CHAPTER 3

RECENT LAW AND ARBITRATION

I. W.R. GRACE AND CO.: AN EPILOGUE TO THE TRILOGY?

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An epilogue, in my dictionary, is "a closing section added to a novel, play, etc., providing further comment, interpretation or information."[1] *W.R. Grace & Co.*,[2] decided by the Supreme Court in its past term, may well fill that definition with respect to the Steelworkers Trilogy.[3] Or it may, conversely, have provided a prologue to a very changed drama. Within the limitations of time present here, I hope to at least address that question.

This paper is not an exercise for the lawyers among us. It is not, at least at this point, a law review survey deep in footnotes. Rather it is, as the French put it, somewhat of a cri du coeur from one who deeply believes in the arbitral process.

The Trilogy, of course, constituted the Court's basic guidelines to be followed in actions under Section 301 of the LMRA. *W.R. Grace* either fleshed out those teachings or may have seriously altered them. I believe it may well have seriously damaged them; I suggest the Court made rulings, without perhaps intending to do so, which have serious ramifications and impact in three separate areas. These are the place of "public policy" in the enforcement of arbitral awards, the "finality" of arbitral awards, and the determination of arbitral jurisdiction by both courts and arbitrators.

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[1]Webster's New Twentieth Century Dictionary Unabridged, Second Edition.

[2]*W.R. Grace & Co. v. Local Union 759, Rubber Workers*, 461 U.S. ___, 31 FEP 1409 (1983).

[3]*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).

Analyzing *W.R. Grace* is not an easy matter. In dinner conference with my closest professional partner, I observed her eating an artichoke. Each leaf that was stripped was bitten and basically discarded, disclosing another leaf. After certain prickly portions were disposed of, the supposedly tender heart was left for consumption. Certainly analysis of *W.R. Grace* requires stripping off much that must be then discarded, with each action or decision leading to another with only a hope that the process reveals a desired finale.

Even the facts of the case are not easily summarized. In 1973, after what the Court describes as a "lengthy" investigation, the EEOC determined that there was reasonable cause to believe that the company had violated Title VII of the Civil Rights Act with respect to the hiring of blacks and women at one of its Mississippi facilities. The Commission further found that the seniority systems contained in the company's bargaining agreement with local 759 of the Rubber Workers Union, were illegal as perpetuating the effects of past discrimination.

Two separate scenarios then developed, one with the Commission and the other in the collective bargaining arena. The company accepted the Commission's invitation for conciliation; the union rejected participation. While conciliation was proceeding, the union contract expired and negotiations failed, leading to a strike. Strike replacements were hired including women whose subsequent job-preference rights became the source of the ultimate controversy. A new agreement was eventually signed. It, significantly, retained *both* the prior seniority system and the continued employment of the strikers' replacements. Certain women employees were subsequently given shift preferences which otherwise, under the seniority system, were mandated for male employees. Grievances were filed as to such action and arbitration was sought.

The company then sought an injunction prohibiting arbitration while conciliation was proceeding with the EEOC; the union counterclaimed to compel arbitration. While such actions were pending before the district court, the company and the EEOC signed a conciliation agreement which supported the company's actions as to shift preference and gave protection to women, junior in seniority, in the event of layoffs. The company then amended its Section 301 action to include the EEOC as a defendant and to seek to enjoin any arbitration of claims conflicting with the conciliation agreement. The EEOC cross-claimed

against the union and asked for a declaratory judgment that the conciliation agreement prevailed over the contract or, alternatively, a declaratory judgment that the contractual seniority system was unlawful under Title VII.

Before these requests were acted upon by the district court, the company conducted a layoff in conformance with the terms of the conciliation agreement rather than those of the collective bargaining contract. More grievances resulted. The company continued to resist arbitration and its position was supported when the district court granted it and the EEOC summary judgment finding that the terms of the conciliation agreement prevailed over those of the contract.[4] The union appealed.

While the appeal was pending, the company again made layoffs in conformance with the conciliation agreement rather than the contract and, again, grievances were filed.

Two years after the district court had acted, the Fifth Circuit reversed it, holding the contractual seniority system lawful and ordering arbitration.[5] Male employees were then reinstated but grievances claiming back pay for the interim period while the district court order was on appeal were then taken to arbitration. Arbitrator Anthony J. Sabella subsequently found the contract had been violated by the company's actions but that no back pay was due for the period in which the company was complying with the district court order. No action to set aside that award (hereinafter called Award No. 1) was filed by the union.

The union, instead, pursued to arbitration a second set of grievances involving male employees laid off both before and after the district court order. Arbitrator Gerald A. Barrett acknowledged that Award No. 1 litigated the same issues as now before him and that the contract contained a "finality" provision as to arbitral results.[6] He held that, nonetheless, the first award was not binding on him because, in his judgment, his predecessor did not have contractual jurisdiction and authority for his actions. He further found that the contract had been breached

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[4]*Southbridge Plastics Div., W.R. Grace & Co. v. Local 759*, 403 F. Supp. 1183 (1975).

[5]*Southbridge Plastics Div., W.R. Grace & Co. v. Local 759*, 565 F.2d 913 (5th Cir. 1978). The Circuit relied heavily upon the Supreme Court's determination in *Teamsters v. United States*, 431 U.S. 324, 14 FEP 1514 (1977) that the seniority system, to be invalid, must have been animated by a discriminatory purpose.

[6]The contract provided that "The decision of the arbitrator on the merits of any grievance adjudicated within his jurisdiction and authority as specified in this Agreement shall be final and binding on the aggrieved employee or employees, the Union and the Company." 31 FEP at 1411 n. 5.

and that the company's liability was not extinguished because of its compliance with the district court order prior to its reversal. The company then brought an action to invalidate the Barrett award (hereinafter called Award No. 2). The district court gave summary judgment in favor of the company on the ground that public policy prevented enforcement of the contractual seniority provision for the period before the original district court order was reversed. The Fifth Circuit, on appeal, reversed, and the Supreme Court granted certiorari.

The Supreme Court, in a unanimous opinion by Justice Blackmun, upheld the validity of the second award. It commenced its discussion by stating that "The sole issue before the Court is whether the Barrett [second] award should be enforced." As no direct judicial review of the initial award was ever instituted, that comment is at least technically correct. Yet in enforcing an award which reversed a prior award, the Court's action subsumed a broader range of decision.

One of the few comforts of the decision in *W.R. Grace*, at least to this commentator, is that the Court finally resolved some uncertainty as to the place of public policy in judicial enforcement of arbitral awards. Stating that, just as any contract which is contrary to public policy may not receive judicial endorsement, the Court held that any arbitral award which conflicts with public policy is likewise void. The Court added, in a broad delineation of the boundaries of such a rule, that the public policy, however, "must be well defined and dominant" and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interest."

Noting that the arbitrator in the award before it had not considered the issue of public policy, the Court further stated that, in any event, it is for the judiciary, not the arbitrator, to "ultimately" resolve such an issue. Careful reading of the opinion, however, forces at least this observer to conclude that the Court stopped somewhat short of stating that an arbitrator is precluded from relying on public policy and that only the "law" of the contract may be applied in arbitration. Rather it only observed that "Barrett's view of his own jurisdiction precluded his consideration of this question."

Prior lower court decisions addressing public policy objections to enforcement of arbitral awards, including those cited by the Court, leave considerable doubt that the task or the results are as objective as the Court implies. Indeed, resort to public "policy"

rather than statutes or precedents directly applicable is, of itself, indicative of a broader range of inquiry. To a degree, the Court's own actions in *W.R. Grace* illustrate ill-defined degrees of shadings.

The Court, in *W.R. Grace,* was, in fact, confronted with two questions involving "public policy." First, the matter of obedience by litigants to judicial orders, including injunctions, and, second, the impact, if any, of Title VII considerations on either judicial or arbitral authority.

Thus, while stating as a truism that "obedience to judicial orders is an important public policy" and that compliance with an injunction, until vacated or withdrawn, falls within that category, the Court here, in the vernacular, slipped the punch. While assuming that the original district court order constituted an injunction, the Court concluded that compliance with it was "at risk." In sum, as the Court observes, "obeying injunctions often is a costly affair" and here the cost of such compliance included back pay liability if the order to do so was later reversed.

Indeed, rather than directly addressing the question of whether obedience to a court mandate overrode compliance with a collective bargaining contract, the Court concentrated on what was "fair." While suggesting that "unfairness," itself, might be a factor in public policy determination (hardly a clear benchmark for parties), the Court concluded that the company was caught in a bind of its own making and must bear the financial cost of any resulting conflict.

In reaching that conclusion, all responsibility for the alleged discrimination addressed by the conciliation agreement was placed upon the company. Which brings us to the second issue of public policy implicit in *W.R. Grace,* i.e., the relative roles of arbitration and of Title VII, a federal statute guaranteeing federal rights. The contract, as the long continuing debate in this Academy on the impact of "external law" subsumes, is the private product of private parties. Here, the company and the union for reasons known only unto them, persisted in maintaining a seniority system in successive contracts after the legality of that system was called into question by an agency of the Federal Government.

One can easily agree that the company may well have taken a calculated risk, in negotiations previous or subsequent to institution of conciliation efforts, by not reforming the seniority clauses

in question. Again, in the vernacular, it takes two to tango. With due respect to the Court, it seems to have gone to questionable extremes to absolve the union of any knowledge of the possible illegality (not resolved until several years thereafter) when it also negotiated the contracts under which the actions arose. Yet the Court, itself, acknowledged that the union was fully aware of the charges of discrimination and declined even to participate in conciliation efforts.

At this point it may be appropriate to note that, so far as my research has been able to reveal, prior rulings of lower courts have uniformly refused to distinguish between the legally binding effects of conciliation agreements and consent decrees reached under Title VII processes.[7] In fact the Court in *W.R. Grace* specifically acknowledged that "Critical to the compliance scheme is the Commission's role in settling Title VII disputes through conference, conciliation, and persuasion before a Title VII plaintiff or the Commission may bring suit."

Yet, while acknowledging that "Voluntary compliance with Title VII also is an important public policy," the Court, again, slipped the punch. It held, I think all would agree properly, that the Barrett award, Award No. 2, did not violate public policy in this regard. Of course it didn't. Award No. 2 did not direct any action inconsistent with the conciliation agreement in finding that the latter did not bar the payment of back pay to those contractually injured by compliance with it. Yet Award No. 2 attempted to invalidate the prior award which had recognized, in the area of remedy, the company's perceived duty to recognize its obligation, then in force, to comply with judicially approved resolution of federal rights under a federal statute.

The Court, indeed, hints at further implications as to conciliation agreements and consent orders under Title VII by making the flat statement that "Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent." The further statement that "Permitting such a result would undermine the federal labor policy that parties to a collective bargaining agreement must have reasonable assurance that

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[7]Under a consent decree, the court must approve the terms of the decree. In the case of a conciliation agreement, enforcement is likened to that of a contract separately reached. *See EEOC v. Liberty Trucking*, 695 F.2d 1038 (5th Cir. 1982). In either case a participant, such as the company here, is subject to judicial mandate to comply.

their contract will be honored" must bring wry faces to unions and employees confronted with the consequences of *Bildisco.*[8]

It is for specialists in other areas of the law to be concerned with the effect of *W.R. Grace* on conciliation efforts under Title VII in the future. It takes only common sense, however, to observe that a union with a favorable contract has nothing to gain and much to lose by becoming involved in any such conciliation efforts, any wishful judicial rhetoric to the contrary.

The second area of inquiry of this paper is that of the impact of *W.R. Grace* on the role or non role of the legal doctrine of *res judicata*[9] in arbitral determinations. In lay terms, this is the question of the finality of arbitral awards.

As has been stated, the Court in *W.R. Grace* went to some pains to emphasize that it was dealing only with the enforceability of Award No. 2, specifically noting that it disagreed with the Fifth Circuit's premise "that the validity of the [first] award" was relevant. So far, so good, but the inexorable fact remains that the Award No. 2 here specifically overruled rather than disregarded Award No. 1. Ergo, enforcement of the second award implicitly affirmed the invalidity of the first. Again, the Court slipped the punch.

Before attempting to establish that criticism directly, a bit of background is necessary. Arbitrator Barrett, in the second *Grace* opinion, went to considerable pains to affirm his belief that arbitrators should, basically, not grant a "second bite at the apple" by allowing a losing party in a prior proceeding to relitigate the same issue decided against it. That conclusion, of course, tracks the sound legal restraints against endless litigation embodied in such legal doctrines as *res judicata.*

Indeed, it would be hard to improve on the statement in the second *Grace* opinion that "It is both essential to the stability of their relationship that both parties be bound by whatever award flows from their forum of arbitration, . . . and that the remedy of the losing party be limited to the arena of collective bargaining in the next period of negotiations rather than to a return match before a different Arbitrator." That conclusion, moreover, found contractual support in the collective bargaining contract's provision in *Grace* that "the decision" of the Arbitrator ". . . shall

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[8]*NLRB v. Bildisco & Bildisco,* 115 LRRM 2805 (1984).

[9]The allied doctrines of collateral estoppel and stare decisis are not separately dealt with here as involving legal nuances not essential to this inquiry.

be final and binding on the employee or employees, the Union and the Company."

Conversely, from the standpoint of judicial review of arbitral awards, substantial precedent exists (albeit at levels below the Supreme Court) that the doctrine of *res judicata* is insufficient to justify a court denial of enforcement of a subsequent, inconsistent award.[10] Those decisions rest greatly on the Trilogy admonition that the award must be enforced unless it does not "draw its essence" from the underlying bargaining agreement. It is doubtful that the Court, in the *Enterprise* segment of the Trilogy, envisaged more than testing the validity of a single award in a single case. Nevertheless, the admonition that arbitrators may be either wrong or right without judicial rejection so long as there is contractual footing for their decisions would also seem to apply in successive litigations.

It is in that respect that a segment of the language of the second *Grace* opinion was omitted in the foregoing quotation. The conclusion by the second arbitrator that he should, for better or worse, follow the judgment of a predecessor was qualified by the phrase "so long as the [prior] award does no obvious violence to their contract." Plainly that qualification leaves ample room for disregard of a prior award as binding.

If one can speculate, some of the residue of confusion which attends the aftermath of *Grace* would have been removed if the second arbitrator had simply said that he did not find the analysis of the prior opinion and award to be persuasive or binding. The second award would then have stood (as the first) in isolation as to judicial review. Such situations are not unknown to the courts. It is, however, far too easy to second-guess long after the fact. Moreover, the "finality" clause quoted previously might well make it difficult for a conscientious adjudicator such as Arbitrator Barrett to state that conclusion preemptorily.

Whatever the reason, the second opinion in *Grace* specifically stated that the prior award was invalid (as contrasted with non-controlling), being beyond the jurisdiction and authority granted by the contract. That finding, inevitably, led to the premise in subsequent litigation that one or the other, but not

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[10]*See, e.g., Connecticut Light & Power Co. v. Local 420, Electrical Workers (IBEW)*, 718 F.2d 14, 114 LRRM 2770 (2d Cir. 1983); *Riverboat Casino, Inc., v. Local Joint Executive Bd.*, 578 F.2d 250, 99 LRRM 2374 (9th Cir. 1978); *Graphic Arts v. Haddon Craftsmen, Inc.*, 489 F. Supp. 1088 (M.D. Pa. 1979).

both, of the two awards must judicially be deemed valid. In this respect, while the Court mildly chastised the Fifth Circuit for considering that the "validity" of the first award was in contest, the ultimate result remained the same. The second award finding the first to be invalid was enforced.

We are thus left with somewhat of an anomaly in *W.R. Grace.* Award No. 1 was never directly presented for judicial acceptance or rejection. The Supreme Court specifically acknowledged that such judicial scrutiny was never undertaken. Yet the award which the Court approved was not just in direct conflict with its predecessor; it purported to invalidate it.

From this it is an easy logical jump to the conclusion that *W.R. Grace* affirms that what lawyers call the doctrine of *res judicata* (or its parallels) does not apply to arbitration. Put more simply, that what arbitrator A decides as to a contractual issue is not *legally* binding on arbitrator B confronted with the same task. I emphasize the word "legally," for few of us would disagree with Arbitrator Barrett's eloquent statement in his opinion as to the industrial relations factors which make arbitrators normally refrain from departing from arbitral precedents between the parties, however, one might have determined the issue if presented for the first time.

Careful reading of *W.R. Grace,* however, does not give the comfort, such as it may be, that the Court has given such a definitive answer. While the result of the Court's action affirms that an award in conflict with a prior award may still be enforceable, the process by which that result was reached took a significantly different direction.

Which brings us to the third area of analysis, i.e., the impact of *W.R. Grace* on the determination of arbitral authority.

To put the subject of that analysis in proper focus, it must be remembered that Award No. 2 was premised upon the conclusion that Award No. 1 was noncontrolling because it was not within the contractual jurisdiction and authority of the prior arbitrator to issue. Rather than merely disagreeing with the prior conclusion as to the proper remedy (which, on precious second thought might have obviated any necessity for the prior award to be placed in contest), the *authority* of the prior arbitrator to reach his decision was reviewed and negated by his successor.

To quote the Court, the second arbitrator's determination that he was not bound by the prior arbitrator's award "was based on his interpretation of the bargaining agreement's provisions

defining the arbitrator's jurisdiction and his perceived obligation [under the finality clause] to give a prior award a preclusive effect."

On this basis, again to quote the Court, "Because the authority of arbitrators is a subject of collective bargaining, just as is any other contractual provision, *the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator.*" (Emphasis supplied.) The Court added, "Regardless of what our view might be of the correctness" of the second arbitrator's contractual interpretation, "The Company and the Union bargained for that interpretation" and may not be "second-guessed" by the courts. One must pause long to consider the implications of that ruling.

It has been my interpretation of the Trilogy, shared, I think, by most observers, that it delineated the roles of the judiciary and the arbitrator as follows. Courts were invested with the authority to determine if the parties had agreed to arbitrate and, if so, to arbitrate a particular dispute. Arbitrators and only arbitrators were to determine the merits. Courts, on review, were still restricted to ascertaining, apart from the merits, whether or not the arbitrator's determination had contractual basis.

That summary is simplistic but, I believe, accurately delineates the role of the courts in ascertaining the limits of arbitral jurisdiction and authority while delegating to the arbitrator full freedom of decision within those limits.

If, as here, a court order compels arbitration, the arbitrator selected clearly has "jurisdiction" to render a determination. Whether the arbitrator has authority to reach a particular result is, again, a matter of judicial review to determine whether the award finds its "essence" in the agreement. Obviously, by reaching a particular result, the arbitrator has concluded, whether specifically so stated or not, that it is within his or her authority.

Applying the Court's analysis in *W.R. Grace* to Arbitrator Sabella's award (unchallenged by direct judicial review), he had the contractually bargained-for authority to determine his own jurisdiction and authority to issue the nonremedy he did. Arbitrator Barrett, equally, had the power to determine his jurisdiction and authority. The question remains, did he have jurisdiction and authority to declare a prior award invalid for want of the same? For Award No. 2 clearly did so. In the accompanying opinion, the finding was flatly made that the prior

award had departed from any interpretation and application of an "express" provision of the contract and that "By so failing, and by fashioning a decision based upon equity utterly unrelated to any provision of the contract it must be ignored." To avoid the impact of the "finality" provision of that contract, the second arbitrator thus assumed a power to annul it.

One can hardly be content with the subsequent judicial evasion of the consequences of such exercise of arbitral authority. As noted, the Court stated that, whatever its view might be of the correctness of Barrett's contractual interpretation, the company and the union bargained for it. One can only ask did the parties not equally bargain for the first arbitrator's contractual interpretation? Must a Rocky III take place with a third arbitral analysis of two prior decisions to provide a majority vote? Consider the unreimbursed grievants in Award No. 1. They have, long after the fact, a statement—but no judgment—that they should have received back pay. Do they make the logical conclusion that the arbitral process is only the luck of the draw?

So much for the finality provision of the contract in issue and, indeed, that finality of process thought to be a basic of the arbitral process.

Despite the Court's disinclination to second-guess, not long before *W.R. Grace* issued, the Second Circuit, while acknowledging that the two conflicting awards before it for enforcement were *both* valid as drawing their essence from the collective bargaining contract, chose one to enforce as more persuasive.[11] That judicial selection inevitably changed judicial review into a determination on the merits.

Proponents of the arbitral process have long feared the disguised review of the merits which can so easily take place in the context of judicial scrutiny or arbitral jurisdiction in post-award proceedings. *W.R. Grace* adds a new concern—that the doctrine of "finality" is to become a prey to the litigant who, before arbitrator or court, insists upon some type of "appellate review." I doubt that the author of the Trilogy, Justice Douglas, envisaged such a result as proper or desirable under the rules set forth therein.

Analysis of *W.R. Grace* is, as I noted at the beginning, a complex task. It is also a somewhat melancholy one for those who believe in the arbitral process. The road leading up to the

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[11] *Connecticut Light & Power Co. v. Local 420, Electrical Workers (IBEW), supra* note 10.

Court's decision is strewn with "what might have beens." What would have happened if the union had participated in the EEOC conciliation efforts? What would have happened if Award No. 1 had been presented for enforcement prior to the second arbitration? What would have happened if Award No. 1 had been viewed only as an exercise in the wide range of arbitral remedial authority? What would have happened if Award No. 2 had been, in fact, Award No. 1?

W.R. Grace should sound a loud warning bell to arbitrators, litigants, and courts. To recall the words of the poet, John Donne, for whom does that bell toll?

For the arbitral process and promise?

For the limits of judicial scrutiny of arbitration?

For the hopes of those who are required to submit to those processes?

Ten long years after a "lengthy investigation" posited an initial conclusion and almost five long years after an initial arbitral determination, the fish in this sea still found further legal nets.

We are dedicated to a process which, we boast, is to be swift, expert, inexpensive, and final.

Is it?

II. Reflections on Wrongful Discharge Litigation and Legislation*

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Until the past decade, the idea of wrongful discharge legislation seemed entirely academic and remote from immediate consideration. The same characterization can be ascribed to the present situation—but the debate has emerged with a measure of intensity unknown a year or so ago. This change is attributable to one major development that has taken place since Professor Clyde Summers' seminal article[1] almost a decade ago which advocated unfair dismissal legislation of the kind which exists in Europe.

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[1]Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481 (1976).