

III. HOW THE COURTS AND THE NLRB VIEW ARBITRATORS' AWARDS

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When Syl Garrett invited me to participate he told me that this was going to be a great opportunity. I was going to get a half hour to stand up here and tell arbitrators what they're doing wrong. That sounded like heady stuff. But actually it was very terrifying because I had been brought up to believe that the way you dealt with all decision makers, judges, arbitrators, was to be extremely nice to them at all times. If you were nice all the time they'd sort of feel sorry for you and you'd do better at the decision stage. So Syl's invitation was an opportunity to blow in half an hour the goodwill I've tried to build up with a lifetime of obsequiousness. I told Syl that that was something I just didn't think I had it in me to do.

But Syl gave me an "out"; he said, "Look, you don't have to say that arbitrators have done anything wrong," he said, "this is in the context of the Academy considering the development of a new training program. So why don't you put it in terms of 'these would be good things to tell those who are going to be arbitrators in the future.'" It was with that "out" that I'm here; that is the context in which I speak. Any resemblance to anything heretofore done by any arbitrator is strictly coincidental.

Even with that limitation, I was reluctant. Maybe it seems sensible that those who negotiate collective bargaining agreements and who draft their language might have something useful to communicate to arbitrators about how those documents ought to be interpreted, but frankly I feel reluctant to do that. I became a union lawyer the year after the Supreme Court decided the *Steelworkers Trilogy*¹ and long before I had ever met an arbitrator, let alone appeared before one, I had read that arbitrators were magical people with magical talents, in consequence of which the Supreme Court was according them magical powers. I read among other things in the Trilogy, that arbitrators do things "that are not normal . . . to the courts." Of course just about that time, there was the raging debate about

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¹*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).

whether the Court had properly understood the arbitration process. Was arbitration what the Court in the Trilogy said it was, or had Dave Feller totally bamboozled the Justices and sold them a bill of goods and a romantic notion that bore no correspondence to reality? Since I had just gone to work for Dave Feller, I of course subscribed to the notion and truly believed, and to this day believe, that what the Supreme Court said indeed was an accurate description of this process, and that arbitrators truly are magicians.

With that understanding, it comes with some ill grace, I think, to suggest that I can come here and help you interpret agreements. It's like a member of the audience going to a convention of magicians and telling them how they can do their tricks better. But there's one little piece, I think, that I can perhaps make a contribution on, and that is because we practitioners, we representatives of unions and employers, get to go some places that arbitrators don't. We get to go to court, and we get to go to the NLRB, and we get to see what happens to arbitration awards when they get there. I thought I might report back from the provinces what's being done out there, and suggest that perhaps arbitrators might like to take account—in how they decide cases and even more importantly, how they write their opinions—of what the courts and the NLRB are doing in their interaction with arbitrators' awards. I come basically with a two-part thesis. Part One is that in training arbitrators it is desperately important that they know exactly how the external world treats their awards. Part Two is that, armed with that knowledge, arbitrators should determine to what extent that should influence the way they decide cases and how they write their opinions. I'll touch on three examples, three stages where arbitration awards hit the real world. I don't mean, by any means, to suggest that these are exclusive—they are not—but they will, I think, make the point of the importance of focusing on what's happening out there.

Stage One is the situation that everybody knows about. What happens when one of the parties, after an arbitrator enters an award, resists the award, sues to vacate the award or compels the other party to sue to enforce the award, and thus the courts get into the act of deciding whether the award will be enforced.

Everybody knows the rules of *Enterprise Wheel*.² And it is important, I think, to remember the Supreme Court expressly

²*Supra* note 1.

reaffirmed the rules of *Enterprise Wheel* in 1983, in the *W.R. Grace*³ case, so that those principles are alive and well. Many of them have been expressed already today. Courts will not second-guess arbitrators on their constructions of the agreement; so long as the award draws its *essence* from the collective bargaining agreement, it will be upheld. That was contrasted with what the Court said arbitrators were not to do, which was to dispense their own brand of industrial justice. The Court recognized that many times arbitrators' awards would be ambiguous; it wouldn't be clear whether the award was "drawing its essence" or "dispensing its own brand." The Court said all ambiguities get resolved in favor of the arbitrator. If it's *possible* that the award is drawing its essence from the agreement, it must be enforced by the court. Likewise, silence is in favor of the arbitrator: if the arbitrator says nothing, a procedure that I might counsel you is the safest of all courses, the court must presume that the arbitrator has drawn the essence of the award from the collective bargaining agreement because the arbitrator has offered no clues to the contrary.

Employer lawyers have come before this Academy over the intervening quarter century and have lulled arbitrators to sleep about *Enterprise Wheel*. They have said repeatedly—and Andy Kramer in the midst of an otherwise commendable address today has done it again—that under the principles of *Enterprise Wheel*, it's virtually impossible for any arbitrator's award ever to be set aside. Arbitrators have heard that a lot, and I think they have decided that they don't need to be concerned about judicial review. They think they can write their awards and their opinions for the parties and tell the parties why they acted as they did, and need not really think about how the award will look when it hits the courts, if it hits the courts. The reality is somewhat more disturbing.

There have always been some judicial decisions setting aside arbitration awards. In the last few years, that process has been escalating substantially. There have been many more decisions recently setting aside arbitrators' awards under the *Enterprise Wheel* standard, and precisely because of this, many more parties are seeking to have it done. The volume of cases in which awards are resisted has grown substantially. Some of those judicial set-asides, I suppose, we could all agree are judicial excesses. The court just didn't like what the arbitrator did, so the court paid lip

³*W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 113 LRRM 2641 (1983).

service to *Enterprise Wheel*, but really was setting aside an award that deserved to be enforced. Other decisions may involve true arbitral excesses: there may indeed be awards in which the arbitrator did dispense his or her own brand of industrial justice. But in reviewing the decisions where courts have set aside awards, it has struck me that in the vast majority of those cases, the problem was one of draftsmanship. The arbitrator seemed to me unquestionably to be construing the agreement; the problem was that the award was written in such a way that reasonable people looking at it would not have thought that was what the arbitrator was doing.

Courts generally have been quite hospitable in this area. They have bent over backwards to construe the arbitrator's language, "What the employer did here shocks my conscience" to mean that implicit in the contract language is the notion that things that shock the conscience are forbidden by the contract and therefore this award draws its essence from it. But not all courts are prepared to do that. Patterns are beginning to develop, principles of construction are beginning to be announced by the courts regarding how one can recognize arbitrators' awards that are dispensing their own brand of industrial justice. I'll give just a couple of examples:

One principle that a number of courts have embraced is essentially as follows: "Where the contract language is plain, and the arbitrator reaches a result contrary to that language, without having proffered in the opinion an explanation of why that language does not mean what it says, a court is entitled to infer that the arbitrator was dispensing his or her own brand of industrial justice." This is clearly a draftsmanship problem.

If the contract language is plain, and the arbitrator has reached a contrary result, no doubt the arbitrator went through a process of analysis that said that language did not mean what it said. If that analysis had been written down, if the arbitrator had said that based on the practices in the plant, or on the negotiating history, or on something else, the broad words in practice don't really mean what they say but instead mean A, B, and C, unquestionably the opinion would draw its essence from the collective bargaining agreement. But if the arbitrator, having recited the clause, then just goes on and recites a contrary result, as has happened in a surprising number of cases—none to be sure authored by members of this Academy—some courts have

become prone to set awards aside under this new rule of construction.

Another recurring principle can be characterized this way: “where the contract says that employees who engage in certain acts may be discharged therefor, and an arbitrator finds that an employee indeed has committed that act but nonetheless reinstates the employee, usually with a modified penalty, it will be presumed that the arbitrator is not drawing the essence of the opinion from the collective bargaining agreement but rather is dispensing his own brand of industrial justice”—and this is really a variation of the plain language principle. The language seems to say that if the employee commits this act the employer is entitled to discharge. In those cases where arbitrators in their opinions have said that “that doesn’t mean what it says, it really means *this*,” courts enforce the award. In those opinions where the arbitrator doesn’t draw that missing link, a surprising number of courts have set the awards aside.

Likewise, where an arbitrator sets aside discipline on procedural grounds, the so-called procedural due process concept, but fails to state that that is what the parties intended among other things to be incorporated in the concept of just cause, courts have said that the arbitrator is injecting a limitation on employer action that is nowhere based on the contract. It is therefore being drawn from left field. It is the arbitrator’s own brand of industrial justice.

The last category I’ll mention—there are others—is that the courts have all said that unless the contract says otherwise, unless the arbitrator explains that the contract means otherwise, arbitrators are not to impose penalties on employers for violating the contract. Therefore when a remedy does not appear to be compensatory, but rather punitive, the court will set it aside as not properly based on the agreement.

This has arisen in several cases, all involving the same issue—I’m sure it’s one that you’ve all encountered and thought about—which is vacation scheduling. The employer deprives employees of the right to take their vacation in the period of time that the contract said they are entitled to have it. In consequence employees have to take it at much less desirable times. Can the arbitrator award a monetary benefit to the employees, who in fact have not lost any wages but have only been required to take their vacation at a less desirable time?

As an arbitral matter, that's an interesting question; does the contract authorize the arbitrator to do it? If an arbitrator concludes that it does, it appears rather important that the arbitrator write in the opinion *either* that these parties contemplated that this could be done as a punitive matter or that this is compensatory and here is why. If the arbitrator does neither, the courts set these awards aside.

As I say, most of these, and there are more areas than those that I have recounted, are curable. They are curable simply by proper draftsmanship in the arbitration award. But to know that it is necessary to write these things, one must know what the courts are doing. Thus it is critically important that arbitrators keep abreast of what exceptions the courts are developing to the *Enterprise Wheel* doctrine.

The second area that I want to talk about is this: Is an arbitrator entitled to subordinate the contract to external law? This has been the subject of an ongoing debate within the Academy over decades. In my labor law course at Georgetown, we use the Cox, Bok, and Gorman case book, and it has several pages devoted to a presentation that Dick Mittenhal made to the 1968 meeting of the Academy,⁴ where he described the various views that arbitrators have taken on what they should do when they think that one of the parties may be engaged in unlawful conduct. He described the Meltzer view, which I learned from my initial employment was also the Feller view: that arbitrators have been hired to construe the contract, and that's all they've been hired to do. It is not their job to go poking around in the external law. And then there were contrary views that every contract incorporates every principle of law and all are there to be found by the arbitrator.

Then Dick Mittenhal advocated an intermediate view, which was that arbitrators should *permit* violations of law but should not issue awards that would *require* parties to violate the law. That was unwittingly a somewhat pro-employer, antiunion doctrine because it meant that if the employer was violating the law but not the contract, the grievance should be denied because there was no violation of the contract. But if the union was processing a

⁴*The Role of Law in Arbitration*, in *Developments in American and Foreign Arbitration*, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 42.

grievance that it was entitled to win under the contract—for example, a seniority grievance saying X is entitled to this job—and the arbitrator was worried that the contract was itself unlawful, to enter an award granting that grievance would compel the employer to violate the law, which, in the Mittenthal view, arbitrators shouldn't do.

This debate has been waged within the Academy as a matter of arbitral jurisprudence. Arbitrators debate the pros and cons as though this were an issue on which they are *free* to act and to make choices. But the Supreme Court has resolved this debate as follows: "The arbitrator . . . has no general authority to invoke public laws that conflict with the bargain between the parties." This was *Alexander v. Gardner-Denver Co.*,⁵ the case in which the Court explained that an employee having lost an arbitration could still bring a suit under Title VII, because the arbitrator had no right to look at Title VII. If those words weren't clear enough, later in the opinion the Court said: "Where the collective bargaining agreement conflicts with Title VII, the arbitrator *must* follow the agreement."⁶ Thus, the Supreme Court has declared an answer, as a matter of Section 301 law, to this question, and the answer is: at least where the parties haven't expressly given the arbitrator the authority to apply the law, the arbitrator is not free to subordinate the contract to the law.

Indeed, there have been a number of lower court decisions setting aside arbitration decisions precisely because arbitrators have said "I can't enforce this provision of the agreement because I believe this provision of the agreement violates the Age Discrimination Act," or Title VII, or the like. The courts have set those awards aside, not on the ground that the arbitrator misunderstood the law, but on the ground that the arbitrator had no business getting into that question. "You were hired to interpret the contract," say the courts.

To salve the concern that Dick Mittenthal identified, which is that arbitrators feel very uncomfortable about rendering awards that compel employers to violate the law, there is of course a simple answer: arbitrators never compel employers to violate the law; arbitrators simply tell employers what they have contractually agreed to do. An arbitrator tells an employer that as a matter of interpretation and application of the contract, the

⁵415 U.S. 36, 53, 7 FEP Cases 81 (1974).

⁶*Id.*, 415 U.S. at 57 (emphasis added).

employer is obliged to do A, B, and C. It still lies with the employer to resist the enforcement of such an award on the ground that it is unlawful. And then—indeed the Supreme Court has said this is the way the game is to be played—it is the court that determines, having been told by the arbitrator what the contract means, whether the contract is lawful or not.

To this broad principle that the Supreme Court has announced, there is one exception, and one qualification. The exception, of course, is where the parties have expressly authorized the arbitrator to take account of the law. The *Jones Dairy Farm*⁷ case, which has already been discussed here this morning, is a classic example. In essence the contract in that case said the employer was free to subcontract except where it would be unlawful to do so. The arbitrator reasoned thus: the parties have incorporated the law: to find out whether the employer has violated the contract, I have to find out whether the employer has violated the law. In effect, the employer has contractually promised not to violate the law. The arbitrator then made his best estimate of what the law was, and found that based on that estimate, the company was violating the law, and therefore was violating the contract.

That posed the fascinating question of what standard of review should apply to an award written in that fashion. Judge Posner authored the opinion in that case, which held that we should apply the *Enterprise Wheel* standard of review, meaning that in this situation courts should not independently review the correctness of the arbitrator's construction of the law. He said that that makes sense when the parties have chosen to put the legal issue to the arbitrator and have agreed that the arbitrator's decision will be final and binding. If we say that the courts can independently review the arbitrator's construction of the law, then what are we attributing to the parties as their intent? That there be yet another layer of decision making on legal questions? That first you go to the arbitrator and then to the district court and then to the court of appeals? It wouldn't make sense to think that that's what the parties intended. Rather, what parties intend when they incorporate the law in their agreement is that an arbitrator will declare the law for them, rather than the courts.

⁷*Jones Dairy Farm v. Food Workers Local P-1236*, 760 F.2d 173, rev'g 755 F.2d 583 (7th Cir. 1985).

Not every court has agreed with Posner on this, and some courts have said that they will review the arbitrator's ruling in that context for the correctness of his legal ruling. But Posner, I think, is right, because the arbitrator is not deciding whether the employer violated the law. The arbitrator is deciding whether the employer violated the contract. It's just that the contract happened to incorporate the law as its standard.

Thus, there is the *Jones Dairy Farm* exception, and there is the qualification that *Enterprise Wheel* itself noted, which is that it's perfectly alright for an arbitrator to look at the law for guidance as to what the parties meant, to look to the law that was in place, for example, at the time the parties negotiated the agreement, because that may be of some guidance in resolving ambiguities. Parties generally intend to comply with the law, not to violate it. If it's realistic to think of that as relevant in assessing their intent, well and good. But here the law is simply an aid to interpreting the agreement; the arbitrator still cannot impose the law on the agreement.

Stage Two of the collision of arbitration with the courts has been where arbitrators impose the law on the contract without the parties' express authorization to do so. The courts have not been receptive, and the Supreme Court has said they are not to do it.

Stage Three, and the last one I want to talk about, is the Board's *Spielberg*⁸ doctrine. From time immemorial, the Board has considered that at least in some category of cases, discharged employees who have brought a just cause grievance and lost will not be allowed to prosecute a Section 8(a)(3) charge to the Labor Board asserting that the discharge violated their rights under the National Labor Relations Act. That's a surprising doctrine because in every other similar context, the Supreme Court has held that an employee who loses a just cause arbitration has *not* forfeited the right to invoke other federal statutory rights that might also apply in that situation. In the case of Title VII, as I've mentioned, an employee can lose an arbitration and still bring a Title VII suit. Under the Fair Labor Standards Act, in *Barrentine*⁹ the Court held that an employee can lose an arbitration and still seek remedies under the federal statute. Last year the Court held that public employees who lost an arbitration could still

⁸*Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955).

⁹*Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 101 S.Ct. 1437 (1981).

bring a First Amendment case saying the discharge was motivated by First Amendment activities.¹⁰ The Board, in the face of this, has continued to maintain that in the NLRA area if you lose an arbitration you may have forfeited your right to get a ruling on your statutory claim.

The lower courts, at least, have viewed this with equanimity and have accepted this concept of deferral, first invented in the *Spielberg* case. The scope of that deferral, as Andy Kramer has mentioned, has varied widely, by and large, with whether it is a Democratic or a Republican administration.

The Carter Board had a very narrow deferral concept. The Board would refuse to entertain a Section 8(a)(3) case only if the unfair labor practice issue was squarely raised in the arbitration, and only if the unfair labor practice issue was decided by the arbitrator and that decision appeared on the face of the arbitrator's award. With that standard of deferral, there was no need for people to come to you, the arbitrators, and say "we need your help." If an arbitrator's decision didn't make clear what had been done, the employee's rights under the National Labor Relations Act were not impaired.

The new Labor Board, to put it kindly, has adopted an entirely different concept of deferral,¹¹ one which in effect says that any time an employee brings a just cause grievance to arbitration, and the facts relevant to that case are parallel to the facts that would be brought before the Labor Board in a Section 8(a)(3) case, the Board will defer. The Board will not allow the employee to litigate the 8(a)(3) claim, even when there is no precise correspondence between the issue before the arbitrator and the issue before the Board.

Let me just cite one example of that and then talk about its implications for what arbitrators do. There are circumstances in which it is protected conduct under Section 7 for a truck driver to refuse to drive a truck because it is unsafe. For an employer to discharge a truck driver in those circumstances is an unfair labor practice which will entitle the employee to reinstatement with back pay, as a matter of federal law. Those same facts can be the basis for a just cause discharge grievance, obviously. Let us assume that the employee goes to arbitration and the arbitrator rules that there is no breach of contract here, that there is just

¹⁰*McDonald v. City of West Branch, Mich.*, 104 S.Ct. 1799, 115 LRRM 3646 (1984).

¹¹*Olin Corp.*, 268 NLRB 573, 115 LRRM 1056 (1984).

cause for discharge within the meaning of the contract. The arbitrator hasn't purported to decide whether this is protected conduct under Section 7 or to adjudicate the remedies that would be available to an employee whose protected rights were violated. Nevertheless, under the new Board deferral doctrine, simply deciding that just cause case in arbitration will foreclose that employee's right to bring an 8(a)(3) charge to the Labor Board. The Labor Board has essentially said that "even though we recognize that we might find this is protected conduct and we might grant a remedy in this case, we will defer."

Whether this broad doctrine will survive judicial review remains to be seen.¹² As long as it is the Board's doctrine, there is something important that must be done at the arbitration stage. Incidentally, unions can't run away from arbitration because the new Board in another case¹³ has said that "if you come to the Board first, we're going to send you to arbitration." So it's the old one-two; you've got to go to arbitration first and whatever happens there is effectively going to dispose of your rights under the National Labor Relations Act.

The first job that needs to be done in arbitration really is the union's job. Whenever there is a just cause case that is arguably an NLRA case as well, the union should be saying to the arbitrator: "This is the situation: we've got a parallel NLRA claim, we fear that under the Board's doctrine we will not be able to adjudicate it separately, and therefore we want to adjudicate the NLRA claim before you, in addition to the contract claim. And we ask the employer to join with us in authorizing you to decide this case under the National Labor Relations Act as well as under the contract." If the employer agrees, well and good; the arbitrator now has the joint submission of both parties upon which to decide the NLRA questions. If the employer refuses (as Andy Kramer has indicated he would advise his clients to do) then it is terribly important that the arbitrator recite on the face of the award that the question was asked, the employer gave a negative answer, and therefore, the arbitrator did not address any question as to the meaning or application of the National Labor Relations Act. It is terribly important that it appear on the face of the award because the new Board doctrine is that the

¹²Indeed, a recent article advocates doing away with Board deferral altogether. Peck, *A Proposal to End NLRB Deferral to the Arbitration Process*, 60 Wash. L. Rev. 335 (1985).

¹³*United Technologies Corp.*, 268 NLRB 557, 115 LRRM 1049 (1984).

burden is on the person resisting deferral to prove that the NLRA issue was not decided by the arbitrator.¹⁴ If the arbitrator's award is silent as to whether the arbitrator has considered NLRA questions, the Board will say "it is possible the arbitrator did, and therefore we defer."

Thus it is vital, at least when asked by the union, that arbitrators clearly articulate in their opinions what account they have taken of the NLRA, and it's vital that they report in their opinions that the employer has declined the request to empower the arbitrator to decide NLRA questions. Having expressed these things in the opinion, the arbitrator will be free to go ahead and decide a typical just cause discharge grievance. The rights of the parties before the Labor Board *may be* unaffected, I say *may be*, because the union will then argue that the employer, by having taken that position in arbitration, has forfeited the right to seek deferral from the Board. Even if this Board as presently constituted *tried* to defer in that situation, it is likely, I think, that the courts would not allow the Board to defer in a context where the employer has refused to put the NLRA issues to the arbitrator. These things must happen at the arbitration hearing and they must be reflected in the arbitration award. The rights of the parties in another tribunal will be vitally affected by whether they do or do not.

I want to leave the remaining five minutes for discussion. Certainly all of this heat that's been generated today deserves it. Right? And I want to end with an observation that is the inverse of the one I understand my partner, George Cohen, made yesterday. I hope you'll invite me back to talk about a lighter subject sometime.

¹⁴*Supra* note 11.