CHAPTER 3

ARBITRATION AND THE COURTS: IS THE HONEYMOON OVER?

I.

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The question of whether the "honeymoon" between the courts and arbitrators is over presumes that there was in fact a honeymoon of sorts at some time in the past, and that for some reason the courts no longer seem as receptive to arbitration. I believe that both propositions are true—to some degree. However, the question itself tends to obscure the ambivalence that courts have always felt when faced with litigants who object to the enforcement of awards they do not agree with. And it tends to obscure the fact that some courts and some judges have always been less enthusiastic about our marriage than others.

Before I share my thoughts with you on the current state of the law regarding the enforcement of arbitration agreements and awards, I think it important to take a brief look at the institution known as arbitration from a judge's perspective. I hope that by doing so we will be able to assess more accurately what has happened in the past and is happening currently in the federal courts—and to appreciate some of the changes that may be occurring.

Unlike what might be called "pure contract," where the constraints on a person's actions are considered to be accepted voluntarily, an arbitration award—as opposed to a mediated settlement—is essentially coercive. Because it is coercive, the question arises as to its enforcement. The basic question for a

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judge is the following: "[When] should society, through its courts, give official backing to the settlements of these private adjudicators?"[1] As Henry Hart and Al Sacks note in their classic work, *The Legal Process*, "[a]rbitration . . . belongs in the realm not of autonomous private ordering but of private law making—the realm of private decisions, which, if duly made, can claim official recognition and enforcement."[2]

From a general perspective, the question for the courts to decide in a particular case is: Given a desire to support the arbitration process in general, is there good cause to overrule the arbitrator in this instance? The answer can be characterized as an attempt to find the right mix of simultaneous deference to and control of the arbitration process. The contradictory pressure both to defer to and to control the arbitrator is the essential conundrum of judicial review of arbitration.

In legal arguments about whether to enforce an arbitrator's award, two basic "pictures" of the arbitration process emerge.[3] The first has been called the "formal" style; it views arbitration as arising out of the parties' contract; in that picture, the arbitrator's role is strictly limited to effectuating and implementing the perceived pre-existing desires of the parties as expressed by their written collective bargaining agreement. The proper role of the arbitrator is, in this view, to be passive and objective. The arbitrator acts illegitimately when he "dispenses his own brand of industrial justice."

The second basic picture is sometimes called the "expertise" style. Here, what is primarily emphasized is that the contract between management and labor is a shorthand code that sets forth governing principles that control the fundamental relationship that exists between the parties. To help define the terms of that relationship more clearly, the parties select arbitrators who are especially competent to interpret the language of the contract in the context of the "common law of the shop." Concomitantly, courts are considered to be an inappropriate institution for the resolution of such matters. An observation by Judge Jerome Frank about commercial arbitration is equally true with respect to labor arbitration:

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[1]Hart and Sacks, The Legal Process (tent. ed. 1958), 335.

[2]*Id.*

[3]*See generally* Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1276 (1984) (employing formal, expertise, judicial review and market-pluralist models in analyzing approaches to the control of bureaucratic organizations in both administrative and corporate law doctrines).

> There is a category of disputes for which the courts seem poorly designed: When two businessmen dispute about a breach of contract, often neither of them wants vindication, or to assuage a feeling of injustice. What they want is a speedy sensible readjustment of their relations, so that they can resume or maintain their usual mutual business transactions.[4]

The arbitrator's professionalism, training, and experience are what in part provide legitimacy to his decisions. One reason for the creation of a professional organization like the National Academy of Arbitrators is to enhance this view of arbitration.

By itself, neither vision of the arbitration process, the formal or the expertise, resolves the essential dilemma of courts: How much control should courts exercise? How much deference should they pay? When and under what circumstances is an arbitration award "illegitimate," so that a court should not coercively enforce it? In both visions, standards for articulating both control and deference are present to some degree. However, in general, the expertise approach is associated with deference to arbitration and the formal or contract approach with control.

Depending upon which basic vision serves as the court's point of departure, a particular result will usually follow. If an opinion emphasizes the arbitrator's expertise, it is ordinarily a safe bet that the court will defer and uphold the award. If the opinion primarily discusses contract concepts or principles, the court will in all likelihood end up "controlling" the arbitrator and vacating the award.[5] Notwithstanding the fact that opposite results are obtainable depending on which view is selected, judges generally share in varying degrees a fundamental principle: the strong although usually unexpressed feeling that arbitration is an institution that judges should both control and defer to.

Why do judges believe that arbitration should be controlled by the courts? Part of the answer lies in the fact that judges are being asked to sanction the coercive use of governmental power to enforce the arbitrator's award. Without such coercion arbitrators would be mediators. On the other hand, with such coercion, in the absence of some judicial review, however modest, a single arbitrator would have power equal to that possessed by all levels of the court system combined. It is only natural for

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[4]Frank, Courts on Trial: Myth and Reality in American Justice (Princeton: Princeton Univ. Pr., 1949), 376–77.

[5]*But see* the excellent statement of a formal, deferential approach to this question in St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L. Rev. 1137, 1140 (1977).

judges to feel that there must be some means of providing a check on this extraordinary power. It is clear, for example, that the arbitrator's authority does not extend to the willful disregard of the parties' collective bargaining understandings. Otherwise, the parties would be subjected to what might properly be called "the tyranny of the arbitrator." This concern is particularly important in the labor context because arbitrators make decisions that affect a large number of people in a critically important part of their lives—a form of private legislation that gives the courts pause. Some check is necessary when so much is at stake.

There are a number of other reasons why judges are attracted by the control approach. Just to mention one, judges believe that the parties have made a contract and that it is the arbitrator's role to interpret that contract. Accordingly, when an arbitrator disregards the contract, it is natural for judges to feel that enforcement should be denied. While all judges probably agree with this formulation, there is, of course, wide disagreement as to what constitutes "disregard" of the contract and how important a part of that contract is the provision that arbitrators, who are human and will make mistakes, shall have the power to interpret the agreement.

Next we must ask, why do judges think that arbitration is entitled to deference? First, arbitration is an alternative dispute resolver. As any judge will tell you, courts are happy to reduce the categories of disputes requiring judicial intervention. The importance of alternative-dispute-resolution institutions has increased with the expansion of our dockets. There is a strong incentive for courts to look more and more to arbitrators to alleviate some of this burden and to limit the extent to which judges must become embroiled in the underlying merits. That the courts' general preference for arbitration continues unabated may be seen in two recent U.S. Supreme Court decisions, one relating to securities transactions and the other invalidating a state statute affording a right to sue in labor disputes notwithstanding the parties' agreement to arbitrate.[6]

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[6]*Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987); *Perry v. Thomas*, 107 S. Ct. 2520 (1987). On the expansion of the dockets of the federal courts and the systemic incentive to encourage parties to arbitrate their disputes, *see generally* Posner, The Federal Courts: Crisis and Reform (Cambridge: Harvard Univ. Pr., 1985); Burger, *Using Arbitration to Achieve Justice*, 40 Arb. J. 3 (1985); Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).

Second, in some respects, arbitration has the appearance of a private consensual settlement system. We generally favor settlements and are reluctant to undo them.

Third, even though arbitration decisions are final, they do not have precedential value. The parties can negotiate away a bad arbitral decision at the expiration of the collective bargaining agreement—usually within a year or two—or even during the contract term.[7] Thus, as a general rule we need not be overly concerned with the harm that may be done by enforcing arbitral decisions.

Fourth, most of us understand that arbitrators are more competent than judges to determine what the contours of a particular management-labor relationship are.[8]

Finally, and certainly at least as important as any other consideration, without deference arbitration would become merely one more added stage of the court process. That would be bad for the parties and bad for the courts.

As I have previously suggested, ordinarily there is some blending of the two approaches—control and deference. Most thoughtful judicial decisions contain elements of each. The key questions, however, are: Where is the balance struck? On which side is the emphasis placed?

At least since the early 1960s, the emphasis in most federal courts has been on the expertise-deference approach. Simultaneously, there was and is a minority view that gives predominant effect to the formal-control approach. The majority view is perhaps best illustrated in the decisions issued by my court, the Ninth Circuit—decisions, I should add, that were reached before I became a member. In *Pacific Northwest Bell*, one of the early post-*Steelworkers Trilogy* cases, we stated that "collective bargaining contracts by their very nature cannot be limited to their express provisions."[9] This statement implicitly and inevitably leads to adoption of the expertise approach. Because labor relations are context-based and because arbitrators have superior training and experience to determine the content of the parties' relationship, arbitration decisions are entitled to sub-

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[7]*See generally* Jones, *"His Own Brand of Industrial Justice": The Stalking Horse of Judicial Review of Labor Arbitration*, 30 U.C.L.A. L. Rev. 881, 896 (1983).

[8]*But see* Hays, Labor Arbitration: A Dissenting View (New Haven: Yale Univ. Pr., 1966), 54–56.

[9]*Pacific Nw. Bell Tel. Co. v. Communications Workers*, 310 F.2d 244, 246, 51 LRRM 2405 (9th Cir. 1962).

stantial deference. As our court stated in the *San Francisco-Oakland Tribune Newspaper Guild* case, we uphold an arbitrator's award if "it is possible for an honest intellect to interpret the words of the contract and reach the result which the arbitrator reached."[10] If collective bargaining agreements by their very nature are not limited to the express words of the contract, arbitrators' practical backgrounds become essential to the task of determining and construing the understandings that exist between the parties—of defining their constitution for industrial self-government. Given judges' lack of experience with the practical day-to-day goings on in various industrial settings, courts are not as competent, from an institutional standpoint, as are arbitrators to assess whether a particular dispute is a legitimate grievance or what the appropriate remedy should be.

I would now like to contrast this view with what has historically been the minority view in the federal courts and among judges generally. An excellent illustration of the minority view is the Second Circuit's well known *Torrington* decision. In *Torrington*, decided at roughly the same time as the Ninth Circuit cases I mentioned, the Second Circuit vacated an award that was based on past practice. The court stated its analysis with a reference to contract principles. Judge Lumbard's opinion stated: "In the first place, . . . labor contracts generally state affirmatively what conditions the parties agree to, more specifically, what restraints the parties will place on management's freedom of action."[11] (This is, of course, the opposite assumption from the one that my court used as its starting point.) Moreover, the Second Circuit stated that "a reviewing court [is required] to pass upon whether the agreement authorizes the arbitrator *to expand its express terms* on the basis of the parties prior practice."[12] Although other explanations could be offered for some of the language used and although we could attempt to harmonize the *Torrington* decision with the majority view, I believe that the underlying message of the case is clear: Courts should enforce an arbitration award only where that award can be said to be based on the literal words of the collective bargaining agreement.

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[10]*San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co.*, 407 F.2d 1327, 1327, 70 LRRM 3184 (9th Cir. 1969).

[11]*Torrington Co. v. Metal Prods. Workers Local 1645*, 362 F.2d 677, 681, 62 LRRM 2495 (2d Cir. 1966).

[12]*Id.* at 680 (emphasis added). The court's analysis is premised, of course, on the formal view of the arbitration process.

This brief analysis discloses, I believe, that the relationship between arbitrators and the courts was less like an enduring honeymoon (or our ideal vision of a honeymoon) and more like the first few years of a marriage. There clearly were problems and disagreements, but none threatened the basic social compact.

Arbitration and the courts: is the honeymoon over? In certain respects, the relationship has never been entirely blissful. The Ninth Circuit decisions I mentioned and *Torrington* were all decided a generation ago. The fundamental conflict between the two visions has never been completely resolved. That the relationship between arbitrators and the courts has frequently been thought of as a honeymoon is a reflection of the ascendancy of the deferential-expertise approach as exemplified by the Ninth Circuit decisions. Significantly, decisions such as *Torrington* purported to be based on the same principles as deferential decisions. Today, as was true 20 years ago, courts quote the same language, employ the same principles, advert to the same concepts, but reach entirely different results depending upon which language or concept is emphasized and which style of argument is used. The difference is that courts now seem to be growing more inclined to use the formal vision, to emphasize the contractual basis of arbitration, in order to control arbitrators by overturning awards.

Because of the perceived change in the tone of a number of court decisions in the past few years, we are asking ourselves today whether the honeymoon between courts and arbitrators is over. I would say, with some qualifications—no, at least not yet. The contract-control approach has indeed been making substantial headway, though not in the Ninth Circuit—and again I should add, at least not yet.

The ancestry of the extreme contract-control approach can be traced directly to an old discredited doctrine originated by the New York courts and subsequently exported nationwide. The *Cutler-Hammer* doctrine[13] required that a dispute meet a threshold standard of judicial sufficiency before courts would enforce an agreement to arbitrate. As the test was put, "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract

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[13]*Machinists v. Cutler-Hammer,* 297 N.Y. 519, 74 N.E.2d 264, *aff'g,* 271 A.D. 917, 67 N.Y.S.2d 317 (1st Dept. 1947).

cannot be said to provide for arbitration."[14] The primary beneficiaries of *Cutler-Hammer* were employers seeking to preclude arbitration.[15]

Under *Cutler-Hammer,* the court was required to decide whether a dispute as to the meaning of the contract was possible; by ruling that the language of the contract was clear, courts would refuse to enforce arbitration agreements. Enforcement would be ordered only if the court determined that there was an arbitral question without, in the court's view, a self-evident conclusion. Under this standard courts used to try the merits of the dispute under the guise of determining arbitrability. Many years ago, the New York state legislature prohibited courts from usurping the arbitrator's role and passing on the merits of a controversy.[16] Similarly, the *Steelworkers Trilogy* repudiated this view.[17]

Yet, the *Cutler-Hammer* contract-control approach is reappearing today, in most instances in a different form—a form even more detrimental to unions than was *Cutler-Hammer* itself. We might describe this new form as an inverse *Cutler-Hammer* approach. The neo-*Cutler-Hammer* doctrine is invoked when after arbitration a party seeks either to have an award vacated or to defend against the enforcement of an award. Employers argue, and more and more courts agree, that the arbitrator's award should not be enforced because the award went beyond the "express language of the contract." (I should note, incidentally, that while the most significant manifestations of the "express language" rule have thus far appeared in postaward cases, the principle, as its ancestry proves, is equally applicable in proceedings to compel or enjoin arbitration.)[18]

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[14]*Id.,* 271 A.D. at 918.

[15]*Cf.* Trumka, *Keeping Miners Out of Work: The Cost of Judicial Revision of Arbitration Awards,* 86 W. Va. L. Rev. 705, 716 (1984) ("[Courts] should view those who seek to vacate arbitration awards with suspicion as the forum shoppers they are.").

[16]N.Y. Civ. Prac. Law 7501 (1980). For subsequent New York law, *see* Heffern, *Has the New York State Court of Appeals Elevated the Labor Arbitrator to the Role of "Philosopher King"?,* N.Y. St. Bar J. 544 (Dec. 1981). On *Cutler-Hammer, see generally* Comment, *Arbitration—A Viable Alternative?,* 3 Fordham Urb. L.J. 53 (1974).

[17]The *Steelworkers Trilogy* essentially established labor arbitration and protected the ensuing award by strictly limiting judicial review. *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).

[18]*See Machinists v. Intercontinental Mfg. Co.,* 818 F.2d 219, 222, 125 LRRM 2907 (5th Cir. 1987).

The new judicial interventionism purports to be based on language that appears in the *Steelworkers Trilogy*. Indeed, proponents attempt to trace the doctrine to one of the *Trilogy's* most famous and most quoted passages:

> An arbitrator is confined to the interpretation or 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.[19]

Ironically, this same language is often used effectively in expertise-style, deference decisions as a basis for upholding arbitrators' awards. In fact, Justice Douglas' paragraph sends a mixed message—a message both to defer to arbitrators and also to control the exercise of their discretion. What Justice Douglas may not have foreseen is that when courts follow the contract-control mode, his much abused language can enable them to dispense their own brand of industrial justice most effectively.

The two most important articulations of the "express language rule" are found in a Sixth Circuit case and a Tenth Circuit case. When either is cited in an opinion, one can be almost certain that the award is being overturned—and a check of Shepards shows that they are being cited with increasing frequency and in more jurisdictions.[20] The Sixth Circuit case, *Detroit Coil*,[21] sets forth the rule as follows:

> [An arbitrator is] confined to the interpretation and application of the collective bargaining agreement, and although he may construe *ambiguous* contract language, he is without authority to disregard or modify *plain and unambiguous* provisions.[22]

The Tenth Circuit, in *Mistletoe Express*,[23] refused to defer to an arbitrator's construction of the phrase that employees may be discharged for just cause. The arbitrator found the term ambig-

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[19]*Enterprise Wheel & Car, supra* note 17, at 597.

[20]Both decisions were reported originally in the late 500's volumes of the Federal Reporter, 2d Series. As of May 1987, the Tenth Circuit case was cited once in the 600's F.2d, eight times in the 700's F.2d, in five other circuits, three states, and five district court opinions. The Sixth Circuit case was cited twice in the 600's F.2d, 17 times in the 700's F.2d, in six other circuits, and ten district court opinions.

[21]*Detroit Coil v. Machinists*, 594 F.2d 575, 100 LRRM 3138 (6th Cir.), *cert. denied*, 444 U.S. 840, 102 LRRM 2360 (1979).

[22]*Id.* at 579 (emphasis added).

[23]*Mistletoe Express Serv. v. Motor Expressmen*, 566 F.2d 692, 96 LRRM 3320 (10th Cir. 1977).

uous and ordered reinstatement with a suspension; the Tenth Circuit disagreed and reversed. The court's decision, as one commentator puts it, "implies that arbitral notions of 'justness' must yield to contract language which is apparently clear and proscribes certain conduct of an employee."[24] What the decision really means is that use of the formal-control model can easily result in the imposition of significant restraints on the ability of arbitrators to look to all the facts and circumstances involved in the collective bargaining relationship.[25]

Two recent cases provide an excellent illustration of the continuing conflict in the courts over arbitration awards. In particular, these two cases deal with the question of the ability of arbitrators to determine "justness" and, implicitly, the degrees of punishment. One decision, that of the District of Columbia Circuit, states that such questions are ordinarily appropriate for the arbitrator. The other decision, from the First Circuit, uses the express-language rule to vacate an arbitral award where the court disagrees with the arbitrator's assessment of "justness" and the appropriateness of the punishment.

On January 6, 1987, in a decision by Judge Harry Edwards, *Northwest Airlines,*[26] the District of Columbia Circuit considered whether the appropriateness of the discharge of an employee for "just cause" was an arbitrable question. The "cause" in that case related to airline safety, an area effectively removed from the scope of collective bargaining by the equivalent of a management-rights clause. The court ruled that the arbitrator was authorized to consider whether there was just cause for discharge and "it is equally plain," noted the court, "that the Board was authorized to judge the legitimacy of the disciplinary circumstances."[27] The opinion quotes a Fifth Circuit case, stating: "Arbitral determination not only of the existence of misconduct but of the fitness of punishment is routinely grist for the arbitral mill."[28] Judge Edwards' opinion is, perhaps not surprisingly, an old-style, pro-arbitration, deference-type decision.

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[24]Hogler, *Industrial Due Process and Judicial Review of Arbitration Awards,* 31 Lab. L.J. 570, 571–72 (1980); *see also* Note, *Judicial Intervention in Arbitration Enforcement Cases—The Tenth Circuit Expands Upon the Limited Judicial Review Standard of Enterprise Wheel,* 62 Den. U.L. Rev. 593 (1985).

[25]*See also Timken Co. v. Steelworkers Local 1123,* 482 F.2d 1012, 83 LRRM 2814 (6th Cir. 1973); *UAW Local 342 v. TRW,* 402 F.2d 727, 69 LRRM 2524 (6th Cir. 1968).

[26]*Northwest Airlines v. Air Line Pilots,* 808 F.2d 76, 124 LRRM 2300 (D.C. Cir. 1987).

[27]*Id.* at 81.

[28]*Gulf States Tel. Co. v. Electrical Workers, IBEW, Local 1692,* 416 F.2d 198, 201 n.10, 72 LRRM 2026 (5th Cir. 1969) (quoted in *Northwest Airlines, supra* note 26, at 81).

By way of contrast, a later decision of the First Circuit is illustrative of the current trend toward emphasizing contract principles and utilizing the "express language rule." The First Circuit in *S.D. Warren Co. v. Paperworkers*[29] overturned an arbitrator's award of reinstatement. The company had discharged 12 employees for violating a rule prohibiting the possession, sale, or use of marijuana on company property. The collective bargaining agreement contained a management-rights clause, a standard broad arbitration clause, and an appendix that included a rule listing "causes" for discharge. The arbitrator found that the rule had, in fact, been broken but held that suspension—and not discharge—was the appropriate penalty in light of various extenuating circumstances.

District Judge Pieras, sitting by designation, began the panel's analysis with the statement that "all arbitration awards *must draw their essence* from the collective bargaining agreement."[30] The court then restricted the scope of the collective bargaining agreement to the express terms of the written contract alone. As the court noted, "[t]he contract itself, not the arbitrator, is the social instrument containing the collective reason of the parties to it."[31] The court also provided a strong statement of the need for control of arbitral awards:

> [T]he courts have not been willing to sacrifice logic, reason, and sound principles of contract laws on the altar of the practicality of giving unlimited power to arbitrators and absolute deference to their interpretations of collective bargaining agreements.[32]

In addition, after reviewing a number of cases including *Detroit Coil*, the *S.D. Warren* court announced the following general rule:

> All these decisions are grounded on the principle that in management resides the inherent right to manage and that the right to manage includes the prerogative to discharge for cause. If the parties to a collective bargaining agreement have the intention to reverse this traditional understanding, they must do so by express and clear language divesting the employer of this right.[33]

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[29]*S.D. Warren Co. v. Paperworkers Local 1069*, 815 F.2d 178, 125 LRRM 2086 (1st Cir. 1987).

[30]*Id.* at 181 (emphasis added).

[31]*Id.* at 182. This is an implicit rejection of Ted St. Antoine's deferential, formal approach to the arbitrator as the designated contract reader. *See* St. Antoine, *supra* note 5.

[32]*Id.*

[33]*Id.* at 184. This principle is a dangerous one. If employed broadly, it would render management-rights clauses almost superfluous. It presupposes a host of fundamental

This is simply another incarnation of the *Torrington* rule but with an even more pro-management emphasis. The entire opinion is really a tour de force of the most anti arbitration formal contract control position. It is equally strongly anti workers'-rights.

When one compares Judge Edwards' forceful opinion with that of Judge Pieras, it becomes clear that there are two fundamentally different approaches to the question of judicial oversight of the arbitration process.[34] Ironically, both decisions rely on many of the same cases. Unfortunately, there is no felicitous explanation for the divergent results and divergent assumptions.

We could do what good lawyers do and draw fine distinctions between the two cases. We could say, for example, that there was a strong management-rights clause in *S.D. Warren*, the First Circuit's case, but not in *Northwest Airlines*. Or we could create some other differences that rationalize the two cases and through legal legerdemain make them appear harmonious or at least not in conflict. However, doing so would not give fair due to the philosophy and view of the law that comes through so strongly in both opinions.

While the question of the appropriate role of the arbitrator is an important element in the debate in the courts, I think that there is another current, one at least as powerful, underlying the debate. I believe the fact is that today some courts and a fair number of judges are less sympathetic to labor and the union movement than were their predecessors. Perhaps the existence of this partially deaf ear for labor's arguments is most evident in cases arising from the National Labor Relations Board, cases in which courts discuss general questions of federal labor relations law.[35] However, I believe that this shift in basic philosophy

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management prerogatives over labor that can be modified only by a special form of contractual expression that is not required with respect to all other aspects of the understanding reached between labor and management. Moreover, it is especially worrisome when it is conjoined with the expanding range of managerial authority over decisions governing capital mobility and capital substitution for labor. *See generally First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 107 LRRM 2705 (1981).

[34]*Compare Machinists v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222, 125 LRRM 2907 (5th Cir. 1987) ("[There is] no indication in the contract or the record that the parties intended to arbitrate the discharges involved in this case.") *with* 29 U.S.C. 173(d) ("Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.").

[35]The Board and the courts have in recent years narrowed the scope of protection of workers' rights and expanded the residual rights of management. *See generally* House Committee on Education and Labor, Subcommittee on Labor-Management Relations, The Failure of Labor Law—A Betrayal of American Workers, H. Rep. 98, 98th Cong., 2d sess., 17-22 (1984); Murphy & Ford, *The Reagan Board*, Second Annual Labor & Employ-

cannot be ignored when we examine the reasons for changes in the attitudes of judges reviewing labor arbitration awards. Although it may be difficult to prove, there appears to be a strong relationship between the increasing popularity of the contract-control approach and the general tendency of the federal courts to be more receptive to the arguments of management. And, although I have not conducted a scientific survey, from my casual reading of decisions overturning arbitral awards, it is almost always the case that it is the union that loses.[36]

Where arbitration awards impede what some judges consider to be legitimate managerial prerogatives, those judges have generally been willing to intervene. The clearest case of this phenomenon involves the reinstatement of workers found to have used marijuana or other drugs on plant premises. Because reinstatement under these circumstances is inconsistent with the vision of "industrial justice" held by some judges, various doctrinal approaches have been employed to overturn arbitral awards ordering such relief. The express-language-of-the-contract doctrine, or the inverse *Cutler-Hammer* rule, is only one of the means currently being utilized to discipline the arbitration process. The most significant controversy today involves, of course, the overturning of arbitration awards for violation of "public policy." The First Circuit decision in *S.D. Warren* provides one of the clearest examples of the use of this technique. In addition to the public policy rationale, Judge Pieras' opinion relies alternatively on the express-language rule as an entirely separate ground for invalidating the award. This is known in other walks of life as a two-fer.

The emergence of the public policy exception as the preferred basis for overturning arbitration awards is directly related to the shifting ideological terrain of the federal courts. While it has

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ment Law Institute (W. Dolson, ed. 1986), 17. The NLRB, in addition to changing the substantive law, has altered its procedures to the disadvantage of workers. "By slowing the processing of cases at the local level and stretching out the already nearly interminable procedural delays at all different stages of the organizing and bargaining process, it made it much more difficult for unions to organize new workers or effectively represent the members they already had." Ferguson and Rogers, Right Turn: The 1984 Election & the Future of American Politics (New York: Hill & Wang, 1985), 135–36. *See also* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1795, 1795–1803 (1983) ("[H]ow long [can] an employer forestall an enforceable order in an unfair labor practice proceeding[?] The answer is distressing: nearly 1000 days as of 1980.").

[36]For an interesting and telling account from the perspective of the president of the United Mine Workers, *see* Trumka, *Keeping Miners Out of Work: The Cost of Judicial Revision of Arbitration Awards*, 86 W. Va. L. Rev. 705 (1984) (discussing in part the *Clinchfield Coal* cases).

been relatively easy for courts to invoke public policy as a method of controlling arbitral authority—at least up to this point—I shall not comment in detail on this technique, in part because the doctrine will shortly be clarified—for good or ill—by the Supreme Court in *Misco*, and in part because I am confident that either or both of my co-panelists will address the subject far more capably than I would.

What is occurring in the federal courts today does, indeed, involve a difference in judicial approach and judicial philosophy. This difference can be detected by noting the change in emphasis in a number of judicial decisions, away from the strong policy in favor of arbitration. Instead, the first analytic step of many courts is to focus on the contractual basis of arbitration. While the directional shift may in part be tied to legitimate concerns about the role of arbitration, it is also in part a reflection of the basic philosophy held by an increasing number of federal judges. It would be naive to believe that the views, attitudes, experience, and background of judges has no influence on their decision making. It would also be wrong to think that judges are or should be philosophical eunuchs. Today, we have a President who actively and very effectively promotes his own particular brand of judicial and social philosophy through his appointments to the federal bench.

Where does this leave us? In my view, the future of the relationship between arbitration and the courts is not entirely predictable. Courts are basically a conservative institution. Judges do not easily change their basic attitudes or practices, and there has long been the understanding within the judiciary that arbitration is an important and useful forum for the resolution of various types of disputes. Moreover, if judicial willingness to intervene causes parties regularly to challenge arbitral awards in the courts, thus substantially increasing our workload, some judges will undoubtedly have second thoughts about the wisdom of their action. There is, I suppose, another possibility that should not be ignored. If arbitrators were to depart from their historic views of traditional employee rights and liberal contract construction, the same judges who currently have little hesitation in overturning their awards would probably receive them much more warmly.

The most reasonable prognostication is that a fair number of today's judges will to some degree or other continue to scrutinize the substance of arbitral decisions more actively than their

brethren did during the early post-*Trilogy* period. But the composition of the judiciary changes quickly. President Carter appointed over half the federal judges who were active at the end of his four years in office. President Reagan has (or shortly will have) appointed over half the currently active federal judiciary. For reasons I hope I have made fairly clear, the continually changing complexion of the federal courts has a significant effect on the relationship between arbitrators and courts. The attitude of the next President, and those around him, toward judicial appointments, as well as their basic political and social philosophy, will probably have more to do with the nature of the future relationship of arbitrators and courts than any other single factor.

Then again, arbitration has proven itself to be a safe, solid, productive, and acceptable institution. As in the case of the judiciary, its ways are becoming set and its practices will not be easy to change. Like an upper-middle-aged couple that has somehow surmounted all the obstacles to permanent togetherness, arbitrators and judges will continue to undergo frustrating and uneasy periods, will quarrel and complain about each other from time to time, but will soon arrive, if we haven't already, at a modus vivendi that neither finds ideal; yet, given the human condition, it is as good a one as either party could reasonably hope for or expect.

II. AFTER THE ARBITRATION AWARD: THE PUBLIC POLICY DEFENSE

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My topic is an old problem[1] which has recently been highlighted by a series of discordant decisions,[2] including the *Misco* case[3] now pending before the Supreme Court.

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[1]*See Black v. Cutter Laboratories*, 43 Cal. 2d 788, 278 P.2d 905, 35 LRRM 2391 (Cal. 1955), *cert. denied*, 351 U.S. 292, 38 LRRM 2160 (1956); *Electrical Workers, IUE, Local 453 v. Otis Elevator Co.*, 314 F.2d 25, 52 LRRM 2543 (2nd Cir.), *cert. denied*, 373 U.S. 949, 53 LRRM 2394 (1963).

[2]*See infra* text accompanying and immediately following notes 15, 17, and 20.

[3]*Misco, Inc. v. Paperworkers*, 768 F.2d 739, 120 LRRM 2119 (5th Cir. 1985), *cert. granted*, 107 S. Ct. 871 (1987). The facts of *Misco* are set forth *infra*, note 32.