

## CHAPTER 5

### CONTRACT INTERPRETATION

#### I. THE INTERPRETIVE PROCESS: MYTHS AND REALITY\*

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Given the thoroughly pedestrian title of my subject as it appears in the Program, that is: “Contract Interpretation,” it is astonishing that so many of you are on hand this morning. There is a possibility, perhaps a probability, that many of you have come simply out of curiosity to see if there really is something to be said about contract interpretation which has not already been said. My understanding of the assignment, however, has led me to title my paper: “The Interpretive Process: Myths and Reality.” This seems considerably more racy and provocative than “Contract Interpretation.” It also avoids the erroneous implication that the process of interpreting a collective bargaining agreement is the same as the process of interpreting any other type of contract.

There still remains, however, the hard fact that since 1947 the Academy has had many brilliant papers—both provocative and scholarly—on the subject of the interpretive process. Thus, to some extent I will be threshing old straw. Nonetheless there may be a few useful grains of wisdom which have been overlooked until today.

In light of a conversation with my 11-year-old granddaughter a few weeks ago, I approach this task with some trepidation. She attends a very fine Pittsburgh suburban school where in the 6th grade they had just studied a little bit about early Greek philosophers. So I asked her what she had learned about Socrates, “Oh,” she said, “he was a great philosopher who went around giving people a lot of good advice all the time—. They poisoned him.”

Let me then start by noting that like many other veteran arbitrators, I have been involved in training new arbitrators in

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one way or another ever since 1951. As far back as 1950 an Academy committee first recommended that the Academy consider developing a training program.<sup>1</sup>

Finally, at our 1962 Annual Meeting we had a workshop on "The Development of Qualified New Arbitrators" which was initiated by Fred Livingston who in that year was Co-Chairman of the Committee on Labor Arbitration for the ABA Labor Relations Law Section. Fred stressed, in part, the unanimous feeling of his committee that some method should be established for developing new arbitrators.<sup>2</sup> By a happy coincidence this workshop occurred at the inception of Ben Aaron's term as NAA President. Ben forthwith leapt at the challenge and launched the Academy in a major training effort. When I succeeded Ben in 1963 we continued to push this endeavor. In those two years, as far as I can recall, there were regional NAA training programs in Chicago, Philadelphia, Pittsburgh, Cleveland, St. Louis, and on the West Coast. In each instance we had the cooperation of NAA members, labor and management representatives, and the AAA at the local level. Although this effort met with at least modest success and the Academy maintained a Training Committee over a dozen or more years, the effort ultimately lost its momentum entirely. In recent years it effectively has been replaced by our mentor-intern training program.

By the 1970s, in any event, the Academy's training efforts were deemed inadequate by many of our constituents and some began to develop their own training programs. General Electric and the IUE pioneered this effort with a program staged at the University of Michigan Law School in 1975. Many leading NAA members participated and gave outstanding presentations on major topics. Most of the program content now can be found in a

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<sup>1</sup>The Profession of Labor Arbitration. Selected Papers from The First Seven Annual Meetings of the National Academy of Arbitrators: 1948-1954 (Washington: BNA Books, 1957), 170, 175: "It is most fitting that this Academy . . . should make training for arbitration one of its major concerns."

<sup>2</sup>*The Development of Qualified New Arbitrators*, in *Collective Bargaining and the Arbitrator's Role*, Proceedings of the 15th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1962) 206. The Committee Report appears in Appendix B, and at page 248, it concludes: "The importance of the subject of this report may be appreciated in light of the virtually uniform commitment to arbitration as the method of deciding disputes arising under the terms of a collective bargaining agreement. Continued and improved effectiveness of this private system of jurisprudence depends significantly upon the quality of the arbitrator. *The Committee is convinced that the Bar must contribute to the development of a body of arbitrators equal to the responsibility entrusted to them.*" (Emphasis supplied.)

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book published by the ILR Press under the editorship of Arnold Zack.<sup>3</sup>

Also during the late 1970s the ABA Labor Law Section Subcommittee on Arbitration developed a training program of even more ambitious scope which is embodied in *Labor Arbitrator Development: A Handbook*, published in 1983.<sup>4</sup> As described in its introduction, the Handbook aims to provide a manual for training acceptable labor arbitrators—including both a substantive and procedural model for developing competent neutrals. Again many leading members of the Academy contributed articles of great merit.

Either of these books can be put to good use as a foundation for any arbitrator training program. Neither, however, directly or fully addresses some subjects which now should be clarified and amplified.

We all know that the objective of any training program is to produce the greatest possible number of “acceptable” arbitrators. Experience demonstrates also that the quality of “acceptability” cannot be achieved simply through exposure to labor and management in meetings, seminars, hearings or even by having a few decisions published. Given the need for essential personal qualities and adequate background knowledge of unionization, management functions, collective bargaining, and major issues in problem areas—the ultimate objective must be to develop basic competence in the individual arbitrator, that is, an ability to produce in each case a decision which is as sound and realistic as is possible under the given agreement and the presentations.

As of this moment, there is an abundance of literature purporting to provide guidance for arbitrators dealing with interpretive problems. Much of this not only is of dubious value but in some instances also seriously misleading. Here let me note that several provisions in our Code of Professional Responsibility are of more than passing interest in this regard. First an arbitrator “must be as ready to rule for one party as the other on each issue.”<sup>5</sup> Second, an arbitrator “should keep current with principles, practices, and developments that are relevant to his or her

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<sup>3</sup>Zack, *Arbitration in Practice* (Ithaca: ILR Press, 1984).

<sup>4</sup>*Labor Arbitrator Development: A Handbook*, eds. Christopher A. Barreca and others (Washington: BNA Books, 1983).

<sup>5</sup>Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (1974), Part 1-A-2.

own field of arbitration practice.”<sup>6</sup> Finally the Code tells us that “An experienced arbitrator should cooperate in the training of new arbitrators.”<sup>7</sup>

Realistic reading of these Code provisions seems to require that every arbitrator strive to develop a sufficient degree of competence and sophistication to ensure that in any given case, he or she in fact can be “as ready to rule for one party as for the other” and that experienced arbitrators should lend assistance in this endeavor. From its beginning, moreover, a principal purpose of the Academy has been “to establish and foster high standards *and competence* among those engaged in the arbitration of industrial disputes on a professional basis.” Just this past Tuesday the Academy’s Board of Governors adopted a new program for training acceptable arbitrators. My presentation today rests on the assumption that all members of the Academy share an obligation to develop as realistic and accurate an understanding of the nature of the interpretive process as may be possible and that some kind of basic consensus on this vital subject now should be possible, some two dozen years after the Steelworkers Trilogy.

In explaining how I personally was tempted into this arena at this time—perhaps I should call it a jungle—let me start with a quotation from Edna St. Vincent Millay. One of my young associates a few months ago gave me this observation by the great poetess and sometime philosopher. She said, “It’s not true that life is just one damn thing after another. Life is the same damn thing all the time.”

After my first 20 years as Chairman of the U.S. Steel/USW Board of Arbitration, I was just about ready to conclude that the life of a grievance arbitrator really had become the same damn thing all the time. But then just a few years ago I made an intriguing discovery out there in the ad hoc world, suggesting that—in the real world of the typical ad hoc arbitrator—life more probably is in fact just one damn thing after another. It was about two years ago that I acquired an ad hoc interpretive case involving one of eight or nine companies which maintained collective bargaining relations with a given union, all under separate contracts but with largely identical language. This particular company was the last in the group to be organized. After

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<sup>6</sup>*Id.*, Part 1-C-1-a.

<sup>7</sup>*Id.*, Part 1-C-2.

the parties' first agreement was negotiated, but before it had been ratified, the employer proceeded to put it into effect by informal agreement. Almost immediately a problem arose as to the interpretation of one wage provision. The parties' top representatives then agreed that, as to this particular interpretive issue, they would accept the decision of another arbitrator who was about to hear the identical issue under the same language in a grievance pending with one of the other employers in the group. But when that arbitrator's decision was issued my company was so distressed by the arbitrator's reasoning that it refused to accept the award as a valid interpretation. At my hearing, the company's case rested almost entirely on the "parol evidence" rule: It strenuously argued that I could not hear any evidence at all as to the interpretive agreement or in any way rely on the other arbitrator's award to "add to" the written terms of its own agreement. Ample citations were provided to support these propositions.

Given the conviction with which this argument was pressed and having had no intimate acquaintance with the parol evidence rule for close to 40 years, I was inspired to consult some texts on labor arbitration. Thus I discovered a new and, for me, disconcerting conceptual world. This world appears to have been created largely by writers who—consciously or otherwise—are anxious to restrict the scope of the interpretive process as narrowly as possible without regard to the essential function of grievance arbitration in producing sound decisions based on realistic interpretations of the parties' agreements. I would hope this morning to demonstrate that such a doctrinaire approach to the arbitral process belatedly should be recognized and characterized as unsound—particularly for the purpose of training new arbitrators.

### **The Parol Evidence Myth**

Let me return briefly then to the parol evidence "rule." Here we find in a recently published arbitration service:<sup>8</sup>

#### *10.4. Parol Evidence Rule*

The parol evidence rule is both a rule of evidence and a rule of construction. As a rule of evidence, its function is to *limit the informa-*

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<sup>8</sup>Labor Arbitration (Prentice-Hall, 1981), 158.

*tion that is admissible at a trial or hearing. As a construction principle, it aids the one making the decision in determining what types of information he should consider when interpreting a contract provision. The rule works primarily as a limiting factor upon the decision maker. (Emphasis supplied.)*

You can imagine that this passage really aroused my curiosity. Thus I was stimulated to consult next the highly regarded—and best available—text on grievance arbitration.<sup>9</sup> There I learned that—

*The parol-evidence rule is very frequently advanced and generally applied in arbitration cases. Sometimes the collective agreement will provide specifically against verbal agreements that conflict with it.*

*While some might argue that arbitrators should consider any evidence showing the true intention of the parties and that this intention should be given effect whether expressed by the language used or not, the general denial of power to add to, subtract from, or modify the agreement provides special justification for the observance of the parol-evidence rule by arbitrators. (Emphasis supplied.)*

Unnerved but unpersuaded by these purported authorities, I finally resorted to Wigmore, Williston, and Corbin to discover, as I initially had believed, that the parol evidence rule is not a rule of evidence at all. It surely has no useful purpose as a “rule of evidence” in arbitration. As for its substantive relevance, the rule in truth is no more than a statement of the obvious: where the parties, on the face of their written agreement, make clear that it embodies their entire agreement on all subjects the interpreter must be controlled by this clear intent.<sup>10</sup>

This kind of clarity can be achieved where the parties really so desire. In 1971, for example, the Postal Service and four Postal Workers Unions did just this in their first agreement after the Postal Reorganization Act was passed. Article XIX in that agreement provided:

*Article XIX. Scope of Agreement*

*This “Working Agreement” constitutes the entire Agreement between the parties and correctly expresses all the rights and obligations of the parties except for those specific subjects which the parties have formally agreed to*

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<sup>9</sup>Elkouri & Elkouri, *How Arbitration Works*, 3d. ed. (Washington: BNA Books, 1973), 362–363.

<sup>10</sup>The inutility of the parol evidence rule in arbitration has been well demonstrated by Addison Mueller, *The Law of Contracts—A Changing Legal Environment*, in *Truth, Lie Detectors, and other Problems in Labor Arbitration*, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1978), 204, 210–215.

*continue negotiating after this "Working Agreement" is concluded. The parties acknowledge that each had the opportunity to make demands and proposals with respect to all collective bargaining subjects. Each party agrees that for the life of this "Working Agreement" the other parties shall not be obligated to bargain with respect to any subject not covered in the "Working Agreement" or reserved by formal understanding as a subject for continued negotiation during the term of this Agreement. (Emphasis supplied.)*

It will come as no surprise to sophisticated practitioners in collective bargaining that this restrictive language did not last beyond the first USPS Agreement. Their new Article XIX—negotiated in 1973—provided:

*Article XIX. Handbooks and Manuals*

Copies of all handbooks, manuals, and regulations of the Postal Service that contain sections that relate to wages, hours, and working conditions of employees covered by this Agreement shall be furnished to the Unions on or before January 20, 1974. Nothing in any such handbook, manual, or regulation shall conflict with this Agreement. Those parts of any such handbook, manual, or regulation that directly relate to wages, hours, or working conditions, as they apply to employees covered by this Agreement, shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least 30 days prior to issuance. The parties shall meet concerning such changes, and if the Unions believe that the proposed changes violate the National Agreement (including this Article), they may submit the issue to arbitration in accordance with Step 4 of the grievance-arbitration procedure within 30 days after receipt of the notice of proposed change.

While no one now can know exactly why all five parties in the 1973 USPS negotiations were ready to embrace this 180° change of course, it seems a fair inference that by this time the parties had become aware that they could not, realistically, develop a written agreement which would embody all necessary standards, rules, and procedures essential for day-to-day administration of employee relations in an enterprise with 35,000 separate installations throughout the United States and more than 700,000 employees.

While this is an extreme example, it underscores the fact that a collective bargaining agreement normally cannot prescribe all essential rules or guidelines for day-to-day administration of

industrial relations. This practical circumstance surely casts doubt on the suggestion that the typical "will not add to" boiler plate language describing the arbitrator's authority (in many agreements) fairly represents a conscious adoption of the "parol evidence" rule.

### **The Pristine Reserved Rights Myth**

The assumption that the "will not add to" phrase embraces the parol evidence rule represents the keystone of the doctrinaire interpretive theory which Charles Killingsworth has described as the "pristine" management reserved-rights theory. For this purpose, I will accept the dictionary definition of "pristine" as meaning "primitive." Let me illustrate this doctrine with a few paragraphs from one of the major texts on labor arbitration<sup>11</sup> under the heading "The Residual Rights' Construction Principle: The Substantive Application of the Parol Evidence Rule.":

*The "Residual Rights" construction principle is very closely related to the parol evidence rule. The policy reasons for the principle are similar. The residual rights—often called "management rights"—construction principle is the simple view that management had all rights necessary to manage the plant and direct the working forces before the union became the employees' representative and negotiated a contract, and that unless management limited its managerial rights by a specific term of the agreement, those rights did not evaporate and hence are still retained by management after the labor agreement is signed.*

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When an arbitrator construes a labor agreement provision under the residual rights doctrine or the parol evidence rule, he or she will hold that, *if there is no negotiated written provision restricting management's right to take specific action, then there is no restriction on management's action.*

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Arbitrators have pointed out that the residual rights construction principle operates even where there is no clause in the agreement specifically reserving to management the right to manage. In *International Shoe Co.*, Arbitrator Raymond R. Roberts said:

Even without a specific retention of management rights in a collective bargaining agreement, it is generally regarded that management retains all of its rights as a common law employer including those necessary to the operation of its business, except to the extent that these rights have been bargained away in the collective bargaining agreement.

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<sup>11</sup>Fairweather, *Practice and Procedure in Labor Arbitration*, 2d. ed. (Washington: BNA Books, 1983), 210-215.

*The "Arbitrator's Jurisdiction" Construction Principle*

*The parol evidence rule and the residual rights doctrine are further articulations of the arbitrator's jurisdiction and authority. The arbitrator must find a restriction imposed on management contained within the four corners of the agreement, simply because the arbitrator has been hired to interpret the terms of the written labor agreement and prescribe how they are to be applied to resolve a particular grievance.*

*Most labor agreements expressly provide that the arbitrator does not have the authority to add to, subtract from, or modify the agreement.*

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Even where the labor agreement is silent on the scope of the arbitrator's jurisdiction, arbitrators usually do not hesitate to imply such limitations. (Emphasis supplied.)

Under this exposition an arbitrator clearly has no authority to hold that management's freedom of action is limited in any respect except by *specific* language "within the four corners of the collective agreement" and this alleged limitation is made clear by the phrase saying that an arbitrator "shall not add to" the terms of the agreement."<sup>12</sup>

This doctrinaire effort to circumscribe the interpretive process began to emerge, particularly in ad hoc presentations of attorneys, shortly after World War II. To say the least, it raises some interesting questions: (1) Is an arbitrator really precluded from finding any implied obligation arising from the written terms of the agreement? (2) How can there be any meaningful substantive interpretation which does not literally "add to" the written terms—in other words how can there be a useful interpretive precedent? (3) How can an arbitrator find a specialized meaning for language based on the context in which it was negotiated rather than on some dictionary definition or ordinary usage? (4) How can either party rely on a long established practice constituting a basic condition underlying—for example—a wage or seniority provision in the agreement? (5) How can an arbitrator "flesh out" a just cause or "make whole" provision by adopting common sense or practical ground rules? or (6) How can we fashion an appropriate remedy for such situations as an improper discharge, a seniority violation, or an improper change in an incentive where no remedy is spelled out in the agreement?

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<sup>12</sup>Essentially the same theory has been enunciated by two eminent members of the Academy. See Zack and Bloch, *Labor Agreement in Negotiation and Arbitration* (Washington: BNA Books, 1983) where, at page 56, we find: "The more prevalent view is that those rights not *specifically* negotiated away from management by the union remain unfettered and within the control of management." (Emphasis supplied.)

In his Presidential Address at the 1969 Academy meeting Charles Killingsworth directly and persuasively challenged this doctrinaire pristine reserved rights theory. Despite the Killingsworth analysis<sup>13</sup> expressions of the pristine management's reserved rights obviously still seem to enjoy a substantial degree of uncritical acceptance, at least verbally. It even seems to have surfaced recently in the 1983 ABA book *Labor Arbitrator Development*. This *Handbook* does not seek to spell out Hornbook rules for interpreting collective bargaining agreements, but does list as suggested reading both of the texts quoted above which embrace this restrictive theory.

An important section of the *Handbook* also reproduces a number of decisions of prominent arbitrators for purposes of instruction. One such opinion was written by one of our most illustrious members early in his career. It apparently was included in the *Handbook* to illustrate an application of the pristine reserved rights doctrine. After holding that (noncraft) job descriptions were not intended to freeze job duties, this arbitrator added a sentence to the effect that management's right to change job duties should be recognized "unless expressly limited or foreclosed by the terms of the Agreement."<sup>14</sup> This opinion was written in 1956 when many arbitrators were prone to spin off such loose observations in their opinions as a kind of makeweight—better known among lawyers as "dicta." During my ad hoc experience up to 1951 I easily could have embraced the same sort of proposition. This particular arbitrator was and is one of our truly great scholars. Ben Aaron's later writings more reliably reflect his real views on the pristine theory of management rights. Based on recent conversations I have no doubt that they essentially coincide with my own.

In these circumstances, it seems imperative once more to evaluate some of the major consequences of embracing the

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<sup>13</sup>The Fairweather concept of management's reserved rights remains today pretty much the same as it was in 1968. In a recent review Carlton Snow observed, in respect to Fairweather's treatment of subcontracting in his 1983 edition: "This discussion seems less intent on highlighting the diverse views among arbitrators on this topic and more concerned with the development of an internally consistent, doctrinal scheme. It tends to obscure the point that arbitrators have provided a dynamic response to the issue of subcontracting that defies a doctrinal approach" 39 Arb. J. 53, 54 (1984).

<sup>14</sup>As a basis for discussion, the *Handbook* asks: "Is the reserved rights doctrine a factor in Arbitrator Aaron's decision?" No other "Factors" are suggested in the questions as possible bases for the decision. *Labor Arbitrator Development: A Handbook*, *supra* note 4 at 340.

pristine management reserved rights theory. Let us start with the most significant—can there be any implied obligations? This basic question arose in one of my first decisions as Chairman of the U.S. Steel/USW Board of Arbitration which later was blasted by various commentators as unsound. The criticism peaked at our 18th Annual Meeting when Francis O’Connell (then Vice President of Olin-Mathieson) characterized the decision as based on “misunderstanding or disregard of the true nature of the collective agreement.”<sup>15</sup>

It is my fond impression that two commentators on the O’Connell paper fairly well demolished his basic thesis,<sup>16</sup> but this fact seems to have escaped the notice of others since that time. A few words now about the actual problem in that case (known as N-159) may be helpful. The company there had brought two outside contractors into the plant to perform work regularly done up to that time by bargaining employees *inside the plant*. One such operation was conducted on a continuing basis in the Open Hearth Department, using equipment formerly operated by U.S. Steel employees and performing the work in exactly the same manner. The contract for this work was to run for an indefinite term. The work was essential to operation of the Open Hearth. Baldly stated, contractor employees simply had been substituted for bargaining unit employees to perform essential work inside the plant. The other contract involved casual use of outside employees to wash windows at some of the plant buildings. The company held as to both grievances there was no restriction at all on its right to contract out bargaining unit work to be performed *in the plant*, even including major operations such as Blast Furnaces, Open Hearths, or Coke Ovens. The union relied on a similarly sweeping argument that—since the work theretofore had been performed only by jobs in seniority units covered by written local seniority agreements—only employees on such jobs could be assigned to the work absent an agreed change in the established seniority unit.

These far-reaching arguments were fairly representative of the way the parties came to arbitration in the early 50s in this

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<sup>15</sup>O’Connell, Jr. *The Labor Arbitrator: Judge or Legislator*, Proceedings of the 18th Annual Meeting of the National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1965), 102, 113.

<sup>16</sup>Fischer, Proceedings of the 18th Annual Meeting, *supra* note 15 at 139–152 and Groner at 171–190.

relationship. Case N-159<sup>17</sup> surfaced within weeks after I came to Pittsburgh as the new Chairman of the U.S. Steel/USW Board of Arbitration in 1951, after they had been unable to agree on any Chairman for about two years. The agreement included no language at all in respect to the use of contractors to perform bargaining unit work. Arguably, a contractual basis could have been found to embrace either one of the two extreme arguments. But to embrace either would have resulted in an unsound precedent of far-reaching implications not only for U.S. Steel but for much of the industry. My instincts thus led me to seek a more realistic and less disruptive basis for decision. I was encouraged to do so by my dim recollection of reading Justice Cardozo's 1917 Opinion in *Wood v. Lady Duff-Gordon* as a law student. Cardozo wrote:<sup>18</sup>

The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking yet the whole writing may be instinct with an obligation, imperfectly expressed.

As my opinion noted, there are at least four different major categories into which may fall what are loosely described as "contracting out" cases.<sup>19</sup> Some sweeping generalization from an opinion in one category of case is not likely to be relevant in a different category. No case was cited to me which addressed the unique problem in N-159. Given my own direct experience in collective bargaining I had no difficulty rejecting *both* the company claim of unlimited right to contract out work *within the plant* and the union claim of exclusive franchise arising from the agreed seniority units. Knowing also that contractors often were used for some purposes within the confines of U.S. Steel plants, and that expansions and contractions of the work force were inevitable for entirely legitimate business reasons, I therefore returned the grievances to the parties to settle on a practical basis, in light of two paragraphs in the opinion stating:<sup>20</sup>

The inclusion of given individuals in the bargaining unit is determined, not on the basis of *who they are*, but on the basis of the *kind of jobs* which they happen to fill. *In view of the fact that the Union has status*

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<sup>17</sup>*National Tube Co.*, 17 LA 790, 2 Steel Arb. 777 (Garrett, 1951).

18222 N.Y. 88, 91 (1917).

<sup>19</sup>As (1) new construction (2) extra-ordinary maintenance projects, (3) manufacture of semifinished products, parts, or subassemblies *in the contractor's plant*, and (4) continuing performance of ordinary bargaining unit work *in the plant*.

<sup>20</sup>*National Tube Co.*, *supra* note 17, 17 LA at 792-793.

*as exclusive representative of all incumbents of a given group of jobs, it would appear that recognition of the Union plainly obliges the Company to refrain from arbitrarily or unreasonably reducing the scope of the bargaining unit.*

*What is arbitrary or unreasonable in this regard is a practical question which cannot be determined in a vacuum. The group of jobs which constitute a bargaining unit is not static and cannot be. Certain expansions, contractions, and modifications of the total number of jobs within the defined bargaining unit are normal, expectable and essential to proper conduct of the enterprise. Recognition of the Union for purposes of bargaining does not imply of itself any deviation from this generally recognized principle. The question in this case, then, is simply whether the Company's action—either as to window washing or slag shoveling—can be justified on the basis of all relevant evidence as a normal and reasonable management action in arranging for the conduct of work at the plant. (Emphasis supplied.)*

It should be of more than passing interest that, with this opinion, the parties disposed of both grievances without any apparent difficulty. Nor was this decision a revolutionary departure from the expectable norm in arbitration in this relationship. At the time I was serving as Chairman of a Board which included a representative of each party. Both had full opportunity to discuss a draft before the decision issued. There was no suggestion that the decision went beyond the legitimate scope of my responsibility to provide a realistic interpretation of the parties' agreement.<sup>21</sup>

It is true, of course, that a finding of implied obligation in respect to the performing of bargaining unit work *within* the plant cannot be reconciled with the pristine reserved rights doctrine. The proponents of the pristine doctrine seem to start with an assumption that—under the common law—management enjoyed absolute discretion in the operation of its business so that when a union negotiated with the company, this unlimited discretion was curtailed only as a specific limitation was written into the contract. The proponents of the doctrine do not explain, however, why the common law represents the starting point for such an analysis. Since July of 1935 the National Labor Relations Act has made *all* terms and conditions of employment subject to good faith collective bargaining once a collective bargaining representative has been designated for a given bargaining unit.

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<sup>21</sup>It may be pertinent that this was not an ad hoc case. Had it been, the result might have been somewhat different, particularly since returning the case to the parties for settlement might not have been feasible or likely to be productive.

Thus it may be an interesting footnote to history that the first pristine management reserved rights proponent to address the Academy was a Vice President of Bethlehem Steel, Jim Phelps—at our Cleveland meeting in 1957.<sup>22</sup> As a top representative of Bethlehem Steel, Phelps presumably was aware that Bethlehem had engaged in collective bargaining with the Steelworkers only after initial protracted resistance (including several cases before the National Labor Relations Board) so that when the parties finally did bargain, both knew that they did so within the framework of the NLRA. Jim, who really was a delightful and generally well-informed individual, did not point to anything in the Bethlehem agreements to indicate that their arbitrators were limited to enforcing only specific written limitations upon management's discretion. Finally, moreover, he was realistic enough to recognize that—where the agreement included no management reserved rights clause—it would have to be “implied.”<sup>23</sup>

One pertinent fact seems totally overlooked by the proponents of the pristine residual rights doctrine. The United States Supreme Court itself has not hesitated to find implied obligations arising from terms in a collective bargaining agreement. Notable examples are the *Lucas Flour*<sup>24</sup> and *Gateway Coal*<sup>25</sup> cases. If the U.S. Supreme Court may infer the existence of a no-strike pledge from the parties' adoption of a comprehensive grievance procedure with arbitration, there hardly can be good reason for an arbitrator to embrace a more timorous approach to the interpretive process.<sup>26</sup>

Finally, of course, the pristine management rights doctrine cannot be reconciled with the controlling opinion of the Supreme Court in the Steelworkers Trilogy which the full Court continues to support with a clear sense of commitment. Speaking for six Justices in the *Warrior and Gulf* Opinion, Justice Douglas stated initially that:<sup>27</sup>

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<sup>22</sup>Phelps, *Management's Reserved Rights: An Industry View*, in *Management Rights and the Arbitration Process*, Proceedings of the 9th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1956), 102, 117—characterizing the collective bargaining agreement as “an instrument containing specific and limited restrictions on the functions that management would otherwise be free to exercise.”

<sup>23</sup>*Id.* at 113–114.

<sup>24</sup>*Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 49 LRRM 2717 (1962).

<sup>25</sup>*Gateway Coal Co. v. U.M.W.*, 414 U.S. 368, 85 LRRM 2049 (1974).

<sup>26</sup>Professor Feller, as early as 1973, detailed numerous judicial opinions finding implied obligations under collective bargaining agreements. See Feller, *a General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 747–751 (1973).

<sup>27</sup>363 U.S. 574, 578–579, 46 LRRM 2416, 2418 (1960).

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The Collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a *generalized code* to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant. (Emphasis supplied.)

The Douglas Opinion went on to describe the potential reach of the arbitrator's authority in sweeping terms. One passage seems most pertinent for present purposes:<sup>28</sup>

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. 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. *The parties expect that his judgment will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment as to whether tensions will be heightened or diminished.* (Emphasis supplied.)

It is true that, initially at least, this portion of the Douglas Opinion drew heavy fire from many commentators,<sup>29</sup> including highly respected members of the Academy. Indeed, the Trilogy quite often has been characterized as excessively effusive in its description of the authority and role of the arbitrator. This generally skeptical reaction to the Trilogy opinions seems still to be commonplace and very possibly has obscured their true significance.

At our Chicago meeting in 1962 the late Phil Marshall of Milwaukee, one of our well-respected members and a WLB alumnus, led the charge as follows:<sup>30</sup>

The Steelworkers Trilogy, and more particularly the opinion in the *Warrior* case by Mr. Justice Douglas, *went so far in entrenching the jurisdiction of the arbitrator that the arbitrator (speaking of him as a generic person) was the first to want to run for the nearest exit.* As one arbitrator

<sup>28</sup>*Id.* at 581–582, 46 LRRM at 2419.

<sup>29</sup>An early and relatively mild critic was Sam Kagel. See *Recent Supreme Court Decisions and the Arbitration Process* (with Discussions by Jesse Freidin and David Feller), in *Arbitration and Public Policy*, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 1, 10, 18.

<sup>30</sup>Marshall, *Section 301—Problems and Prospects*, in *Labor Arbitration and Industrial Change*, Proceedings of the 16th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1963), 146, 150–151.

has observed: "Few arbitrators today possess, nor do they desire, the virtually unlimited charter of authority which Mr. Justice Douglas seems determined to grant to them." (Harold W. Davey, 36 *Notre Dame Lawyer* 138, 143 (1961).) . . . .

The most dangerous aspect of the "Douglas Doctrine," as I see it, is not to be found in the issue of arbitrability, which can be rationalized, as I have suggested immediately above, by distinguishing between the pure question of arbitrability as arbitrators have generally applied that concept and the degree of frivolity necessary to render an agreement to arbitrate unenforceable in the federal courts. *Rather, the danger lies in the high degree of expertness which Mr. Justice Douglas seems to confer upon arbitrators as a class and the frightening suggestion that his award may be based upon his judgment as to whether plant "tensions will be heightened or diminished" by his decision.* I had always thought it fundamental that the decision of an arbitrator be based upon the collective bargaining agreement and the evidence presented and not on an evaluation of the issue based upon the specialized knowledge of the arbitrator. (3 *Am. Jur.*, Arbitration & Award, Sections 3 and 4; and 85 ALR 2d 780.) (Emphasis supplied.)

Marshall's blast was echoed by Francis O'Connell at our 18th meeting in 1965:<sup>31</sup>

*It is rather widely acknowledged by now that in discussing the nature of arbitration in the Warrior case, Justice Douglas went to some rather fanciful extremes. There is no need in this paper to review the Court's unrealistic notions concerning the arbitrator's function of reducing tensions and improving morale. I do not believe that many arbitrators take that rhetoric very seriously. And it could be dismissed as the "romantic" notion which Paul Hays labeled it, but for one thing: It illustrates the fundamental, and pervasive error of the Steelworkers' Trilogy, the one that is doing continuing harm to the arbitration process, the one that has created the mood, indeed, the need, for restrictive language concerning arbitration. That error is the assumption that wide-open, free-wheeling arbitration à la Taylor is what both parties want from the arbitrator. That both parties want the arbitrator to be father confessor, mediator, judge, and legislator. It is the need to negate this view that makes many in management determined to amend their contracts—to restore rights arbitration to its rightful role, that is, a judicial role rather than a legislative or mediatory one.* (Emphasis supplied.)

O'Connell was right at least to the extent that by 1965 it had become relatively fashionable to criticize the Trilogy Opinions as unrealistic. A commentator at our 20th Annual Meeting struck a particularly high note with the comment that he did not "share

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<sup>31</sup>O'Connell, Jr., *supra* note 15 at 106-107.

Justice Douglas' mystical reverence for the arbitration profession."<sup>32</sup>

As far as I am aware, indeed, few spokesmen have come forward until today to point out that the Trilogy Opinions in fact may be much closer to reality than most of the criticisms so colorfully expressed.<sup>33</sup> Most critics seem oblivious to the principal purpose of the Opinions. The key fact here is that the Court had set out earlier, as noted in its critically important 1958 *Lincoln Mills* decision, to develop a federal common law of arbitration. The dominant purpose of the Court in this regard was to maximize the role of arbitration and minimize the role of the courts in determining, initially, whether any given grievance was arbitrable. This required that—in describing the arbitration process—the majority opinions in *American Manufacturing and Warrior and Gulf* deliberately stake out the furthest possible legitimate reach of the arbitral function—not because of “romantic” notions of arbitral omnipotence but simply for the very practical reason that this was essential to make clear to the lower federal courts (and to state courts) their limited role in dealing with arbitration problems under Section 301 of the LMRA.

This objective required that the Court be concerned with what an arbitrator (as distinct from a court) legitimately *could* do, and not with what an arbitrator *should* do in a given case. In this endeavor the Court drew heavily on the writings of two illustrious and highly respected members of the Academy who also happened to be professors of law—Harry Shulman<sup>34</sup> and Archie Cox.<sup>35</sup> Both Shulman and Cox earlier had made giant contributions to an understanding of the true nature of grievance arbitration. Their basic views essentially are combined in the Trilogy. The Court was impelled to embrace their writings in

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<sup>32</sup>Lewis, *The Arbitrator and the NLRB: Workshop Sessions: Workshop A*, 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), 111, 122–123.

<sup>33</sup>There have been many valuable presentations on the clear impact of the Trilogy in guiding the lower federal and state courts. One recent excellent treatment is by Charles Morris. See *Twenty Years of Trilogy: A Celebration*, in *Decisional Thinking of Arbitrators and Judges, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators*, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1981), 331–373.

<sup>34</sup>Shulman, *Reason, Contract, and Law in Labor Relations*, in *Management Rights and the Arbitration Process*, supra note 22, Appendix A.

<sup>35</sup>Cox, *Reflections Upon Labor Arbitration in the Light of the Lincoln Mills Case*, in *Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators*, ed. Jean T. McKelvey (Washington: BNA Books, 1959), 24, 33.

large part by Dave Feller who was the principal architect of the USW presentation in the Trilogy,<sup>36</sup> as well as in *Lincoln Mills*.

My experience since 1946, including handling well over 10,000 cases has not yet revealed to me that degree of excessive romanticism which Marshall, O'Connell, and many others have seen in the Trilogy. Is it really absurd, for example, to be concerned, where relevant, with the effect of a given decision upon (1) "productivity," (2) "morale," or (3) "tensions in the shop"? Clearly not. A decision as to the adequacy of new or changed incentive standards may require careful evaluation of both productivity and employee morale in order to determine whether the standards are proper. If there is also a claim of slow down, there surely will be "tensions in the shop" to be evaluated with care. Safety cases frequently involve serious "tension" problems.<sup>37</sup>

All three of these factors can be present in a single case. Suppose a crane operator with several years' experience on a variety of cranes is demoted to a lower job because he is said to be unable to operate a crane safely. This occurs after a relatively minor accident involving apparent negligence. He grieves, claiming violation of his seniority rights. At the hearing we learn that the crane to which he was assigned served a production crew whose incentive earnings were largely dependent on the crane operator's speed. The grievant had bid successfully onto this crane only four weeks before his removal. His predecessor had been one of the most efficient operators in the shop. The production crew first complained to the foreman that their earnings had gone down markedly because grievant was too slow. One week later he had a minor accident because he was trying to cut corners to speed up. The crew then complained he was unsafe. His removal followed. The union now claims that the demotion was for reasons other than safety. Here are productivity, morale, and tensions in the shop all in one seniority case.<sup>38</sup>

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<sup>36</sup>Attorneys Goldberg, Feller, Bredhoff, and Anker briefed all three cases for the USW. Feller argued *American MFG* and *Warrior & Gulf*. He was joined by Bredhoff in arguing *Enterprise*.

<sup>37</sup>It is true that many companies and unions exclude incentive and safety issues from arbitration and that such issues rarely are involved in ad hoc cases. This fact may account for some of the scornful comment heaped upon the Trilogy by arbitrators who had not been exposed to such problems.

<sup>38</sup>Justice Powell, speaking for 7 other Justices in *Gateway Coal*, specifically quoted the language in *Warrior & Gulf* referring to productivity, tensions, and morale and then observed: "We think these remarks are as applicable to labor disputes touching the safety of the employees as to other varieties of disagreement. Moreover, the special expertise of the labor arbitrator, with his knowledge of the common law of the shop, is as important to the one case as the other, and the need to consider such factors as productivity and worker

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All of this by no means is to suggest that the Trilogy was calculated to spell the end of management reserved rights. Quite the contrary. In fact, most arbitrators today seem to recognize that management indeed does have reserved rights which will prevail where no limitation on the exercise of essential management discretion may be found to have arisen from the particular agreement. Such a widely held perception may well be viewed as part of the "common law" of industry, as visualized in the *Warrior and Gulf* opinion.<sup>39</sup>

Finally, if there really were any doubt today that an arbitrator properly may recognize that management is free to act where no limitation can be found to arise under the agreement, it should be dispelled by reference to the Steelworkers brief in the Trilogy,<sup>40</sup> and the later observations of Dave Feller in "A General Theory of the Collective Bargaining Agreement."<sup>41</sup>

This, of course, leaves a major question as to the extent to which the "common law of the shop" (described in the Trilogy as one "source of law" available to an arbitrator) potentially may limit the exercise of management discretion. This language in the Trilogy surely was not intended to suggest that there always

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morale is readily apparent." 414 U.S. 368, 379. On April 16, 1985 the Supreme Court once more made plain its adherence to the basic policy enunciated in the Trilogy. *Allis-Chalmers v. Lueck*, 118 LRRM 3345.

<sup>39</sup>Beyond that, a number of commonly accepted general principles have developed over the years which arbitrators may embrace in the absence of some cogent reason not to do so: for example, the notion of progressive or corrective discipline prior to ultimate discharge where the only contractual standard for evaluating discipline is "just" or "proper" cause. At our 23rd Annual Meeting Ralph Seward listed perhaps a dozen other generally accepted notions embraced by most arbitrators. *Grievance Arbitration—The Old Frontier*, in *Arbitration and the Expanding Role of Neutrals*, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 153, 158–159. Other commentators have stressed the implied authority of arbitrators to develop appropriate remedies where the contract is silent. See Stutz, *Arbitrators and the Remedy Power*, (with Discussion by M.S. Ryder) in *Labor Arbitration and Industrial Change*, supra note 30 at 68 and Seitz, *Remedies in Arbitration*, in *Labor Arbitration—Perspectives and Problems*, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1965), 1965, 171. An excellent recent analysis of the remedy "power" may be found in Feller, *The Remedy Power in Grievance Arbitration*, 5 *Indus. Rel. J.* 128 (1982).

<sup>40</sup>Brief for the Petitioner, Case Nos. 360, 443, and 538, U.S. Sp. Ct. Oct. Term 1959, 21, 23, 36–37 and 41. Particularly pertinent is the following: "In these cases there is no contemplation of the addition of new provisions to the agreement during the term, or of negotiation with the right to strike on subjects omitted from the agreement. *The agreement is intended to cover the total employment relationship.* It describes not only the rights of the employees and the ways in which management's normal prerogatives to hire, fire, promote, assign employees, and otherwise operate the plant will be limited, *but also in what areas management will be permitted to exercise unrestrained discretion because there is no limitation in the agreement. The usual collective bargaining agreement, in short, is not only a statute governing the conduct of the parties during the term of the agreement, it is a complete code.*" (At 36–37; emphasis supplied.)

<sup>41</sup>61 Calif. L. Rev. 663, 802 (1973).

will be a relevant "common law" in a given plant or that an arbitrator—particularly ad hoc—always will have a tangible basis to ascertain what such "common law" might be. Rather this portion of the Trilogy reflects the Court's earlier extensive quotation from Archie Cox's speech at our 1959 meeting where he observed:<sup>42</sup>

Within the sphere of collective bargaining the institutional characteristics and the logic of the governmental nature of the process of collective bargaining demand *a common law of the shop which furnishes the context of, and also implements, the agreement*. We must assume that intelligent negotiators acknowledge so plain a need unless they state a contrary rule in pretty plain words. (Emphasis supplied.)

It is my impression that for any "common law" of the shop to be effectuated in arbitration it should be found only in some specific solidly established practice which implements language in the agreement, or possibly is of such a basic nature as to support a finding that it constituted an implied condition of the entire agreement or of some specific provision in the agreement. Many distinguished commentators—Aaron, Wallen, and Mittenthal, among others—since have considered the nature and uses of established practice in arbitration.<sup>43</sup>

There is not much which I can add to the masterful treatment of this subject by Dick Mittenthal,<sup>44</sup> although some word of caution may be in order even today. As Owen Fairweather has noted, there is language in at least one early article which indicates that *all* existing practices in effect when an agreement is signed automatically should become part of the agreement and thus enforceable in arbitration. Some arbitral opinions are cited by Fairweather in which this expansive doctrine appears to have been embraced, at least verbally.<sup>45</sup> Practices which might be

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<sup>42</sup>*Reflections Upon Labor Arbitration in the Light of the Lincoln Mills Case*, *supra* note 35 at 44.

<sup>43</sup>An early USS/USW Board of Arbitration decision in Case N-146 often is quoted broadly as defining an enforceable established practice. That decision, however, involved a specific section in the parties' agreement declaring that certain "local working conditions"—arising from long practice—might be of controlling significance. The Opinion in N-146 was not intended for general application in determining implied obligations in the absence of such a "local working conditions" clause. *National Tube Div., U.S. Steel Co.*, 2 Steel Arb. 1187 (Garrett, 1953).

<sup>44</sup>Reproduced in Zack, *Arbitration in Practice*, *supra* note 3 at 181. The Mittenthal paper originally was published under the title *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy*, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 30-58.

<sup>45</sup>Fairweather, *Practice and Procedure in Labor Arbitration*, *supra* note 11 at 219-224.

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encompassed in this broad view could include the giving of Christmas turkeys, the number and location of plant gates, shift starting times, cafeteria availability, assignment of work among various departments or seniority units, and so on.

Here the third case in the Trilogy—*Enterprise Wheel*—is of dominant importance. In that opinion, Douglas wrote:<sup>46</sup>

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. (Emphasis supplied.)

Under this language there should be no doubt that a practice implementing, interpreting, or applying given agreement language, or constituting a basic condition underlying some term of the agreement, properly may be adopted as a basis for arbitral decision, whereas the annual discretionary giving of a Christmas turkey (without more) surely would be hard to visualize as an implied obligation. This type of discretionary gift, quite simply, does not appear to be such a basic condition of employment as to represent an assumption on which the agreement (or some provision thereof) was negotiated. Such a claimed controlling practice stands in contrast to paid lunch periods, regular coffee breaks, or wash-up time. Arguably a long practice of these types may represent part of the bargain embodied in an agreed wage structure or in a safety and health provision.<sup>47</sup>

### The Rules of Construction Myth

In contrast to those early commentators who suggested that all existing practices became part of the agreement are those who still insist that “ordinary contract construction principles” must control the interpretive process in arbitration. One widely used text asserts:<sup>48</sup>

At the very heart of labor arbitrator practice are the contract construction principles. These are used by arbitrators to construe the

<sup>46</sup>363 U.S. 593, 597, 46 LRRM 2423, 2425 (1960).

<sup>47</sup>An excellent early analysis of this type of situation appears in Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 Harv. L. Rev. 1097, 1123–1124 (1950).

<sup>48</sup>Fairweather, *supra* note 11 at 199.

provisions and significant language in labor agreements that approve or limit management action—the source of the grievance that provide grist for their mills. (Emphasis supplied.)

A more detailed exposition of this approach appears in *How Arbitration Works* by the Elkouris:<sup>49</sup>

Accepting, then, that the basic function of the “rights” arbitrator is agreement interpretation, an inquiry should be made concerning the techniques, standards, or rules used by arbitrators in executing this function. . . .

It should be emphasized that the courts, when called upon to construe collective agreements, use accepted standards of interpretation of general application.

Arbitrators likewise use these standards of construction. *In other words, it should be recognized that all written instruments, constitutions, statutes, and contracts are interpreted by the same general principles*, although the specific subject matter may call for strictness or liberality. Accordingly, collective agreements should be drafted with the same care and precision exercised in drafting commercial contracts. (Emphasis supplied.)

As these excerpts reveal, some authorities still seek to create an impression that, in interpreting a collective bargaining agreement, the arbitrator primarily must seek to find some appropriate rule for contract interpretation (or set of rules) to be applied as though the parties had negotiated a conventional one-shot commercial contract. The basic problems in this approach were so fully exposed by Shulman and Cox, whose analyses were embraced in the *Trilogy*, that it comes as a genuine surprise to find it still embodied in a text published as recently as 1973.

It well may be that rules of contract construction frequently are advanced in argument, particularly in ad hoc cases, and even are cited in opinions from time to time. But—as I used to tell my law students in the early 1950s—there are almost always two conflicting sets of concepts, rules, and legal theories which might apply in any genuine interpretive dispute and neither set can be thought to compel embracing a given analysis. It was gratifying some dozen years later to hear (at our 1962 Annual Meeting) one of the outstanding professors of contract law at that time—Lon Fuller—say essentially the same thing when he characterized the formal legal principles of interpretation as a “needless

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<sup>49</sup>Elkouri & Elkouri, *supra* note 9 at 297–298.

encumbrance” in labor arbitration.<sup>50</sup> In 1977 Professor Addison Mueller gave what should have been the coup de grâce to the practice of relying on “ordinary” contract law for purposes of interpreting collective bargaining agreements.<sup>51</sup>

The dominant fact is that—even if we elect to characterize it as a “contract” for convenience—a collective bargaining agreement almost always is the product of a unique negotiating context. For one to seek to interpret such a document without full awareness of its unique nature—and particularly the context of the specific relationship—is nothing short of naive. In retrospect it may be inferred that Harry Shulman preferred to characterize the collective agreement as a “code” (rather than a contract) in order to avoid ensnaring the interpretive process in rules developed for “ordinary” contract interpretation.<sup>52</sup>

### The Arbitrator’s Exercise of Judgment

The inescapable truth is that the ultimate responsibility of an arbitrator in the interpretive process is to rely on his or her total background of experience and expertise in the collective bargaining process, with due regard to the relationship of the given parties and their presentations so as to provide as practical and realistic an interpretation as is possible under the given agree-

<sup>50</sup>Fuller, *Collective Bargaining and the Arbitrator*, (with Discussion by Feinsinger) in *Collective Bargaining and the Arbitrator’s Role*, *supra* note 2 at 8, 11. “No one has seriously contended, I believe, that formal legal principles of interpretation ought to govern the construction of a labor contract. *In labor arbitration they would be a needless encumbrance and would probably make no difference in the result.* As is often pointed out, *these principles tend to come in offsetting pairs.* One can find a maxim according to which when you say ‘trees’ you mean shrubs also, shrubs being so much like trees. By another maxim one can argue that when you say ‘trees’ you must mean to exclude shrubs because if you had meant shrubs you would have said so; shrubs being so much like trees, and so naturally suggested by them, you couldn’t have forgotten about them when you said ‘trees’ and stopped. *Latin expressions of these contradictory truths may lend a certain dignity to judicial opinions. They can hardly serve any purpose in an arbitration award.*” (Emphasis supplied.)

<sup>51</sup>Mueller, *supra* note 10 at 206–207. Mueller wrote: “I concluded a long time ago that there is no real-life ‘ordinary’ contract law. What we like to think of in this way is what is taught in the course labelled ‘contracts’ in the first year of law school. Most of us who engage in that exercise dearly love it, as well we should. But too often our infatuation with its wonderful philosophical ramifications, its neat logical progressions, and its struggle for structural symmetry causes us to lose sight of the fact that what we are teaching is a body of law that has limited application beyond settling disputes between a non-existent A and a non-existent B dealing in a vacuum.” At page 209, Mueller added: “collective bargaining agreements are not entered into for the same purposes for which contracts for the purchase and sale of loads of hay are made, and paying lip service to the ordinary rules of contract formation when dealing with the former is a meaningless exercise.”

<sup>52</sup>The Trilogy adopts this label at one point in *Warrior & Gulf*. Dave Feller and others more recently also have observed that the collective agreement may be regarded as a “code” for some purposes at least. *See, in particular, Feller supra* note 41 at 695–696, 802.

ment.<sup>53</sup> The ultimate personal responsibility of the arbitrator to decide patently requires independence of mind. In the last analysis this is what the arbitrator owes the parties, as a professional. Thus it is disconcerting to observe an apparent tendency of some to decide cases largely on the basis of general language extracted from the opinions of other arbitrators, operating under different agreements, in radically different bargaining relationships. While an opinion of another arbitrator, in an unrelated bargaining relationship, sometimes may be useful in suggesting possible approaches to a difficult interpretive question, the inescapable fact is that the parties agree in any given case only to accept the judgment of the arbitrator whom they have selected—they grant no commission to apply some other individual's judgment.

The potential for error in embracing generalizations from another arbitrator's opinion seems almost too obvious to warrant elaboration. Let me nonetheless mention a recent case in the iron ore industry which involved the meaning of what—on its face—seemed to be a relatively clear seniority provision. This had been interpreted initially by the given company in a manner consistent with what seemed to be the “plain meaning” of the seniority provision. But another company, from whose agreement the language had been copied in the first place, had adopted an opposite interpretation and consistently followed it for years. This other company also was in the iron ore industry in the same general area. I had no choice but to rule that the same language could, and did, have different meanings in two bargaining relationships for both of which I was the impartial Chairman. If my decision in that case represents any precedent at all for the iron ore industry, it is that the same words can have opposite meanings based solely on usage in the given relationship.<sup>54</sup>

This brings me, then, to a final topic. How, in the last analysis, does the arbitrator decide? My own belief on this matter was first

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<sup>53</sup>No one arbitrator can hope to acquire such a complete stock of knowledge—based on education and experience—as to enable that arbitrator to handle every conceivable type of case with an equal degree of skill and sophistication.

<sup>54</sup>See *United States Steel (Minnesota Ore)* and *United Steelworkers*, 84 LA 314, 317–318 (1985): “By this time, of course, it is well recognized that identical or similar language embodied in separate Iron Ore Agreements years ago may be given different interpretations by the given parties in the individual bargaining relationships. Such different interpretations, or applications, do not reflect differences in relative skill or sophistication in reading the language. Instead, it seems reasonable to infer, each set of parties may embrace an interpretation best suited to the basic practical problems and factual setting which characterize their particular bargaining relationship. The extent to which these highly significant contexts may vary needs no elaboration here.”

expressed at our 1961 Santa Monica meeting where I described the decisional function of the arbitrator in these passages:<sup>55</sup>

The creative and intuitive nature of this function, as visualized by Shulman, has a counterpart in the conventional judicial process. Judges are not often driven to given results in difficult cases by the inexorable compulsion of concepts, maxims, logic, and language. Almost always there is a choice among several potentially applicable sets of principles.

One knowledgeable judge, far from a visionary, has written that the vital motivating impulse for judicial decision often is a “hunch” or intuition as to what is right or wrong for the particular case. Judge Hutcheson’s explanation of the opinion-writing process will seem familiar to many an arbitrator. He went on to write that, having reached a “hunch” decision:

. . . the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics.

As far as I am aware this was the first direct reference at an Academy meeting to the function of intuition or the “hunch”<sup>56</sup> in the arbitral process. It certainly was not the last. At our very next meeting, in Pittsburgh, Peter Seitz entertained us with a luncheon analysis of “How Arbitrators Decide Cases—A Study in Black Magic”<sup>57</sup> and Gabe Alexander devoted his Presidential Address to “Reflections on Decision Making,” citing both Cardozo’s *Nature of the Judicial Process* and Jerome Frank’s *Law and the Modern Mind*. Some of Gabe’s observations seem to reflect at least mild discomfort with the uncertain nature of the unconscious elements which might affect the decisional process.<sup>58</sup> In

<sup>55</sup>Garrett, *The Role of Lawyers in Arbitration*, in *Arbitration and Public Policy*, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 102, 122.

<sup>56</sup>See Hutcheson, *The Judgment Intuitive: The Function of the ‘Hunch’ in Judicial Decision*, 14 Cornell L.Q. 274, 278 et seq. (1929).

<sup>57</sup>Peter concluded with the profound observation that “My Grandma’s procedures for choosing a good mushmelon, it occurs to me, may well have relevance in the problems involved in the choice of a mistress or even a wife. The more one thinks about it, the more one gets persuaded. But if you should ask me (and I have a right to assume that you would) how an arbitrator makes his decision, I should answer you—exactly as my Grandma chose mushmelons.” Seitz, *How Arbitrators Decide Cases: A Study in Black Magic*, in *Collective Bargaining and the Arbitrator’s Role*, *supra* note 2 at 159, 164.

<sup>58</sup>See Alexander, *Reflections on Decision Making*, in *Collective Bargaining and the Arbitrator’s Role*, *supra* note 2 at 7, where Gabe observed: “The unknown elements in decision making, those variously described as ‘hunches’ or ‘intuition’ are less susceptible to identification and control. But we know more about them today than we did when Judge Cardozo wrote his essays. Beginnings, at least, have been made in the development of techniques for dealing with predilections and prepossessions. It now is possible, within limits, for men to deal consciously with erstwhile subconscious forces. *We may in the future be able to bring them within better control of rationality, and thereby diminish the uncertainty which they engender.*” (Emphasis supplied.)

1980 our entire program was devoted to decisional thinking of arbitrators and judges.<sup>59</sup>

One more recent treatment of this subject provides an intriguing “stream of consciousness” analysis of an arbitrator’s possible reactions at various stages of a hearing. But then this commentator adds a somewhat troubling passage:<sup>60</sup>

Thus, when you are deciding a case, intuition comes first and will prevail if borne out by the evidence and the testimony but there are times *when this visceral reaction is outweighed by reality*, for instance, by a specific contract provision. . . . *There are cases where the arbitrator is faced with a choice between adhering to that strict construction or doing what he or she thinks is better for the parties.* (Emphasis supplied.)

It is gratifying to find this most recent acknowledgement that the “hunch” or “intuition” can be useful in the decisional process but in all truth this exposition seems to misconceive the true nature of the intuitive judgment. Clearly reliance on an intuitive reaction, or “hunch” cannot be useful unless it is based on everything that appears relevant to the issue in hand. A capable judge or arbitrator hardly would seek to form a judgment—intuitive or otherwise—without weighing *all* factors relevant to the decision. A “hunch” thus would have little value if it ignored relevant language in the parties’ agreement. The real difficulty in deciding, where there are supportable alternatives, does not lie in ascertaining what factors may be relevant—but in determining what weight should be given, in balance, to the counter-vailing factors. Since as yet no scale, or computer, has been

<sup>59</sup>Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. James L. Stern & Barbara D. Dennis (Washington: BNA Books, 1981). See in particular Edgar A. Jones, Jr. *The Decisional Thinking of Judges and Arbitrators as Triers of Fact*, 45–61; Alex Elson, *Decisional Thinking: Chicago Panel Report*, 62–87; Howard S. Block, *Decisional Thinking: West Coast Panel Report*, 119, 124–130; and Rolf Valtin, *Decisional Thinking, Washington Panel Report*, 209, 212–213.

<sup>60</sup>Zack, *Arbitration in Practice*, *supra* note 3 at 173. See also a similar analysis by Zack in *Labor Arbitrator Development: A Handbook*, *supra* note 4 at 126, where he elaborated: Consider a hypothetical case in which the company is subcontracting part of the operation, which results in a layoff of 20 percent of the employees. The contract says that there shall be no limitation on the employer’s right to subcontract work. There is a line of reasoning, but the contract prevents the arbitrator from reaching the conclusion which equity dictates. The arbitrator must alter his line of reasoning and say that it may appear to be wrong but that the parties negotiated the contract which controls. In most cases intuition will probably be supported by contract language. However, there are times when intuition is wrong and the arbitrator is bound by a contract.

*Some arbitrators will adhere strictly to the contract. Others, in order to reach their intuitive judgments, may rationalize their way around contract language and get into negotiating history because they feel that they have a roving commission to do good. Sometimes that may be justified. It depends upon the arbitrator’s relationship with the parties and their method of dealing with such matters.* (Emphasis supplied.)

devised to perform this critical function, we must settle for an exercise of human judgment which really is incapable of description or definition—this in short, is the intuition or “hunch.”<sup>61</sup>

Clearly, too, an initial intuitive judgment is not inevitably final. As Judge Hutcheson wrote, an intuitive decision must be justified and supported in a reasoned opinion. All of us become aware, sooner or later in our careers, that an initial decision not only may be extremely difficult to reach but sometimes also must be abandoned later during the detailed analysis inherent in writing a reasoned and persuasive opinion. At that point a fresh start must be made so that a more realistic decision can be developed.

### Conclusion

My limited objective today has been to challenge a few misconceptions as to the nature of grievance arbitration which seem sufficiently unreal to be labelled as myths. I do not aspire, however, to delineate any single ideal approach to the interpretive process in arbitration. There is none. I happily embrace Ben Aaron’s rejoinder when a questioner challenged his analysis of a problem—“Whatever I have had to say is inevitably idiosyncratic.”

On the other hand, I believe that members of the Academy bear a special responsibility to “tell it like it is” in our utterances concerning the nature of grievance arbitration both in our speeches and in our opinions. The hard fact is that many arbitrators—perhaps as many as 50 percent—are not trained in the law and (at least initially) may be unduly impressed or intimidated by unfamiliar legal jargon and dogmas which really have no legitimate place in labor relations. We arbitrators may, and do, quite reasonably disagree in our perceptions of the proper role of the arbitrator. But none can deny that the Supreme Court has staked out the terrain within which we legitimately may function with reasonable clarity. Whether we elect, in general or in some specific case, to press against those outer limits inevitably is a matter of individual choice. Just as there is infinite variety among arbitration systems developed by the parties, there is great variety in the ways we perform our function.

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<sup>61</sup>Howard Block’s discussion of this subject at our 33rd Annual Meeting is particularly useful in this regard. See Block, *supra* note 59.

Thus, if I have any quarrel at all with the Trilogy Opinions, it is with the assertion that an arbitrator does not sit to "dispense his own brand of industrial justice." This pleasing euphemism, originally coined by Harry Shulman, does not seem entirely accurate. As any experienced practitioner full well knows, an arbitrator (like a judge) brings to each case a set of qualifications and preconceptions based on education, experience, associations, personal qualities, and perhaps instinct, which often may influence the outcome of a case. Indeed, it seems pertinent that the approach of Dean Shulman at Ford differed markedly from that of the GM umpire at the very time he wrote—a fact of which he was well aware. Shulman largely shaped the nature of grievance arbitration at Ford through the force of his personality and did not hesitate to mediate at times. The GM umpires were very narrowly restricted in their function.<sup>62</sup> Surely one of the crucial functions of the parties' representatives is to select the best possible arbitrator available for the particular case or relationship.<sup>63</sup>

A few final words are in order. Dick Mittenthal kindly reviewed an earlier draft of my paper and gave me a number of valuable suggestions which were gratefully embraced. One comment which he made, however, calls for a word of explanation. Essentially, he noted that the thrust of my presentation was essentially negative since it made no effort to delineate the various factors and criteria which may be useful to arbitrators in developing sound decisions. Dick is entirely correct in this but, frankly, it never was my intent to delve into this matter at all. My more limited objective has been solely the elimination of some troublesome underbrush. The broader subject visualized by Dick is much too important to be squeezed into my presentation. It should be at the heart of any training program worthy of the name. I will leave its exposition, in any event, to future commentators. If I have any single message at all for the next generation of arbitrators, however, it is to be wary of those who tell you what you *must* or *must not* do. Remember what Polonius said to Laertes, "And this above all, to thine own self be true and it must follow as the night the day that thou canst not then be false to any man."

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<sup>62</sup>See Alexander *Impartial Umpireships, The General Motors-UAW Experience*, in *Arbitration and the Law*, *supra* note 35 at 150.

<sup>63</sup>The publication of decisions and the use of arbitration information services largely are in response to this need. See the comments of Barreca and Zimny in *Labor Arbitration Development: A Handbook*, *supra* note 4 at 194-195.

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