CHAPTER 1

A MEDITATION ON LABOR ARBITRATION AND "HIS OWN BRAND OF INDUSTRIAL JUSTICE"

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The scriptural reading for our meditation on this occasion is a familiar one. It presents us in three sentences with a riddle enfolded in a paradox. It reads as follows:[1]

> "[A]n 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.* When the arbitrators' words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

The "his own brand" phrase has gained currency,[2] first, in petitions by losing parties to vacate awards on the ground that some hapless arbitrator has flunked the *Enterprise Wheel & Car* "essence" test; and second, in the opinions of judges who vacate the award, thereby transforming the contractual winner into a judicial loser.[3]

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[1] *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2414 (1960).

[2] There are several perspectives from which one might view the import of that protean phrase: the Supreme Court that uttered it, the appellate courts that superintend its applications, the trial courts that vacate or confirm arbitral awards in its name, the arbitrators who do the awards, and the collective bargainers who create the office of arbitration and jointly select the persons to sit as arbitrators to hear and decide their disputes. The central role of the collective bargainers in selecting *their* own brand of industrial justice has not been sufficiently remarked. It is the focus of this address.

[3] *See, for example, Safeway Stores, Inc.* v. *Machinists Lodge 1486*, 534 F.Supp. 638 (D. Md. 1982); *United States Postal Service* v. *Nat'l Rural Letter Carriers Ass'n*, 535 F.Supp. 1034 (N.D. Ohio 1982). *See also F. W. Woolworth Co.* v. *Warehousemen's Local 781*, 629 F.2d 1204, 104 LRRM 3128 (7th Cir. 1980) (reversing district court's vacation of arbitral award); *Smith Steelworkers, DALE 19806* v. *A. O. Smith Corp.*, 626 F.2d 596, 105 LRRM 2044 (7th Cir. 1980) (reversing district court's vacation of arbitral award); *International Brotherhood of Firemen and Oilers Local 935-B* v. *Nestle Co.*, 105 LRRM 2715 (6th Cir. 1980) (vacating arbitral award that had been confirmed by district court); *Johnson Bronze Co.* v. *United Automobile Workers*, 621 F.2d 81, 104 LRRM 2378 (3d Cir. 1980) (reversing district court's vacation of arbitral award). *Also see* Philadelphia cases cited, *infra*, at note 6. *See* Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 Col. L. Rev. 267 (1980).

The paradox inherent in the Court's "essence" test in those three sentences is that it created a semantic slipnoose around the exercise of arbitral judgment and committed its use to what the Court itself characterized as inexperienced and uninformed judges.[4] At the same time, throughout the three opinions of the *Steelworkers Trilogy,* the Court convincingly detailed the functional necessity for chosen arbitrators rather than imposed judges to resolve collective bargaining grievances.[5]

That distinction was realistic and remains valid. It is based on the realization that arbitrators and judges look to different resources of judgment and tend to think differently about them in deciding issues arising out of collective bargaining.[6] The Court ac-

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[4]For example: "The lower courts in the instant case had a like preoccupation with ordinary contract law. The collective agreement requires arbitration of claims that courts might be unwilling to entertain. In the context of the plant or industry the grievance may assume proportions of which judges are ignorant." *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564, 567, 46 LRRM 2414 (1960). ". . . The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not part of the plant environment may be quite unaware." *Id.* at 568. "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts." *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 46 LRRM 2416 (1960). "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." *Id.* at 582.

[5]". . . The question is not whether in the mind of the court there is equity in the claim. . . . The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for." *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564, 567–568, 46 LRRM 2414 (1960).

[6]For an example of the significantly different analytical approaches of a conceptually minded judge and a pragmatically inclined arbitrator, compare *Western Airlines, Inc.,* 37 LA 700 (Edgar Jones 1961) with *Trans World Airlines, Inc.* v. *Beaty et al.,* 402 F.Supp. 652 (S.D.N.Y. 1975), *aff'd by oral op.* 542 F.2d 1165, 94 LRRM 2125 (2d Cir. 1976) (begging question whether court-enforced company policy was itself contractually sustainable as "just cause" for discharges under "grandfather" provisions insulative of Flight Engineers—and therefore arbitrable).

A graphic example is presented by several cases that arose out of one labor dispute involving several Philadelphia supermarkets in which a federal district judge's preoccupation with an inapposite legal concept manifestly caused the court not to comprehend the collective-bargaining reasoning of two successive arbitrators. The distinction was not lost on the Third Circuit, however, which reversed both of the district court vacations of the arbitral awards at issue. *Philadelphia Food Store Employers' Labor Council* v. *Retail Clerks,* 453 F.Supp. 577, 98 LRRM 3225 (E.D. Pa. 1978) (Troutman, J., vacating award of Arbitrator Lewis Gill against employer), *rev'd,* 87 CCH L.C. ¶11,593 (3d Cir. 1979) (per curiam, unpublished op.); *Acme Markets, Inc.* v. *Local 6, Bakery Workers,* 470 F.Supp. 1136, 101 LRRM 2575 (E.D. Pa. 1979) (Troutman, J., vacating award of Arbitrator Robert Koretz against employer), *rev'd,* 87 CCH L.C. ¶11,768 (3d Cir. 1980); compare *Warehouse Employees Local 169* v. *Acme Markets, Inc.,* 473 F.Supp. 709, 105 LRRM 3206

cordingly concluded that judges should exercise considerable restraint to refrain from interfering with the bargaining processes of which arbitration is an integral part.[7] Otherwise, for lack of understanding, they may unwisely alter the evolution of the private bargain and exacerbate conflict. Adherence by employers and unions to voluntarily fashioned conditions of employment and production leads to stability and productivity.[8] The Court saw that to be the central goal of national labor policy.

Seemingly recoiling somewhat from the implications of its construct of arbitral independence, however, the Court created the paradox of the "essence" test. It did so by joining conceptually what are functionally incompatible. First, it said that judges must not allow arbitrators to stray beyond the parameters of the essence of collective agreements. But second, it also said that the parties' chosen arbitrators are more aware than are judges of the parties' intent and needs which are constitutive of that "essence."[9] Thus, as written, the "essence" test is simply unworkable.

In turn, the riddle of "his own brand" inheres in the unworldliness of the declaration that an arbitrator "does not sit to dispense his own brand of industrial justice." Several examples should suffice.

(E.D. Pa. 1979) (Broderick, J., dismissing union petition to vacate Arbitrator Buckwalter's award in favor of employer).

See Jones, *The Name of the Game Is Decision—Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration*, 46 Tex. L. Rev. 865 (1968); Jones, *Power and Prudence in the Arbitration of Labor Disputes: A Venture in Some Hypotheses*, 11 U.C.L.A. L. Rev. 675 (1964) (comparing conceptual and pragmatic patterns of decisional thinking, at 715 passim).

[7]". . . The court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585, 46 LRRM 2416 (1960).

[8]"Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement." *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 567, 46 LRRM 2414 (1960). "The Judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585, 46 LRRM 2416 (1960). "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. . . . [T]he arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements." *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 46 LRRM 2423 (1960). ". . . [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Id.* at 599.

[9]*See* note 4, *supra*.

An arbitrator is asked to decide whether an employer's disciplinary response to a grieving employee's conduct was contractually allowable under the otherwise undefined criterion of "just cause." There are thousands of these cases each year that are submitted to arbitrators. Where lies the "essence" from which to deduce what discipline is, and what it is not, for "just cause"?

A dozen employees work under an incentive system; they become dissatisfied with new piece rates set by the employer; they complain to no avail but they do not file a written grievance. Instead, they reduce their output from their usual average of 150 percent over the contractual minimum to, but not below, the 100 percent floor for the basic wage rate. Have they engaged in a contractually prohibited "slowdown," as the employer argues, or are they entitled to forgo reaching for the carrot that has become unpalatable?[10] Whence comes the "essence" from which to distill the solution to that problem?

A supermarket employer is a member of a multi-employer bargaining unit with agreements with four unions that represent their craft employees in the stores. The contract with one of the unions expires. The union strikes one of the employers; its members continue to work for the other employers. The contracts of the other three unions with the employers remain in effect. Each agreement contains a no-strike, no-lockout provision. One for all and all for one, all of the employers close down all of their stores. The Labor Board and the courts would characterize that lockout as "defensive" and therefore not a violation of Section 8(a)(1) and (5) of the NLRA, were the unions to file charges with the Board.[11] But they grieve instead. In arbitration, may the nonstriking unions get cease-and-desist orders and back pay for their members from the unstruck stores that shut down?[12] Where does one find the "essence" from which to

[10]The facts are drawn from *Charlton Furniture Co.*, an unpublished case heard by the author. For similar problems of "essence" and alternate decisional tangents, *see Bethlehem Steel Corp.*, 81-1 ARB ¶8036 (Edgar Jones 1980) (Where the collective agreement mandates that overtime is voluntary, does a refusal to continue work into overtime by several disaffected drydockmen during the operation of the drydock constitute a contractually prohibited refusal to work?); *Elevator Manufacturers Ass'n* v. *Local 1, International Union of Elevator Constructors*, 534 F.Supp. 265 (S.D.N.Y. 1982) ("Is the Union on strike when it refuses overtime work? . . . If I were to decide the issues presented, I would be making a finding which the parties bargained to have an arbitrator decide.").

[11]*See American Ship Building Co.* v. *NLRB*, 380 U.S. 85, 58 LRRM 2672 (1965); *NLRB* v. *Brown*, 380 U.S. 278, 58 LRRM 2663 (1965); *Weyerhaeuser Co.*, 166 NLRB 299 (1967). *See* Bernhardt, *Lockouts: An Analysis of Board and Court Decisions Since Brown and American Ship*, 57 Corn. L.Q. 211 (1972).

[12]*See* the Philadelphia cases, *supra* note 6. Two arbitrators held the actions of two of the employers to be violative of the collective agreement; a third arbitrator, unpersuaded

extract the collective bargaining wisdom to resolve that dispute?

If the arbitrator in these cases "does not sit to dispense his own brand of industrial justice," what other brand is available for him to dispense? The given answer is, "that of the parties." If that be so, where does the arbitrator locate it when they have not set it out in words in the agreement?

Now his award has been issued and is challenged in court. How does the court tell whether the award he has issued was "his own brand" rather than the parties' own brand? The given answer is that the Supreme Court has laid it down that his award must either draw its "essence" from their agreement or a court must refuse to enforce it.[13] That of course closes the loop of the paradox, which is—how may a court, from its resources and experience, be expected to make the necessary sensitive assessments of "essence" in these cases? Whether the court recognizes the situation or not, petitions to vacate awards usually arise out of the more difficult and divisive of the disputes that are heard by arbitrators. Yet the Supreme Court made a finding of fact that the ablest judge is not institutionally competent functionally and experientially to engage in that kind of probing of the soul of collective bargaining.[14] Most of them, in their days of practice as lawyers, have had no professional involvement with labor disputes.

The federal courts of appeals have mostly succeeded nonetheless in breaking out of the constraints of the circular "essence" test and of the "his own brand" riddle. They have done this by judicial fiat, compelling unwilling lower court judges to toe the line of imposed judicial restraint, however painful and unaccustomed an experience that does seem to be for some judges.[15]

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by the decisions of the other two, thereafter upheld one of the employers; a federal district judge vacated the two awards for the unions; the federal court of appeals for the Third Circuit reversed the two district court decisions and reinstated the two arbitral awards. Net quantification of "essence": two enforced awards—with certified "essence" —struck down the actions of two employers, and one unchallenged ("essence"?) award sustained the actions of the third employer; *ergo:* one contractual source, two countervailing "essences."

[13] *See* text at note 1, *supra.*

[14] *See* note 4, *supra.*

[15] *See* notes 3 and 6, *supra.*

In the course of reversing and remanding a federal district court's vacation of reinstatement awards of two employees that had offended the "his own brand" sensibilities of the district judge, Fifth Circuit Judge John R. Brown observed, "Proving again that the infusion of judicial enthusiasm for arbitration in labor relations does not always keep the Judiciary out of the act . . . the District Court, performing a Solomonic role, declined to deny enforcement as such, denied enforcement of the back pay award, dismissed the Employer's complaint, but declared that if the two discharged employees extended an appropriate written apology to the employer, he would order reinstatement as to the

The courts of appeals have done that by interpreting the "essence" rationale in such a manner as to implement the determined effort of the Supreme Court to surround labor arbitration and the parties' collective bargaining agreement with the strongest possible measure of insulation from the displacing intrusions of courts. Yet they have not wholly precluded access to the ultimate constitutional safeguard of judicial review. It cannot otherwise be accomplished. It is semantically impossible for the Supreme Court or anyone else so to define the "essence" of a collective agreement as to enable a reviewing court to differentiate between the proscribed brand and the allowable brands available.

Although the Court did not remark the fact in the *Trilogy*, it is significant that the run-of-the-bench judges, from the least to the most competent, are selected to sit in judgment on a case by processes that are almost wholly depersonalized. That is in marked contrast to how the run-of-the-shop arbitrators are chosen. From the ablest to the least able among them, the process of their selection is highly personalized and individually focused. A trial or appellate judge on a multijudge court draws an assignment to hear or to review a case by the turn of some sort of rotation wheel or the direction of a presiding judge. The decision of whom to place in the seat of judgment in the courtroom is not controlled by the disputants; sovereign prerogative makes the choice. In contrast, collective bargainers are in complete control of the process for seating their arbitrators.[16]

The crucial difference between the selection procedures for judges and those for labor arbitrators is dramatized by a federal judge's rejection of a proposal for enabling peremptory challenges of federal judges in civil and criminal cases.[17] A bar association committee became concerned about "bad temper, intellectual mediocrity, or bias in a particular kind of case" on the federal bench in New York. They wish to avoid having a person judged by a judge who "has a personal bias" or whose "impartiality might be reasonably questioned." Under present

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future." *Dallas Typographical Union No. 173* v. *A. H. Belo Corp.* 372 F.2d 577, 579 (5th Cir. 1967). The case is discussed in Jones, *The Name of the Game Is Decision—Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration*, 46 Tex. L. Rev. 865, 877–879 (1968).

[16]"But precisely because dispute resolution in this setting involved as much rule-finding and rulemaking as rule-applying, recourse to the courts invites too narrow a view of the problem. . . . And the parties have too much at stake to entrust the contours of their relationship to whatever judge happens to come along next on the assignment list in the computer." Kaden, *supra* note 3, at 275.

[17]Bartels, *Peremptory Challenges to Federal Judges: A Judge's View*, 68 A.B.A.J. 449 (1982).

procedures, recusal (removal of a judge) seldom occurs because specific facts must be established supportive of disqualification.

Federal District Judge John R. Bartels has attacked the recommended peremptory procedure as "not the answer because it is not addressed to the bias or impartiality of a judge but simply permits the expression of the subjective feeling, whim, and reaction of a litigant or his attorney. No judge should be disqualified without some factual basis being set forth in an affidavit or otherwise." The judge set forth some of the reasons which have been held by courts to be *insufficient* for involuntary recusals of judges. They include:[18]

> "the preferences of one party for another judge; displeasure with the judge's performance in prior proceedings; preference for a judge possessing plaintiff's philosophy; previous expression by the judge on a particular point of law; prior adverse judicial determinations involving the same issue; and a judge's judicial philosophy or prior rulings of law in general."

Now substitute, if you will, "arbitrator" for "judge" in that recital and you will immediately recognize this as a litany of reasons commonly cited among parties for not selecting particular labor arbitrators.

However constituted may be the brands of judicial justice being dispensed in our courtrooms, and whatever one may think of the quality of the respective brands available, their components assuredly are not being predetermined by contesting litigants to accord with their perceived self-interests. Labor arbitrators, however, have for decades lived under that kind of subjective dispensation by the parties and their lawyers. Indeed, they have readily accepted their own dispensability in the selection process as indispensable to collective bargaining.

Before the parties join to select the person to "sit" to "dispense" whatever it is that will end up being dispensed, the individual they ultimately choose to arbitrate is just another person with some ideas and the presumed potential for some more. But he has no commission to do anything for or to anyone else, let alone for or to these collective bargainers. The office of arbitrator is entirely of their own creation; government does not compel it. It is wholly up to them whom they may choose in this process of comparative selection. The process is governed by the perceptions of self-interest of each of the bargainers as they

[18] *Id.* at 450.

try to identify, each in his own way, that individual arbitrator whose personal characteristics make it at least likely, if not certain, that the resultant award in the case will be favorable. Government does not tell them whom they must choose, nor what must be the components of his judgment.

Once appointed, however, the parties have placed their conflicting bets on this individual, whatever may be their respective reasons. In this second phase of the process of appointment, collective bargainers universally expect tough-minded integrity; they view any signs of subservience to one or the other with suspicion and disdain. So it is that some persons who would welcome careers as arbitrators fail in their ambition because they do not evidence in their conduct that they meet the common expectation of the parties that arbitrators will conduct themselves with visible independence of judgment before and after their appointment, true to the self that the parties have perceived and, for whatever reason, have selected.[19]

It would be astonishing if employers and unions were not to pay considerable attention to the personal characteristics of the individual whom they winnow out of the pack of available arbitral brands of industrial justice. This scrutiny of the collective bargainers is far from casual, particularly when lawyers are involved. The selection of an arbitrator is seen as central to the tactical problem of getting a favorable decision. Courtroom litigants may lack any effective control over the components of judgment of whoever will sit as judge in deciding their dispute. But collective bargainers always have the opportunity to analyze, compare, and prescribe the specific elements constitutive of the brand of industrial justice they respectively seek, each in his own hopeful way.

Those brand-name elements commonly examined by the parties include at least the following: experience, education, *past decisions on point,* temperament, fairmindedness, *past decisions on point,* skepticism, insight, *past decisions on point,* intelligence, articulateness, and, finally, *past decisions on point.* These judgmental elements are identified in the relative mix that appears desirable in a particular case. Each advocate sorts through the roster of available arbitrators very purposefully. Each looks for the particular composite of judgment on the shelf of arbitral availability

[19] *See* Loewenberg, *An Arbitral Timebomb?* 37 Arb. J. 50 (1982), discussing the dearth of, and the need for, empirical research to develop realistic profiles of participants' perceptions of arbitration and arbitrators.

that it deems most suitable to obtaining a favorable decision.

There have always been available aids of various sorts in that culling process. For decades, of course, there have been the two information networks operated by employer advocates and by union advocates. Accumulated hearsay and direct observations flow over the networks (horror stories predominate, naturally) detailing the varying perceptions of the rationalities and irrationalities of individual arbitrators. Those perceptions, realistic or fanciful, have become encrusted on reputations and are seen to be part of "his own brand."

The commercial marketplace of data about labor arbitrators includes looseleaf periodic subscription services that reproduce current arbitral decisions essentially on a sampling basis; well under 10 percent of the annual output of arbitrators gets into print. Computer programming has also now been introduced in an effort to gather into one repository the decisional output of all active labor arbitrators.

One marketer has gathered awards of more than 2,300 arbitrators. Its sales brochures headline the availability of "Your Own Private Arbitration Tracking System." It poses the question: "Have you ever needed to make a quick decision on which arbitrator to choose for a case?" Offered is "a comprehensive computer search of over 40,000 arbitration awards." Its "entire data base" can be searched by arbitrator name, union, employer, subject, or any combination, resulting in a computer printout listing all of an arbitrator's awards, designating the employer or union as "winners." Its brochure reads: "Our computer search is particularly useful in choosing an arbitrator, i.e., when a list is received from AAA or FMCS, just call us with the names and we will send back a list of all the cases we have from the arbitrator, listing: employer and union names—dates—subjects—who won—and citations to summaries or full text."

Another service sells lists of accumulated published and "private" awards of individual arbitrators, together with "management reaction" comments which record "approvals" and "dissents" by employer respondents. Its reports disclose the extent to which collective bargainers seek to calibrate the quantity and quality of past decisions and the quirks and fancies of individual arbitrators. The approach and data are quite typical of all such evaluative services, whether manual or computerized. Here is the way the several dozen respondent employers polled by this service described the brand of industrial justice of one busy

Academy member whom we shall call *Brand A* (some of the employers would prefer *Brand F* as his name, as you will see):

> "Conducts orderly hearing; does not permit introduction of irrelevant data (22 dissents); grasps issues readily (1 dissent); gives no indication of bias during hearing or in award (16 dissents); does not compromise or split awards (14 dissents); does not put burden of proof improperly on employer (20 dissents); respects contract language (17 dissents); gives weight to past practice when contract is ambiguous (10 dissents); confines himself to terms of submission agreement (1 dissent); adheres to the record (16 dissents). *Views his authority as broad* (3 dissents). *Recognizes reserved rights doctrine* (some dissent). *Requires due process in disciplinary cases and favors progressive penalties.* Top-notch arbitrator, who is more conservative than many others. . . . Relatively unqualified, particularly for contract technicalities and job evaluation issues. . . . Allow him to be judge and be somewhat beholding to him in your approach.
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> "*Consensus:* Qualified with reservations, particularly in discharge cases. . . . A restrictive submission agreement, a transcript and post-hearing brief are recommended. Must be restricted to avoid displeasing results. . . . Qualified for clear-cut cases."

In addition to those subjective and varying appraisals of the conduct and attitude of each arbitrator whose name appears in this service's data packet, there is a personal resume of education, prior employment, professional memberships, umpireships, panels (AAA, FMCS, state and local governments), and the per diem fees charged. The bulk of each individual report is comprised of an extensive listing on several pages of the arbitrator's past decisions with citations to the publications in which they may be found (a few are recorded simply as "private"). Each case citation is accompanied by several words describing the subject matter, and the cases are listed under one of two headings, either "to employer" or "to union." Our *Brand A* arbitrator's total published output comprised 272 citations, 144 "to employer" and 128 "to union." He has probably decided about 2,500 cases in his arbitral career.

Lest it be thought that only private-sector employers and unions seek this kind of appraisal data for individual arbitrators, consider the following advice from the State of Michigan Office of the State Employer to its labor relations staff concerning 16 named arbitrators, several of whom are Academy members:

> "Examination of numerous awards, as well as extensive discussion with other management representatives, indicates that the following arbitrators should be avoided to the maximum extent possible. This

> Office strongly recommends that Departmental Labor Relations Liaisons categorically reject the following individuals should they appear on a AAA, MERC, or FMCS panel:

[4 women's and 12 men's names are listed.]

> "Reasons for exclusion include: arbitrator continually exceeding authority; demonstrated bias against employers; substitution of judgment where employer's discretion is authorized; refusal to confine the *dicta* and the award to the record; napping during hearing."

Public and private employer and union advocates alike sniff out that kind of information like a bear in a berry patch!

One may question the usefulness of such an assortment of information as that which was supplied the employer subscribers interested in choosing among the arbitrators surveyed. The point, however, is not whether the parties are wise or foolish in the criteria they use for their selections; it is that they are thorough and calculated in their appraisals and resultant appointments. Indeed, wise or foolish, information (or misinformation) identical to that which I have just read to you about our *Brand A* arbitrator is bandied about in the corridors of each annual meeting of this Academy, at bar association meetings, and at cocktail parties and dinners throughout the country throughout the year. When a brand-name arbitrator has been selected by the parties, the assumed components of expected judgment and hearing conduct have been carefully remarked and evaluated.

Of course, each of the advocates in any case hopes that the mindset of this one who is now chosen has been profiled accurately enough to make it reasonable to predict to a "yes"-needing client that *Brand A,* when applied to the facts of the case at hand, will disclose that a "yes"-saying arbitrator has been named—even as an advocate for the "no"-needing client is assuring *his* client that a comparative analysis of the brands available indicates that a "no"-saying arbitrator has been chosen.

Later, after the award in the case has been issued, it is inevitable that the "yes"-needing or "no"-needing losing party will discover to its disappointment, or even dismay, that it has miscalculated or somehow been misled about the components of *Brand A.* But in this process of competitive selection, "*his* own brand" was analyzed and adopted as *their* own brand, whatever may have been their respective expectations and however deeply felt may be the loser's resentment at the loss. Whatever

may be the content or import of the award, and however it may otherwise be described, the brand of industrial justice dispensed in that challenged award is the precise brand that they assessed and agreed to purchase, eyes open, for better or for worse, for richer or for poorer.

A court should give short shrift to those plaintive cries of surprise and outrage from the party who now discovers that it has lost its taste for the brand it had investigated and then bought.[20] Both parties knew, going into the arbitration, that sooner or later, coming out, one of them would have to swallow hard. They knew that, and they accepted it, when they appointed their *Brand A* arbitrator rather than one of the many others available. Courts should be most reluctant to override the earlier commitment of both parties to select this particular arbitrator as the articulator of their contractual obligations in order now to relieve one party from the unwelcome result of that purposeful choice.

There may be reasons for a court to vacate that award. It may be contrary to a public policy which the court must protect from encroachment.[21] It may be the product of fraud or of improper conduct serious enough to warrant judicial intervention. But if the sole basis of the petitioner for setting the award aside is that it allegedly conflicts with some express or implied term of the contract, the court should inquire further. If the contract is *that* clear, was not the prospect for improper interpretation evident from the outset? Should not the party now urging vacation more properly have refused to arbitrate in the first place? If the contract explicitly conferred on the supermarkets the right to close down their entire operations if one rather than all of them are struck by a union, the matter is simply not arbitrable, foreclosed as it is by express language—and so said the Supreme Court.[22] But when the "essence" is not expressed, the courts will order

[20] *See, for example, Louisiana-Pacific Corp.* v. *IBEW Local 2294*, 600 F.2d 219, 102 LRRM 2070 (9th Cir. 1979) (One employer with two separate collective bargaining agreements with two unions; disputed work; two bilateral arbitrations; two conflicting awards, one for Union A, another for Union B; district court held each had "essence," confirmed each, Union A's for future work, Union B's for 585 hours of pay for past deprivation; 9th Circuit affirmed: "At several stages the Company made choices as to collective bargaining and litigation strategies. It must now abide the consequences of these choices.").

[21] *See, for example, Local No. P-1236* v. *Jones Dairy Farm*, 519 F.Supp. 1362 (W.D. Wis. 1981) (award sustaining employer's disciplinary action for complaint to U.S.D.A. inspectors, vacated as contrary to public policy which encourages disclosure of unsanitary conditions).

[22] "A specific collective bargaining agreement may exclude contracting out from the grievance procedure. Or a written collateral agreement may make clear that contracting

the matter arbitrated because it is the manifested will of the parties to submit such disputes to arbitration.[23] Why should it be viewed any differently once the award has issued? Why should not the party now seeking court intervention be deemed to have waived any right it may have had for that intervention once it elected to submit to arbitration?

Interestingly, a court intervening to rearrange these contractual circumstances to suit its own view of contractual propriety brings itself into conflict with the Supreme Court's decision in *H. K. Porter, Inc.* v. *NLRB.*[24] (That was a decision, incidentally, that was widely acclaimed by management advocates because of its emphasis on freedom of contract and its disapproval of governmental intervention to impose terms not freely bargained for by the collective bargainers.[25] Ironically, it is true that the bulk by far of petitions to vacate arbitral awards originate from employers.) In *H. K. Porter* the Court ruled that government (the NLRB in that instance, the vacating court in this one) is without power to compel an employer *or a union* to agree to any substantive contractual provision of a collective bargaining agreement. In the name of a "fundamental" statutory policy of "freedom of contract," the Court declared in *H. K. Porter* that to allow the Board—and assuredly a court—"to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the Act is based—*private bargaining* under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."[26] If that insulation from government dictate holds for employer bargainers, as it does, it assuredly does also for union bargainers.

What could be more central to "private bargaining" and to the daily search for consensus by an employer and a union than

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out was not a matter for arbitration. In such a case a grievance based solely on contracting out would not be arbitrable." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584, 46 LRRM 2416 (1960).

[23]"Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581, 46 LRRM 2416 (1960).

"In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." *Id.* at 584–585.

[24]397 U.S. 99, 73 LRRM 2561 (1970).

[25]*See, for example,* Swerdlow, *Freedom of Contract in Labor Law: Burns, H. K. Porter, and Section 8(d),* 51 Tex. L. Rev. 1 (1972).

[26]*Supra* note 24, at 108 (emphasis added).

is the competitive process whereby they select that brand of industrial justice by which they agree to be governed in resolving disputes? When a court intervenes to set aside that award, it is bending governmental power to aid one party to default on the agreement to submit the issue for decision by that person. Stripped of its hortatory rhetoric, the petitioner is doing so because it has now lost its freely undertaken wager on the probability of success that it made when it agreed to go with the *Brand A* arbitrator rather than with *Brand B, Brand C,* or some other brand on the shelf of availability.

That is indeed a strange cause for a court to embrace in the name of justice and contractual "essence." Instead, the court should decide whether there did exist a contractual commitment to arbitrate. If it finds it, it should then leave the parties to their own consensual devices. It was, after all, their freely undertaken contractual obligation to designate some person to be their arbitrator and then, win or lose, right or wrong, to abide by that arbitrator's resolution of their dispute, as final and binding on both of them.[27]

One characteristic of collective bargaining is that agreements are made for relatively short terms—one, two, or three years. It is the usual expectation of bargainers that an occasional aberrant arbitral decision will be returned to the same process of negotiation by which the parties created the arbitrator's authority in the first place. It is common for vexatious awards to be

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[27]"The premise of the *Steelworkers Trilogy* is that the court should allow the parties to a collective bargaining agreement containing a binding arbitration clause to receive the benefit of the bargain—*binding* arbitration on contract disputes. Professor St. Antoine recognized the soundness of this doctrine when he wrote:

> '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. Thus, a "misinterpretation" or "gross mistake" by the arbitrator becomes a contradiction in terms. In the absence of fraud or an overreaching of authority on the part of the arbitrator, he is speaking for the parties and his award *is* their contract.'

St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny,* 75 Mich. L. Rev. 1137, 1140 (1977). This Court has followed this doctrine time and again." *Boise Cascade* v. *United Steelworkers,* 588 F.2d 127, 128–129, 100 LRRM 2481 (5th Cir. 1979).

See also Kaden, *supra* note 3, at 275: "The parties' stake in arbitral finality, then, exists not so much because the arbitrator has special competence, experience, or understanding, or even because sometimes he may be filling in gaps in the agreement, making rather than applying rules. Instead, the parties have an institutional stake in finality because the arbitrator is their creation; he functions by their consent and at their sufferance, and his powers and roles can and should be molded by them to suit their own purpose. That they freely do so is evident in the wide variety of arbitration procedures, selection mechanisms, and individual umpires selected in major collective bargaining agreements."

modified or vacated in the next negotiations. It is also common for the sense of immediate outrage at a resented award to dissipate and the ruling to be left intact. But if an award proved egregiously upsetting to the functioning of the workplace, or to the sense of propriety of the losing party, once again experience indicates that midterm negotiation will take place and relief will be bargained for and reached.

Those various bargaining responses to resented awards routinely occur. They do, that is, unless misconceived judicial intervention unwisely displaces them with adjudicative processes. True enough, negotiation is a more difficult and frustrating course of action than simply turning to a court with a petition to vacate an award that has lost its "essence." But as the Supreme Court emphasized in *H. K. Porter,* negotiation and compromise, without governmental dictate, is the essence of free enterprise.

As an arbitrator, I have no problem whatsoever with the prospect of an attorney petitioning a court to vacate an award of mine or of some other arbitrator, whatever may be the reason advanced, including that it has no "essence" (or, perhaps, to his nostrils, too much essence). The problem of disruption of the bargaining relationship that is entailed is not created by petitioning employers or unions. It is created by courts that encourage the practice of petitioning to vacate resented awards by their willingness to muster governmental power to override the voluntarily undertaken contractual commitment by collective bargainers to arbitral finality.

Why should a court intervene to set to naught that mutual conference of confidence in that person,[28] chosen for those reasons, by the collective bargainers as *their* arbitrator, as *their* brand of industrial justice?

[28]"The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 46 LRRM 2416 (1960).