state and federal courts deciding about 120 Section 301 cases a year on average and about 300 or so cases reviewing decisions of the Labor Board. The Board itself contributes upward of 1,000 of its own decisions, no more than a couple of dozen of which are concerned with arbitrators' awards or the prospect of arbitration as an alternative to Board procedures. (Of course I have not referred to the office practice of the Board's regional offices which must cope with a torrent of cases heading for the 50,000 mark, of which the vast bulk are handled in the regional offices with finality. My reference in these remarks is to litigated matters, since they afford a meaningful comparison to the activities of arbitrators.)

[7] *33rd NLRB Annual Report* (1968), Tables 8, 19, and 19A.

Look now to the activity of arbitrators, still thinking only of numbers. First of all, my correspondence with practitioners in the 50 states indicates to me that there are fewer than 500 men and women in the United States categorizable as active labor arbitrators, even making two or three decisions a year. My discussions with Federal Mediation and Conciliation Service and American Arbitration Association people over the years, added to my informal survey of the various states, has convinced me that there are probably fewer than 300 truly active arbitrators in the country, handling at least a dozen cases a year resulting in awards. By contrast, the U.S. district courts number about 365 district judges, and the Labor Board uses the services of about 75 trial examiners who apparently conduct an average of about a dozen hearings a year.

Bearing in mind the informed guess that there are about 300 or so active arbitrators in the country, recall the 1962 study of the Academy in which 158 members responded to a survey, disclosing the issuance of 6,279 decisions for the year.[8] Extrapolating those figures, it seems a conservative estimate to me that upward of 10,000 final and binding awards are being issued each year by labor arbitrators. That is a very awesome figure! Just in sheer numbers it is impressive enough. But it derives its awesomeness for me from the speculation it compels about the effect of this outpouring of awards upon the quality of justice in our country, for these arbitral awards are multiplied almost exponentially in their effects upon the conduct of workers, supervisors, and managers who consciously try to be guided by these awards or the anticipation of them.

It is a fact today that no one can realistically purport to describe the quality of American justice unless he can relate the substance of what labor arbitrators are actually doing in their conduct of hearings and in the issuance of decisions on the variety of issues that are brought before them by grievances during the terms of collective bargaining agreements. Unfortunately in that regard, the 1962 survey of Academy members also disclosed that less than 10 percent of the arbitral decisions

[8] In *Labor Arbitration: Perspective and Problems*, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1964), at 295.

become available for study through publication. As of now, it must be said, awareness of what arbitrators are actually doing in their dispositions of grievances is only knowable, if at all, by observing the few decisions that do make their censored appearance in print and through conversation by and with arbitrators and those whose business it is to keep track of what's going on in labor-management affairs. (Every now and then, of course, as we have witnessed annually, one of them can also be lured out of his insulated anonymity of judgment to make ill-considered disclosures, the only result of which is active note-taking on the programs—"Strike him!"—as he lives to regret that fleeting temptation to vanity unsuppressed. If I were Peter Seitz, at this point I would utter a striking poetic image; but Seitz incites insights that only Seitz insights sight.)

How then shall we look for what is "national labor policy"? It becomes necessary to think of labor arbitrators engaged in their highly individual and personal acts of judgment—almost, but not quite, immune to post-award review albeit *jointly* selected by the disputants in the first place—and to relate their activities, not just to one another and to their cumulative impress on American labor policy, but also in terms of their interaction, conscious or unconscious, with other governmentally sanctioned tribunals engaged in fashioning labor and other public policy. There must be reckoned the administrative apparatus of the National Labor Relations Board—its regional officials, the General Counsel and his staff, the 75 or so trial examiners, and the five members of the Labor Board. But we must also view arbitrators and their decisional activities relative to the 50 state court systems. And then as kind of a capper we have to be mindful of the federal judiciary, the 365 or so federal district judges sitting throughout the states and the 11 federal circuits sitting in three-judge panels or *en banc* to review the decisions of the Labor Board, or of lower federal courts reacting to the prospect or actuality of arbitral decisions. If that were not enough to bedazzle the would-be synthesizer, there is the further necessity to reckon the federal Equal Employment Opportunities Commission and its state facsimile agencies. And now over the horizon stirs the Goliath of public sector employment with its own infinite variety of public service functions and agencies—federal, state, and local—and millions of em-

ployees whose grievances are as numerous in the contemplation as are the grains of sand on the Santa Monica beach.

How in the name of God can all of this frenetic decisional activity be harnessed to any common purpose? Forty mules could be harnessed to bring water to Death Valley, despite the conventional wisdom about mules. What about 40 times 40 forums? The mules drew one element—water. No one in this room is so naive as to think that 40 forums draw one element—justice! We are all too knowing about the frailties of human reason and its susceptibility to the setting of judgment —time, circumstance, and personalities—to be deluded by the single-minded myth of single-minded justice.

II.

At the outset of their classical study of the history of English law, Pollock and Maitland at the turn of this century defined the conditions of acceptance in the community of a national mode of disputes resolution. "Different and more or less conflicting systems of law," they wrote, "different and more or less competing systems of jurisdiction, in one and the same region, are compatible with a high state of civilization, with a strong government, and with an administration of justice well enough liked and sufficiently understood by those who are concerned." [9]

For its time and locale that was a remarkably sophisticated view. It could well have been written today and for us, not as theory but as descriptive of our experience with labor arbitration and its interactive state and federal tribunals in America. But it does also constitute a sound theoretical premise for that tribunal interaction. It accepts a diversity of viewpoint about what justice might be in particular circumstances. But impliedly it also posits the existence of some kind of commonality loosely holding it all together.

This is what another English scholar, Professor Percy Winfield of Cambridge, identified a few years later as "the common stock of legal ideas without which no civilized community can exist." He was reflecting on the implications of public policy in the evolution of English law. His thought was turned back to the formative era from which we in America as well as our English

[9] Pollock and Maitland, *History of English Law* (1911), xxv.

cousins draw many of our currently compelling legal ideas. "The whole of that era," he wrote, "was one of rapid building in our law, and it had to be developed more by analogies, by logic, and by a broad perception of what was wanted than by precedents of which there were few compared to the mass that exists in more modern law." Nonetheless, there was some kind of reservoir from which each would be apt to draw some "common stock of legal ideas" radiating notions of fairness whereby human affairs in that community might reasonably be expected to be ordered. This reservoir of conviction and commitment has come to be referred to as "public policy." "In tracing the history of public policy," Professor Winfield wrote, "two things must be clearly distinguished. One is the unconscious or half-conscious use of it which probably pervaded the whole legal system when law had to be made in some way or other, and when there was not much statute law and practically no case law at all to summon to the judges' assistance. The other," he added, "is the conscious application of public policy to the solution of legal problems. . . ." [10]

Mark the parallel between the contemporary labor arbitrator and the common law judge of that formative era of our heritage described by Winfield and bearing in mind Leon Green's identification of law as "the power of passing judgment." Observe, if you will, how labor arbitration fits into the Pollock and Maitland scheme of systems of jurisdiction and law in a state of continuing but understood and accepted tension one with another. Those early judges had little or no legal precedent to command them. Nor do contemporary labor arbitrators. Review of those early court decisions was rare, sporadic, and unstructured, as it is today of arbitral awards. Statutory law seldom if ever laid its legislative arm on their discretion, nor does it today on arbitrators. The early judges may have thought to pay some attention to each other's patterns of decision, but they had no structured means—other than the King's Own Good Pub—whereby to share concern about the rightness of decisions in recurrent mutual problems, and so it is with us. But they did share that "common stock of legal ideas" and it was evident

[10] P. Winfield, "Public Policy in the English Common Law," 42 *Harv. L. Rev.* 76, 79-81 (1928).

in the evolution of their decisions that their thinking did have a common gene pool. I would suggest that we are similarly situated today as labor arbitrators.

My colleague Melville Nimmer recently undertook a study for the Israeli Ministry of Justice of the uses of judicial review in Israel's present quest for a constitution. His effort led him to seek to identify the sources of a "higher law" (short of the Deity, I should add, as this was not a rabbinical work) which might afford a stability for the fundamental societal values inherent in the commitment to freedom of expression and of worship and to the equal protection of the laws. He concluded that such a higher law was necessary to which all could subscribe despite their differences and from which, as a consequence, there could be derived "meaningful assurance that the societal values of freedom and equality will endure." [11] This is a modern affirmation observable in the circumstances of a nation newly forging constitutional ideas that reflects the same kind of reliance upon Winfield's "common stock of legal ideas" that makes possible Pollock's and Maitland's coexistent diversity of systems of law and jurisdiction. There is a vital lesson to be drawn from our legal history in this connection. In Professor Nimmer's words, "if the delicate balance between majority rule and the preservation of minority rights, both of which are essential to a democratic state, are to be preserved, it is essential that all segments of the population play by the rules and that the rules themselves not be susceptible to easy change by transient or intolerant majorities." Nor, we might add, by final and binding decision-makers who simply ignore them.

Several years ago in his thoughtful remarks to this Academy Professor Bernard Meltzer advised arbitrators to construe collective agreements where possible so as to avoid invalidating confrontations with countermanding law. Although he evidently credited arbitrators with competence to engage in that kind of subtle interpretive maneuver, positing as it does a knowledge of the contours of the obstacle around which it would be necessary to maneuver, he nevertheless disqualified them as a group, and the arbitral process as a system, to resolve "irrepressible

[11] M. Nimmer, "The Uses of Judicial Review in Israel's Quest for a Constitution," 70 *Colum. L. Rev.* 1217, 1257 (1970).

conflict" when the mandates of the collective agreement and those of some "higher law" external to it come unavoidably into conflict. In that posture, he declared, the arbitrator "should respect the agreement and ignore the law." [12] And there is little doubt that his counsel reflected the conviction of most of the arbitrators present, and I suspect that that balance would probably still exist among us today.

In dissent, I sense an unperceived and mischievous potential for the continued good health and utility of labor arbitration in the assumption that ignorance is not only bliss, but virtue as well. If I have been successful in prodding your thinking up to this point in my remarks, you should be prepared to join me in what I would now press upon you to be an important distinction. It is that between "law" in a narrow sense and "public policy" in the broader sense of that "common stock of legal ideas" that we all share.

Mr. Justice Holmes once defined "law" in a famous phrase. It was for him "the prophecies of what the courts will do in fact," [13] and no more. I have no hesitancy whatsoever in joining Professor Meltzer in abjuring law as the pursuit of arbitrators if by "law" we may accept the Holmes definition. If an arbitrator is indeed fearful today of what courts will do in fact in response to a decision he is contemplating, he is needlessly so if the pattern of adjudication and arbitration interaction teaches us anything at all these past six years. Such an arbitrator would have to believe that judges fly on brooms in search of wayward arbitrators. (I should drop a caveat here, and that is that I am referring to the pattern of interaction of courts and arbitrators in the private sector, not as to public employment problems where, as we shall see, it is as yet uncertain what the pattern of interaction may shape up to be.)

We may surely stipulate together that arbitrators should not, and need not, fret about law in the Holmesian sense of "prophecies of what courts will do in fact." Having done so, I would then like to propose to you that *all* labor arbitrators should feel in conscience bound to be concerned about how their deci-

[12] Meltzer, *supra* note 3, at 16.
[13] Holmes, *Collected Legal Papers* (1920), at 173.

sional conduct accords with "the common stock of legal ideas without which no civilized community can exist," as Professor Winfield saw it. Then, to the hindmost with the courts! The critical query is whether in these thousands of arbitral decisions we as labor arbitrators are leaving this country with a higher or a lower quality of justice. I believe, with Professor Nimmer, that it *is* essential that all segments of the population play by the elemental rules or, more precisely, *try* to play by them. It seems to me that it would be most destructive if our societal values of freedom and equality were being warped and diminished across the land because arbitrators felt themselves to be above the law, or felt that they should not be concerned to be the spokesmen of those values rather than ignorant or heedless of them. Thousands of grievants are bringing before supervisors asserted rights which are being measured against what arbitrators have been deciding and saying in like circumstances. These values radiating from our commitments to freedom and equality have historically always been embattled. They have always required strong and courageous guardians to insure that the weak and easily overwhelmed shall enjoy them. After all, they are the least able to lay assured claim to their benefits and the most needful of them.

If the guardians will not guard, who shall guard the guardians? I have a deep sense of presentiment that were it to become evident that labor arbitrators were issuing awards in significant numbers contrary to the spirit of the "common stock of legal ideas" protective of our freedom, arbitration would then have dealt a mortal wound to collective bargaining. Juvenal asked, "Who guards the guardians?" [14] For our purposes here I have little doubt in my own mind that the answer will run in the alternative: The conscience of the guardian, informed and sensitive, must guard the guardian; or the guardian will be dismissed and his house dismantled.

III.

The circuitry along which we thread our thoughts on this subject of the roles of public policy in labor arbitration has a number of breakers strung out along it which seem to short-

[14] Juvenal, *Satires VI.* Professor Nimmer refers to this conundrum as "the perennial problem of jurisprudence." Nimmer, *supra* note 11, at 1217.

circuit communication rather frequently. Since I have experienced this short-circuit phenomenon a number of times, let me take heed of at least some of the obvious circuit breakers with the following affirmations. First, I have never heard any participant in the labor arbitral processes seriously advance the notion that collective bargainers, using the usual general language of a broad arbitration clause, intend to or do create an arbitral ombudsman who may properly roam at will among the equities of a dispute in response to the distressed summons of either of the parties or of affected employees.

Second, I share the view expressed a dozen years ago by Willard Wirtz, and I take it to be expressive of the minds of practically all, if not all, arbitrators with whom I have ever discussed the subject. He observed then that " 'due process' is a symbol borrowed from the lexicon of law, and therefore suspect in this shirtsleeves . . . business of arbitration." [15] The sense of his caution was that uncritical adoption of ideas grown in another milieu is a dangerous business and, secondly, that any application of ideas adapted from the "lexicon of the law" had to have their utility demonstrated, and this *before* being engrafted on arbitral function. He went on to wonder if "protection of certain individual interests" might be more effectively accomplished by holding elected representatives to standards of fair representation, perhaps by penalizing them through the ballot box, or by a forum like a court or the Labor Board, rather than by "endowing the umpires of controversy with the obligation and authority." [16] I have extrapolated some of Bill Wirtz's thoughts and, having done so, I should add that the actions of the courts in the intervening 12 years have, in my judgment, so enhanced the power of arbitrators by further insulating their judgment against judicial review as to create more rather than less reason for arbitrators to seek to preserve public policy rights protective of individual freedom and equality and, I should add, dignity.

Third, I would ally myself without hesitancy with Abe Stock-

[15] Wirtz, "Due Process of Arbitration," in *The Arbitrator and the Parties*, Proceedings of the 16th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1958), at 1.

[16] *Id.* at 5.

man's observation,[17] at the same meeting at which Bill Wirtz spoke in 1958, that there is no automatic analogy linking the rights of a person accused of a crime, and involved in law enforcement procedures, with the rights of an employer, an employee, and a union, all of whom are concerned about the investigation of a problem, for example, of warehouse thefts. And, finally, I know of no arbitrator who would be willing, let alone merely be reluctant, "to blanket the arbitration process with due process considerations."[18]

There are, nonetheless, recurrent situations in plants in the course of which the necessity for an arbitrator to assess "the common stock of legal ideas" about what is tolerable in our society is well nigh inescapable. A decade ago Professor Alfred Blumrosen studied the disposition of various public issues by arbitrators and by the courts as disclosed in published awards. Interestingly, he found, "Arbitrators consider it their duty to take account of public policy considerations involved in labor-management relations. In not a single case has it been suggested that the employer-union relationship is a private affair, and that the public interests should not affect a decision by a person privately selected by the parties to resolve some of their private disputes."[19] His survey convinced him that arbitrators, lawyer or no, tended to "handle public policy considerations with understanding and intelligence," and were not "blinded by the

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[17] *Id.* at 39-40.

[18] H. Edwards, "Due Process Considerations in Labor Arbitration," 25 *Arb. J.* 141, 143 (1970). Unfortunately Professor Edwards has misread a decision of mine, deducing from it a position contrary to the views to which I subscribe and which are stated above in the text. See *Thrifty Drug Stores Co.*, 50 LA 1253 (1968), Edgar A. Jones, Jr. The thrust of the reasoning in that opinion was expressed thus: "Of course, we are not here concerned with 'the forces of the law.' . . . But our concern is not unlike that of the courts when they are coping with the testimonial privilege or with custodial interrogations by police. We must determine whether there was truth-telling despite these custodial interrogations as they were conducted in the Company's security cubicles in the absence of union representatives. It is sometimes overlooked and certainly underemphasized that those procedures which impose pressures on interrogated persons to disclose incriminating facts are unreliable as eliciters of truth and that their unreliability mounts in direct proportion to the increase in the pressures." 50 LA 1260-1261. "The question here is whether the statements are so tainted by compulsions created by the manner of their taking as to make it too speculative for a trier of fact—the Arbitrator—to give them credence as evidence against those whom they would implicate." *Id.* at 1262.

[19] Blumrosen, "Public Policy Considerations in Labor Arbitration Cases," 14 *Rutg. L. Rev.* 217, 235 (1960).

importance of policy considerations into an ill-considered weighing of evidentiary factors." [20] I *think* that remains valid as a description, although I feel disturbingly ignorant of what all those thousands of unpublished awards are accomplishing in this regard.

In discussing the relevances of public policy to arbitral decision-making, it is essential to be fact-oriented. Public policy is not a disembodied voice speaking commandingly from a cloud. It is a concern which arises from a perceived set of facts, and in our context the set of facts will always involve contractual differences. It is a contract we are expounding (with proper deference to Chief Justice Marshall); it is not a constitution. But Mr. Justice Black, no ingenuous acceptor of the untrammeled virtues of arbitration in all settings, expressed the Court's basic view when he wrote that a collective agreement "is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts, which control such private contracts." [21] The Court has been firm in its acceptance of Dean Harry Shulman's definition of arbitration as "an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees." [22] Professor Wellington has well described the agreement as "one episode in a continuing, joint history of a firm and a union. It is a temporary calm in a restless, shifting relationship." [23] But in my judgment it is vital for us to realize that it is also the instrument for the ordering of aspirations, achievements, and frustrations of individual employees for whose freedom and equality our society has the most pressing concern, men and women who move impersonally in and out of our enterprises in this incredibly mobile society of ours in which it is not at all uncommon for a work force to be almost wholly renewed in five years.

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[20] *Id.* at 236.

[21] *Transportation-Communication Employees Union* v. *Union Pacific Railroad Co.*, 385 U.S. 157, 161, 63 LRRM 2481 (1966); see discussion of this case in Jones, "A Sequel in the Evolution of the Trilateral Arbitration of Jurisdictional Labor Disputes—The Supreme Court's Gift to Embattled Employers," 15 *UCLA L. Rev.* 877 (1968).

[22] Shulman, "Reason, Contract and Law in Labor Relations," 68 *Harv. L. Rev.* 999, 1024, (1955).

[23] Wellington, *supra* note 2, at 120.

Arbitrators do indeed interpret the collective agreement. They do not, and I do not suggest that they should, dissociate themselves from the agreement in order to undertake to expand upon the Constitution, the Civil Rights Act, the National Labor Relations Act, the Railway Labor Act, the Norris-LaGuardia Act, the Sherman Anti-Trust Act, or any other resource of national policy. But many important public policies are latent in the terms of collective agreements. To ignore them, wittingly or unwittingly, is to frustrate them.

I recently participated in the filming of a movie for use in secondary schools in a series designed to illumine the Bill of Rights.[24] My role was to sit as "arbitrator" to hear a grievance by a white senior employee who had bid on a leadman job that was awarded to a bidding black junior employee. It was dramatized in the film that these men were relatively equal in ability as well as in economic and educational status. The worthy aim of this employer was to move black workers in the plant into leadership roles in order to remedy one aspect of the historic pattern of racial discrimination. Ultimately the viewers were left to answer the question whether that aim could be held to justify deviation from the plain meaning of the seniority provision. The latter dictated setting aside the black worker's promotion to leadman and awarding the job to the white senior employee. This film had a "Lady and the Tiger" ending, with the arbitrator summing up the considerations on either side of the issue and then concluding with the statement that he would be in touch with them when he had reached his decision. (I have to confess I have run into time-bind problems from time to time in getting awards out, but I shudder as I contemplate viewers of that movie for years asking me, "You mean you haven't gotten that decision out *yet*?")

That situation of the black junior, in my judgment, exemplifies the kind of public policy preemptive reasoning that should not be regarded as proper for the arbitrator to justify deviation from the plain meaning of the seniority provision. I have never been able to figure out any convincing way to answer the white senior's question, "Why *me*?" While I realize that some think

[24] "The Bill of Rights in Action—Equal Opportunity," Film 716, Bailey-Film Associates, Los Angeles, Calif. (1969).

that seniority is an antiquated mechanism for making choices among employees, I do not so regard it. I have yet to hear anyone set forth a system that can evenhandedly and uniformly, without discrimination, enable an employer to decide who shall go out on layoff and who shall stay—the obnoxious lout who is supporting a crippled mother and 11 fine children (who all take after their mother) or the great guy who has no children and works only because he doesn't think he should live on his inheritance lest he lose the common touch. I do not think that coloring them black or white makes the decision any the more readily just.

Employers who wish to pursue that worthy goal of true integration ought to seek an agreement with the union, with or without EEOC involvement, to set aside some percentage, realistic for the particular plant, of occasions when the employer may promote minority employees without regard to seniority. If the whole work force bears the responsibility of that kind of accommodation at a time when it has not yet become personalized into a choice between this fellow right here and that fellow right there, I think such a policy would be viable and fair. But I repeat what the arbitrator said in the film: "What can I say to this particular white worker that reasonably ought to cause him to believe that it is rational and right for him to give up his own welfare and that of his family in favor of achieving a worthy social goal, *not* at the expense of society, but at his own right-here-and-now personal expense?" From whence may I be said to derive the supervening power as an arbitrator to veto the express terms of a collective agreement when one of the bargainers refuses to waive its right? Is is not a rational distinction to interpret ambiguity, or silence, or malleability of application, to comport with public policy while declining to reverse explicit contractual mandates?

In contrast to the seniority problem of racial preference, it thus seems perfectly proper in a case in which relative seniority is not a problem for an arbitrator to take into consideration the public policy favoring integration of our races. Thus where there is doubt whether a black employee may be said to have the qualification to perform a job as to require a trial period, fairly administered, he should be preferred if he has

made any kind of a decent showing of aptitude or experience. Similarly, in discipline cases I have observed that arbitrators are inclined to lean over backwards a bit, not to penalize employers with unfair back-pay awards, but with give-him-another-chance awards without back pay. This is in circumstances when, to be quite blunt about it, the discipline of a white employee would not be mitigated.

On the other hand, there are obviously instances—I have had a couple and heard of others—when a minority employee is so wound up tight about his racial realization that he is incapable of conducting himself in a manner that will enable him to work with the particular people who are his supervisors. If I am satisfied that there is neither objective nor subjective discrimination—which is to say, supervision is clean, free both of unintended but nonetheless discriminatory conduct and of plain, old-fashioned, you-better-believe-it racial discrimination [25]—I am not prepared, and I do not see how any arbitrator can be prepared, to condone conduct that is incompatible with the necessities of the supervision of the work force.

The Supreme Court is currently busy with Title VII cases that will be of great interest to arbitrators. Thus an arbitrator upheld the discharge of an employee of Reynolds Metals Co. when he joined a religious sect that forbade working on Sunday, so that he refused to work contractually mandatory overtime and counselled a possible replacement not to do overtime work either. Mr. Dewey, the employee, then sued in the federal district court for the alleged violation of the Civil Rights Act of 1964.[26]

Parenthetically, had he sued before arbitrating, it is likely that

[25] See the discussion in *Allison Steel Mfg. Co.*, 53 LA 101 (1969), Edgar A. Jones, Jr., discussed in Jones and Peratis, "Arbitration and Federal Rights Under Collective Agreements in 1969," in *Arbitration and the Expanding Role of Neutrals,* Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 219-220. The *Allison Steel* case is perhaps a classic instance of the pressures that warp the lives of those who suffer racial indignities. While a federal district court's refusal to enforce the remedy fashioned by the arbitrator was pending on appeal before the Ninth Circuit—with good reason to anticipate reversal of the lower court—the unemployed grievant and his wife split up (according to the union's counsel) and in the personal turmoil that followed, he shot and killed her and then committed suicide. The appeal was dismissed as moot.

[26] *Dewey* v. *Reynolds Metals Co.*, 291 F.Supp. 786, 1 FEP Cases 440, 69 LRRM 2601 (W.D. Mich. 1968).

he would have been told to exhaust his contractual remedies first. The district court held, however, that the arbitral award did not preclude the later action by Mr. Dewey under the Civil Rights Act. The Sixth Circuit reversed, directing dismissal of the action. It felt that it would "sound the death knell to arbitration of labor disputes" to hold otherwise, since the employer would admittedly have been bound by the arbitral award and the employee not, under the district court's reasoning. "The tremendous increase in civil rights litigation leads one to the belief that the Act will be used more frequently in labor disputes," said the court. "Such use ought not to destroy the efficacy of arbitration." [27]

The Supreme Court will have to decide whether the employee, disappointed in the arbitration, is entitled to another chance to overturn the employer's discharge action under Title VII. What shall the role of an arbitrator be in these statutory discrimination cases? Should the arbitrator uphold the right of a religious believer to tithe his employer to support his religion? I cannot believe it. We shall see shortly how the Court views it.

In another case,[28] the Court reportedly came to grips with Women's Lib last week. In a *per curiam* opinion the Court remanded to the Fifth Circuit for further development of the record. If there is to be sexual discrimination in hiring practices, it indicated, there would have to be a showing of such "conflicting family obligations" as to warrant preferring male to female employees. Mr. Justice Thurgood Marshall, concurring, expressed his concern lest his brethren had "fallen into the trap of assuming that the act permits ancient canards about the proper role of women to be a basis for discrimination." The Court's conclusion was apparently that a woman with a young child might pose such "conflicting family obligations" in a particular industrial setting as, for example, to warrant an employer's not promoting her to a leadlady position requiring availability for unexpected overtime assignments.

Martin-Marietta may suggest a decision adverse to Mr. Dewey. But the difficult dimensions of these discrimination cases are

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[27] *Id.* at 429 F.2d 324, 2 FEP Cases 687, 691 (6th Cir. 1970).

[28] *Phillips* v. *Martin-Marietta Co.*, 400 U.S. 542, 3 FEP Cases 40 (1971). The remarks in the text were made on Jan. 28, 1971.

suggested by the argument reportedly made by the Department of Justice in this *Martin-Marietta* case just decided: to sustain this employer's policy of not hiring mothers of small children "will cause unwarranted hardship to families in which the mother is the only available breadwinner." [29] The harsh facts of life are that this kind of worker-mother situation may also quite possibly have a double discriminatory aspect if the mother is also black.

When an arbitrator is confronted with a grievance in this kind of case, I believe he will be found trying to assess the claim in conscience, balancing the realistic needs of the particular employer involved, setting the public policy pull on his judgment in tension with the industrial realities evidenced before him. One helpful way to look at this kind of situation, if you happen to be a representative of an employer or a union, is to regard it as largely a problem of proof. To do so is at least to make a focused effort to get in tune with the felt dilemma of the labor arbitrator in 1971 who tries to balance his role as a contract interpreter with that of final and binding decision-maker, creature of the contract, indeed, but also guardian of the received genetic complex of public policy concepts applicable to *this* specific configuration of facts now presented to him in the context of the necessity of decision in *this* case.

IV.

The growing body of arbitral awards and opinions dealing with grievance arbitration in the public sector points up an interesting and significant element distinguishing the public from the private sector arbitration of grievances. Arbitrators making decisions in the private sector have often been hesitant to rationalize (or acknowledge their rationalization) in terms of public policies whose sources are external to the collective agreement. Still, there is a certain amount of disingenuousness in this posture. It is quite evident in the published reports of private sector awards that a large number of decisions, regardless of express rationalization, have been prompted by notions of propriety and fairness surely not to be found other than by wholly creative deduction from a silent agreement.

[29] *Los Angeles Times*, Jan. 25, 1971, p. 7, col. 1.

And it could hardly be otherwise when the dispute at hand is covered by that amoebic phrase "just cause." Its fluid mandate inevitably and strongly has to be influenced by shared convictions that have accumulated in the community concerning how institutions and individuals ought to interact in our society. I confess to a certain amount of pish-tosh as I listen to the knee-jerk complaints of those who willingly execute a "just cause" provision in a contract and then later excoriate an arbitrator for "going outside the agreement" to draw on constitutional, statutory, common-law, or, for that matter, umbilical ideas to give content to that phrase. Typically, the complaining party didn't have the nerve to define it in the terms that it now urgently argues should have been inferred by an arbitrator.

In the public sector, however, arbitrators in grievance cases involving the rights of employees will quite foreseeably constantly be pressed to reckon public policy. State, county, and city legislative bodies, commissions, special purpose districts, boards of education, boards of trustees, and so on, are all intricately hedgerowed by specific grants of constitutional and statutory powers. These will frequently require interpretation by an arbitrator concerning the public employer's discretionary powers and his own authority. Furthermore, although private sector employers are rarely disposed to litigate disappointing awards, public sector managers appear on occasion to be compulsively litigious. It appears to reflect a yearning to be assured, before venturing out on a policy limb for any distance at all, that the limb will be judicially declared safe to climb at any speed without fear of being shaken off by gusts of second-guessing by politicians or local editorial writers.

At least until the court of last resort of the particular jurisdiction promulgates a universal rule of deference in grievance cases to public sector arbitral awards, it is foreseeable that an arbitral award in a grievance case that appears to compel anything remedial other than the most innocuous and routine of managerial action may well have to be judicially enforced before the public administrator will feel free to implement it.

This is in marked contrast to the private sector. And experience over the years with judicial reluctance to let go of the merits in private sector arbitration also suggests that the courts

to which resort will have to be had in these cases may well exhibit the same compulsive difficulty with judicial forbearance. This judicial instinct to intervene—ostensibly to "accomplish justice"—is likely to be heightened considerably in the public sector by the sovereignty syndrome that is already hampering the needed acceptance of public sector grievance arbitration. That syndrome senses a certain sanctity of sovereign prerogative even in the shoveling of garbage, and it is not going to be easily curbed, except perhaps in cases of unshoveled garbage.

It is really going to be up to the judges of first instance, hopefully encouraged by early and acerbic appellate counselling, to demonstrate the kind of withholding of hands that the Supreme Court has required in the private sector. For it will still be true that in a suit to compel public sector grievance arbitration, a court ought not to weigh the merits but should order arbitration even of what it may consider to be a frivolous claim. When a judge thinks a particular grievance, or an arbitral award responsive to it, is foolish, even outrageous, it may well be that he simply does not understand the problem involved.[30] Thus, for example, misguided concern for unnecessary costs for the overburdened taxpayer may well create far greater economic costs for him in bad labor relations and in consequent deteriorated or interrupted public services. Undoubtedly it came as a rude and wholly unexpected shock to the New York judges a couple of weeks ago when the explosive wildcat "job action" (as unlawful public strikes are now euphemistically called) of the New York policemen erupted after an appellate decision

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[30] By no means do I mean to belittle the judicial function in this area. It does not lie easy on the conscience of a judge to abstain from righting what he is convinced is a wrong-headed decision. But the Supreme Court has made it a mark of professional competence to exercise judicial self-restraint in these matters, and the rationale is a sound one: "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competency of courts. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 36 U.S. 574, 581-582, 46 LRRM 2416 (1960). For an example of the judicial forbearance needed in these cases, see *Local 1011 IBEW* v. *Bell Telephone Co. of Nevada*, 254 F.Supp. 462, 63 LRRM 2167 (D. Nev. 1966), discussed in Jones, "The Name of the Game Is Decision—Some Reflections on 'Arbitrability' and 'Authority' in Labor Arbitration," 46 *Texas L. Rev.* 865, 868-869 (1968).

forestalled a wage increase seemingly assured by a lower court. It was a classic illustration of the blowup potential inherent in a court decision that unwittingly frustrates expectations reasonably created by earlier favorable negotiations or rulings by other public functionaries.

The standard established by the Supreme Court in *Warrior & Gulf* [31] is going to have to be transplanted to the public sector by an understanding judiciary. The grist for the forum, after all, is substantially the same—issues of discipline and discharge, applications of provisions for seniority, vacations, holidays, wages, hours, conditions of employment, work assignments, transfers, overtime, jury duty, and even time off to vote out of office the elected officials who are still sitting on the last fact-finding wage recommendation.[32] Past practices will be apt to be a more fruitful source of dispute in the public than in the private sector as thousands of little bureaucratic empires crumble under the stress of negotiation followed by impartial scrutiny of the eroded remains.

Courts undoubtedly will be confronted with nonarbitrability arguments by public administrators and their supportive lawyers in government service, reflecting the familiar sovereignty syndrome and graphically raising the specter of the suffering taxpayer to avoid being compelled to submit particular issues to arbitration. The courts, if grievance arbitration is to work in the public sector—*which it had better*—will have to echo the Supreme Court in *Warrior & Gulf* that arbitration will not be denied "unless it may be said with positive assurance that the arbitration clause"—whether it be a negotiated agreement or a legislative enactment—"is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." [33] Similarly, public sector arbitral awards, where brought before the courts in grievance cases, will have to receive a circumspect judicial review that does not manipulate the merits but seeks instead to enforce an award as long as, in the words of the Ninth Circuit Court of Appeals in a

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[31] *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).

[32] See Robert Howlett, "Arbitration in the Public Sector," in *Labor Law Developments* (Albany: Matthew Bender, 1969), 268.

[33] *United Steelworkers, supra* note 31, at 582.

recent private sector case, "it is possible for an honest intellect to interpret the words of the contract [or, we may add, the statute or ordinance] and reach the result which the arbitrator reached." [34] Although it may be that knowledge of "industrial common law—the practices of the industry and the shop" as part of the arbitrator's "source of law" may at first appear inapposite in the public sector grievance arbitration, further reflection suggests that this is not so. Arbitrators typically have become experienced in dealing with a great variety of industries and working conditions, each with unique and differing worker problems and managerial necessities, and they will hardly be astonished to find that work assignments in a municipal zoo [35] will differ substantially from those encountered by helicopter-flown firefighters.

Indeed, it is this marked variety of past experience that should prompt the courts to reason in the public as in the private sector that this successful method of dispute resolution is deserving of judicial forbearance as the rule rather than the exception. The Supreme Court observed in *Warrior & Gulf* of the private sector arbitrators who are now also serving in the public sector, "The labor arbitrator performs functions which are not normal to the Courts; the considerations which help him fashion judgments may indeed be foreign to the competence of Courts. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." [36]

As arbitrators move increasingly into the public sector in grievance disputes, they will find themselves being confronted with the necessity to make arbitrability rulings as to which top governmental employees—or more accurately, the managerial administrators—will make essentially the same argument against arbitrability that was made against governmental participation in binding grievance arbitration in the first place. That is,

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[34] *Newspaper Guild* v. *Tribune Publishing Co.*, 407 F.2d 1327, 70 LRRM 3184 (9th Cir. 1969).

[35] See, for example, *Zoological Society of San Diego*, 50 LA 1 (1967), Edgar A. Jones, Jr. This arbitration and the transcript of testimony quoted in the opinion may not afford a reliable test whereby questions about sexual identity may be self-resolved, but it does afford a like opportunity for those who may feel insecure about their identification with mammals as against birds, or vice versa.

[36] *United Steelworkers, supra* note 31, at 581-582.

that state or local legislation, or a constitution or a charter, has vested the employer with "plenary" power over the terms and conditions of employment which cannot lawfully be delegated to a "third party," a "private person," or assumed by that person. Although the parties wouldn't even be before an arbitrator if that reasoning hadn't been rejected by responsible governmental authority, it is evident that many an arbitrator will hear it repeated lower down the governmental scale of advocacy on specific issues sought to be arbitrated by unions representing governmental employees. As in the private sector, however, the primary legal source of the arbitrator's authority is the agreement containing provision for it in terms negotiated between the union and the governmental employer.

An arbitrator has to be wary of crediting arguments against arbitrability—in contrast to those for or against a certain result on the merits of the grievance—that are rooted in sources external to that agreement. There is a very real danger already visible in the reports of awards that the adaptation of arbitration to the public sector—initiated to meet demonstrated and often pressing needs to assure stability of public services—may be seriously hampered by uncritical or unduly timorous deference by arbitrators to foreclosing public policy arguments unwisely pressed upon them by public administrators in order to avoid arbitration.

If the administrator has a serious concern about the legality of arbitrating a particular dispute, let him refuse and by court order either be vindicated in his refusal or be compelled to proceed. In the private sector, top management normally will not long tolerate the expense of futile resort to the courts in place of good-faith participation in the jointly adopted dispute resolution procedure of arbitration. We may anticipate that the instinct to dig in heels and resist the intrusion of "that outsider" reviewing the propriety of managerial decisions—as psychologically expectable and explicable in the public as in the private sector and certainly visible in either on occasion today—will pass in time, in part because of economically motivated negative reactions by those who supervise supervision.

In the meantime, the burden of demonstrating lack of arbitrability of a particular grievance from sources extraneous to

the operative agreement should be a considerable one before court or arbitrator. Public policies external to the agreement may very well influence, even dictate, a particular disposition on the merits. But the presumption of arbitrability should be, if anything, heightened in the public sector, far more than in the private. This is so precisely because the alternative right of public employees to strike will remain for some time quite limited, if not wholly outlawed.

Public administrators and arbitrators—not to mention courts —will do well to reflect long and hard on the significance of those angry, frustrated New York cops surging out the doors of their precincts in unplanned outrage.

Once again, that ancient truism comes to mind: "He who builds a pressure cooker had better vent the steam or blow the scene!"

Comment—

CHARLES J. MORRIS *

Ted Jones has taken a complex question—What is the role of arbitration in state and national labor policy?—and he has given a thoughtful and descriptive answer, synthesizing the diversity which characterizes arbitration and providing an overview of what arbitrators actually do. I find myself in agreement with much, but not all, of what he has said about private sector arbitration; and I whole-heartedly second his motion about public sector arbitration: that if grievance arbitration is to work in the public sector, it will have to echo the *Warrior & Gulf* [1] presumption of arbitrability, and further, that public sector arbitral awards, where brought before the courts in grievance cases, should receive circumspect judicial review that does not manipulate the merits of the dispute. I shall say no more on this occasion about public sector arbitration, for Ted has done an exceedingly good job in his treatment of this sensitive subject.

It is with regard to the role of arbitration in the private sector that I find myself in some disagreement with his position.

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[1] *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).