CHAPTER 3

JUDICIAL REVIEW OF LABOR ARBITRATION AWARDS: A SECOND LOOK AT *ENTERPRISE WHEEL* AND ITS PROGENY

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I. Introduction

Logic, so the cliché goes, is not the life of the law. But logic is very much like the DNA of the law—the structural principle without which all is sprawl and muddle. With due respect to the thoughtful and experienced persons who have addressed this distinguished assembly during the past decade, I think that a fundamental illogicality has pervaded the discussions of the Academy for over ten years concerning the role of the arbitrator in issuing awards, and the role of the courts in reviewing and enforcing those awards.

The error, as I see it, is that we have tried to impose a personal vision on a process that is not of our making. Thus, some of us worry about the validity and finality of arbitral awards, and argue that we should seek guidance from statutory law in order to reduce the likelihood of challenge in the courts.[1] Others examine our professional credentials and conclude we aren't up to the task of construing statutes, even if the courts would let us get away with it.[2] Still others stress the undoubted role of the arbitrator as part and parcel of the ongoing collective bargaining process, and insist that insofar as we embark upon the totally different mission of statutory

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[1] Howlett, *The Arbitrator, the NLRB, and the Courts,* in The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 67; Mittenthal, *The Role of Law in Arbitration,* in Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 42. But *cf.* Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration,* in The Arbitrator, the NLRB, and the Courts, *supra* this note, at 1.

[2] Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study,* in Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 59.

interpretation, we shall deprive our awards of the deference traditionally accorded them by the courts.[3] I, too, have been guilty of this effort to impose a personal vision. At the 1968 meeting, I drew what I now consider a quite inadequate distinction between judicial review of an arbitral award based wholly on contract interpretation, and judicial review of an arbitral award based at least in part on statutory interpretation.[4]

To restore perspective, we must be prepared to accept the necessary and logical implications of a premise that probably none of us disputes. Labor arbitration, as we know it, is not the product of the intellectualizing of the National Academy, or even of the mythologizing of Justice Douglas.[5] It is the product of contract—or, more precisely, the product of the *particular* contracts of *particular* parties. These contracts may vary widely in the scope of the matters entrusted to final and binding arbitration. The appropriate scope of judicial review and enforcement of arbitral awards under such contracts will thus also vary widely. Except for certain considerations of basic public policy, to be discussed later,[6] it is the parties themselves, the unions and the employers, who should supply the answers to the questions that have so plagued this Academy throughout the past decade. As interested bystanders, I am sure we are entitled to suggest to the parties what answers we might regard as wisest and most prudent. But once we have accepted an arbitral assignment in a given case, our own views should be irrelevant. The parties' views, as best we can discern them, should control.

Put most simply, the arbitrator is the parties' officially designated "reader" of the contract. He or she is their joint alter ego for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement. In the absence of fraud or an overreaching of authority on the part of the arbitrator, a reviewing court should ordinarily treat his or her award exactly as if it were a written stipulation by the parties setting forth their own definitive construction of the labor contract.[7] This concept of the arbitrator as contract "reader" is so

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[3] Feller, *The Coming End of Arbitration's Golden Age*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 97.

[4] St. Antoine, *Discussion—The Role of Law in Arbitration*, in Developments in American and Foreign Arbitration, *supra* note 1, at 75, 82.

[5] Justice Douglas's encomium is inscribed most memorably, of course, in the *Steelworkers* trilogy, *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[6] See text accompanying notes 85-95, *infra*.

[7] I can think of one likely exception to this equation. In *Boys Markets, Inc.* v. *Retail Clerks*

central to my thesis about the proper role of the judiciary in enforcing arbitral awards that I wish to elaborate on it a bit before proceeding to an analysis and assessment of *Enterprise Wheel* and its progeny.

II. The Arbitrator as Contract "Reader" and the New Golden Age

In a brilliant and provocative paper presented at last year's meeting of this Academy, David Feller dolefully proclaimed the imminent end of arbitration's golden age.[8] As I understand Dave's argument, the deference customarily paid arbitral awards by the courts cannot be fully explained by any special expertise possessed by arbitrators, or by any special speed or economy possessed by the process. (Surely, Dave is right about this.) Instead, he contends, that deference "derives from a not always explicitly stated recognition that arbitration is not a substitute for judicial adjudication, but a part of a system of industrial self-governance."[9] In other words, the key to the special status of labor arbitration is that it is an integral component of union and management's autonomous regulation of their ongoing relationship. The courts do not try to substitute their judgments for that of the arbitrator because they *cannot*. Courts can only adjudicate according to preexisting substantive standards. In contrast, it is of the essence of labor arbitration that the arbitrator's most critical function is to apply a set of rules governing the union-employer relationship which are "integral with and cannot be separated from the machinery that the parties have established to resolve disputes as to their meaning."[10]

Local 770, 398 U.S. 235, 74 LRRM 2257 (1970), the Supreme Court overruled *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 50 LRRM 2420 (1962), and authorized the federal courts to issue injunctions, despite the Norris-LaGuardia Act, against strikes by unions over grievances that could be submitted to final and binding arbitration. Even before *Boys Markets*, however, courts were prepared to specifically enforce an arbitrator's award ordering a union to cease striking in violation of contract, although under *Sinclair* the parties' own clear no-strike clause would not have been subject to specific enforcement. *E.g.*, *New Orleans Steamship Assn.* v. *Longshoremen's Local 1418*, 389 F. 2d 369 (5th Cir. 1968), *cert den.*, 393 U.S. 828 (1968). I assume this approach will be followed, even though it does not necessarily fit the rationale of *Boys Markets*, which was based on the notion that a union could be enjoined from striking over a matter subject to arbitration at the behest of the union. *Cf. Buffalo Forge Co.* v. *Steelworkers*, 96 S. Ct. 3141, 92 LRRM 3032 (1976). If I am correct, the effect will be to create one category of arbitral awards, *i.e.*, those ordering the halt of a union's strike in breach of contract, which will have *greater* judicial enforceability than the parties' own contract. This apparent anomaly may be explained by the underlying Norris-LaGuardia policy against direct judicial intervention into labor disputes. Here, the arbitrator constitutes a buffer between the court and the parties.

[8] Feller, *supra* note 3.

[9] *Id.*, at 107.

[10] *Id.*, at 101.

The arbitrator's award is not so much an interpretation of the collective bargaining agreement as an organic extension, a fulfillment, a flowering of the seed it planted. The standards governing the arbitrator's typical award under a collective bargaining agreement are at least as much process-oriented as substance-oriented. The converse, of course, as Dave would have it, is that arbitration immediately loses its peculiar magic and status as soon as it undertakes (as it has increasingly undertaken) the interpretation and application of "external law," that is, statutory and decisional law, the heretofore exclusive domain of the courts—presumably the kind of law, as distinguished from that of the collective bargaining agreement, which provides every adjudicating court with a univocal, definitive standard of judgment.

Let me acknowledge straightaway that Dave Feller has provided us, both in last year's Academy address and in his masterful article on the collective bargaining agreement,[11] with some fresh, penetrating insights into the nature of labor arbitration as it has developed in this country. Having said this, I must go on to express my own conviction that some of his basic conclusions—that the collective bargaining agreement, except for its arbitration clause, is not a judicially enforceable contract, and that arbitration awards derive their authoritativeness in the judicial arena from the process-involvement of the arbitrator and from the absence of substantive contractual standards—are at best partly true, and at worst misleading. I shall deal only with the asserted basis for the courts' deference to arbitration.

Undoubtedly, much of arbitration is concerned with filling in the gaps in the parties' agreement through a process that looks more like rule-making than rule-application. But this is not invariably the case. The other day I handled an arbitration which turned on a delicious question about the meaning of "and/or" in a labor agreement. No court, and no first-year contracts class in law school, would have found that unfamiliar terrain. Moreover, whenever a court must tackle such protean terms as "due process" and "equal protection" in constitutional litigation, or a whole variety of "fair" and "reasonable" tests in statutory contexts, I would insist it is engaged in much the same sort of exercise as an arbitrator wrestling with "just cause" in a labor agreement.

The real explanation for the courts' deference to arbitral awards is not to be found in some unique element of the collective bargain-

[11] Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663 (1973).

ing process. The real explanation is simpler, more profound, and more conventional. Courts will ordinarily treat an arbitral award as "final and binding" because the parties have *agreed* on such treatment. This is their *contract*. Like other contracts, that is the measure of their legal expectations. With certain well-recognized limitations, courts are in the business of enforcing contracts.

Confirmation that the parties' agreement, and not something peculiar to collective bargaining, is the key to judicial deference is to be found in the treatment accorded to commercial arbitration awards. In a line of decisions extending far back before the *Steelworkers* trilogy,[12] the courts have held that they will not review the merits of arbitral awards in commercial settings, and will look only at procedural fairness, fraud, partiality, or total irrationality. The contractual nature of the arbitration process is stressed in most opinions.[13] Following the trilogy's establishment of federal standards for review in labor-arbitration cases, some courts in enforcing commercial-arbitration awards have sought to apply the same standards,[14] while others have thought they were applying a standard either more[15] or less[16] likely to result in an overturning of the commercial award.

I see nothing anomalous in according an arbitral award greater finality, in either a labor or commercial context, than would be accorded a trial court's construction of the self-same contract. Customarily, parties to a contract containing no arbitration provision do not agree that the trial court's interpretation shall be "final and binding." If, to save time or money or effort, the parties did include such a provision, I would expect an appellate court to honor that limitation on its reviewing authority.[17]

The point of all this, of course, is that (within limits) the parties are the masters of their own contract. The appropriate scope of judicial review should be determined by the particular agreement in any case, and not by anything inherent in the arbitration or collective bargaining process. I should have thought this was pretty

[12] *Supra* note 5.

[13] *See, e.g., Burchell* v. *Marsh*, 58 U.S. (17 How.) 344 (1855); *Park Constr. Co.* v. *Independent School Dist.*, 216 Minn. 27, 11 N.W. 2d 649 (1943); *Harrell* v. *Dove Mfg. Co.*, 234 Ore. 321, 381 P. 2d 710 (1963). Cases are collected in 5 Am. Jur. 2d Arbitration & Award §167, pp. 643-44; 6 C.J.S. 2d Arbitration §2, pp. 162-64.

[14] *Lentine* v. *Fundaro*, 29 N.Y. 2d 382, 328 N.Y.S. 2d 418 (1972); *Morris* v. *Zuckerman*, 69 Cal. 2d 686, 446 P. 2d 1000 (1968).

[15] *Swift Industries, Inc.* v. *Botany Industries, Inc.*, 466 F. 2d 1125 (3d Cir. 1972).

[16] *O. S. Corp.* v. *Samuel A. Kroll, Inc.*, 29 Md. App. 406, 348 A. 2d 870 (1975).

[17] *Cf. United States Consol. Seeded Raisin Co.* v. *Chaddock & Co.*, 173 F. 577 (9th Cir. 1909), *cert. den.*, 215 U.S. 591 (1910) (agreement not to appeal valid and enforceable).

clear from *Enterprise Wheel*[18] itself. For all the bouquets thrown arbitrators and arbitration by Justice Douglas, it is ultimately the "collective bargaining agreement" from which an award must "draw its essence" in order to be valid and enforceable.[19]

Recognition of the arbitrator as the parties' official "reader" of the contract—no more and no less—would enable us to dispose of many of the conundrums that have been posed at these meetings over the past decade. It clearly would resolve the perennial question of what the arbitrator should do when confronted with an irreconcilable conflict between the parties' agreement and "the law." With a right good conscience, he should follow the contract. After all, he is not responsible for "enforcing" an illegal or invalid contract. Only courts can enforce contracts. All the arbitrator is asked for is a definitive parsing of the parties' own agreement regarding the matter in dispute—or, more realistically, of the putative agreement they would have reached if they had ever anticipated the issue that has now arisen. This preference for contract over "law" also seems supported by *Enterprise Wheel*'s declaration that an arbitrator exceeds the scope of his submission if he bases his decision on his view of the "requirements of enacted legislation."[20] Furthermore, the notion of arbitrator as contract-reader permits of no distinction between an award *upholding* conduct contrary to law, and an award *ordering* conduct contrary to law. In either instance, the arbitrator's mandate is plain: Tell the parties (and the courts) what the contract means, and let them worry about the legal consequences.

I do not wish to appear perverse in urging arbitrators to engage in the futility of rendering unenforceable awards. But as I stated at greater length at the 1968 meeting, the law is often not all that clear. The parties may hotly dispute not only the legality of a particular interpretation of a contract clause, but also the intended meaning of that clause. One party may be prepared to pursue the legal question through the courts. But first he wants a definitive ruling from the arbitrator on the meaning of the clause in issue. I feel he is entitled to such a ruling, uncluttered by the arbitrator's speculations about the law.[21]

On the other hand, there is obviously a situation in which the

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[18] *Steelworkers* v. *Enterprise Wheel & Car Corp.*, *supra* note 5.

[19] *Id.*, at 597.

[20] *Ibid.*

[21] St. Antoine, *supra* note 4, at 78-80. See also Meltzer, *The Role of Law in Arbitration: Rejoinders*, in Developments in American and Foreign Arbitration, *supra* note 1, at 58, 59-64.

arbitrator is entitled or even mandated to draw upon statutory or decisional sources in fashioning his award. That is when the parties call for it, either expressly or impliedly. If a contract clause, such as a union-security provision, plainly tracks certain statutory language, an arbitrator is within his rights in inferring that the parties intended their agreement to be construed in accordance with the statute. Similarly, the parties may explicitly agree that they will abide by the arbitrator's interpretation of a statute whose meaning is in dispute between them. In each of these instances, I would say that technically the arbitrator's award implements the parties' agreement to be bound by his analysis of the statute rather than by the statute itself. That distinction may have significant practical implications, as we shall see in a moment. Now, there may be every kind of good reason, as was suggested at last year's Academy sessions, that arbitration should not be saddled with the burden of statutory construction. For me, unless the opponents can persuade unions and employers to refrain from imposing this responsibility, those reasons are beside the point. The choice is the parties', not ours. The only recourse for an adamantly objecting arbitrator is to decline such appointments.

The treatment of an arbitral award by a reviewing court is also clarified by the notion of the arbitrator as a contract-reader. A "misinterpretation" or "gross mistake" by the arbitrator becomes a contradiction in terms. So long as he is dealing with a matter duly submitted to him, the arbitrator is speaking for the parties, and his award *is* their contract. That is what the "final and binding" language of the arbitration clause says. The court thus need have no qualms about enforcing an award that appears to the court to be at odds with the parties' agreement.

There is one principal qualification to the finality doctrine. In agreeing to arbitration, the parties were entitled to assume that the arbitrator would act honestly, that his award would not be tainted by fraud or corruption. A fraudulent award is, of course, not binding.[22] In addition, as will be elaborated in a subsequent section,[23] the court has an independent appraisal to make, after it has accepted the award as the embodiment of the parties' agreement, and before it issues an order enforcing the award. The court must be satisfied that the award is not contrary to law or public policy,[24]

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[22] See Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 UCLA L. Rev. 936, 950-51, 956-57, and cases and statutes cited.

[23] See text accompanying notes 85-95, *infra*.

[24] See R. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining, 593-98 (1976).

and specifically that it does not reflect a union's unfair representation or otherwise constitute an invasion of individual or third-party rights.

One final, perhaps controversial, lesson flows from my theory of the arbitrator as contract-reader. It has previously been assumed, by others as well as by me,[25] that insofar as an arbitrator's award construes a statute, it is advisory only, and the statutory question will be examined *de novo* if the award is challenged in the courts. I no longer think this is the necessary result. As between the parties themselves, I see no impediment to their agreeing to a final and binding arbitral declaration of their statutory rights and duties.[26] Obviously, if an arbitrator's interpretation of an OSHA requirement did not adequately protect the employees, or violated some other basic public policy, a court would not be bound by it. But if the arbitrator imposed more stringent requirements, I would say the award should be enforced. The parties agreed to that result, and their agreement should be accorded the same finality as any other arbitration contract.

Whatever damage may be done to the pristine purity of labor arbitration by this increased responsibility for statutory interpretation,[27] I consider an expanded arbitral jurisdiction inevitable. Such recent statutes as Title VII of the Civil Rights Act,[28] the Pension Reform Act (ERISA),[29] and OSHA[30] are so interwoven in the fabric of collective bargaining agreements that it is simply impracticable in many cases for arbitrators to deal with contractual provisions without taking into account statutory provisions. Since I believe that, as between the parties, the arbitrator's rulings on the law should have the same finality as his rulings on the contract, I conclude, in contrast to the forebodings of my friend Dave Feller, that we are actually entering a new "golden age" for the arbitration process.

III. Background and Development of *Enterprise* Doctrine

A. Statutory and Decisional Sources

As is well known, in Section 203(d) of the Taft-Hartley Act, Congress endorses voluntary arbitration as the preferred, definitive way

[25] Feller, *supra* note 3, at 121-26; St. Antoine, *supra* note 4, at 82.

[26] Although the decisions are somewhat divided, there is clear authority that arbitrators may be made the final judges of law as well as fact, and that awards issued under misconception of the law will be upheld. See Annotation, 112 A.L.R. 873 (1938), and cases cited.

[27] See Feller, *supra* note 3, at 123-26.

[28] 78 Stat. 253 (1964), as amended 42 U.S.C. §§2000(e) *et seq.*

[29] 84 Stat. 1590 (1970), 29 U.S.C. §§651 *et seq.*

[30] 88 Stat. 832 (1974), 29 U.S.C. §§1001 *et seq.*

to resolve disputes over labor contracts: "*Final* adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes over the application or interpretation of an existing collective-bargaining agreement."[31]

Perhaps not so well known is Section 3 First (q) of the Railway Labor Act. In a 1966 amendment, Congress provided that on court review of an award by a division of the National Adjustment Board, which arbitrates contract disputes in the railroad industry, the findings and order of the division shall be "conclusive on the parties," subject only to the following exceptions: "failure of the division to comply with the requirements of this Act, . . . failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or . . . fraud or corruption by a member of the division making the order."[32] Both the Senate and House reports on the 1966 amendment emphasized that judicial review should be limited to "the determination of questions traditionally involved in arbitration litigation—whether the tribunal had jurisdiction of the subject, whether the statutory requirements were complied with, and whether there was fraud or corruption on the part of a member of the tribunal."[33] The statute says nothing about an inquiry into the merits, and the Senate report in particular makes clear that this is precluded. The Senate Labor Committee even rejected "arbitrariness or capriciousness" as a basis for setting aside an award, on the ground "such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed as being arbitrary or capricious."[34] The committee immediately went on, however, to leave the door ajar for some judicial perusal of substance by explaining that it rejected an "arbitrary or capricious" standard "on the assumption that a Federal court would have the power to decline to enforce an award which was actually and indisputably without foundation in reason or fact, and the Committee intends that, under this bill, the courts will have that power."[35]

Despite the manifest difficulties of drawing lines between what is merely "arbitrary or capricious" and what is "actually and indisputably without foundation in reason or fact," I am reluctantly prepared to accept an additional exception to the finality doctrine

[31] 61 Stat. 154 (1947), 29 U.S.C. §173 (d).
[32] 80 Stat. 210 (1966), 45 U.S.C. §153 First (q).
[33] S. Rep. No. 1201, 89th Cong., 2d Sess. 6 (1966); H.R. Rep. No. 1114, 89th Cong., 1st Sess. 3 (1965).
[34] S. Rep. No. 1201, 89th Cong., 2d Sess. 3 (1966).
[35] *Ibid.*

worded somewhat along the latter lines. Besides assuming, in their agreement on final and binding arbitration, that the arbitrator would be untainted by fraud or corruption, the parties presumably took it for granted that he would not be insane, and that his decisions would not be totally irrational. In any event, I do not think it possible to keep courts from intervening, on one theory or another, when an arbitral award is so distorted as to reflect utter irrationality, if not temporary insanity. Indeed, in railroad cases[36] and others,[37] the courts have indicated their willingness to intervene in such extreme circumstances.

The United States Arbitration Act can also be looked to for guidance in actions under Section 301 of the Taft-Hartley Act to review arbitration awards.[38] Section 10 of the USAA authorizes the vacation of awards on such grounds as fraud, corruption, partiality, procedural misconduct, exceeding of power, or absence of a final and definite award.[39] Nothing is said about "gross error"—or even, for that matter, about "utter irrationality" or "contravention of public policy." These omissions are significant, since the traditional common law bases for vacating awards included gross mistake as well as fraud, misconduct, or want of jurisdiction,[40] and since the Uniform Arbitration Act added violation of public policy as a ground for setting aside an award.[41] At the very least, the USAA constitutes further evidence of congressional endorsement of a restrictive approach to judicial review.

B. The Enterprise *Standard of Judicial Review*

Against the background just described, the rules set forth in *Enterprise Wheel*[42] to govern judicial review of labor-arbitration awards seem preordained. Unlike the executory agreements to arbi-

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[36] *See, e.g., Gunther* v. *San Diego & A. E. Ry.*, 382 U.S. 257, 261, 264 (1965) ("wholly baseless and completely without reason").

[37] See cases cited in notes 56-59, *infra*. *Cf. Amoco Oil Co.* v. *Oil Workers Local 7-1*, 548 F. 2d 1288 (7th Cir. 1977) (dissent).

[38] See Judge Wyzanski's opinion in the leading case of *Textile Workers* v. *American Thread Co.*, 113 F.Supp. 137 (D. Mass. 1953), approved and followed in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 451, 40 LRRM 2113 (1957).

[39] 61 Stat. 669 (1947), 9 U.S.C. §10.

[40] D. Ziskind, Labor Arbitration under State Statutes 3 (Washington: U.S. Department of Labor, 1943); Comment, *supra* note 22, at 949-50.

[41] Uniform Arbitration Act §909 (1955).

[42] *Steelworkers* v. *Enterprise Wheel & Car Corp.*, *supra* note 5. Even if preordained, the *Enterprise* rules may well have had a powerful therapeutic effect. As Professor Charles J. Morris of Southern Methodist pointed out following delivery of this paper, many arbitral awards in his part of the country were being contested prior to *Enterprise;* subsequently, they were almost invariably accepted. The Midwest has apparently always been more hospitable to arbitration than the Southwest or the East. See Meltzer, *supra* note 1, at 12.

trate which were at issue in the other two cases of the *Steelworkers* trilogy,[43] and which the courts had come only slowly and grudgingly to hold legally enforceable,[44] there was, as we have seen, a long, strong tradition of judicial enforcement of awards once rendered, without review on the merits.[45] Not surprisingly, then, the Supreme Court in *Enterprise* was prepared to state: "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."[46] The Court spelled out the proper scope of judicial review in these words:

> "Nevertheless, an arbitrator is confined to the 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. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."[47]

Two important points should be noted about the Supreme Court's approach in *Enterprise*. First, the arbitrator is not limited in construing a contract to the four corners of the document. He is justified, for example, in "looking to 'the law' for help in determining the sense of the agreement."[48] The companion *Warrior & Gulf* decision is even more expansive: "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it."[49] Furthermore, insofar as the contract permits, the arbitrator is entitled to take into account "such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished."[50]

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[43] *Steelworkers* v. *American Mfg. Co.* and *Steelworkers* v. *Warrior & Gulf Navigation Co.*, *supra* note 5.

[44] Gregory & Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. Chi. L. Rev. 233, 236-41, 254 (1950). The persistence of judicial hostility to the enforcement of executory agreements is exemplified by *Machinists* v. *Cutler-Hammer, Inc.*, 297 N.Y.S.2d 519, 74 N.E.2d 464, 20 LRRM 2445 (1947), where New York's highest court held that a grievance must be found arguable before arbitration could be ordered. The effect was to require the courts to examine the merits in the course of determining arbitrability.

[45] *See, e.g., Burchell* v. *Marsh*, 58 U.S. (17 How.) 344, 349 (1885) ("If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact"). See also note 13, *supra*.

[46] *Steelworkers* v. *Enterprise Wheel & Car Corp.*, *supra* note 5.

[47] *Id.* at 597.

[48] *Id.* at 598.

[49] *Steelworkers* v. *Warrior & Gulf Navigation Co.*, *supra* note 5.

[50] *Id.* at 582.

The second point to be stressed about *Enterprise* is that, for all its extolling of arbitration and its rejection of plenary review, the Court exhibits an ambivalence about how far it wishes to go in embracing finality. In insisting that an enforceable award must "draw its essence from the collective bargaining agreement," and must not, for example, be based solely upon "the requirements of enacted legislation," the Court plainly appears to authorize *some* substantive examination. This is a risky invitation, because a number of courts will inevitably seize upon any opening to intervene in cases of alleged "gross error" in construction.[51] As if aware of this danger, the Court in the latter portions of its opinion in *Enterprise* returns to the theme of finality and dismisses the argument that the arbitrator's decision was not based on the contract because his interpretation was demonstrably wrong under correct principles of contract law.[52] *Warrior & Gulf* was still more emphatic that "judicial inquiry under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator the power to make the award he made."[53]

Expectably, the lower courts in applying *Enterprise* have reflected the Supreme Court's ambivalence toward finality. In *Safeway Stores* v. *Bakery Workers Local 111*,[54] an arbitrator awarded employees additional pay for 24 hours of unperformed work on the ground the contract guaranteed 40 hours' pay each week, even though the employer's payment for 16 hours in one week resulted from a mere change in pay days and not from any loss of working time. The Fifth Circuit found that the award was based on the terms of the contract, observing bluntly: "[J]ust such a likelihood [of an 'unpalatable' result] is the by-product of a concensually adopted contract arrangement. . . . The arbiter was chosen to be the Judge. That Judge has spoken. There it ends."[55]

On the other hand, many courts feel compelled to test an arbitral award against some minimum standard of rationality. Thus, even the Fifth Circuit in *Safeway Stores* conceded an award should be set

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[51] See text accompanying notes 73-75 *infra*.

[52] *Steelworkers* v. *Enterprise Wheel & Car Corp.*, *supra* note 5.

[53] *Steelworkers* v. *Warrior & Gulf Navigation Co.*, *supra* note 5.

[54] 300 F. 2d 79, 67 LRRM 2646 (5th Cir. 1968).

[55] *Id.* at 84. See also *Electrical Workers (IUE)* v. *Peerless Pressed Metal Corp.*, 489 F. 2d 768, 82 LRRM 3087 (1st Cir. 1973); *Machinists Dist. 145* v. *Modern Air Transport, Inc.*, 495 F.2d 1241, 86 LRRM 2886 (5th Cir. 1974), *cert. den.*, 419 U.S. 1050 (1974); *Oil Workers* v. *Mobil Oil Co.*, 350 F.2d 708, 59 LRRM 2938 (7th Cir. 1965); *UAW* v. *White Motor Corp.*, 505 F.2d 1193, 87 LRRM 2707 (8th Cir. 1974); *Amalgamated Butcher Workmen* v. *Capital Packing Co.*, 413 F.2d 668, 71 LRRM 2950 (1969).

aside "if no judge, or group of judges, could ever conceivably have made such a ruling."[56] It has also been said that the award must in some "rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention,"[57] that the award must not be a "capricious, unreasonable interpretation,"[58] and that it must be "possible for an honest intellect to interpret the words of the contract and reach the result the arbitrator reached."[59]

Despite their unwillingness to let go of irrationality or even capriciousness as a possible basis for vacating an award, the courts are obviously uncomfortable about relying on grounds that trench so closely on the merits. They much prefer to act, as I shall next discuss, on the basis of one or the other of the better recognized exceptions to the deference doctrine.

IV. Qualifications of Deference Doctrine

A. Lack of Arbitral Jurisdiction or Authority

In *Warrior & Gulf*, the Supreme Court demanded an "express provision excluding a particular grievance from arbitration" or else "the most forceful evidence of a purpose to exclude the claim from arbitration" before the presumption in favor of the arbitrability of all disputes concerning the interpretation of the terms of a collective bargaining agreement could be overborne.[60] Nonetheless, the arbitrator remains the creature of the contract, and the parties retain the power to remove such disputes from his purview as they see fit. The electrical industry fought vigorously to restrict the ambit of arbitrable grievances. Thus, where an arbitration clause in an electrical manufacturer's contract explicitly excluded disputes over a merit-pay provision of the labor contract, an arbitrator was held to have exceeded his jurisdiction when he sustained a grievance based on that provision.[61] The parties themselves, of course, may decide whether they wish the question of substantive arbitrability to go to the arbitrator instead of to the court;[62] if their choice is the arbi-

[56] 390 F.2d at 82.
[57] *Ludwig Honold Mfg. Co.* v. *Fletcher*, 405 F.2d 1123, 1128, 70 LRRM 2368 (3d Cir. 1969).
[58] *Holly Sugar Corp.* v. *Distillery Workers*, 412 F.2d 899, 904, 71 LRRM 2841 (9th Cir. 1969).
[59] *Newspaper Guild* v. *Tribune Pub. Co.*, 407 F.2d 1327, 1328, 70 LRRM 3184 (9th Cir. 1969).
[60] 363 U.S. at 585.
[61] *Electrical Workers (IBEW) Local 278* v. *Jetero Corp.*, 496 F.2d 661, 88 LRRM 2184 (5th Cir. 1974).
[62] *Steelworkers* v. *Warrior & Gulf Navigation Co.*, *supra* note 5.

trator, the same limited standard of review should apply to his ruling on arbitrability.[63]

An eminently practical approach for any respondent in arbitration (ordinarily the employer) who believes the arbitrator lacks jurisdiction is to preserve explicitly his challenge to jurisdiction and to declare that his challenge will be presented to a court if there is an adverse decision on the merits. Courts respect such reservations and do not accord the resulting awards the usual presumptions of legitimacy.[64]

An arbitral award is also subject to judicial vacation for want of authority if it reached beyond the boundaries of the "submission," or the statement of the claim as agreed upon by the parties. For example, an arbitrator who is empowered to decide whether an employer has unreasonably increased assembly-line quotas is not authorized to order the parties to negotiate for engineering studies to guide future quota disputes.[65]

Arbitrators are subject to the mandate of the parties, not only with regard to "subject matter" jurisdiction, but also with regard to the capacity to fashion a particular remedy. Frequently, the arbitrator will find in disciplinary cases that the employee engaged in the misconduct alleged, but that the discharge or other sanction imposed is too severe. Most courts will hold that the arbitrator can reduce the penalty in these circumstances, for example, to a suspension of specified length or to reinstatement without back pay. Often the rationale is that the arbitrator properly concluded that the heavier penalty was without "just cause."[66] But if the employer secures a clause denying the arbitrator the power to modify discipline, this will ordinarily be enforced by the courts.[67]

Perhaps the most dramatic illustration of a court's willingness to sustain an arbitrator's remedial powers, despite contractual limitations on his authority to "add to, detract from, or alter in any way the provisions of this contract," is provided by *Steelworkers* v.

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[63] *Steelworkers* v. *United States Gypsum Co.*, 492 F.2d 713, 85 LRRM 2962 (5th Cir. 1974), *cert. den.*, 419 U.S. 998, 87 LRRM 2658 (1974).

[64] *Bakery Workers Local 719* v. *National Biscuit Co.*, 378 F.2d 918, 65 LRRM 2482 (3d Cir. 1967); *Trudon & Platt Motors Lines, Inc.* v. *Teamsters Local 707*, 71 LRRM 2814 (S.D.N.Y. 1969).

[65] *Electrical Workers (IUE) Local 791* v. *Magnavox Co.*, 286 F.2d 465, 47 LRRM 2296 (6th Cir. 1961). *See also Retail Store Employees Local 782* v. *Sav-On Groceries*, 508 F.2d 500, 88 LRRM 3205 (10th Cir. 1975).

[66] *E.g., Machinists* v. *Campbell Soup Co.*, 406 F.2d 1223, 70 LRRM 2569 (7th Cir. 1969); *Lynchburg Foundry Co.* v. *Steelworkers*, 404 F.2d 259, 69 LRRM 2878 (4th Cir. 1968); *Campo Mach. Co.* v. *Machinists Local 1926*, 536 F.2d 330, 92 LRRM 2513 (10th Cir. 1976).

[67] *See, e.g., Amanda Bent Bolt Co.* v. *UAW Local 1549*, 451 F.2d 1277, 79 LRRM 2023 (6th Cir. 1971). *But cf. Painters Local 1179* v. *Welco Mfg. Co.*, 93 LRRM 2589 (8th Cir. 1976).

United States Gypsum Co.[68] Distinguishing Supreme Court precedent restricting NLRB remedies in analogous situations, the Fifth Circuit held that an arbitrator could award wage increases based on his projections of the wage settlement that would have been reached if the employer had not violated its duty to bargain under the wage reopener in a labor contract.

B. Arbitral "Modifications" or "Gross Error"

Collective bargaining agreements often provide that an arbitrator may not "add to, modify, or otherwise alter the terms of this contract." Such language paves the way for what is probably the most troublesome of all assaults on arbitral finality. *Torrington* v. *Metal Products Workers Local 1645*[69] is the classic case. Prior to the negotiation of a new contract, an employer unilaterally announced the discontinuance of a long-standing practice to pay employees for one hour away from work on election day. An arbitrator sustained the union's grievance, finding that the past practice could be terminated only by mutual agreement. The Second Circuit refused enforcement, declaring that "the mandate that the arbitrator stay within the confines of the collective bargaining agreement . . . requires a reviewing court to pass upon whether the agreement authorizes the arbitrator to expand its express terms on the basis of the parties' prior practice."[70] A dissenting judge argued that the court was improperly reviewing the merits, and that the arbitrator was entitled to look to "prior practice, the conduct of the negotiation for the new contract and the agreement reached at the bargaining table to reach his conclusion that paid time off for voting was 'an implied part of the contract.' "[71]

The difficulty is that any time a court is incensed enough with an arbitrator's reading of the contract and such supplementary data as past practice, bargaining history, and the "common law of the shop," it is simplicity itself to conclude that the arbitrator must have "added to or altered" the collective bargaining agreement. How else can one explain this abomination of a construction? Yet if the courts are to remain faithful to the injunction of *Enterprise*, they must recognize that most arbitral aberrations are merely the product of fallible minds, not of overreaching power.[72] At bottom,

[68] *Supra* note 63.

[69] 362 F.2d 677, 62 LRRM 2495 (2d Cir. 1966).

[70] *Id.* at 680.

[71] *Id.* at 683. *See also H. K. Porter Co.* v. *Saw Workers Local 22254*, 333 F.2d 596, 56 LRRM 2534 (3d Cir. 1964); *Teamsters Local 784* v. *Ulry-Talbert Co.*, 330 F.2d 562, 55 LRRM 2979 (8th Cir. 1964). *Torrington* was roundly criticized in Aaron, *Judicial Interpretation in Labor Arbitration*, 20 Stan. L. Rev. 41 (1967); Meltzer, *supra* note 1, at 9-11.

[72] See, *e.g.*, Gorman, *supra* note 24, at 593.

there is an inherent tension (if not inconsistency) between the "final and binding" arbitration clause and the "no additions or modifications" provision. The arbitrator cannot be effective as the parties' surrogate for giving shape to their necessarily amorphous contract unless he is allowed to fill the inevitable lacunae.

"Gross error" is another accepted common law ground for setting aside arbitration awards. In *Electronics Corp. of America* v. *Electrical Workers (IUE) Local 272*,[73] an award was vacated because "the central fact underlying an arbitrator's decision is concededly erroneous." There the arbitrator had assumed, contrary to the evidence as presented to the court, that an aggrieved employee had not been suspended previously by the employer. Similarly, in *Northwest Airlines, Inc.* v. *Air Line Pilots Assn.*,[74] the court refused enforcement of an award which was based on the arbitration panel's mistaken belief that the meaning of "pilot seniority list" in a letter from the company to the union was agreed to by both parties as not including furloughed pilots in addition to active ones. Other courts, however, have been more rigorous in adhering to the *Enterprise* and *Warrior & Gulf* standards. Thus the Third Circuit declared in *Bieski* v. *Eastern Auto Forwarding Co.*:

> "If the court is convinced both that the contract procedure was intended to cover the dispute and, in addition, that the intended procedure was adequate to provide a fair and informed decision, then review of the merits of any decision should be limited to cases of fraud, deceit, or instances of unions in breach of their duty of fair representation."[75]

C. *Procedural Unfairness or Irregularity*

Fraud and corruption are universal bases for invalidating an award. So is bias or partiality, which may consist of improper conduct at the hearing,[76] or an association with one party that is not disclosed to the other.[77]

Much less common is the vacation of an award because of an unfair and prejudicial exclusion or admission of evidence. Hearsay, of course, is ordinarily acceptable in arbitration proceedings, and

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[73] 492 F.2d 1255, 1256, 85 LRRM 2534 (1st Cir. 1974).

[74] 91 LRRM 2304 (D.C.Cir. 1976).

[75] 396 F.2d 32, 38, 68 LRRM 2411 (3d Cir. 1968). See also *Aloha Motors* v. *ILWU Local 142*, 530 F.2d 848, 91 LRRM 2751 (9th Cir. 1976). *But cf. Ludwig Honold Mfg. Co.* v. *Fletcher*, *supra* note 57, at 1128 ("totally unsupported by principles of contract construction").

[76] *Holodnak* v. *Avco Corp.*, 387 F.Supp. 191, 87 LRRM 2337 (D. Conn. 1974), *modified on other grounds*, 514 F.2d 285, 88 LRRM 2950 (2d Cir. 1975).

[77] *Colony Liquor Distributors, Inc.* v. *Teamsters Local 669*, 34 App. Div. 1060, 312 N.Y.S.2d 403, 74 LRRM 2942 (1970), *aff'd*, 28 N.Y. 2d 596, 77 LRRM 2331 (1971).

arbitrators are accorded considerable latitude in their evidentiary determinations.[78] It is the excessively technical, unexpected, and hurtful ruling which is likely to trigger judicial intervention. In the interest of fostering finality, courts will rarely overturn an award on the basis of new evidence not introduced at the hearing.[79]

D. Individual Rights

Professor William P. Murphy will deal generally with the union's duty of fair representation, and I do not wish to poach on his territory.[80] For the sake of completeness, however, I should say a brief word about the effect of a union's breach of that duty upon any subsequent court review of the arbitral award.

It is well established that a union "may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."[81] If a union so violates its duty of fair representation, an adversely affected employee is relieved of the obligation to exhaust grievance and arbitration procedures, and any arbitral award loses the finality it would otherwise possess.

A striking demonstration of this latter principle is *Hines* v. *Anchor Motor Freight, Inc.*[82] Trucking employees were discharged for alleged dishonesty in seeking excessive reimbursement for lodging expenses. The employer presented motel receipts submitted by the employees which exceeded the charges shown on the motel's books. Arbitration sustained the discharges. Later, evidence was secured indicating that the motel clerk was the culprit, having recorded less than was actually paid and pocketing the difference. In a suit by the employees against the employer, the Supreme Court held that the employer could not rely on the finality of the arbitration award if the union did not fairly represent the employees in the arbitration proceedings. Such a rule can hardly be faulted as an abstract proposition. But the results could be mischievous if the courts become too quick to equate a halting, inexpert arbitration presentation by a lay union representative with "bad faith" or "perfunctoriness."

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[78] Gorman, *supra* note 24, at 599-603, and cases cited.

[79] *Id.*, at 601-602.

[80] Murphy, *Due Process and Fair Representation in Grievance Handling in the Public Sector, infra* at Chapter 5.

[81] *Vaca* v. *Sipes*, 386 U.S. 171, 191, 64 LRRM 2369 (1967). *See also Humphrey* v. *Moore*, 375 U.S. 335, 55 LRRM 2031 (1964); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 652, 58 LRRM 2193 (1965).

[82] 421 U.S. 928, 91 LRRM 2481 (1976). *See also Bieski* v. *Eastern Auto Forwarding Co.*, *supra* note 75. *Cf. Railway Express, Inc.*, 145 NLRB 513, 515 (1963); *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082, 36 LRRM 1152 (1955). *But cf. Hotel Employees* v. *Michelson's Food Serv.*, 545 F.2d 1248, 94 LRRM 2014 (9th Cir. 1976).

As will be discussed in the next section, arbitral awards will also be denied finality and will be set aside if they unlawfully deprive individual employees of statutory rights under the National Labor Relations Act, the Civil Rights Act, or other applicable federal or state law.

E. Violation of Law or Public Policy

As I have argued earlier,[83] and as I believe *Enterprise Wheel* itself commands,[84] an arbitrator confronted with an irreconcilable conflict between the terms of a collective bargaining agreement and the apparent requirements of statutory or decisional law should follow the contract and ignore the law. But the parties to *any* contract will not be able to secure judicial enforcement if their agreement is illegal or otherwise contrary to public policy. Similarly, the court will not enforce an arbitral award that either sustains or orders conduct violative of law or substantial public policy.

Such an approach involves no infidelity to *Enterprise*. When a legal challenge is mounted to an award, a court "is concerned with the *lawfulness of its enforcing* the award and not with the *correctness of the arbitrator's* decision."[85] In effect, the court is assuming the soundness of the arbitrator's reading of the parties' agreement, and is proceeding to test the validity and enforceability of the award just as if it were a stipulation by the parties as to their intended meaning.

In entertaining legal challenges to arbitral awards, the courts have had to consider the impact of a wide variety of federal and state laws. These have ranged from the Sherman Act[86] to the anti-kickback provisions of Taft-Hartley's Section 302[87] to state protective legislation.[88] Most often, arbitral awards have been attacked on the ground they approve or direct the commission of an unfair labor practice in violation of the National Labor Relations Act. Despite some forceful argument that a court in such cases should

[83] See text following note 19, *supra*.

[84] *Steelworkers* v. *Enterprise Wheel & Car Corp.*, *supra* note 5.

[85] Quoted in *Botany Industries, Inc.* v. *Amalgamated Clothing Workers New York Joint Bd.*, 375 F.Supp. 485, 490 (S.D.N.Y. 1974), *vacated on other grounds*, 506 F.2d 1246 (2d Cir. 1974) (emphasis in the original). *See also Newspaper Guild Local 35* v. *Washington Post Co.*, 442 F.2d 1234 (D.C.Cir. 1971); *Glendale Mfg. Co.* v. *ILGWU Local 520*, 283 F.2d 936, 47 LRRM 2152 (4th Cir. 1960), *cert. den.*, 366 U.S. 950, 48 LRRM 2323 (1961).

[86] *Associated Milk Dealers* v. *Milk Drivers Local 753*, 422 F.2d 546, 73 LRRM 2435 (7th Cir. 1970).

[87] *Steelworkers* v. *United States Gypsum Co.*, *supra* note 63.

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

defer to the National Labor Relations Board,[89] it is now the general view, I think rightly, that a court ought not to sanction illegal conduct, even though that means it must boldly step into the unfair-labor-practice thicket. After all, federal district courts handle 10(j) and 10(l) cases, federal courts of appeals routinely review NLRB decisions, and state courts are ultimately subject to Supreme Court oversight.

In passing upon unfair labor practices potentially lurking in arbitral awards, the courts have not even shrunk from tangling with the intricacies of NLRA Section 8(e)'s hot-cargo ban.[90] Probably more frequent, however, is the situation where the arbitral award would have a coercive or "chilling" effect on employees' protected activities.[91] The easiest case, naturally, is where the Labor Board has already acted by the time the court is asked to vacate the award. Thus, in *Glendale Mfg. Co.* v. *ILGWU Local 520*,[92] the court refused to enforce an arbitrator's bargaining order against an employer when, shortly after the award was issued, the union was defeated in a Board certification election.

A more nebulous ground for vacating an award is that it is contrary to "public policy." A court must resist the temptation to employ this rubric as a device for asserting its own brand of civic philosophy. Invariably cited as an example of such behavior is the McCarthy-era case of *Black* v. *Cutter Laboratories*.[93] Cutter fired a Communist employee, allegedly because of her party membership. An arbitration panel held the real reason for the discharge was her union activity and ruled this was not "just cause." The California Supreme Court set aside the award, declaring that "an arbitration award which directs that a member of the Communist Party who is dedicated to that party's program of 'sabotage, force, violence and the like' be reinstated to employment in a plant which produces antibiotics . . . is against public policy."[94]

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[89] See Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 Harv. L. Rev. 529, 561-68 (1963), citing *Retail Clerks Locals 128 & 633* v. *Lion Dry Goods, Inc.*, 369 U.S. 17, 49 LRRM 2670 (1962). *But cf.* Aaron, *supra* note 71, at 53; Meltzer, *supra* note 1, at 17, n. 40.

[90] *Compare Botany Industries, Inc.* v. *Amalgamated Clothing Workers New York Joint Bd.*, *supra* note 85, *with La Mirada Trucking, Inc.* v. *Teamsters Local 166*, 92 LRRM 3524 (9th Cir. 1976).

[91] *See Dries & Krump Mfg. Co.* v. *NLRB*, 93 LRRM 2739 (7th Cir. 1976); *Hawaiian Hauling Serv.* v. *NLRB*, 93 LRRM 2952 (9th Cir. 1976).

[92] 283 F.2d 936, 47 LRRM 2152 (4th Cir. 1960), *cert. den.*, 366 U.S. 950, 48 LRRM 2323 (1961). *See also Carey* v. *Westinghouse Elec. Corp.*, 375 U.S. 261, 55 LRRM 2042 (1964).

[93] 43 Cal.2d 788, 278 P.2d 905, 35 LRRM 2391 (1955), *cert. den.*, 351 U.S. 292, 38 LRRM 2160 (1956). *See also Goodyear Tire & Rubber Co.* v. *Sanford*, 92 LRRM 3492 (Tex. Civ. App. 1976).

[94] 43 Cal.2d at 798-99.

Electrical Workers Local 453 v. *Otis Elevator Co.*[95] reflects a more enlightened attitude. An employee was discharged for violating a company rule against gambling after he had been convicted and fined for "policy" trafficking in the plant. The arbitrator found him guilty, but reduced the discharge to reinstatement without back pay for seven months, emphasizing his good work record, family hardship, and other factors. In upholding the arbitral award, the court of appeals observed that the suspension and criminal fine vindicated the state's antigambling policy, and that the reinstatement was in accord with the public policy of criminal rehabilitation. *Otis Elevator*, of course, does not reject public policy as a basis for vacating arbitral awards, but it does caution against an overzealous resort to it.

F. Independent Statutory Claims Following Arbitration

A new dimension was added to the court-arbitrator relationship by the Supreme Court's 1974 decision in *Alexander* v. *Gardner-Denver Co.*,[96] about which so much was heard at last year's Academy meeting. As you all know, the Court held in *Gardner-Denver* that an individual employee whose claim of racial discrimination under a labor contract resulted in an adverse arbitration ruling was not thereby precluded from suing his employer under Title VII of the 1964 Civil Rights Act. The Court emphasized that in the arbitration proceedings the employee was pursuing contractual claims, while in the court suit he was asserting independent statutory rights. Although recognizing the analogy to discrimination charges filed with the NLRB following an adverse arbitral decision on a discrimination grievance, the Court refused to follow the deferral standard adopted by the Labor Board in *Spielberg Mfg. Co.*[97] Instead, the Court concluded that a federal court should consider

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[95] 314 F.2d 25, 52 LRRM 2543 (2d Cir. 1963), *cert. den.*, 373 U.S. 949, 53 LRRM 2394 (1963). See also *Machinists* v. *Campbell Soup Co.*, supra note 66.

[96] 415 U.S. 36, 7 FEP Cases 81 (1974).

[97] 112 NLRB 1080, 1082 (1955) (NLRB will defer to arbitral award when "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act"). In *Electronic Reproduction Serv. Corp.*, a 3-2 Board majority extended the deferral doctrine in discipline cases to unfair-labor-practice issues that would have been, but in fact were not, submitted to the arbitrator. *But cf. General American Trans. Corp.*, 228 NLRB No. 102, 94 LRRM 1483 (1977), *overruling National Radio Co.*, 198 NLRB No. 1, 80 LRRM 1718 (1972), and thereby abrogating the *Collyer prearbitration* deferral doctrine insofar as it applied to individual §8(a)(1) and (3) coercion and discrimination charges. For the time being at least, the Board will continue the *Collyer* policy of deferring to contractual arbitration machinery in §8(a)(5) unilateral-action cases. *Roy Robinson Chevrolet*, 228 NLRB No. 103, 94 LRRM 1474 (1977), following *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971).

the employee's Title VII claim *de novo*. The Court added, however, that the "arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."[98] This qualification was elaborated on in the now-famous footnote 21, which stated, *inter alia*: "Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record."[99]

The *Gardner-Denver* distinction between deference in NLRA cases and nondeference in Title VII cases seems supportable on at least two grounds. First, racial discrimination (as well as religious and sex discrimination) presents peculiarly sensitive and difficult problems. Their solution has received the highest priority. Second, the NLRA deals essentially with collective rights, while Title VII deals essentially with individual rights. It therefore is more appropriate that a union and an employer should be able to make a final and binding settlement, or provide for its equivalent through arbitration, with regard to collective rights than with regard to individual rights. A court of appeals, in *Satterwhite* v. *United Parcel Service, Inc.*,[100] relied on both these points in declining to examine *de novo* under the Fair Labor Standards Act certain wage claims that had previously been the subject of an adverse arbitration award.

None of this bears directly on judicial review of arbitral awards. But *Satterwhite* surely suggests a receptivity to enforcement of awards involving statutory issues, at least "when the arbitral and judicial proceedings arise out of, and must be decided on, the same factual background."[101] Even on Title VII questions, which may be *sui generis*, I find myself more inclined to side with Ted Sachs[102] than with Harry Edwards[103] or Bernie Meltzer[104] concerning arbitrator participation—always assuming, of course, the implicit or explicit authorization of the parties. Even though the arbitration award on a Title VII issue cannot be conclusive, nor even technically entitled to "deference," it may end the dispute. The employee

[98] 415 U.S. at 60.

[99] *Id.*, at 60, n. 21.

[100] 496 F.2d 448, 450-51 (10th Cir. 1974), *cert. den.*, 419 U.S. 1079 (1974). The result in *Satterwhite* may well be erroneous, but that is immaterial for my purposes.

[101] 496 F.2d at 451-52.

[102] Sachs, *Comment—The Coming End of Arbitration's Golden Age*, in Arbitration—1976, *supra* note 3, at 127, 130-31.

[103] Edwards, *supra* note 2.

[104] Meltzer, *Arbitration and Discrimination—The Parties' Process and the Public's Purposes*, in Arbitration—1976, *supra* note 3, at 46.

may prevail. Or the evidence adduced may be so overwhelming that the employee concedes. At any rate, in the usual discharge or disciplinary case, it would be highly artificial, if not impossible, for the arbitrator to separate out Title VII considerations if race or sex or religious discrimination is one of the grievances under the contract. I hear the objections to arbitrators' legal competence, and I have mouthed them myself on occasion, but I think they are make-weights, at least in the civil rights area. "Discrimination" is a simple concept, however subtle and elusive; it is not the Internal Revenue Code. To paraphrase Justice Holmes, the only reason the courts look so smart in dealing with it is that they come along at a later stage in the decision-making process. If an arbitrator had ever come up with *Washington* v. *Davis*,[105] the Supreme Court decision restricting the "effects" test to Title VII cases and requiring invidious intent in constitutional cases, the critics would have stoned him (or even her).

Court decisions subsequent to *Gardner-Denver* confirm that arbitration of civil-rights discrimination claims is not a futility. In *EEOC* v. *McLean Trucking Co.*,[106] for example, the Sixth Circuit held that a successful grievant may not accept the arbitration award and then sue for additional private benefit. He may, however, profit along with other employees from any changes secured by the EEOC in a suit brought on the grievant's charge for the public benefit. And in *Swint* v. *Pullman-Standard*[107] a federal district court in a suit under the 1866 Civil Rights Act was persuaded in part by the arbitration award that the discharge of one employee and the suspension of another were not racially motivated. Similarly, in *Communications Workers* v. *Mountain States Telephone & Telegraph Co.*,[108] a federal district court gave heavy weight to a decision by arbitrator Harry Platt[109] in working out a delicately poised accommodation between an affirmative-action "override" in a consent decree and the seniority system in a collective bargaining agreement.

G. Postscript on the Public Sector

It was not my design to deal with judicial review of grievance arbitration in the pubic sector. But I have an exceptionally conscientious research assistant, and she provided me with digests cover-

[105] 96 S.Ct. 2040, 12 FEP Cases 1415 (1976).
[106] 525 F.2d 1007, 11 FEP Cases 833 (6th Cir. 1975).
[107] 11 FEP Cases 943 (N.D.Ala. 1975).
[108] C.A. No. 75-P-245 (D. Col. Jan. 14, 1977).
[109] *Mountain States Telephone & Telegraph Co.*, 64 LA 316 (Platt, 1974).

ing public-sector cases during the past year. I think I should provide you with one interesting set of statistics, however crude they may be. They bear out the observation made several years ago by that trio of eminent scholars, Russ Smith, Harry Edwards, and Ted Clark:

> "To date in those few cases where the issue has arisen, the courts have shown an inclination to apply the same standards as are utilized in reviewing private sector awards. . . . There is, however, some reason to believe that the courts will be somewhat more active in reviewing the merits of arbitration awards in the public sector granting economic benefits."[110]

In a cross section of 38 public-sector cases examined, the arbitral awards were enforced in only 18, or less than 48 percent. By contrast, during the same period, enforcement was granted for 26 of 39 awards in the private sector, or 67 percent. I should emphasize that these were not genuine samplings, but simply a collection of the more significant decisions. I suspect that a more comprehensive selection would indicate a higher rate of enforcement in both categories—unless only the more dubious awards are being challenged. Still, there seems a definite tendency toward a more searching review in the public sector, even on the part of courts purporting to follow the "essence test" of *Enterprise Wheel*.[111] This accords with the prognosis that the courts would pay more heed to public policy when examining awards involving public employers.[112]

V. Conclusion

The grievance arbitrator is the parties' designated, definitive reader of their labor contract. What he reads is, by reason of their agreement and not any peculiarity of the collective bargaining process, what they meant to write. "Gross error" or "misinterpretation" by this reader is a contradiction in terms. An award is other than the parties' own putative agreement only if the arbitrator is untrue to his charge, or dishonest, or unfair, or perhaps totally irrational. An arbitrator must find the essence of his award in the parties' agreement, but that may include, implicitly or explicitly, an authorization for him to draw upon a range of other sources, including statutory and decisional law.

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[110] R. Smith, H. Edwards, and T. Clark, Labor Relations Law in the Public Sector: Cases and Materials 943-44 (1974), and cases cited.

[111] *See, e.g., Leechburg Area School Dist.* v. *Leechburg Educ. Assn.*, 92 LRRM 2368 (Pa.Comm.Ct. 1976).

[112] My compilation was not confined to awards granting economic benefits, but this merely suggests that the Smith-Edwards-Clark thesis would be confirmed *a fortiori*.

A court asked to review or enforce an arbitral award can relax about the merits. By definition, the award *is* the parties' stipulated, adopted contract. The only conditions are procedural, not substantive—jurisdiction, authority, honesty, fairness, and basic rationality. Before granting enforcement, the court ordinarily need only concern itself with the legality of the award, just as it would have to concern itself with the legality of any contract. The only exceptions are when substantial rights of third parties, such as individual employees, intervene. Unfair representation by a union may invalidate an award. An arbitral award cannot bar a suit based on a highly sensitive, individual, independent statutory right, such as the right to be free from racial, sexual, or religious discrimination. But in the absence of some adverse impact on such individual rights or on third parties, an arbitrator's interpretation of either contract or external law should have the same finality as between the union and the employer.

If it is true in any sense that we are leaving behind a golden age, it is only in the sense that we may be exchanging the primitive simplicities of ancient Greece for the sophisticated glories of the High Renaissance.

Comment—

WALTER L. ADAMS*

Approximately 17 years have passed since David Feller scored his "hat trick" in Washington. Following that fateful day, we have watched the various circuits wrestle with Mr. Justice Douglas's rhetoric, and as the circuits came forth, one by one, the commentators commented and have continued to comment over the years. *Enterprise Wheel* has received so much attention during the years that, when asked to participate in these proceedings, I harbored some reservation as to whether anything meaningful was to be added to what has already been said. I need not have worried. Ted St. Antoine has again provided us with a presentation possessing depth and insight—one that I can agree with, in part, and take issue with, in part.

I was a young labor lawyer when the *Steelworkers* trilogy[1] came

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[1] *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 591, 46 LRRM 2423 (1960).

down. My youth and inexperience at the time are best revealed by my recollection of my initial reading of those decisions. As I went through *American Manufacturing,* into *Warrior & Gulf,* and then *Enterprise Wheel,* I found myself more enthralled with what Mr. Justice Douglas had to say about arbitrators and less interested in what he had to say about arbitrability and judicial review of awards. Having been to my first National Academy meeting just a few months earlier, I knew that, indeed, you were entitled to every plaudit he bestowed upon you. Alas, shortly thereafter negotiations and arbitration cases assumed a dominant role in my professional life, and another myth was dispelled. The warts appeared, and you became mere mortals working the same vineyards as the rest of us—fortunately possessed of integrity, diligence, and intellectual honesty, but readily capable of mistake.

The difficulties experienced with some of the language of the trilogy, and particularly *Enterprise Wheel,* have been explored in depth by Ted St. Antoine. He has provided a thorough review of *Enterprise* and its progeny, highlighting and analyzing the nuances, shadings, and inconsistencies of the developing case law. However, I believe that he has left us with a thought—a theme, if you will—of much greater importance than mere recitation of what the cases are saying.

Ted has done us a great service today by returning to the basics. For far too long, discussion and debate have flourished concerning labor arbitration—not only, as Ted suggests, the scope of matters entrusted to arbitrators and the scope of judicial review, but also the proper scope of the arbitrator's function and his award without regard to judicial-review implications.

He sends us back to square one—the particular contract of the particular parties. The arbitrator becomes "officially designated reader of the contract." I find the ring to that phrase very attractive. If the parties intend that the arbitrator's award be "final and binding," then, absent narrow exceptions, it should not be disturbed by the courts. Under those circumstances, judicial restraint should be exercised. To show such deference to the parties' expressed intent and to treat the award as if "it were a written stipulation by the parties setting forth their own definitive construction of the labor contract" is laudable.

However, the call for judicial restraint consistent with the intent of the parties to the contract has its requisite concomitance—arbitral restraint consistent with the intent of the parties to the contract. When I received Ted's paper a while ago, I looked for a clear

call for arbitral restraint. Instead of finding it, I found a summary of Dave Feller's thoughtful paper presented last year and, from this summary, the following metaphor sprang out at me: "The arbitrator's award is not so much an interpretation of the collective bargaining agreement as an organic extension, a fulfillment, a flowering of the seed it planted. The standards governing the arbitrator's typical award under a collective bargaining agreement are at least as much process oriented as substance oriented."

When I read that, I realized that all those "industrial doctors" posing as arbitrators I've been attempting to avoid all these years have been transformed, without my knowledge, into "industrial horticulturists." And, to complete the metaphor, we are plunged back into the thicket.

The key to judicial deference is found in the parties' agreement on such treatment. If that is the "measure of their legal expectations," may they not expect at least as much from the contractually created creature chosen to "read the contract," the arbitrator? Must they be burdened by the outside influences, however well-meaning, constantly lumping all agreements into one and referring to them as "generalized codes"—forever cautioning the arbitrator that he or she was chosen because of his/her knowledge of "shop and industry practices" (thus implying, I assume, that they somehow should influence the award), when, in fact, the parties have agreed to submit disputes "involving the interpretation or application of the Agreement" to the arbitrator? And the agreement mandates, in typical fashion, that he shall not "add to, subtract from, or in any way modify the Agreement." I don't think it presumptuous to suggest that the parties know what they want the arbitrator's function to be. When they state that they do not want him adding to the contract, can we not accept that as fully as their stated intent concerning finality of the award? The "add-to, subtract-from" prohibition is commonly found. That does not relegate it to the cliché or bromide category. What it should do is indicate the specific desire of the parties and what they expect of the arbitrator. Some apparently dismiss it as being too vague for serious literal consideration. I submit that it is as susceptible to literal interpretation as the term "final and binding."

My experience is generally with clients whose bargaining relationships provide for ad hoc arbitration. I have no idea of how numbers compare between ad hoc arbitration cases and permanent-umpire cases, but I know there is a lot of ad hoc arbitration taking place. Even where arbitration is common at a particular

location, the parties often opt in favor of a new selection for each case. At a very minimum, in the ad hoc situations, I believe the parties have every right to expect arbitral restraint consistent with the total contract. The prohibition against "adding to or subtracting from the contract" should be recognized by the arbitrator with a vigor at least equal to that expected of a reviewing court when it sees the "final and binding" language. When an arbitrator chooses to find a violation based on an alleged practice not covered by the contract, and *Torrington*[2] or its progeny upsets it as an addition and beyond the arbitrator's authority, I shall not see it as a threat to the arbitration process or as doing violence to *Enterprise Wheel.*

I bow to no one in recognizing the importance of judicial restraint. I accept the reason advanced by Ted: it is the intent of the parties. However, for the same reason, I recognize the need for arbitral restraint. In the main, that is the parties' intent and is expressed by the parties in their agreement. I believe that a cessation of the intellectualizing on the role of the arbitrator and his sources, with an accompanying suggestion to look to the particular contract of the particular parties for his role, will alleviate your concerns about the courts in short order.

However distressing it may be to some that a federal court, in fact, reviews the merits of an award, or grants it something less than the finality we might like to see attached to it and does so under the guise of some standard of reasonableness or "abuse of authority," I do not share the degree of concern expressed by Dean St. Antoine and others. Basically, my experience tells me that the failure of federal courts to give full vent to the rhetoric found in *Enterprise Wheel* is not sounding the death knell for the arbitration process in the United States. As a practical matter, it is fair to describe the number of awards challenged in court as being minuscule. On a personal note, I have tried many arbitration cases during the past 17 years. I have yet to represent a client in court where we are attempting to vacate an award or where enforcement is being sought. Only once have I been called upon when a union attempted to vacate an award received by a client. This is not to say that challenges have not been considered. Awards have been reviewed where one could argue that the award is "dead wrong," and perhaps under standards being employed in a particular circuit, a reasonable chance of prevailing might exist. However, any responsible party to a collective bargaining agreement, and its counsel, have

[2] *Torrington Co.* v. *Metal Products Workers,* 362 F.2d 677, 62 LRRM 2495 (2d Cir. 1966).

many other factors to consider in making a decision as to whether judicial review should be sought. I am certain that there are many lawyer guests here today who beat no path to the courthouse in an attempt to destroy the finality of an award. It is expensive, and it may have a debilitating effect on the relationship with the other party. In addition, once you get by the initial emotional trauma of an award revealing a constitutional inability to keep a man discharged and the order to reinstate for "one more chance," most awards are not, on balance, that important in the overall scheme of things. To be sure, there are many that are, but somehow, in most instances, the parties survive the award without a challenge.

Perhaps I take slight liberty with the word "progeny," but I read it to encompass not only the court decisions that have been spawned by *Enterprise Wheel,* but also the many speeches, law-review articles, and general comments dealing with the arbitration process and judicial review. A common theme found throughout most of the comments has been the feeling that certain reviewing courts have overstepped the bounds of *Enterprise Wheel* and in some way not respected the finality that should be accorded the award itself under the *Enterprise* doctrine. It is not surprising that reviewing courts have had difficulty in applying the *Enterprise* standard. The language of *Enterprise* itself renders it susceptible to such confusion. At one portion of the decision we are told "the refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."[3] At that juncture it would appear that there was little that would disturb the finality of the arbitrator's award. However, one page later we find the Court saying: "When the arbitrator's words manifest an infidelity [to the essence of the collective bargaining agreement] courts have no choice but to refuse enforcement of the award."[4] And then "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."[5] I do not suggest that the right hand took away what the left hand had granted. However, I do suggest that a degree factor was

[3] 363 U.S. at 596.
[4] 363 U.S. at 597.
[5] *Ibid.*

put in at that point and provided the cornerstone for the varying standards applied by the different circuits.

I think it a fair statement that most of the commentators have found the ever-present judicial intervention to be a disturbing factor. However, it is not shared to the same degree by all. Some ten years ago in a talk to this body, Bernard Meltzer commented:

> "The exercise of some judicial responsibility for the results to be enforced seems to me not only inevitable but desirable from the standpoint of arbitration. I do not, of course, mean to suggest the desirability of frequent recalcitrance by the losing party and frequent appeals to the courts. Arbitration is already sufficiently expensive and slow. But the prospect of responsible, albeit limited, judicial review, even though rarely resorted to, is likely to deepen the arbitrator's sensitivity to the admonition in *Enterprise Wheel* about the sources of his authority. The existence of a judicial check on arbitral aberrations is, moreover, likely to make the parties, and especially employers, more willing to agree to arbitration clauses, without demands for exclusion clauses that multiply issues in negotiations. Finally, such review would presumably promote clearer and better-reasoned opinions by arbitrators. In short, I am suggesting that limited judicial review in this context would have its customary institutional values.
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> "There are serious risks, as well as substantial values, involved in even such drastically limited judicial review. The overriding risk is, of course, unenlightened, heavy-handed, and excessive intervention. But that risk is much smaller than it was a generation ago, because of the work of this Academy, because of the emphasis the Supreme Court has given to the values of arbitral autonomy, and because the parties generally realize that such values are jeopardized by excessive reliance on the courts. Indeed, in the Midwest long before the trilogy the parties rarely challenged an award . . . ."[6]

If one seeks out a theme common to virtually all of these promulgations—at least the ones I have seen or heard—there is the emphasis on the therapeutic value of the grievance procedure and any resulting arbitration. To be done with dispatch and finality serves the parties well. In fact, Ted St. Antoine wrote some 13 years ago: "Ordinarily, if industrial harmony and productivity are to be maintained, a swift and inexpensive disposition of any grievance is at least as important as a 'correct' disposition of it."[7] In the same article, in describing the scope of judicial review, he wrote (quoting extensively from *Warrior* and *Enterprise Wheel*):

> "An arbitrator's award is invalid unless it 'draws its essence from the collective bargaining agreement'; even legislation cannot be relied upon

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[6] 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), at 12.

[7] St. Antoine, *Contract Enforcement and the Courts,* 15 Lab. L. J. 583, 587 (1964).

> except for 'help in determining the sense of the agreement.' Apart from that, however, an arbitrator's decision is not subject to judicial review on the merits. Nor need an arbitrator point to an express provision of the contract in deciding a controversy or in fashioning a remedy. This is in keeping with the concept of the labor agreement as a 'generalized code,' which cannot possibly anticipate and deal specifically with every problem that may arise in the industrial community. The arbitrator can thus base his award on what the contract impliedly incorporates: the continually developing body of industrial common law—the practices of the industry and the shop."[8]

My concern with such quotes is that what commences as a dissertation on the outer limits of protection for the finality of an award inevitably slips into a philosophical exercise on the method of rendering an award and, essentially, what an arbitrator should do. *Warrior* and *Enterprise Wheel* speak in this manner. Commentators have picked up on it. It is one thing to tell an arbitrator that he may look to the practices of the industry and the shop and so long as his award draws its "essence" from the contract, his award will not be overturned. It is another thing to tell him that he possesses greater expertise than the judge, that he is chosen for his knowledge of the common law of the shop, that a swift and inexpensive disposition of any grievance is at least as important as a "correct" disposition of it, and that he should look to the practices of the industry and the shop. I think it imperative that a clear distinction be drawn between that which withstands judicial interference and that which guides an arbitrator in reaching a decision.

Five years ago, in Boston, Tom Christensen delivered a paper before this group dealing with judicial review of arbitration awards.[9] At that time he pointed out that the trilogy granted "imposing if not frightening authority to the arbitrators."[10] He further stated that the "obligation to observe contractual limits on our authority is made as much a moral as a legal restraint because we exist as adjudicators of a dispute only because of the full or reluctant trust of the parties that we shall serve within the limits of authority which they, and they alone, grant us."[11] I delight in finding such quotes. They are all too rare and ofttimes become lost in the wealth of material critical of a court decision vacating a "dead wrong" arbitration

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[8] *Id.*, at 586.

[9] Christensen, *The Disguised Review of the Merits of Arbitration Awards*, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1973), 99.

[10] *Id.*, at 111.

[11] *Id.*, at 112.

award. The virtue of one concept need not necessarily be at the expense of the other.

Let me not extend beyond my own experience. Arbitration is alive and well and living throughout the U.S. However, many good, experienced arbitrators have left us. The system grows and names that are unfamiliar appear on arbitration panels. The experience level of those listed may be very limited. In some cases, all of the names on the panel are unfamiliar. What are they reading to prepare for the rigors of an arbitrator's life? What guides do they look to? In typical lawyer fashion, let's answer the question with a question: "What do the parties look for in selecting an arbitrator?"

Again, my experience is with clients and relationships generally devoid of master agreements and permanent umpires. I am in the ad hoc area. To the best of my recollection, I have never advised the selection of an arbitrator because of his knowledge of the shop or industry. There are arbitrators here today, and others, that would be recommended by me for any kind of case, regardless of issue. Their integrity and intellectual honesty recommend them without regard to the industry or the particular shop. They will rule consistent with their authority and the intent of the parties as revealed by the agreement.

With the great influx of new arbitrators, coming from all walks of life, the doctrine of arbitral restraint is imperative. The collective bargaining relationships of the 1970s are more sophisticated than those of earlier years. Sophistication will continue to increase. For too long arbitrators have been told by others what they should look to. They have been told by authorities on college campuses that they should fill in the gaps—rule making, if you will. "Help the parties flesh out what they forgot."

What they should be told is that the source, and the only source, to look to is the parties themselves. What do they want and expect of an arbitrator? How do they define a "labor contract"? What is their bargain—the product of their negotiations? The parties who sit down at the bargaining table today are not the neophytes that they may once have been, if at all. Whether a company and union are represented by trained labor counsel, a personnel manager, plant manager, business agent, or an international or staff representative, each is familiar with labor agreements. They have some familiarity with arbitration law, and they have the familiarity with the shop practices that they may wish to codify in one way or another within a labor agreement. For example, the union representative is fully familiar with restrictions on subcontracting. He has seen

dozens and dozens of clauses that restrict it in one form or another. The company representative knows how to thwart those, and if it's necessary to capitulate in one area or another, he will do it in the way that he thinks is proper and, hopefully, is agreeable to the union. The union representative knows how to request a past-practice clause into the contract if he so desires. If a company representative is concerned about side agreements coming back to haunt, and is not satisfied with present limits on the arbitrator's authority, let him look to an entire agreement clause to buttress his position. With that knowledge, arbitrators should be extremely careful when they start delving into the thickets of recognition clauses, seniority clauses, and job classifications, in order to start implying certain restrictions on the company's right to manage where there is no express limitation. Any claim of restriction must have firm foundation in the contract. When the parties use the phrase, "Don't add to or subtract from, and don't modify the agreement," they really believe there is some meaning to that.

In the early sixties, a rather large brouhaha existed over subcontracting. Where contracts were silent, arbitrators were encouraged to imply limitations arising from seniority clauses, recognition clauses, wage articles, job classifications—and many subscribed to such approaches. At that time, a case came before the late Marion Beatty, and he was urged to adopt one or more of these. He rejected such contentions and wrote with clarity concerning the functions of an arbitrator and arbitral restraint. I believe the long-term vitality of arbitration in a healthy, productive industrial society would be well served by close adherence to his words:

> "In grievance arbitrations, arbitrators are employed to interpret contracts, not to write them, add to them or modify them. If they are to be modified, that has to be done at the bargaining table. If this Union is to have 'jurisdiction over work,' it must obtain this at the bargaining table in language which fairly imparts this.
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> "Arbitrators are not soothsayers and 'wise men' employed to dispense equity and goodwill according to their own notions of what is best for the parties, nor are they kings like Solomon with unlimited wisdom or courts of unlimited jurisdiction. Arbitrators are employed to interpret the working agreement as the parties themselves wrote it.
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> "I am not unmindful that some arbitrators have read contracting-out restrictions into contracts containing no clear statements on the subject. In contract interpretation, we are trying to ascertain the mutual intention of the parties. We must be guided primarily by the language used. Admittedly, certain inferences may be read into it, but they should be only those inferences which clearly and logically follow from the language used and which reasonable men must have mutually intended. To go far afield in search of veiled inferences or ethereal or celestial fac-

tors is a mistake. I believe Labor contracts are much more earthly; they are not written in fancy language purposely containing hidden meanings.

"When an arbitrator finds that the parties have not dealt with the subject of contracting-out in their working agreement, but that the employer is nevertheless prohibited from contracting-out (a) unless he acts in good faith; (b) unless he acts in conformance with past practice; (c) unless he acts reasonably; (d) unless his act does not deprive a substantial number of employees of employment; (e) unless his acts were dictated by the requirements of the business; (f) if his act is barred by the recognition clause; (g) if his act is barred by the seniority provisions of the working agreement; or (h) if his act violates the spirit of the agreement, the arbitrator may be in outer space and reading the stars instead of the contract."[12]

Perhaps I am beating a dead horse. However, again let me suggest to you that new arbitrators coming into the field must understand the admonition that "the arbitrator will not add to, subtract from, or modify this agreement" has meaning. If the new faces in arbitration do not understand this—if they, in effect, take seriously the rhetoric of the past two decades—if they continue to blur the distinction that must be drawn between judicial-review standards and arbitral restraint, then the real progeny of *Enterprise Wheel* will be the loss of confidence in the arbitration process. And the cause will not lie at the courthouse steps. An award should be "final and binding." However, equal billing must be given to the mandate that the arbitrator is not there to dispense his own brand of industrial justice. Arbitral restraint, judicial restraint: the scope of both should be determined by the "particular contracts of particular parties." If arbitral restraint commands equal billing, consistent with what the parties want, another visit to *Enterprise* and its progeny will be avoided.

Comment—

HAROLD KATZ*

I'm not sure I'll be able to give anybody's slant but my own on Dean St. Antoine's paper. As he indicated, he delivered his paper to me last evening, and as he also indicated, I had been badgering him for it.

I don't think he understood why I had been badgering him for

[12] *American Sugar Refining Co.*, 37 LA 334, 337-38 (Beatty, 1961).

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the paper. Early in my legal career, I heard a story about Mr. Justice Cardozo that is particularly appropriate in this regard. Cardozo said late in life that when he was on the New York Court of Appeals, he had to adopt a unique policy to guard against the triumph of error in the hearing of cases that involved the State of New York. Charles Evans Hughes was then the Attorney General of New York who argued the cases on behalf of the State of New York in the New York Court of Appeals. Mr. Justice Cardozo said that Hughes's eloquence was so overwhelming, his style so moving, that Cardozo made it a firm practice to allow at least 48 hours to pass following oral argument before making any judgment in his own mind about a case Hughes argued lest justice lose out to brilliance.

Professor St. Antoine, you see, has once again demonstrated his genius by making it impossible for me to exercise that judicial restraint that Walt Adams spoke about, as exemplified by Mr. Justice Cardozo, by not delivering his paper to me until last night!

It is entirely appropriate and in keeping with the spirit of the times that the Academy is here engaged in going back to its roots in understanding, finally, the meaning of the "holy trilogy." As long as the judgment draws its essence from the works of Mr. Justice William O. Kunte Kinte, then we know that we have truly found our roots.

My roots go back a long time with Professor St. Antoine—longer perhaps than anyone here unless he happened to have brought his mother along. And with Walt Adams, it was interesting that Ray Goetz mentioned the *Acme Industrial* case. Our firm was on the other side of that case. The interesting thing is that our clients won the case, but the employer closed the plant down. There may be a lesson in all that for you philosophers who believe in judicial and union restraint.

Last year Professor Feller summed up his views on this problem under the compelling title, "The Coming End of Arbitration's Golden Age." He said, "Thus, the very special status that courts have awarded arbitrators has little to do with speed or informality or, indeed, the special expertise of arbitrators." The status, he said, derives from a not always explicitly stated recognition that arbitration is not a substitute for judicial adjudication, but a part of the system of industrial self-government. Feller went on to conclude that with the plethora of laws being passed affecting employees and the employment relation, as he put it, "The golden age of arbitration will indeed come to an end. Labor arbitrators will become junior adjudicators who should, perhaps, be given a first crack at diffi-

cult problems, but whose decisions must always be subject to correction and review by the authorities properly charged with interpreting and applying the law."

Here today Dean St. Antoine has rejoined, with the major part of his paper appearing under the heading, "The Arbitrator as Contract 'Reader' and the New Golden Age." I understand the essence of St. Antoine's response to be as follows: First, he agrees with Feller that the special status that courts have awarded arbitrators has little to do with the speed or informality of the process, or with the special expertise of arbitrators. However, unlike Professor Feller, who believes that the special status of labor arbitration derives from the fact that it is part of a system of self-government, Dean St. Antoine believes that the explanation for the courts' deference to the arbitral process is to be found in the fact that the parties have made the awards final and binding under the collective bargaining agreement, and thus the courts, who are in the business of enforcing contracts, give effect to those awards.

I agree with Dean St. Antoine's penetrating observation that the special status of labor arbitration under the law derives from the finality that the parties themselves have attached to the process by contract. However, the notion, in Mr. Feller's words, that the special status has little to do with speed or informality or the special expertise of arbitrators may be somewhat misleading. These are the special qualities that have caused the parties to include arbitration in their system of self-government—in Mr. Feller's framework—and to consent willingly to the finality to which Dean St. Antoine points. These qualities of speed, informality, and expertise account for the finality by consent of labor arbitration.

Mr. Feller, in support of his thesis, argues that small claims courts are more informal than labor arbitrations, and injunction proceedings speedier. Moreover, Feller argues, occasional arbitration proceedings are not simple, but complex, while some adjudicators, like NLRB members, are as well or better versed than the average labor arbitrator.

Each of Professor Feller's remarks is correct, but it still remains a fact that small claims courts don't hear grievances; equity courts are not available to do this either, nor are members of the NLRB available to hear grievance cases. While an occasional arbitration hearing may be insufferably long, by and large the arbitration process is still the best and speediest one available for doing the absolutely essential job of adjudicating grievances.

Dean St. Antoine opened his paper with the quotation that logic

is not the life of the law. I have not had a chance to check this out, but unless my memory fails me, the essence of the whole quotation of Holmes from which that portion is extracted was that the life of the law has not been logic, but experience. The experience of labor and management in the United States with labor arbitration has been very favorable.

The experience has also been that only once in a blue moon has an award come down that has been successfully contested in the courts. That rare case has only served to point up how usual is the pattern of voluntary compliance by the parties with labor arbitration awards in the United States. I understood Mr. Adams, in his critique, to say that in 17 years of very active practice, he had only gone to court once to seek to upset an award. That's *really* an endorsement of the quality of the work of labor arbitrators in the United States.

I find myself in agreement with Dean St. Antoine's thesis that the job of an arbitrator is to interpret and apply the particular agreement. That is the job he was selected to do by the parties. However, unlike Mr. Adams, who finds the ring of this phrase attractive, I am not enamored of Mr. St. Antoine's selection of the word "reader" to describe the labor arbitrator's role in the process of getting there. I hope I am not being picayune about a word, or overly sensitive because, when I was a young man, my parents were disappointed to find I preferred *The New Republic* to *Reader's Digest*. My concern is that the word "reader" masks the adversary nature of the arbitrator's role. Before the issue reaches the arbitrator, the parties have already exhausted their efforts at conciliation; they have had a chance to think together, to reason together, to talk together, and to scream at each other—all without success, apparently, or they wouldn't be where they find themselves.

I don't think anything is added by calling a person who is to decide the law of the contract as applied to that grievance a "reader." He is really a judge, conducting a bench trial in a case where the parties have entered into a stipulation not to appeal. And from the point of view of the process, I see little difference between whether the document being interpreted is a collective bargaining agreement or a statute.

I am with Dean St. Antoine in his strong criticism of court reviews of the merits of arbitration awards. The parties have selected the arbitrator precisely for the purpose of applying the agreement. I warm to his conclusion that in this situation, gross error or misinterpretation is a contradiction in terms. Then, however, there is this

sentence in his conclusion, and I quote: "An award is other than the parties' own putative agreement only if the arbitrator is untrue to his charge, or dishonest, or unfair, *or perhaps totally irrational*" [emphasis added].

It has snuck in again by the back door, but it is there, notwithstanding! If alleged irrationality is a ground for setting aside an award, then the award is not final and binding if the court concludes that it was "irrational." This, also, with regard to the question of who is to decide whether the award adds to or subtracts from the contract. This is precisely the function of the arbitrator.

What is more, if rationality is going to be the test of anything, what sense does it make to set aside an arbitrator's award because his opinion or decision manifests an irrational treatment of the problem, and yet accord enforceability, as we do, to an award without an opinion?

I do understand the concern of the courts over immunizing arbitrators from any kind of review, but they really have to understand that providing such a review circumvents the clear language of the agreement as to finality. Arbitrators who are, in fact, irrational will not survive long with parties who are not irrational. Moreover, in the total picture, the important thing is that the grievance be speedily resolved, not how it is resolved, but that it be resolved—except, of course, for those cases involving our office!

At one point Dean St. Antoine states that an eminently practical approach for a respondent in arbitration who believes the arbitrator lacks jurisdiction is to preserve explicitly its challenge to jurisdiction and to declare that an appeal to court will follow an adverse decision on the merits. Since nonlawyers are frequently charged with the responsibility for conducting such hearings, jurisdiction should not depend upon ritual, or be conferred by silence.

Finally, I would only say to you here today that Dean St. Antoine's masterful, well-reasoned, and totally rational paper will be available to you when the proceedings are published. The few suggestions I have raised should not keep you from failing to perceive that I am in essential agreement with his thesis relating to the central role of consent in the judicial treatment of American labor arbitration.

I simply don't want us ever to forget why the parties gave their consent to a procedure that voluntarily divested them of a right ordinarily looked on as fundamental to the American legal system—the right to correct what a party perceives to be an error through an appeal to a higher tribunal. Certain things have made the system of

arbitration totally paramount in the field of grievance disposition in the United States. It is not a coincidence. The quality of finality is, perhaps, the most essential element, and only in that area would I take exception to Mr. Adams's remarks, and to Mr. St. Antoine's remarks which are sort of halfway in between, I think. Mr. St. Antoine doesn't go quite as far as Mr. Adams; and yet, if you do open it to a court to decide what is rational or what is not rational, we know that the judgment of someone is superimposed over the judgment of the person the parties by consent agreed should finally resolve such disputes—and that is not desirable.

Finally, there was some discussion about the problem of arbitrators as regards matters coming within federal jurisdiction or statutes of this or that kind. I think that the problem has to be understood in perspective, first of all, and those cases are really very rare. Most of the cases in labor arbitration don't involve that kind of issue, and that's why the notion that the golden age is coming to an end seems to me to be, like the report of Mark Twain's death, quite premature.

With regard to Title VII situations, I believe that the Supreme Court resolution of the problem was, if I may borrow Mr. St. Antoine's words, not only rational but sensible to leave to a court the decision as to how much weight to accord an arbitrator's decision. I do not believe that the parties by agreement can take away from a citizen of the United States the right to litigate his case, if he wants, in a court of the United States.

It also does not follow that because you are a disciple of arbitration that you believe that arbitration is the solution to all problems. We only say it's a good method for handling grievance matters. There are situations in which an individual who believes that her rights under Title VII have been compromised needs more than simply an arbitrator to vindicate those rights. An administrative agency may be needed to investigate the case; there may be need of counsel who has no obligation to anyone other than the aggrieved, who will utilize modern discovery techniques to marshall the evidence needed to win the case. To say that in those situations the labor arbitration award should not be accorded the same finality as in grievance arbitration matters so as to preclude Title VII litigation is in no way to denigrate the role and the importance of labor arbitration in the resolution of grievances. Nor does it foretell the end of any golden age. It simply means that in relation to problems of a different character, other techniques may be needed which may prove as useful in relation to the solution of those problems as

management and labor have found labor arbitration to be in the resolution of grievance disputes.

And so I leave to you, then, these weighty problems which by their very nature are not capable of final and binding solution. However, if the proposed solutions draw their essence from the needs of labor and management in the United States, they will indeed serve a most useful purpose.

Discussion—

MARK L. KAHN: Dean St. Antoine, Harold Katz mentioned your reference to the company that says, "We'll arbitrate the merits, but we reserve the right to challenge arbitrability in the courts if we lose on the merits." In light of your basic theme that the arbitrator is the reader of the agreement, should not the arbitrator decide the arbitrability issue as to whether or not the parties intended to arbitrate such an issue, and do not the courts defer to such arbitral decisions as much as to other contract interpretation by arbitrators?

MR. ST. ANTOINE: I believe they do not. A basic point in *American Manufacturing* and *Warrior & Gulf* is actually on the side of persons resisting arbitration: the threshold question of whether a particular grievance is subject to the contract arbitration clause is a matter for the courts. I think the Supreme Court is very clear on that point. It's often overlooked by the parties, but the question of so-called substantive arbitrability is for the courts to decide unless the parties, by their own agreement, have given it to the arbitrator.

The result is that any party is entitled to resist arbitration and force the petitioner to go to court to get an initial determination of arbitrability. At least the employer, in the situation where he reserves the jurisdiction question, is conserving that first step. He may be making it unnecessary. It may be that he will prevail in the arbitration, and then we can forget about the court suit. Even if the employer loses, he may take a look at the award and say, "We can live with this, so why worry about going to court about it?"

But technically, Mark, the employer retains the right to thresh the matter out in court, and I think there is no question that this is different from the other areas in which the arbitrator's decision would be regarded as decisive.

CHARLES B. BLACKMAR: I'd like to ask Dean St. Antoine a question. In the first place, I am correct in hearing you say that if there

is a square conflict between the agreement and the statute, the arbitrator must follow the agreement.

MR. ST. ANTOINE: Yes.

MR. BLACKMAR: Now I'd like to refer to two maxims that appear in a lot of judicial opinions. They may not always be well thought out, but we find them time and again. Especially in insurance cases, we will find a statement that governing statutes become a part of the agreement, and that this is so even though the policy specifically provides the contrary. That's one situation.

Another time you'll find a statement that, had the parties thought about it, they would not have written a provision that was contrary to statute. You'll find that also in quite a few cases.

Let me take just one example: Let's assume we have a bargaining agreement that provides for a union shop, but after it's executed the operations that are covered by the agreement are extended so that their employees are in a state with a right-to-work law. I should think that no arbitrator would say that this is what the parties intended, even though you have a very clear union-shop contract.

MR. ST. ANTOINE: That's why I introduced that weasel word "irreconcilable" conflict.

I do think, and this was the burden of my theme nine years ago before this group, that this question has probably been inflated out of proportion to its practical importance, that most of the supposed conflicts can be resolved by the various approaches that Charlie has alluded to just now, and that one can look to language in the contract and say, "The parties really wanted this contract to be interpreted in accordance with the statutes," or "It's a development that they didn't think about when they went into the right-to-work state, and surely they didn't mean their provision to apply here."

So I think there are several ways in which an arbitrator is entitled to infer that the better interpretation is the one that is cognizant of the existing statutes and in consonance with their provisions. But every once in a while you are going to find a case in which you can't use that sort of reasoning. It's for those situations that I am trying to preserve, in deference to the parties' mandate to the arbitrator, the principle that the contract will prevail over the law in the arbitrator's reading.

NEIL N. BERNSTEIN: The United Mine Workers, in their contracts, introduced the notion of an arbitration review board. The board is not, in my opinion, working well in that area for reasons that have to do with the mechanics and not with the basic idea.

I was just wondering, especially in the context of nationwide multiemployer contracts, if there were an arbitration review board

which could reverse the arbitrators who issue these irrational decisions, would that be a mechanism that would bolster the judgments?

MR. ST. ANTOINE: My quick, off-the-cuff reaction is that I don't like the idea of proliferating the process. I would like to see the most expeditious arbitration method possible, consistent with due process for the parties. There are plenty of delays as it is, and introducing an appellate process, it seems to me, just tends to exacerbate the problem. I would be interested in the views of people who look at it from the point of view of union and management.

MR. KATZ: I think Ted has really made the point. I don't think a review board is going to help at all. I think you have to accept the fact that you are buying the judgment of a particular individual, for better or for worse. What it amounts to is that instead of having a one-tier approach, you will have a two-tier approach with all that goes with it, including the delays.

I think that if you're going to have a system where you provide reviews, then do it through the process that we already have, like a court system. The reason the parties haven't followed that system is that they want something quick and easy, and that's why I would tend to be against the review-board proposal.

RICHARD LEUKAR: This may be unfair, but the Supreme Court decided a case called *Nolde* in which the basic facts are that a contract has expired, the company has shut down a plant, the union files a grievance, and the Supreme Court says the grievance can be arbitrated. I'd appreciate it if either the management or the union side of the theory of arbitration could give me a reason why the Court decided that the issue was arbitrable.

CHARLES J. MORRIS: Let me just comment on *Nolde* because I think it relates to what I'm going to say. It is interesting that the Supreme Court in the *Nolde* case picked up that language which was so flattering to arbitrators—about the arbitrator bringing more to the scene than would the best judge. Arbitration is very much alive in the Court. I think the reason the Court decided as it did in *Nolde* was because of the nature of the collective bargaining agreement that the Court was construing.

This brings me to my question directed to Ted. I don't substantially disagree with your analysis of the requirement that the parties infer by their agreement as to what the arbitrator's authority will be. But the courts, since *Lincoln Mills,* have been pragmatically fashioning a special law of the collective bargaining agreement, and I think that pragmatism is the answer to *Nolde* and the answer to the role of the arbitrator.

Let me get to my point: The *Boys Markets* and *Buffalo Forge* cases in particular seem to create an equation between the right to strike and the scope of arbitrability, at least as to the availability of injunctive relief. You will recall the language Justice Douglas used about the quid pro quo as between the two. What bothers me about the presentation you made is that you omitted reference to the real function of arbitration. It is a substitute for a strike; it is not a substitute for judicial determination.

If you'll look at the countries that have not made the fine distinction between rights disputes and interest disputes, such as Australia and the United Kingdom, you will see a vast number of little quickie strikes disposing of the kinds of grievances that we submit to arbitration. I think that suggests the essence of our arbitration system, and it relates to Harry Arthurs's concern about the overprofessionalization of arbitration. I think if we forget that arbitration is a quick, easy, and reasonably final method of substituting an informal settlement procedure for a strike, then we do a great disservice to the process—and it may very well be that arbitration will have passed its golden age.

MR. ST. ANTOINE: Charley, you essentially reiterate Dave Feller's speech of last year. There is no question that there are some fundamental disagreements between Dave and me as to what is the legal basis for the enforceability in the courts of the arbitral award. I must say this whole question of whether arbitration is a substitute for the right to strike or for a judicial determination seems to me to have much more relevance to industrial relations philosophy than to law. That is to say, it's much more important with regard to the policy question of what the parties should agree to arbitrate as a matter of sound labor relations than with regard to the legal question of what they have in fact agreed to arbitrate in a given case.

But once you have a particular award based on a particular contract, then it seems to me that it is the award itself, and what the parties had agreed to submit to arbitration, that should be the focus of attention. In the absence of some definite violation of public policy, the parties' contract, and not the views of the several Justices of the Supreme Court, is the appropriate standard for judging the enforceability of an award.

MR. KATZ: Doesn't the recent decision of the Supreme Court in *Buffalo Forge* say that the dispute has to be arbitrable? If it's arbitrable, then the court can enjoin a strike. If it's not arbitrable, the federal courts cannot enjoin.

SINCLAIR KASSOFF: If I understand Dean St. Antoine's discussion of the *United Parcel Service* case, I thought I heard him say that to the same extent as deferral is given to NLRB cases, similarly in the wage-hour area deferral should also be given to arbitral determination.

But in the NLRB area, is it not a fact that only because the NLRB on its own agreed to defer and has gone back and forth on exactly what it will and will not defer to arbitration, that the courts have adopted the policy of deferral? Should not the Wage and Hour Division of the Department of Labor be given the same first crack at the question, namely, is it willing to defer? And, having heard the determination, should the courts not then make their decision?

MR. ST. ANTOINE: You may be entirely right. There is the further obvious point to be made that *Satterwhite* could be wrong in regarding the Fair Labor Standards Act as essentially involving collective rights rather than individual rights. I do think an argument could be made that the Court was right for reasons that it didn't present, namely, that the Fair Labor Standards Act was initially passed not so much to give individuals the right to a 40-hour week or a certain premium for overtime, or whatever, but rather to spread the work in the depression. That seemed to provide by far the greater impetus for the Act as one looks at the legislative history.

My point really is, regardless of whether *Satterwhite* is dead wrong, that it is an indication that the courts are not automatically going to conclude that after *Gardner-Denver* the nondeferral rule of *Gardner-Denver* is to be applied to every other situation where an arbitrator has passed upon a matter that also involved a statutory right.

That is the only importance that I attach to *Satterwhite*. Its substantive rightness or wrongness, in a sense, is almost irrelevant. I think it's a sign, and I hope, indeed, it's a correct sign, that *Gardner-Denver* will not necessarily be regarded as a decision automatically applicable to every area beyond civil rights.