new ground and venture blindly into areas not contemplated by the parties in their bargaining relationship. To the extent that the parties adopt and apply changes in the way troubled employees are treated, arbitrators may properly make decisions reflecting these values. To go beyond that boundary, however, is to effect a disservice to the parties' on-going relationship.

Admittedly, this is a conservative view of the arbitrator's role, but it has been the role that has made arbitration successful and a viable alternative to economic warfare. Arbitration does not exist for the benefit of arbitrators who desire to apply their own models of legal, social, or medical justice; it exists for the benefit of the parties. Although arbitrators are actors in an ongoing drama, they should never strive for top billing in providing assistance that was never contemplated by the parties themselves.

III. LIFE AFTER MISCO

R. WAYNE ESTES*

In its 1987 *Misco*[1] decision, the United States Supreme Court focused attention on the requirements for a reviewing court vacating a labor arbitration award on the basis of the award's being contrary to public policy. The Court limited this judicial action to situations in which the public policy violated is "well defined" and ascertainable by reference to "laws and legal precedents." The Supreme Court indicated that the violation of "general considerations of supposed public interests" will not suffice as a basis for vacating an award.[2]

Equally important to the Court's ruling on public policy vacation was its basic endorsement of the 1960 *Steelworkers Trilogy*

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[1]*Paperworkers v. Misco*, 484 U.S. 29, 126 LRRM 3113 (1987). For a general discussion of the impact and meaning of the *Misco* decision, *see* Wayland, Stephens & Franklin, *Misco: Its Impact on Arbitration Awards*, 39 Lab. L.J. 813 (1988); Parker, *Judicial Review of Labor Arbitration Awards: Misco and Its Impact on the Public Policy Exception*, 4 Lab. Law. 683 (1988); Berlowe, *Judicial Deference to Grievance Arbitration in the Private Sector: Saving Grace in the Search for a Well-Defined Public Policy Exception*, 42 U. Miami L. Rev. 767 (1988); Roebker, *Public Policy Exception to the General Rule of Judicial Deference to Labor Arbitration Awards*, 57 U. Cin. L. Rev. 819 (1988); and Dunsford, *The Judicial Doctrine of Public Policy: Misco Reviewed*, 4 Lab. Law. 669 (1988).

[2]*Paperworkers v. Misco, supra* note 1, 126 LRRM at 3119.

decisions[3] in regard to the scope of judicial review of labor arbitration awards. As earlier indicated in its 1986 *AT&T Technologies* decision,[4] the Court agreed with the *Trilogy* decisions as to the limited role of the courts in reviewing labor arbitration awards and noted that "[c]ourts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing the decisions of lower courts."[5] The Court restated the doctrine of the *Enterprise Wheel* decision[6] of the *Trilogy* that while awards must draw their "essence" from the labor agreement, a reviewing court cannot strike down an award simply because the court disagrees with the arbitrator's decision.[7]

Public Policy Challenges Since *Misco*

Two 1988 decisions of federal circuit courts of appeals provide illustrations of judicial application of the *Misco* public policy standards.

In its *Stead Motors*[8] decision, the Ninth Circuit found that *Misco* standards for public policy were satisfied by a district court in vacating an award reinstating an employee who had been discharged for not properly tightening the lugs on a motor vehicle wheel. The court recognized the requisite violated public policy in the safety requirements of the California Vehicle Code and the statute creating the California Bureau of Automotive Repair.[9]

The Third Circuit engaged in a stricter quest for a violated public policy in its *U.S. Postal Service v. National Association of Letter Carriers* decision.[10] An arbitrator had reinstated an employee who fired gunshots into his supervisor's unoccupied vehicle. A district court vacated the award, finding a violation of a public policy against permitting an employee to direct physical violence at a supervisor and ruling that the arbitrator had mis-

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[3]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[4]*AT&T Technologies v. Communications Workers*, 475 U.S. 643, 649, 121 LRRM 3329 (1986).

[5]*Paperworkers v. Misco, supra* note 1, 126 LRRM at 3117.

[6]*Steelworkers v. Enterprise Wheel & Car Corp., supra* note 3.

[7]*Paperworkers v. Misco, supra* note 1, 126 LRRM at 3118.

[8]*Stead Motors of Walnut Creek v. Machinists Lodge 1173*, 843 F.2d 357, 127 LRRM 3213 (9th Cir. 1988). *See* Parker, *supra* note 1 at 702.

[9]*Id.* at 359.

[10]839 F.2d 146, 127 LRRM 2593 (3d Cir. 1988). *See* Parker, *supra* note 1 at 702.

construed the "just cause" standard for discharge that was set out in the labor agreement. The circuit court criticized the district court's "second-guessing" of the arbitrator's evidentiary findings and construction of the contract and found that the district court had failed to establish a violated public policy in keeping with the *Misco* standards.[11]

Looking Ahead

What can be expected in regard to further judicial review of labor arbitration awards? Many courts apply the *Trilogy* standards with great care and consistency. In reading opinions from other courts, it appears that sometimes ways around the Supreme Court *Trilogy-Misco* judicial review criteria are sought. If the public policy route had been used in the past to implement broader judicial review of awards, the restrictive *Misco* public policy limitations may mean that any increased judicial scrutiny of labor arbitration awards now may be based upon other theories.

While it is unwise to judge motivations, particularly judicial motivations, it is difficult to resist the conclusion that some judges may not be totally supportive of the *Trilogy* originated and *Misco* endorsed concept of a very limited judicial role in reviewing labor arbitration awards. In some instances, one can sense a lack of total judicial appreciation of the basic policy favoring arbitration finality and recognizing grievance arbitration as the desired method of resolving disputes arising under labor contracts. In other instances, it is apparent that some judges have a very restrictive concept of when an award derives its "essence" from the labor agreement.

Judicial review approaching an examination of the merits of the underlying dispute and the "correctness" of the award is sometimes noted. Consider the following observations made in recent decisions about characteristics of an award that may subject it to judicial vacation:

1. "Arbitrary or capricious."[12]
2. Not "'rationally inferable' in 'some logical way'" from the contract.[13]

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[11]*Id.* at 148 and 149.
[12]847 F.2d 775, 778, 128 LRRM 2842 (11th Cir. 1988).
[13]*Manville Forest Prods. Corp. v. Paperworkers*, 831 F.2d 72, 74, 126 LRRM 2895 (5th Cir. 1987).

3. "Irrational."[14]
4. "[T]he grosser the apparent misinterpretation, the likelier it is that the arbitrators weren't interpreting the contract at all."[15]

If greater judicial activity develops in scrutiny of the essential merits of awards, the basic thrust of the *Trilogy* review standards may be undermined even though these standards continue to be endorsed by the Supreme Court.

The *S.D. Warren* Decisions

Two 1988 First Circuit Court of Appeals decisions involving the S.D. Warren Company and the United Paperworkers International Union have prompted discussion and examination.[16] These cases are sometimes referred to as *Warren I*[17] and *Warren II*.[18] In both cases, discharges had occurred for drug related offenses under a contract that contained both a just cause standard for discharge and a set of disciplinary rules under which the drug related offense was cause for discharge. The arbitrators in both awards found an ambiguity in the agreement language and other company publications concerning whether discharge was mandatory for the offense. Considering past practice by the employer in instances in which discharge had not always followed the rule infraction, the arbitrators found that standard just cause tests for discharge had not been satisfied, and they reinstated the employees. Two different panels of the First Circuit found that the discharges were proper under the contract, and the awards were vacated. Essentially, the courts in *Warren I* and *Warren II* found that an ambiguity had not existed in the contract language and that the arbitrators had exceeded their authority in fashioning a remedy other than discharge for the rule violation.

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[14]*Independent Employees Union of Hillshire Farm Co. v. Hillshire Farm Co.*, 826 F.2d 530, 533, 125 LRRM 3435 (7th Cir. 1987).

[15]*Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1195, 124 LRRM 3057 (7th Cir. 1987).

[16]*See* Alleyne, *The Law and Arbitration*, Chronicle, Oct. 1988, at 3 (National Academy of Arbitrators); *Circuit Court Reaffirms S.D. Warren Decision*, Study Time, No. 2, at 1 (American Arbitration Association 1988); *Circuit Judge Raises Questions About S.D. Warren Ruling*, Study Time, No. 3, at 1 (American Arbitration Association 1988); Parker, *supra* note 1 at 700.

[17]*S.D. Warren Co. v. Paperworkers Local 1069*, 845 F.2d 3, 128 LRRM 2175 (1st Cir. 1988).

[18]*S.D. Warren Co. v. Paperworkers Local 1069*, 846 F.2d 827, 128 LRRM 2432 (1st Cir. 1988).

However, in *Warren II* one of the judges filed a concurring opinion that actually is a dissent. Circuit Judge Coffin reasoned that, at least arguably, the arbitrator could have found an ambiguity in the contract language, and in view of the employee's past practice in regard to the rule violation, the arbitrator arguably might have found a lack of proper cause for the discharge.[19]

Judge Coffin concluded that under *Trilogy-Misco* standards for judicial review, the award should not have been vacated. Judge Coffin, in discussing both *Warren I* and *Warren II*, ended his "concurring" opinion:

> I would conclude that, in both cases, the arbitrator was "arguably construing or applying the contract and acting within the scope of his authority." *Misco*, 108 S.Ct. at 371. Therefore, the fact that we might be "convinced he committed serious error does not suffice to overturn his decision." *Id.*[20]

Increased Judicial Scrutiny of Merits?

More intensive judicial examination of arbitrators' findings of "ambiguity" in contract language and increased attention to the "plain meaning" of contract clauses could result in judicial expansion of the *Trilogy* "essence" test.[21] Such inquiries could bring about judicial review that is closer to an examination of the merits of disputes than apparently was intended under the *Steelworkers* and *Misco* decisions.

A wide and distinct division among the circuits may be required before the Supreme Court agrees to hear another case relative to the application of the *Trilogy* standards of judicial review of labor arbitration awards. In the meantime, more attor-

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[19]*Id.* at 833.

[20]*Id.*

[21]Following the presentation of this paper, Academy member William Murphy made the following comment:

> Despite the Supreme Court's reaffirmation and amplification in *Misco* of its *Enterprise Wheel* language on the power of the arbitrator to interpret the contract, the *Misco* opinion contains a real joker. That is the statement that "The arbitrator may not ignore the plain meaning of the contract. . . ." The plain-meaning rule, despite all criticisms and ridicule, refuses to die. The Supreme Court and other courts continue to apply it, and I wager almost all arbitrators have used it to explicate a result. It was predictable that the Court's recognition of the rule in *Misco* would provide the justification for the refusal of lower courts to enforce an award. This was precisely what the First Circuit did in *S.D. Warren II*. The joker permits a court to hold that the contract language is "plain" even though an arbitrator has held that it is ambiguous. Unless the Supreme Court puts a stop to it, we can be sure that *S.D. Warren II* is not the last decision to reverse an award under the plain-language joker.

Estes, *Life After Misco*, Chronicle, Mar. 1988, at 4 (National Academy of Arbitrators).

neys for losing parties in arbitration may advise their clients to test the waters of their circuits in attempts to use an expanded "essence" test as a basis for vacating awards. Even if unsuccessful, such litigation could have the effects of undermining labor arbitration finality and adding burdens to an already crowded court system.