CHAPTER V

JUDICIAL REVIEW: AS ARBITRATORS SEE IT

I. THE DISGUISED REVIEW OF THE MERITS OF ARBITRATION AWARDS *

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There are delights which are inevitably accompanied by some degree of pain. While I had previously thought that classroom confrontation of a professor and today's students afforded the classic illustration of that fact, I find that an assignment to address this audience carries a greater measure of both elements. The pleasure and honor of appearing before the Academy and its guests need no explication; the penalties and fears attached to the same can be fully known only to those who live through the task. My trepidation is increased by the fact that my subject of discussion involves the alleged commission of errors by arbitrators and the degree to which those errors may be identified and corrected as such by the courts. Indeed, I would have prefaced these remarks by a disclaimer of any possibility that a member of this Academy could be adjudged guilty of such an offense had not a recent experience convinced me that some degree of human frailty exists even in these exalted ranks. Not long ago I was tendered an opinion and award by a fellow member, who shall remain nameless, in which he cited a prior opinion and award of mine involving the same company and union. My fellow Academy member not only cited my opinion and award, but he did so three times. In each case he disagreed with its conclusion. In each case he misspelled my name and did so in a different manner on all three occasions. It is with deep grief, accordingly, that I approach my subject with the knowledge that arbitrators can err.

In a more serious vein, the problem of arbitral error and its

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remedy, if any, has not suddenly bloomed in the past year or two, but has grown and intensified with the explosion of the use of arbitration in the past few decades and particularly since the Supreme Court in the *Steelworkers* trilogy [1] attempted a basic delineation of arbitral authority. The trilogy unquestionably—even apart from Mr. Justice Douglas' extravagant rhetoric—set forth certain fundamental rules as to the division of arbitral and judicial authority, albeit in the broad brush strokes of an impressionist painter rather than the precise blueprints of an architect. A few years ago, Judge Paul Hays' intense attack on the judicial relationship with arbitration [2] as posited by the trilogy stirred my arbitral and academic interest in the matter, and I made a modest survey of court review of awards.[3] Since then, others have added further commentary.[4] This paper, in essence, is both an updating of these efforts and a warning. The message of this paper, indeed, is that *Cutler-Hammer* [5] is alive and well but living in disguise.

The "Law" and Its Limits on Judicial Review

We must start with the premise, which I think is incontestable, that ever since the advent of arbitration as a dispute settlement device in the industrial relations field, there have been countless occasions on which receipt of an award from the chosen village Solomon has left one party with the impression, "How could anyone have been so wrong?" That reaction has not infrequently led to the further question as to how the wrong can be righted. The several states, in their pre-Section 301 central control of the arbitration process, in some instances spelled out by statute those grounds on which an arbitration award could be reversed, modified, or clarified.[6] In the post-*Lincoln Mills* [7] era, the

[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).

[2] Paul Raymond Hays, *Labor Arbitration: A Dissenting View* (New Haven: Yale University Press, 1966).

[3] Christensen, "Labor Arbitration and Judicial Oversight," 19 *Stan. L. Rev.* 671 (1967).

[4] See, particularly, Dunau, "Three Problems in Labor Arbitration," 55 *Va. L. Rev.* 427 (1969).

[5] *Machinists* v. *Cutler-Hammer, Inc.*, 67 N.Y.S.2d 317, 19 LRRM 2232, *aff'd* 297 NY 519, 74 NE.2d 464, 20 LRRM 2445 (N.Y. Ct. App. 1947).

[6] Thus, the Pennsylvania statute provided for review where "the award is against the law, and is such that had it been a verdict of the jury the court would have entered different or other judgment notwithstanding the verdict." Act of April 25, 1927, P.L. 381, No. 248, § 11 (P.S. § 171). Compare N.Y. Civ. Practice Law and Rules, Art. 75, § 7511.

[7] *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957).

status of these state regulations has been clouded, if not, as yet, completely eclipsed. *Lincoln Mills,* of course, posited the federal law in the area of the collective bargaining contract and arbitration as paramount, if indistinct, in its possible acceptance of precedents and rules stemming from state regulation. The subsequent trilogy decisions only in part resolved these difficulties.

In addressing an audience as sophisticated in the labor-management field as this one, it would be both an insult and a waste of effort to review in detail the rules laid down by the trilogy. A short summary, however, is necessary for the material and discussion that follow.

Mr. Justice Douglas, speaking for the Court in the trilogy, enunciated a basic approach to be followed by the judiciary in two quite separate situations involving arbitration. The first situation is when a court is called upon to decide whether or not any obligation to present an issue to arbitration is present and binding. His answer was that, if the parties include an arbitration provision in their collective bargaining agreement, that provision must be viewed by the courts in a most sympathetic fashion. In brief, Mr. Justice Douglas' instructions were that, in any situation where the contractual obligation to arbitrate a dispute could be said to be indefinite or ambiguous, all doubts and presumptions should be resolved in favor of arbitrability.

As to the initial, doorstep question of whether or not parties to a collective bargaining agreement have promised to arbitrate and, if so, as to what issues, the first two decisions comprising the trilogy severely circumscribed the range of judicial authority. Further, in those decisions, Mr. Justice Douglas made it more than evident that, in determining arbitrability of a dispute, the courts were not to utilize any weighing of the merits of the disputant's case. The contrary *Cutler-Hammer* decision, espoused by courts of the State of New York, was explicitly rejected. That latter doctrine, of course, held that a "dispute" of arbitrable nature could not be held to be present where only one result, in the court's opinion, could possibly legitimately result.

The literature would not indicate that many grieve the passing of *Cutler-Hammer.* Moreover, the reported cases since the trilogy demonstrate an appreciable decline in the number of instances in which arbitrability of a dispute has been subjected to a court test prior to arbitration. This is undoubtedly due in largest part to

the strength of Mr. Justice Douglas' strictures and the difficulty of obtaining contractual language which will overcome his test of "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." It may also be due, as is my own opinion, to the belated discovery on the part of companies and unions that a court order to arbitrate, where contest as to arbitrability has been raised, may have the effect of a subtle but real pressure upon the arbitrator to find some merit in the claim which he, under judicial mandate, then hears and determines. One can only speculate as to whether the eventual decision in, for example, *Warrior & Gulf* would have been the same had it not been the preliminary subject of extravagant comment by the Court as to the values of arbitration in the trilogy.

The third decision comprising the trilogy, *Enterprise Wheel & Car*, directly addressed the second area of court-arbitral contact, *i.e.*, the enforcement or review of an award. I repeat again what I have said before: This is an entirely different question than that of arbitrability, and *Enterprise*, despite its cross references to the companion cases which dealt with the latter problem, is concerned with a quite distinct arena of possible judicial-arbitral conflict. There is a nexus between arbitrability review and award review. It is emphasized in *Enterprise* and consists of a common command that in neither instance is the court to insert its authority as a tryer of the merits. But *Enterprise* clearly states a quite different role for the courts when they are called upon to give their seal of approval to an award than when they are asked to defer, initially, to the arbitral forum. I sense that Mr. Justice Douglas recognized the added difficulties implicit in the award-review situation, for *Enterprise* contains language pregnant with the possibility of arbitral error not evident in the two companion cases. Thus, while he stated:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."

He added:

> ". . . Nevertheless, an arbitrator is confined to 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 to enforce the award."

Enterprise, accordingly, propounds a truly Delphic response to the question of the judicial controls to be exercised on review of an award. The arbitrator is allowed, if not expected, to refer to many sources in finding the solution of a dispute, but that solution must "draw its essence" from the collective contract which invests him with authority. The instruction is not only Delphic but, in retrospect, constitutes an invitation for additional survey by those who occupy the benches and wear the robes of our state and federal judiciary.

To summarize, the trilogy decisions uniformly recognize that all facets of arbitral power must flow from and be established by the collective contract. The existence of contractual authority to hear a particular dispute is to be broadly assumed if an arbitration provision appears in the agreement. No similar presumption is stated, at least as explicitly, as to the validity of a determination by an arbitrator after hearing. The Court contented itself with stating:

> "It is the arbitrator's construction [of the contract] which was bargained for; and *so far as the arbitrator's decision concerns construction of the contract,* the courts have no business overruling him because their interpretation is different from his." (Emphasis supplied.)

The name of the game, accordingly, is what constitutes a construction or interpretation of the contract.

Bernard Dunau, in his usual perceptive manner, has set forth the resulting dilemma: [8]

> "The agreement is the source of an arbitrator's authority; within the scope of his authority, his award is final, but outside that scope it has no legal basis. The elemental judicial role is therefore to confine the arbitrator to action which does not exceed his authority.
>
> "The syllogism is, however, deceptively simple. A dispute over the existence of a contractual limitation on authority is itself a question of contract interpretation."

Judge Hays, however, has approvingly viewed the opportunity for judicial intervention offered by the syllogism: [9]

[8] Dunau, *supra* note 4.
[9] Hays, *supra* note 2, at 82.

> "Holding that . . . an issue is arbitrable does not mean, I think that an arbitrator's award should be enforced if he decided the issue in favor of the claim. . . . the arbitrator has the *jurisdiction* to be wrong. The question is whether he has *authority* to decide issues contrary to the provisions of the contract."

Yet, acceptance of Judge Hays' approach makes very real the warning of *Enterprise* that "plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final."

The refrain, round and round the mulberry bush we go, seems appropriate.

Contractual Limits on Arbitral Power

The "law," as it has been discussed above, subsumes the concept that either management or labor can and does control the scope and reach of arbitral authority. They can only do so, obviously, by restrictions contained in the collective agreement. The possibility of doing so, however, is somewhat contradicted by the difficulties of doing so.

The problems of draftsmanship are so evident and well known as to any portion of a collective bargaining contract as to need no repetition herein. They are particularly present in the situation where either party desires restrictions to be placed on an otherwise general arbitration clause. A simple example will suffice. Management considerations may impel its attorney to require that the no-strike clause be worded as prohibiting arbitral review of any discipline imposed on a mid-contract walkout participant. The same management attorney may discover, to his dismay, that this language will not prevent arbitration of the threshold (and possibly dispositive) question of whether or not such a walkout did occur. I think it fair to state that limitations as to arbitral authority couched in such terms of impossible definition as "automation" or "matters strictly a function of management" are so imprecise as to only afford opportunity for just that contract interpretation which has been sought to be avoided.

It is, nonetheless, not beyond the power of contract draftsmen to circumscribe arbitral authority. Indeed, where such clear and unequivocal instructions exist, I think they are predominately welcomed by arbitrators; a specific command, whether equitable or not, relieves us of the need to probe as to what might have

been meant, or might not have been meant, with no assurance that we are correct. Review of the published cases and my own two decades of experience lead me to the conclusion that such explicitness is rarely present and if it is, it is normally in the area of remedy. Thus, a contractual restriction that, in a discharge case, the arbitrator is limited to two choices, *i.e.*, reinstatement with full back pay or complete affirmance of the termination, may require a degree of anguish in the making of an award in a doubtful case but will afford a result clearly commanded by the parties and clearly reversible if a partial reinstatement is awarded.

The problems of draftsmanship, fortunately or unfortunately, have led to recognition of what I shall label the "ambiguous limit" in the contract. A few examples will illustrate. Thus, in *Automobile Workers* v. *TRW, Inc.*,[10] the arbitrator reversed certain disciplinary actions taken as to employees who had engaged in violations of a no-strike clause. The discipline was invoked as to some but not all of the participants in the walkout. The no-strike clause specifically stated: "The parties recognize the right of the Company to take disciplinary action ... [as to employees breaching the clause] where such action is taken against all of the participants or against only selected participants." The arbitrator, nevertheless, reversed or modified the disciplinary penalties involved on the ground that the company had improperly applied its standard of selection as to those who were to be punished or had utilized unfair procedures in the process of punishment. The contract also contained a somewhat unusual provision that:

> "The arbitrator shall be bound by the provisions of this Agreement. Any decision by an arbitrator contrary to such provisions shall not be binding on either party *and shall not be enforceable except upon a determination de novo that the arbitrator's decision is not contrary to the provisions of the Agreement.*" (Emphasis supplied.)

The court affirmed the award, finding that the above quoted language did not "give the Court the right to make an independent appraisal of the agreement" and that the arbitrator did not exceed the scope of his authority.

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[10] *Local 342, Automobile Workers* v. *TRW, Inc.*, 65 LRRM 2597 (D.C. Tenn. 1967).

By contrast, the Sixth Circuit in *Magnavox* v. *Electrical Workers* [11] set aside an award where the contract provided that:

> "An arbitrator under this Agreement shall not have the right to: . . . (c) To consider, rule or enter any award with respect to disciplinary action imposed upon an employee for refusal or failure to perform assigned job tasks, *except where the employee can positively establish that the performance of such task would have created a serious health hazard to him.*" (Emphasis, the court's.)

The arbitrator, here, found that the duty which the employee rejected would not in fact have created a health hazard to him, but that the employee had good-faith doubts as to the hazard. He concluded that some mitigation of the penalty was appropriate. The court found his award to be beyond the scope of his authority.

I am not as concerned with whether or not the arbitrator or the courts reached the "correct" decision in either of the above cases as I am with the legal quicksand which they expose. An award rendered under a contractual restriction with at least latent ambiguities in each case is given diametrically different treatment by the two courts. This, plainly, is the result which has evolved from the impreciseness of the standards of review and enforcement announced in *Enterprise*. In the application of those standards, depending upon the court in which one finds oneself (as well as the presence or absence of resources for procuring appellate review), the final result is predictable only in terms of the palatability of the arbitral process and its result to the reviewing judge. Plainly, the bench mark that the award must "draw its essence from the contract" has become only a basis for the very judicial review of the merits of a dispute which *Enterprise* attempted to prohibit.

This is not to impute improper motives to our reviewing courts. They have made valiant, if inconsistent, attempts to flesh out and make meaningful the *Enterprise* rule. Thus, as the Third Circuit summarized in *Ludwig Honold Mfg. Co.* v. *Automobile Workers:* [12]

> "Each case seems to have fashioned its own standard, and among those variously employed have been: the reviewing court should not disturb the award so long as the interpretation was not arbitrary,

[11] *Magnavox Co. of Tennessee* v. *IUE*, 410 F.2d 388, 71 LRRM 2049 (6th Cir. 1969).

[12] 405 F.2d 1123, 70 LRRM 2368 (3rd Cir. 1969).

> or 'even though the award permits the inference that the arbitrator may have exceeded his authority,' or merely because it believes that sound legal principles were not applied; the court should interfere 'where the arbitrator clearly went beyond the scope of the submission,' or where 'the authority to make * * * award cannot be found or legitimately assumed from the terms of the arbitration agreement,' or if the arbitrator made a determination not required for the resolution of the dispute.
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> "Three decisions suggest no review whatsoever of the arbitrator's interpretation: construction and interpretation is not for the reviewing court; there should be no review on the merits at all; review is confined to the question of whether the union agreed to arbitrate or give arbitrator power to make the award."

The court went on to note that agencies such as the National Labor Relations Board as well as state and federal courts in arbitrations arising under statutes other than Section 301 of the Taft-Hartley Act had adopted varying standards for review of awards.

My own prior study and the survey made in preparation of this paper, covering the period of time which has elapsed since that earlier review, sustains a personal conclusion that reviewing courts under Section 301 are increasingly accepting the invitation to review the merits of an award in the guise of determining contractual restrictions on arbitral authority. Limits of time and space prevent a detailed recitation of the more than 80 judicial decisions covered by the last survey. A few examples must be utilized as illustrations of the trend. My criticism of the courts' actions in these cases is not to be deemed necessarily as agreement with the findings and conclusions of the awards to which they denied enforcement. Indeed, the case, *Torrington Co.* v. *Metal Products Workers* [13] which, in retrospect, marked the onset of such disguised review of the merits, was one in which I suspect many arbitrators, including myself, might well have reached a conclusion opposite to that contained in the award. It is not the rightness or wrongness of the award in any particular case which is the subject of this inquiry; second guessing is, in any event, of little avail to the parties intimately involved in the dispute unless that second guessing is done by a reviewing court.

Torrington, in any event, has been sufficiently chewed and rechewed in the legal literature as to not require or sustain a

[13] 362 F.2d 677, 62 LRRM 2495 (2d Cir. 1966).

further academic mastication herein. I have asserted a trend of increased judicial intervention to have occurred after *Torrington* and other earlier cases. The most dramatic illustrations of that occurred in the invariably emotion-laden area of union-management conflict, the "wildcat" strike situation.

The controversy which erupted at the premises of the Needham Packing Co. in May 1961, I am sure all of you are aware, resulted in an eventual, important decision by the U. S. Supreme Court [14] as to the continuing obligation to arbitrate which exists despite a major (alleged) breach of the contract by the party demanding arbitration. As such, the dispute and the Court's commands as to *arbitrability* of the discharge of employees involved in such a situation are now a matter of legal history. Not so many of the observers of the labor-management relations scene are aware of the aftermath of the Court's direction that arbitration of employee claims take place despite the claimed union breaches of the contract. That arbitration did take place and the award which resulted was subsequently reviewed by the Supreme Court of the State of Iowa.[15] The award sustained the discharge of one individual who was a key participant in the walkout which occurred. It reinstated, however, a number of other participants in that walkout with some reductions in back pay for their period of unemployment following discharge. A central factor in this disposition of the case by the arbitrator was that certain oral arrangements as to return to work made between the agents of management and the union were, thereafter, breached by the employer. A further factor in the award was the fact that the company demanded that any employee who returned to work do so on the basis of becoming a new hire without any recognition of prior service.

The facts of *Needham Packing* are far too complex even to summarize herein. It is sufficient, I believe, to state that the arbitrator concluded that, while discipline including discharge was allowable under the contract for employees engaging in a work stoppage in breach of the no-strike clause contained therein, the action of the company in demanding total loss of seniority as the price of return to work was not one compatible with the contract's terms under the special circumstances of the case.

[14] *Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247, 55 LRRM 2580 (1964).

[15] *Packinghouse Workers* v. *Needham Packing Co.*, 151 NW.2d 540, 65 LRRM 2498 (Iowa Sup. Ct. 1967).

Whether one agrees with the conclusion of the arbitrator reached in *Needham*, there is no question, as the Iowa Supreme Court's opinion acknowledges, that it made reference to contractual terms. The Iowa court refused enforcement, however. Its reasons for doing so are set forth in a lengthy, verbose, and imprecise statement which can only yield frustration to a reader intent upon finding its essence. Thus, the court constantly refers to the issue of whether the dispute was "arbitrable." The Iowa Supreme Court is, I must assume, competent to read and apply a decision of the Supreme Court of the United States. Such a decision of the latter Court had been rendered in precisely this case and held that the dispute was arbitrable. The arbitration was held and the arbitrator, rightly or wrongly, interpreted and applied provisions of the contract. The Iowa court, however, concluded that his references to recall discussions and alleged side agreements somehow gave birth, anew, to the issue of *arbitrability* as distinct from contractual limits on the arbitrator's powers:

> ". . . It cannot be implied that the arbitration clause was intended to include an agreement to arbitrate the return to work after an illegal strike when a strike was prohibited under the terms of the agreement. An illegal strike makes it impossible to obtain the goal of uninterrupted production by arbitration.
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> "The grievance was for the wrongful discharge of the employees based on the violation of the 'agreed upon terms' for the employees' return to work, not upon the illegal use of total deprivation of seniority. This concept originated with the arbitrator. It may be that proof the company violated such an agreement would subject the company to damages. This is not for us to decide. However, it is far different from saying the company agreed in the collective bargaining agreement to submit this particular type of dispute to arbitration. It may also be that this is the kind of ambiguous decision which the United States Supreme Court has enjoined the courts not to question, but we believe the difficulty is more basic. The finding of arbitrability, in our opinion, is inconsistent with many of the other findings and conclusions of the arbitrator. The 'arbitrator's words manifest an infidelity' to his obligation to draw the 'essence' of the authority and award from the collective bargaining agreement. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp., supra, loc. cit.* L. Ed. 1428. We do not believe this controversy can be held arbitrable under these findings and conclusions.
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> "Therefore, as his conclusions demonstrate 'he derived his authority from sources outside the collective bargaining agreement at issue,' we must vacate the arbitrator's award as being beyond his jurisdiction and the extent of his authority."

One hardly knows where to begin in commenting upon what can only be termed a judicial masterpiece which combines both obfuscation and legal illiteracy.

If one can be certain of anything in the court's opinion—and that is doubtful—it is that the reversal of the award was based upon (a) the fact that the contract did not contain any terms as to recall of strikers, and (b) that the arbitrator referred to discussions and accords which dealt with such a recall. The answer to these absurdities is that (a) it is a rare collective bargaining agreement which contains reference to recall of wildcat strikers, and (b) that fact, as the arbitrator recognized in *Needham,* does not necessarily mean that contractual terms dealing with discipline and seniority may not be interpreted in view of actions and statements of the parties not contained within the contractual text. In sum, the decision of the Iowa Supreme Court was not really based upon a finding that the arbitrator had exceeded contractual limits upon his interpretation of limitations contained in the agreement. Rather, it was a rejection of the arbitrator's interpretation of terms clearly present in the agreement.

Perhaps because a work stoppage allegedly in breach of contract draws almost universal negative reaction, judicial attempts to reverse rulings on the merits are most apparent and inevitable in such cases. The Sixth Circuit, in *Amanda Bent Bolt* v. *Automobile Workers,*[16] illustrates that federal courts as well as state courts are equally susceptible to the temptation to overturn an arbitral award which does not wholly condemn the employee malefactors. In *Amanda Bent Bolt,* the contract again provided for a no-strike commitment by the union and the employees and stated that violation of that clause "may be made the subject of disciplinary action, including discharge." Employees discharged for cause, as is customary, suffered total loss of seniority. As in *Needham,* a stoppage alleged to be in violation of contract occurred and the employer, again, required that return to work by the strikers be premised upon their assuming the status of new employees. The arbitrator held, as the court observed:

> "[N]otwithstanding the grievants' violation of the contract in engaging in a work stoppage, and the fact that the company was authorized to consider the penalty of discharge, such action was not, in fact, taken; the notice of discharge coupled by the proposal to

[16] 451 F.2d 1277, 79 LRRM 2023 (6th Cir. 1971).

> re-employ the grievants as new hires was a punitive measure at variance with the contract provisions and the established disciplinary concepts."

He also said:

> "[T]he arbitrator is frank to acknowledge that he regards the indiscriminate application of the discharge penalty to all employees who engaged and participated in work stoppage without consideration of other factors including the degree of their participation is unusually harsh and severe."

The court, relying, incidentally, on the Federal Arbitration Act's provision for vacation of awards,[17] held:

> "The no-strike clause was an important part of the collective bargaining contract. When twenty-eight employees violated this provision, they were subject to discharge. The determination of the penalty was reserved to the company and was not the prerogative of the arbitrator."

The court's holding could be justified only if the agreement there in issue had specifically stated that discharge was an automatic penalty indiscriminately applied to any employee who engaged in a mid-contract work stoppage. The agreement did not so state.

Amanda Bent Bolt basically differs from *Needham* only in the fact that the Sixth Circuit was more sparse in the textual defense of its action. Both decisions are unquestionably decisions on the merits rather than examples of judicial review of contractual limitations on the powers of an arbitrator. I repeat: Perhaps the arbitrators in both cases were wrong in their leniency as to the discipline to be awarded participants in work stoppages violative of the collective agreement. In each case, however, the arbitrator did no more than the Supreme Court has said he should do, *i.e.*, interpret a contractual standard of imprecise meaning.

The Need for Restraint in the Arbitral Process

The trilogy, rightly or wrongly, granted imposing if not frightening authority to the arbitrators who adjudicate, by consent of the parties, most of the industrial relations disputes which occur in the segment of our economy subject to collective bargaining agreements. I do not believe that most of the arbitrators invested with that power, let alone the members of this Academy, interpret that mandate as an open-ended commission for the determi-

[17] 9 U.S.C. § 10. *Cf. Ludwig Honold Mfg. Co.* v. *Automobile Workers*, 405 F.2d 1123, 70 LRRM 2368 (3rd Cir. 1969) where the Federal Arbitration Act was considered inapplicable to Sec. 301 cases.

nation of what is justice. Mr. Justice Douglas stressed that fact, if only obliquely, in *Enterprise.* We, as arbitrators, are not empowered to go beyond the authority which the parties grant us even if we feel, as I have so frequently felt, that the contractual mandate is not one which comports with our sense of fairness. Our obligation to observe contractual limits on our authority is made as much a moral as a legal restraint because we exist as adjudicators of a dispute only because of the full or reluctant trust of the parties that we shall serve within the limits of authority which they, and they alone, grant us.

This need for arbitral restraint, so essential in view of the fact that only an extremely small percentage of awards are even subjected to judicial review, must also be accompanied by some restraint on the part of our state and federal courts. The standard of review set forth in *Enterprise,* that the award draw its "essence" from the collective contract, is imprecise. It also clearly adjures the courts to reverse arbitral judgment only when it poses an adjudication which the parties have prohibited. Courts, like arbitrators, must learn that a result which they deem inequitable may, nevertheless, be a legitimate exercise of authority. Perhaps the standard of review announced by the Supreme Court as applicable to determinations of arbitral boards under the Railway Labor Act, that they are reversible only if wholly baseless and completely without reason,[18] is too "giant" a step to track under Section 301. A somewhat more acceptable bench mark may well be that adopted by the Third Circuit in *Ludwig Honold*—that the award be vacated only "where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop."

Any standard eventually adopted will have its dangers and its disagreements. With the utmost respect, however, I must remind the judiciary that almost two centuries have left us, the bar, the bench, and the public, without a complete, definitive, and all-encompassing finding as to the meaning of a document much shorter than many, if not most, collective bargaining contracts—the U. S. Constitution. If a nation, over that period of time, is unable consistently to concur as to the meaning of the words of its charter of existence, we cannot impose a harsher burden upon a product of only one of the segments of society—the labor-

[18] *Gunther* v. *San Diego & Arizona Eastern Ry. Co.,* 382 U.S. 257, 60 LRRM 2496 (1965).

management accord. Certainty is more a matter of accomplished past fact than an achievable aim of the draftsmen of a legal document as to future events.

Unlike Mr. Justice Douglas, I do not deem all arbitrators to be more able than all judges in all industrial relations disputes. While his rhetoric was extravagant, the more modest premise on which it was based is, I consider, well established. An arbitral award is more likely to be based upon an informed and perceptive judgment of the merits of a labor dispute than that of a judge reviewing a cold, written record. I, perhaps, need not point out to the representatives of management that the determinations which have given them, collectively, the most sleepless nights have been those of the judiciary, not the arbitrator. [19] I am sure that it is needless to remind representatives of unions that further erosion of the process which once promised swift, inexpensive determinations will only create further unrest in the ranks of their members.

My message is, relatively, a short one. Will increased judicial review of the merits of a grievance advance or irreparably injure our system of industrial relations? I think the answer obvious, but others may disagree. To the latter I send a further question. Have you recently visited your local, state, or federal court? Have you observed the length of time—and the patience of hearing—which accompanies the disposition of life and property in those courts as compared to that of the ordinary arbitration?

Only a few comments need be added. Arbitrators, much more than judges, are the product of those who seek their advice and judgment. We exist and only exist because of your voluntary, continued acceptance of our services, individually and collectively. You mold and winnow our ranks with the registry of a personal choice quite distinct from the political process which results in the designation of judges on either the federal or the state level. Whether that be a better or inferior method of selection is open to legitimate question and debate. The fact remains that it is a method of selection—a method of obtaining justice, if you will—which is not only unique but which affords the highest degree of control by those who utilize it. It also contains its own unique "appeal" machinery—the bargaining which will occur as to a

[19] See, for example, *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 55 LRRM 2769 (1964).

successor contract to that interpreted by the arbitrator. The more traditional appeal mechanism, resort to the courts, obviously must be retained as a necessary curb for those instances when an arbitrator disobeys the mandate granted him. But the teaching of *Enterprise* is that an arbitration opinion and award are not to be viewed as a trial court record and that it is expected that a given result will search beyond the bare words of a collective contract because, if for no other reason, those words most frequently do not and cannot present standards of mathematical precision to be applied to situations unknown at the time of their writing. When Mr. Justice Douglas affirmed that the arbitral award must have a foundation in the "essence" of the agreement, he was, I believe, deliberately granting the widest possible range of action. The Court did not predicate review by a judge as a reexamination of what a contractual provision might or might not mean. Absent disobedience to a specific limitation, errors of an arbitrator are not to be corrected—if the institution of arbitration is to survive—by a determination of a judge that the terms of an agreement have been altered simply because those terms read differently in the scrutiny of the bench than they do in the perspective of the individual chosen by the parties for precisely that task.

II. JUDICIAL REVIEW OF EMPLOYMENT DISCRIMINATION ARBITRATIONS *

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The passage of Title VII of the Civil Rights Act of 1964 [1] has helped place employment discrimination law on a collision course with some of the basic principles of the labor legislation which

*This paper was delivered before both *Rios* v. *Reynolds Metals Co.*, —— F.2d ——, 5 FEP Cases 1 (5th Cir. 1972) and *Alexander* v. *Gardner-Denver Co.*, 4 FEP Cases 1210 (10th Cir. 1972). Accordingly, the paper does not analyze either of these decisions.

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[1] Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1970). Title VII is not the only civil rights statute involved in the conflict. The others are the Civil Rights Act of 1866, 14 Stat. 27 (1866); Equal Pay Act of 1963, 29 U.S.C. § 206 (d) (1967); and the Age Discrimination Act of 1967, 29 U.S.C. §§ 621-34 (1970). Both the National Labor Relations Act and the Constitution are involved as well. With regard to the former, see *Packinghouse Workers* v. *NLRB*, 416 F.2d 1126, 70 LRRM 2489 (D.C. Cir. 1969), *cert. denied* 396 U.S. 903, 72 LRRM 2658 (1969). (The Board's decision on remand is *Farmers' Cooperative Compress*, 194 NLRB No. 3, 78 LRRM 1465 (1971).) See also cases cited in note 9. With regard to the Constitution, see, *e.g.*, *Ethridge* v. *Rhodes*, 268 F.Supp. 83 (S.D. Ohio 1967).