CHAPTER 12

TWENTY YEARS OF TRILOGY: A CELEBRATION

CHARLES J. MORRIS*

I. An Occasion to Celebrate

This month marks the birthday of the Supreme Court's *Steelworkers Trilogy* decisions. The three cases, *American Manufacturing,*[1] *Warrior & Gulf,*[2] and *Enterprise Wheel,*[3] represent an integrated legal doctrine which is still very much alive and in relatively good health. The decision was a robust infant when it was delivered 20 years ago with the able assistance of lawyer David Feller. It was thus of considerable concern to the many friends of the *Trilogy* that four years ago Professor David Feller examined the subject, which he saw as a continuation of a "golden age of labor arbitration"[4] that had begun to flourish in the forties, and diagnosed its condition as critical. However, the following year the Academy received a second opinion—a diagnosis by Dean Theodore St. Antoine, who pronounced the subject in excellent health.[5] I concur with Dean St. Antoine's basic observation, though I must disagree with some of his findings and conclusions, about which I shall have more to say later.

My own examination of the subject indicates that this is indeed the occasion for a celebration, not a memorial service. The *Trilogy* doctrine is still robust. It has grown; it has matured; it has come of age. Its acceptance in private-sector labor relations is now commonplace; it has long ceased to be the subject of seri-

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*Member, National Academy of Arbitrators; Professor, School of Law, Southern Methodist University, Dallas, Tex.

[1] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960).

[2] *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).

[3] *Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[4] Feller, *The Coming End of Arbitration's Golden Age*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), at 97.

[5] St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L. Rev. 1137 (1977).

ous criticism. Nevertheless, there are some disquieting signs which should be watched carefully and even some dangerous outgrowths which should be checked before they spread. I shall discuss these worrisome conditions later in this paper.

First, however, I wish to say how honored I am to be assigned the task of reviewing the *Trilogy* for the benefit of this distinguished audience of *Trilogy* users. But the experience is also very humbling. The process of reexamining the case law and assembling these remarks put me face-to-face with the realization of the symbiotic nature of the relationship between arbitrators and judges—a special relationship which the Supreme Court decided was necessary if the American collective bargaining contract was to be protected as the basic institution of industrial self-government. The experience is humbling because you, the judges, the arbitrators, and the parties to whom I am speaking, are not only knowledgeable about the subject at hand, but are also the active participants—the movers and shakers—who are engaged in this joint venture for which the *Trilogy* is the charter.

This evening's dinner-dance will provide the revelry appropriate for a birthday celebration. But birthdays are also the occasion for serious reflection and reappraisal.

II. Pre-*Trilogy* Arbitration and Judicial Intervention

I shall begin the reflective part of this paper by recalling the nature of arbitration as it existed before the *Trilogy*. Recall with me both the state of the art and the state of the law. The state of the art was at its peak. Among its practitioners were the giants of our profession—the very arbitrators who founded the National Academy. Arbitration procedures were generally informal. Arbitration had achieved high acceptability among almost all of the union and employer parties who used the process. Grievance arbitration had become the standard adjunct to collective bargaining, and the reason for its adoption was plain to see. Addressing the Second Annual Meeting of this Academy, George W. Taylor[6] observed the truism that grievance arbitration is "very hardy," that it persists despite many shortcomings,

[6]Taylor, *Effectuating the Labor Contract Through Arbitration*, in Selected Papers from the First Seven Annual Meetings, National Academy of Arbitrators, 1948–54, ed. Jean T. McKelvey (Washington: BNA Books, 1957), at 20.

but that its strength derives from the much greater disadvantages of the alternative "principal method of settling day-by-day disputes, i.e. by work-stoppages."[7]

For a considerable period in the recent past, conventional wisdom tended to idealize the collective agreement as an entirely consensual arrangement between an employer and a labor union—a relationship in which the judiciary had no business intruding. Indeed, that was the philosophy which led to passage of the Norris-LaGuardia Act[8] in the early thirties, for it had been widely believed that if courts—particularly the federal courts—would no longer issue injunctions in labor disputes, the parties and the public would benefit from the agreements which labor and management would reach by themselves through the interplay of voluntary negotiations and the use of traditional economic means.[9] I am not prepared to say that such conventional wisdom was wrong. But it is too late to seek that laissez-faire condition, for that was not the direction in which American labor relations ultimately moved. With the passage of the Wagner[10] and Taft-Hartley[11] Acts, the law and the legal process became deeply imbedded in the structure of the labor-management relationship. The 1944 *J.I. Case*[12] decision, establishing the supremacy of the collective agreement over the individual contract of employment, followed as the night follows the day. And after watching and participating in ten years of judicial fumbling[13] to find the meaning of Section 301,[14] the Supreme

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[7]*Id.*, at 24.

[8]47 Stat. 70 (1932), 29 U.S.C. §§101–15 (1964). *See* Frankfurter and Greene, *The Labor Injunction* (1930).

[9]*See generally*, I. Bernstein, The Lean Years (Boston: Houghton-Mifflin, 1960), 391–415.

[10]49 Stat. 449 (1935), 29 U.S.C. §§151–68 (1952).

[11]61 Stat. 136 (1947), 29 U.S.C. §§141 et seq. (1952).

[12]*J.I. Case* v. *NLRB*, 321 U.S. 332, 14 LRRM 501 (1944).

[13]*E.g.*, *Steelworkers* v. *Gallanel-Henning Mfg. Co.*, 241 F.2d 323, 325, 39 LRRM 2384 (7th Cir. 1957); *Signal-Stat Corp.* v. *Local 475*, 235 F.2d 298, 300, 38 LRRM 2378 (2d Cir. 1956); *ILGWU* v. *Jay-Ann Co.*, 228 F.2d 632, 37 LRRM 2323 (5th Cir. 1956), *semble*; *Rock Drilling Union* v. *Mason & Hanger Co.*, 217 F.2d 687, 691–92, 35 LRRM 2232 (2d Cir. 1954); *Ass'n of Westinghouse Employees* v. *Westinghouse Elec. Corp.*, 210 F.2d 623, 625, 33 LRRM 2462 (3d Cir. 1954), *aff'd on other grounds*, 348 U.S. 437, 35 LRRM 2643 (1955); *United Elec., Radio & Machine Workers* v. *Oliver Corp.*, 205 F.2d 376, 384–85, 32 LRRM 2270 (8th Cir. 1953); *Milk and Ice Cream Drivers* v. *Gillespie Milk Prod. Corp.*, 203 F.2d 650, 651, 31 LRRM 2586 (6th Cir. 1953); *Textile Workers Union* v. *Arista Mills*, 193 F.2d 529, 533, 29 LRRM 2264 (4th Cir. 1951); *Hamilton Foundry* v. *Int'l Molders and Foundry Workers Union*, 193 F.2d 209, 215, 29 LRRM 2223 (6th Cir. 1951); *Mercury Oil Ref. Co.* v. *Oil Workers Union*, 187 F.2d 980, 983, 16 LA 129 (10th Cir. 1951); *Schatte* v. *Int'l Alliance*, 182 F.2d 158, 164, 26 LRRM 2136 (9th Cir. 1950); *A.F. of L.* v. *Western Union*, 179 F.2d 535, 25 LRRM 2327 (6th Cir. 1950).

[14]61 Stat. 156, 29 U.S.C. § 185 (1952).

Court in *Textile Workers* v. *Lincoln Mills*[15] finally recognized the federal law of the collective agreement, which in hindsight now seems to have been a natural consequence of the direction in which labor relations was moving—a direction which Congress had set when it turned away from the Norris-LaGuardia philosophy and erected instead an elaborate system of legal machinery and statutory conditions[16] that were specifically designed to govern the collective bargaining process.

Despite the steady movement toward the direction of governmental intervention, many wise observers and participants in the system raised their voices in warning, seeking to retain or achieve a labor arbitration process that would be independent of judicial control. In his famous 1955 Holmes lecture,[17] Dean Harry Shulman argued that the institution of labor arbitration could best flourish without judicial intervention. He viewed legal enforcement of the agreement to arbitrate in a collective bargaining contract as "an unwise" limitation on the parties' autonomy.[18] He conceded that the intensely practical system of grievance arbitration which he described relied upon the wholehearted acceptance by the parties of the autonomous rule of law and reason which the collective agreement established. He summed up the utility of the process by saying that it required a congenial and adequate arbitrator, and despite the fact that arbitration might be resented by either party as an impairment of its authority, that it was susceptible to buck-passing and face-saving, and that it sometimes encouraged litigiousness, he reminded us that

> ". . . when the system works fairly well, its value is great. [But to] consider arbitration as a substitute for court litigation or as the consideration for a no-strike pledge is to take a foreshortened view of it. In a sense it is a substitute for both—but in the sense in which a transport airplane is a substitute for a stagecoach."[19]

He viewed arbitration as an integral part of industrial self-government—a means to make collective bargaining work for managerial efficiency, for union leadership participation in the enterprise, and for securing justice for the employees. But above all, he wanted the law to stay out. He said that when the

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[15]353 U.S. 448, 40 LRRM 2113 (1957).
[16]*Supra* notes 10 and 11.
[17]Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955).
[18]*Id.*, at 1002.
[19]*Id.*, at 1024.

process "works fairly well, it does not need the sanction of the law of contracts or the law of arbitration."[20] And when the autonomous system which he described breaks down, he preferred that the parties be left to "the usual methods for adjustment of labor disputes rather than to court actions. . . ."[21] He closed his lecture by suggesting "that the law stay out—but, mind you, not the lawyers."[22]

That lecture had an enormous impact on the shape of the law of labor arbitration, though, paradoxically, not in the manner which Dean Shulman proposed or would likely have foreseen. His description of a relatively autonomous arbitration process within a system of industrial self-government was preserved from excessive intrusion of the law only because the Supreme Court used the law to keep the law out. I am referring, of course, to the law relating to enforcement of the parties' own collective agreement, not to the hotly debated issue of the increasingly important role of external law as regulator of the employment relationship as to which David Feller attributed the coming demise of the golden age of labor arbitration.[23]

While Dean Shulman's pristine conception of labor arbitration found much favor with his colleagues,[24] and presumably with many of the participants who thought seriously about the process, it did not find favor in the courts. Regardless of the state of the art of arbitration, the state of the law of arbitration before the *Trilogy* was an entirely different picture. The law was more restrictive both as to the duty to arbitrate and as to the enforcement of the arbitration award. I read the historical evidence differently from Dean St. Antoine, who contends that the *Enterprise*[25] rules regarding judicial enforcements of awards were "preordained,"[26] and that the decision "did not mark a departure from prevailing doctrine."[27] I do not believe that meaningful prevailing doctrine, for comparison purposes, can be gleaned from the items on which he relies: the hortatory

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[20]*Ibid.*
[21]*Ibid.*
[22]*Ibid.*
[23]Feller, *supra* note 4. The impact of external law is not within the scope of this paper. *See* text preceding note 132 *infra.*
[24]E.g., Aaron, *On First Looking Into the Lincoln Mills Decision,* in Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1959), 1.
[25]*Steelworkers* v. *Enterprise Wheel and Car Corp., supra* note 3.
[26]St. Antoine, *supra* note 5 at 1146, n. 39.
[27]*Id.*, at 1144.

language of Section 203(d) of the Taft-Hartley Act[28] that encouraged voluntary arbitration, or the later enacted 1966 Railway Labor Act Amendments[29] relating to court review of arbitration under the statute, or even to the United States Arbitration Act,[30] which at the time was generally deemed inapplicable to labor arbitration,[31] though it did provide some guidance by analogy. The nature of the law that was of greater significance was that which prevailed in most of the states, that is, the application of common law concepts[32] which at the time were followed in most of the states[33] and, before *Lincoln Mills,* prevailed unrestrained. At common law, an award was unenforceable not only for fraud, partiality, and misconduct on the part of the arbitrator;[34] it could also be set aside for "gross mistake,"[35] which in a labor case was often an open invitation for a court to substitute its judgment for that of the arbitrator. "Want of jurisdiction" was also a common rubric by which collective agreements were construed by courts as a means to reverse an arbitrator's determination on the merits.[36] Illustrative of the extent to which some courts intervened in the decisional process in those pre-*Trilogy* days was a case in the early fifties which I well remember, *Rice* v. *Southwestern Greyhound Lines, Inc.,*[37] where a Texas appellate court affirmed the judgment of a district court, setting aside three garden-variety arbitration awards in which an experienced labor arbitrator had reviewed the evidence and construed a clause requiring "sufficient cause" for discharge. The district court examined the transcripts of the arbitration hearings and baldly found that the majority of the arbitration board erred in deciding that the evidence was insuffi-

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[28]29 U.S.C. § 173(d) (1970).

[29]Pub. L. No. 89-459, 80 Stat. 208 (1966) (codified in 45 U.S.C. § 153 (1970)).

[30]9 U.S.C. §§ 1-14 (1970).

[31]*E.g., Tenney Eng., Inc. v. United Elec. Workers Local 437,* 207 F.2d 450, 21 LA 260 (3rd Cir. 1953); *Pennsylvania Greyhound Lines* v. *Amal. Ass'n of Street Elec. Ry. & Motor Coach Emp. Div. 1063,* 193 F.2d 327, 17 LA 688 (3rd Cir. 1952); *Amal. Ass'n of Street Elec. Ry. & Motor Coach Emp. Div. 1210* v. *Pa. Greyhound Lines,* 192 F.2d 310, 17 LA 372 (3rd Cir. 1951); *United Furniture Workers* v. *Colonial Hardwood Flooring Co.,* 168 F.2d 33, 22 LRRM 2102 (4th Cir. 1948); *Gatliff Coal Co.* v. *Cox,* 142 F.2d 876, 14 LRRM 732 (6th Cir. 1944). *But see Hoover Motor Exp. Co.* v. *Teamsters Local No. 327,* 217 F.2d 49, 35 LRRM 2301 (6th Cir. 1954).

[32]*See* Jones, *Judicial Review of Arbitral Awards—Common Law Confusion and Statutory Clarification,* 31 S. Cal. L. Rev. 1 (1957).

[33]*Id.,* at 8, n. 26.

[34]6 C.J.S. Arbitration § 153.

[35]*Id.,* at § 154.

[36]*Id.,* at § 150.

[37]244 S.W.2d 245, 17 LA 468 (Tex. Civ. App.—Fort Worth 1951, Ref. N.R.E.).

cient to support the discharges. I would like to think that the *Rice* case was merely a throwback to Texas frontier justice—a modern version of Judge Roy Bean's "Law West of the Pecos." But, unfortunately, many state courts elsewhere were also willing to intervene in labor arbitration cases after awards were rendered, notwithstanding the long tradition at common law concerning judicial enforcement of awards without review on the merits.[38] Recall the 1955 decision of the California Supreme Court in *Black* v. *Cutter Laboratories.*[39] An arbitration board had reinstated a grievant under a "just cause" for discharge clause, but because the grievant was a member of the Communist party the award was deemed unenforceable as contrary to "impelling public policy."[40]

It is true, however, that judicial intervention was more of a problem at the pre-arbitration stage than at the postaward stage. Dean St. Antoine noted that "the courts had come only slowly and grudgingly to hold legally enforceable"[41] executory agreements to arbitrate. And Professor Benjamin Aaron, in his essay *On First Looking Into the Lincoln Mills Decision,*[42] reminded us that

> ". . . each week the advance sheets [would bring] fresh examples of the judicial mind at work on disputes over arbitration. . . . Some of the[se] decisions involving arbitrability . . . are based on reasoning not dreamt of in any arbitrator's philosophy, and the list of Horrible Examples grows longer and longer; from *Cutler-Hammer*[43] to *Warrior & Gulf Navigation Company*[44] the story is the same: under the guise of determining arbitrability, the court disposes of the merits of the case, usually by finding the relevant language of the collective agreement so clear in meaning and so ineluctable in effect that, it would seem, only idiots and arbitrators could profess to see in it a lurking ambiguity giving rise to an arbitrable issue."[45]

Those "Horrible Examples" contributed to Professor Aaron's widely shared concern that the *Lincoln Mills* decision might lead

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[38]St. Antoine, *supra* note 5 at 1147, n. 42. *See generally* Jones, *supra* note 32; Aaron, *supra* note 24 at 7–10.

[39]43 Cal.2d 788, 278 P.2d 905, 35 LRRM 2391, *cert. granted,* 350 U.S. 816 (1955), *cert. dismissed,* 351 U.S. 292, 38 LRRM 2160 (1956).

[40]*Id.*, at 916.

[41]St. Antoine, *supra* note 5 at 1146.

[42]Aaron, *supra* note 24.

[43]*Machinists* v. *Cutler-Hammer Inc.*, 271 App. Div. 917, 67 N.Y.S.2d 317, 19 LRRM 2232, *aff'd,* 297 N.Y. 519, 74 N.E.2d 317, 20 LRRM 2445, *aff'd,* 297 N.Y. 519, 74 N.E.2d 464 (N.Y. Ct. App. 1947).

[44]168 F.Supp. 702 (D.C.S.D. Ala. 1958), *aff'd,* 269 F.2d 633 (5th Cir. 1959), *reversed,* 363 U.S. 574, 46 LRRM 2416 (1960).

[45]Aaron, *supra* note 24 at 8.

to an arbitration system governed from above by the federal courts applying a federal law of arbitration. He felt that "under such a system the pressure on the losing party in an arbitration case to appeal the decision to the higher authority of the courts would be almost irresistible."[46] But in many cases the pressure in the state courts to do just that was already almost irresistible. The dockets of many state courts were filled with actions for stays of arbitration.[47] *Lincoln Mills,* therefore, did not impose federal law where no law had existed; it imposed federal law in place of state law. The Supreme Court's rulings on preemption and supremacy under Section 301, articulated in the *Lucas Flour*[48] and *Smith* v. *Evening News*[49] cases, insured that result.

That idyllic condition of labor arbitration and collective bargaining envisioned by Dean Shulman, which Professor Aaron originally feared might be paradise lost if the federal courts intervened,[50] was not in fact the reality of labor law as it was viewed through the eyes of state judges. Which is not to say that the Shulman description served no purpose. On the contrary, it served a high purpose, for it became the guiding principle toward which the Supreme Court eventually gravitated.

III. *Lincoln Mills*—The New Common Law of the Collective Agreement

As we celebrate the *Trilogy* cases, we recognize that they were but the offspring of the *Lincoln Mills* case, which in my judgment was the happiest accident that ever occurred in American labor law. Therefore, homage is due to *Lincoln Mills,* as it is due to the late and great Mr. Justice William O. Douglas, the author of all four of these landmark opinions. Congress is also entitled to a little credit. If awards were given for legislative serendipity, the 80th Congress would have won hands down for having included in the Taft-Hartley Act[51] an obscure provision designed to make

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[46]*Id.,* at 14.

[47]*See* Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass,* 2 Buffalo L. Rev. 1 (1952); Mayer, *Judicial Bulls in the Delicate China Shop of Labor Arbitration,* 2 Lab. Law J. 502 (1951); Scoles, *Review of Arbitration Awards on Jurisdictional Grounds,* 17 U. Chi. L. Rev. 616 (1950); Comment, *Judicial Deference to Arbitrable Determination: Continuing Problems of Power and Finality,* 23 U.C.L.A. L. Rev. 941–42 (1976).

[48]*Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95, 49 LRRM 2717 (1962).

[49]371 U.S. 195, 51 LRRM 2646 (1962).

[50]Aaron, *supra* note 24.

[51]*Supra* note 11.

it easier for employers to sue unions for breach of no-strike provisions in collective agreements.[52] This was Section 301.[53] It was so poorly drafted that it required ten years of litigation, including two major decisions of the Supreme Court,[54] to solve the problem posed by the constitutional requirement that federal judicial power applies only to federal substantive law, save for diversity and other inapplicable types of cases.[55] In Section 301, however, Congress provided a federal forum but no obvious federal substantive law. American industrial relations will be long indebted to Justice Douglas for his choice of solutions. His decision was deceptively simple, but brilliant. He found the missing federal substantive law, the jurisdictional sine qua non, in the bare statutory language of Section 301(a) which made agreements between employers and labor organizations enforceable in the federal courts. He said that the provision "expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained in that way."[56] Since Congress failed to define the law to be enforced, or to indicate its source, it remained for the Court to fill the void. Justice Douglas therefore asked and answered the question: "[W]hat is the substantive law to be applied . . . ?"[57] As every student of labor law quickly learns, his answer was "federal law, which the courts must fashion from the policy of our labor laws."[58] Thus was born the judicial basis for the common law of the collective agreement.

Congress may not have consciously intended for the courts to play such a dominant role in shaping the contours of the collective agreement, but history is full of determinative accidents, and this one happily contributed to a better definition of the nature of the collective agreement than Congress would have devised had it sought to enact a legislative code, for in its consideration of legislation affecting labor-management relations

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[52]S. Rep. No. 1656, 79th Cong., 1st Sess., 9 (1945); H.R. Rep. No. 267, 1430, 80th Cong., 1st Sess., 1 (1947).

[53]61 Stat. 156 (1947), 29 U.S.C. § 185 (1964).

[54]*Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 348 U.S. 437, 35 LRRM 2643 (1955) and *Textile Workers* v. *Lincoln Mills*, *supra* note 15. *See* cases cited in note 13 *supra*.

[55]U.S. Constitution, Art. III.

[56]353 U.S. at 455.

[57]*Id.*, at 456.

[58]*Ibid.*

Congress has usually responded only to polarized political pressure.[59] The confluence of Section 301 and *Lincoln Mills* thus compelled that the legal nature of the collective agreement would be what the Supreme Court decreed, and Congress has evidently been satisfied with that arrangement.

With scant reliance on theoretical preconceptions, the Court, led primarily by Justice Douglas, proceeded pragmatically to construe the collective agreement to fit the circumstances required by the bargaining partners and by the public interest, as the Court saw that interest embodied in congressional labor policy. And because the Court was and still is fashioning common law[60]—a quasi-legislative process—it has been free to move with both large and small steps, and free to employ trial-and-error methods, even reversing itself[61] or altering direction.[62] This is not the occasion to explore the full dimensions of the collective agreement as the Court has defined it in a series of interrelated decisions. But it is the occasion to focus on the central features of the collective agreement, for the Court intended the *Trilogy* to provide the basic documentation on the legal nature of that agreement.

As a student and teacher of labor law, I have naturally read those three decisions countless times. So I did not expect that in rereading them for the preparation of this paper I would find

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[59]*E.g.*, "Wagner Act," 49 Stat. 449 (1935); "Taft-Hartley Act," 61 Stat. 136 (1947); "Landrum-Griffin Act," 73 Stat. 519 (1959); and the aborted "Labor Law Reform Act of 1978," H.R. Rep. 8410, 95th Cong., 1st Sess., 19 (1977); S. Rep. No. 2467, 95th Cong., 2d Sess., 8 (1978); Labor Relations Year Book—1978, at 4 (1979).

[60]*E.g.*, *Nolde Bros.* v. *Bakery Workers*, 430 U.S. 243, 94 LRRM 2753 (1977); *Buffalo Forge Co.* v. *Steelworkers*, 428 U.S. 397, 92 LRRM 3032 (1976); *Howard Johnson Co.* v. *Detroit Joint Board*, 417 U.S. 249, 86 LRRM 2449 (1974); *Arnold* v. *Carpenters*, 417 U.S. 12, 83 LRRM 2033 (1974); *Granny Goose Foods* v. *Teamsters Local 70*, 415 U.S. 423, 85 LRRM 248 (1974); *Gateway Coal* v. *UMW*, 414 U.S. 368, 85 LRRM 2049 (1974); *Avco Corp.* v. *Aero Lodge 735*, 390 U.S. 557, 67 LRRM 2881 (1968); *Vaca* v. *Sipes*, 386 U.S. 171, 64 LRRM 2545 (1967); *UAW* v. *Hoosier Cardinal*, 383 U.S. 696, 61 LRRM 2545 (1966); *Republic Steel* v. *Maddox*, 379 U.S. 650, 58 LRRM 2193 (1965); *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 55 LRRM 2769 (1964); *Carey* v. *Westinghouse*, 375 U.S. 261, 55 LRRM 2042 (1964); *Truck Drivers Local 89* v. *Riss and Co.*, 372 U.S. 517, 52 LRRM 2623 (1963); *Smith* v. *Evening News*, 371 U.S. 195, 51 LRRM 2646 (1962); *Drake Bakeries, Inc.* v. *Local 50, Bakery Workers*, 370 U.S. 254, 50 LRRM 2440 (1962); *Atkinson* v. *Sinclair Ref. Co.*, 370 U.S. 238, 50 LRRM 2433 (1962); *Sinclair Ref. Co.* v. *Atkinson*, 370 U.S. 195, 50 LRRM 2420 (1962); *Lucas Flour Co.* v. *Teamsters Local 174*, 369 U.S. 95, 49 LRRM 2717 (1962); *Retail Clerks* v. *Lion Drygoods, Inc.*, 369 U.S. 17, 49 LRRM 2670 (1962); *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 49 LRRM 2619 (1962); *Steelworkers* v. *American Mfg. Co.*, *supra* note 1; *Steelworkers* v. *Warrior & Gulf Navigation Co.*, *supra* note 2; *Steelworkers* v. *Enterprise Wheel and Car Corp.*, *supra* note 3.

[61]*Compare Sinclair Ref. Co.* v. *Atkinson*, *supra* note 60, *with Boys Markets, Inc.* v. *Retail Clerks Union Local 770*, 398 U.S. 235, 74 LRRM 2257 (1970).

[62]Compare *John Wiley & Sons* v. *Livingston*, *supra* note 60, with *Howard Johnson Co.* v. *Detroit Joint Board*, *supra* note 60.

anything new. Indeed, I saw the same language I had seen many times before, but this time the occasion caused me to see something else. I saw these decisions more vividly as an integrated whole with interrelated parts. I saw them not just as three important cases among a series of Section 301 cases, and not just as rules defining the respective roles of courts and arbitrators in relation to disputes arising under collective agreements. I saw them—as if for the first time—as a single document defining the nature of the collective agreement and the role of the arbitrator in relation to the collective bargaining process.

The legal entity which emerges from this definition is not identical to any description supplied by any of the eminent legal scholars who have written on the subject,[63] although there are strong resemblances to certain prominent features in some of their theoretical models. The Court's definition commands our attention. Aside from the persuasive fact that the Court's definition represents the law, it also represents an approach to the collective bargaining process that has worked remarkably well during the past 20 years and will likely continue to do so in the foreseeable future. Notwithstanding that this audience is quite familiar with the *Trilogy* opinions, I want to review them at this time in order to emphasize the unity of their doctrine and to demonstrate that certain errors in several recent court decisions are attributable to the failure of some courts to apply the doctrine as a whole. This is particularly true of the Courts of Appeals for the Fourth and Sixth Circuits.[64]

Justice Douglas presented the opinions in an order that roughly coincided with the frequency with which the main problem areas in judicial enforcement of grievance arbitration tended to arise.

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[63]*E.g.*, Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1 (1958); Aaron, *On First Looking into the Lincoln Mills Decision*, *supra* note 24; Summers, *Collective Agreements and the Law of Contracts*, 58 Yale L.J. 525 (1969); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663 (1973); St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, *supra* note 5; and Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, in The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas Jones (Washington: BNA Books, 1967), 1 (also 34 U. Chi. L. Rev. 545 (1967)).

[64]*See* notes 100–103 and 207–226 *infra* and accompanying text.

IV. The *Trilogy* Revisited

A. American Manufacturing

The first case, *American Manufacturing,*[65] concerned the problem of judicial intrusion into the merits of a dispute prior to an arbitral decision. The grievance involved the discharge of an employee who had brought a worker's compensation action against his company. In the ensuing settlement of the case, his physician expressed the opinion that the injury had left the employee permanently partially disabled. When the union sought his reinstatement in a grievance, the company relied on the physician's statement and contended that the employee was unable to work. It refused reinstatement and refused to arbitrate. The district court held that the employee was estopped because of the settlement of the worker's compensation claim. The court of appeals affirmed,[66] but for different reasons, holding that the grievance was frivolous, patently baseless, and therefore not subject to arbitration. The Supreme Court reversed and ordered arbitration. In doing so, it expressly rejected application of New York's *Cutler-Hammer*[67] doctrine with which some courts were denying arbitrability "[i]f the meaning of the provision of the contract sought to be arbitrated" was deemed by the Court to be "beyond dispute."[68]

In this first of the *Trilogy* decisions, Justice Douglas began the process of describing the nature of the collective agreement and how it differed from ordinary commercial contracts. He noted the "crippling effect" of the lower court's "preoccupation with ordinary contract law."[69] He said that "special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve."[70] Viewing the collective agreement essentially as Dean Shulman had described it in his Holmes lecture, about which the *Warrior & Gulf*[71] opinion would be even more specific, he emphasized the manner in which the arbitrator's role was integrated into the bargaining process:

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[65] *Steelworkers* v. *American Mfg. Co., supra* note 1.
[66] 264 F.2d 624, 43 LRRM 2757 (6th Cir. 1959).
[67] 271 App. Div. 917, 67 N.Y.S.2d 317, *aff'd,* 297 N.Y. 519, 74 N.E.2d 464, 20 LRRM 2445 (1947).
[68] *Id.,* 271 App. Div. at 918.
[69] 363 U.S. at 567.
[70] 363 U.S. at 566–67.
[71] *Steelworkers* v. *Warrior & Gulf Navigation Co., supra* note 2.

"Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."[72]

That language was alluded to and repeated in part in the *Enterprise Wheel*[73] decision, but its initial statement in *American Manufacturing* is also helpful in explaining what the Court meant in *Enterprise* about the limits on a court's reviewing authority when an arbitrator fails to apply "correct principles of law to the interpretation of the collective bargaining agreement."[74] I shall return to this point when I examine some recent decisions setting aside arbitration awards where the courts in question could not bring themselves to countenance bad judgment by an arbitrator. As we shall see, the courts in those decisions failed to understand that the Supreme Court intended that the arbitrator would have the right to be wrong, for he was selected and agreed upon by the parties as the person who would settle disputes over issues which had also been agreed upon as proper subjects for submission to arbitration.

An arbitrator under a collective agreement was characterized more recently, in Mr. Justice Powell's opinion in *Alexander* v. *Gardner Denver Co.*,[75] as the "proctor"[76] of the bargain. The phrase is apt, for as the Court described him in Dean Shulman's words: "He is . . . part of a system of industrial self-government created by and confined to the parties."[77]

The problem posed by the specific issue in *American Manufacturing* has ceased to be a problem. The Court's opinion has served as a clear "keep off" sign directed to the lower courts regarding arbitrable disputes prior to arbitration. The rule which it announced, which was expounded further in the second *Trilogy* case, was that:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.

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[72] 363 U.S. at 568.
[73] *Steelworkers* v. *Enterprise Wheel and Car Corp.*, *supra* note 3.
[74] *Id.*, at 598.
[75] 415 U.S. 36, 7 FEP Cases 81 (1974).
[76] *Id.*, at 53.
[77] *Id.*, n. 16, quoting Shulman, *supra* note 17 at 1016.

> "The courts . . . have no business weighing the merits of the grievance. . . . The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."[78]

B. Warrior & Gulf

The *Warrior & Gulf*[79] case was chosen as the vehicle for the Court's principal statement on the nature of the collective agreement. In connection with the immediate issue of substantive arbitrability, the statement explained why a collective agreement should be construed differently from an ordinary contract. But the statement also provided the broad philosophical underpinnings for the relative roles of court and arbitrator which Justice Douglas was seeking to define.

The grievance in issue concerned contracting-out of maintenance work. Although the collective agreement contained no provisions directly relating to subcontracting, it did contain the usual recognition clause. There was also a clause stating that issues which "were strictly a function of management shall not be subject to arbitration."[80] Relying on the latter provision, the employer refused to arbitrate. The Supreme Court held the grievance arbitrable.

Whether the parties have agreed to arbitrate a particular dispute is a threshold contract question the determination of which provides the basis for the arbitrator's jurisdiction. This question of *substantive arbitrability*[81] is thus properly to be determined by the court, not in the final instance by the arbitrator.[82] In order to give full effect to the congressional preference for arbitration as the favored means for the settlement of disputes under collective agreements,[83] the Court decreed, as a rule of contract construction, a presumption in favor of arbitrability in a collective agreement which contains an arbitration clause. Such a rule was appropriate because judges, unlike arbitrators,[84] were not expected to delve into the bargaining background or other unwritten factors which might properly influence the interpretation of

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[78]363 U.S. at 567–58.
[79]*Supra* note 71.
[80]*Id.*, at 576.
[81]In a later case, the Supreme Court ruled that the determination of *procedural arbitrability* was properly the function of the arbitrator. *John Wiley & Sons* v. *Livingston, supra* note 60. *See* note 176 *infra.*
[82]363 U.S. at 582. *See also John Wiley & Sons, supra* note 60.
[83]29 U.S.C. § 173(d) (1970).
[84]*See* notes 69–78 *supra* and accompanying text.

collective bargaining provisions. Furthermore, the Court recognized that whereas arbitration "[i]n the commercial case . . . is the substitute for litigation," under a collective agreement it is "the substitute for industrial strife."[85] It therefore concluded that because of the difference in function, "the hostility evinced by courts toward arbitration of commercial agreements has no place here."[86] The presumption of arbitrability was framed as follows:

> "[A]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."
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> . . .
>
> "In the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. . . ."[87]

In the instant *Warrior & Gulf* case, the Supreme Court relied on the existence of a broad grievance and arbitration provision relating to "differences . . . between the Company and the Union [and] any local trouble of any kind"[88] to conclude that the subcontracting grievance was arbitrable.

The *Warrior & Gulf* holding on arbitrability has not created any significant problems in its application. A recent First Circuit decision, *Mobil Oil Corp.* v. *Local 8–766, OCWA,*[89] is illustrative of strong judicial awareness of the policy favoring substantive arbitrability. The issue in that case also concerned subcontracting. The arbitration clause limited arbitration to the "express terms" of the agreement. There was no provision specifically dealing with subcontracting, although the agreement contained a recognition clause and provisions for seniority, wages, and classifications. The arbitrator found the dispute arbitrable and that the employer had violated the agreement by unilaterally contracting out certain deliveries from one of its plants. The lower court enforced the award without making an independent determination of arbitrability. Although the court of appeals affirmed, it declared the district court in error for failing to make an independent determination of arbitrability; however, remand

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[85]363 U.S. at 578.
[86]*Ibid.*
[87]*Id.*, at 582–83, 584–85.
[88]*Id.*, at 576.
[89]600 F.2d 322, 101 LRRM 2721 (1st Cir. 1979). *See also, e.g., Kansas City Royals Baseball Corp.* v. *Major League Baseball Players Ass'n,* 532 F.2d 615 (8th Cir. 1976).

was not required for the issue was one of law and the record was complete. The court of appeals also rejected the employer's proffer of extrinsic evidence of bargaining history, which was offered to establish an intent to exclude subcontracting from arbitration. Although a split among the circuits on such use of bargaining history to determine substantive arbitrability was acknowledged, the court held such evidence irrelevant under *Warrior & Gulf* standards, noting that the Supreme Court had reaffirmed those standards in its 1977 ruling in *Nolde Brothers* v. *Bakery Workers,*[90] where arbitrability of a grievance that had arisen under a collective agreement was upheld even though the agreement itself had expired.

Warrior & Gulf, however, was more than a case about arbitrability. It was also the case in which Harry Shulman's concept of the collective agreement was implanted as the underlying rationale of the newly fashioned law of the collective agreement and arbitration. Although the judiciary was accorded its proper role of determining whether there was an agreement to arbitrate, where there was such an agreement the arbitrator's role was enhanced and the court's role was diminished. The reason for the new apportionment of responsibility was the Court's acceptance of Shulman's view of the collective agreement—that it "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."[91]

Justice Douglas saw in the collective agreement "a system of industrial self-government"[92] with the grievance procedure at the very heart of the system. Arbitration was viewed as "the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties."[93]

Using the words of Dean Shulman, the Court described the written collective agreement to indicate the diverse compilation of provisions which it typically contains: "Some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in

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[90] *Supra* note 60.
[91] 363 U.S. at 578.
[92] *Id.,* at 580.
[93] *Id.,* at 581.

their application; and some do little more than leave problems to future consideration with an expression of hope and good faith."[94]

The Court was thus recognizing that most arbitral awards will call for fairly traditional contract interpretation, not unlike that which a court engages in when it construes a commercial contract. But the last type of provision described, where problems are left for "hope and good faith" consideration, will require special competence and different expectations from the decision-maker. The opinion specified that "[g]aps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement."[95] Accordingly, the Court stressed that the arbitrator's role in the process was creative as well as interpretive, for

> "... [a]rbitration is a means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and conduct are given to the collective agreement."[96]

The arbitrator was indeed the "proctor" of the agreement—a role not unlike "the parties' officially designated 'reader' of the contract,"[97] as the arbitrator was described by Dean St. Antoine.

The Court in *Warrior* was thus explicating what it meant by the requirement, stated later in *Enterprise Wheel,* that the arbitrator's award must draw its "essence"[98] from the agreement. It said: "The labor arbitrator's source of law is not confined to the express provisions of the contract as the industrial common law —the practices of the industry and the shop—is equally a part of the collective bargaining agreement, although not expressed in it."[99] The Court then illustrated the kind of judgment which the parties expected from their arbitrator—their "proctor" or "reader." It was an illustration which the Sixth Circuit should have noted, for example, in its 1979 decision in *Detroit Coil* v. *Machinists.*[100] The pertinent statement in *Warrior & Gulf* was that:

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[94]*Id.*, at 580, quoting Shulman, *supra* note 17 at 1005.
[95]*Ibid.*
[96]*Id.*, at 581.
[97]St. Antoine, *supra* note 5 at 1140.
[98]363 U.S. at 597.
[99]363 U.S. at 581–82.
[100]594 F.2d 575, 100 LRRM 3138 (6th Cir. 1979).

> "The parties expect that [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished."[101]

In the *Detroit Coil* case, the Sixth Circuit provided a classic illustration of a court narrowly reading the phrase from *Enterprise Wheel* about an arbitrator's "dispensing his own brand of industrial justice" (which I shall discuss further when I review the last *Trilogy* decision) and giving it a meaning different from what the Supreme Court was stressing in the *Trilogy* as a whole, particularly in its *Warrior & Gulf* description of the factors on which an arbitrator's judgment could be based.

The contract in *Detroit Coil* contained a provision that unless the local union notified the company "within eight (8) working days from the date" when the union made the decision to arbitrate, "the grievance or grievances shall be considered settled."[102] The union made its decision to arbitrate at a meeting on April 6, 1976, and notified the company by letter dated April 15, which the company did not receive until April 30. The company responded that it considered the grievance settled, although the union persisted in seeking arbitration, to which the company would not agree. However, the parties did agree to submit the arbitration issue to arbitration.

The arbitrator ruled that despite the union's failure to meet the literal notification requirements in the contract, the case should be heard on its merits because of several factors: (1) The letter containing the notification was dated within the eight-day period. (2) No evidence was submitted to indicate that the union actually considered the grievance settled. (3) The parties had not in the past used the excuse of time-limits to deny a grievance. (4) Union testimony indicated it had not insisted on a company response within a 48-hour requirement specified in the contractual grievance procedure. (5) The union had waived the time requirements at Step 3 in order to give the owner of the company an opportunity to provide his input in the company's response. And, finally, (6) the arbitrator took note of the

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[101]363 U.S. at 582.
[102]594 F.2d at 577.

good relations between the union and the company, indicating that a denial of arbitrability would result in a deterioration of that relationship.

The Sixth Circuit disregarded or considered irrelevant the first five reasons, holding that there was no evidence of waiver of this particular requirement in the past. As to the factor relating to potential deterioration of good relations, the court, without reference to the morale factor mentioned in *Warrior* as a proper basis for arbitral consideration, concluded that such reliance amounted to the arbitrator's "dispensing his own brand of industrial justice,"[103] and the award was vacated.

A final word about *Warrior & Gulf:* In concluding his description of the arbitrator's pivotal role under the collective agreement, Justice Douglas compared arbitrators and judges, using language which has been characterized by such phrases as "extravagant"[104] or "wonderful nonsense."[105] His extravagant praise for arbitrators was a source of some consternation in the judicial community and a source of embarrassment or amusement in the arbitration community. Although I have shared the feeling of amusement, I am not sure that any of these reactions was proper. Justice Douglas prefaced his praise by observing that: "The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment."[106]

He was thus elaborating on the unique nature of the decisional expectations which collective bargaining parties place on the arbitrator whom they have personally chosen as their proctor. Here again he was giving broad meaning to the limitation in *Enterprise* that the award must draw its "essence"[107] from the agreement, for the practice of drawing upon experienced personal judgment and industrial common law to fill in the gaps in an agreement was obviously not to be equated with the impro-

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[103]*Id.*, at 581, quoting 363 U.S. at 597.

[104]Feller, *supra* note 4 at 111; Christensen, *Judicial Review: As Arbitrators See It,* in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1972), at 100.

[105]Aaron, *supra* note 24 at 44.

[106]363 U.S. at 582.

[107]363 U.S. at 597.

priety of an arbitrator's dispensing "his own brand of industrial justice."[108]

Justice Douglas stressed that those functions which the arbitrator was required to perform in order to serve the "specialized needs" of the collective bargaining process were foreign to what judges do in construing "ordinary contract law."[109] He therefore concluded that: "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."[110] He was not saying that arbitrators are more intelligent or generally better informed than judges. He was only reporting their relative experience and competence attributable to the respective conditions under which they operate. In the first place, unlike a judge, an arbitrator is personally selected and agreed upon by the disputing parties. The arbitrator's background and experience concerning industrial relations are thus initially considered by the parties to be suitable for the dispute in question. Although such experience and competence generally do exist, it is equally important that they be so perceived and screened by the parties. Second, the arbitration hearing is usually conducted close to and often even within the physical confines of the location of the dispute. Hearings are commonly held in factory conference rooms or in nearby motels, not in remote courthouses. Witnesses at the hearings are called from and return directly to their jobs in the plant. Thus, even from a physical standpoint the arbitration hearing and the presence of the arbitrator tend to be visible fixtures within the collective bargaining process. Third, the ablest judge cannot be similarly informed because the rigid evidentiary process upon which judges must rely would often be insufficient to meet the specialized needs of the parties. This is not to say that a judge could not fill the arbitrator's role. Rather, judges in the existing judicial system simply do not fit that role, nor should they be expected to fit it considering the nature of the collective agreement. Of course, as individuals, judges are usually very competent and many would probably make excellent arbitrators. In fact, in a few jurisdictions there are some highly qualified judges who moonlight as highly qualified arbitrators. Some of

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[108] *Ibid.*
[109] 363 U.S. at 567.
[110] 363 U.S. at 582.

them are members of this Academy. But decision-making by a judge is significantly different from that by an arbitrator—a difference that Justice Douglas understood and stressed because of its bearing on the relationship between judges and arbitrators that the *Trilogy* was intended to define. Since the *Trilogy,* the Supreme Court has had no cause to dilute Justice Douglas's description of the relative functions and levels of information available to arbitrators and judges; indeed, in its 1977 *Nolde Brothers*[111] decision, the Court repeated and approved exactly the same description.

C. Enterprise Wheel

The last of the *Trilogy* cases, *Steelworkers* v. *Enterprise Wheel and Car Corp.,*[112] is the one which has been most involved in subsequent litigation. The principles of *American Manufacturing* and *Warrior & Gulf* were readily accepted by the lower courts, but the *Enterprise* decision, which relates to enforcement and review of awards after their rendition, is occasionally the subject of judicial action. There are two primary reasons for such litigation. In the first place, the Supreme Court intended some limited review of arbitration awards; therefore, many cases of judicial review are simply what the *Enterprise* decision required and anticipated. In the second place, the language in *Enterprise* defining the scope of review has seemed sufficiently ambiguous to allow some courts to set aside arbitration awards with which they disagreed by holding that such awards did not draw their "essence from the agreement" or that the arbitrator was "dispensing his own brand of industrial justice."[113] A number of those decisions, especially several recently issued by the Fourth and Sixth Circuits, have actually broadened the scope of review far beyond the *Trilogy* standard. But the reviewing standard of *Enterprise* is not as ambiguous as some commentators[114] have asserted. Most courts have understood its meaning and most—with some notable exceptions—have dutifully enforced awards, notwithstanding that they may have disagreed with the arbitrator's fact-finding, reasoning, or conclusions.[115]

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[111] *Supra* note 60.
[112] 363 U.S. 593 (1960).
[113] *Id.,* at 597.
[114] *E.g.,* Aaron, *supra* note 24 at 44, and St. Antoine, *supra* note 5.
[115] See discussion *infra* at notes 135–226 and accompanying text.

Before examining specific cases, however, I want to review the familiar facts of *Enterprise* and note exactly what the Court said about those facts. The grievance at issue was the discharge of several employees who had left their jobs in protest of the discharge of a fellow employee. The arbitrator found that although the work stoppage was improper, discharge was not justified; accordingly, he modified the discipline to a ten-day suspension. The Supreme Court approved the award, stating that "the courts have no business overruling [arbitrators] because their interpretation of the contract is different from his."[116] The Court's definition of the collective agreement and the role of arbitration thereunder, about which it had elaborated in *American Manufacturing* and *Warrior & Gulf*, provides the touchstone for judicial review of an arbitrator's award. The specific phrases in *Enterprise* defining the limitations of an award, to which some courts have myopically supplied their own more restrictive definitions, were the following:

> "[T]he 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 agreement. When the arbitrator's words manifest an infidelity to his obligation, courts have no choice but to refuse enforcement of the award."[117]

In adopting that standard, the Court was recognizing that an award must relate to the agreement—for that was what the arbitrator was selected to construe. But the word "essence" is not a word of precision, especially when read with the Court's numerous references to the multiple sources to which an arbitrator might look in order to determine the proper meaning of the agreement with regard to the issue in dispute. In the very paragraph in which the standard appears, the Court said that the arbitrator was "to bring his *informed judgment* to bear in order to reach a *fair* solution of a problem."[118] Language deemed ambiguous by an arbitrator and resolved in a way intended to achieve fairness, even though a court might read such language to provide for a different result, would thus not be a manifestation of the kind of infidelity to which the foregoing paragraph alluded.

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[116]363 U.S. at 599.
[117]*Id.*, at 597.
[118]*Ibid.* (emphasis added).

The efficacy of this "fair solution" approach was deemed "especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations."[119]

It is significant that Justice Douglas avoided the adoption of conventional standards of judicial review.[120] Such standards would certainly have been inappropriate considering the nature of the collective agreement which the Court had defined in *Warrior & Gulf.* He thus did not use the phrases "gross error" or "gross mistake," terms which had traditional common law meanings.[121] Nor did he use such phrases as "without foundation in reason or fact" or indicate that an award must in some "rational way be derived from the agreement."[122] The concept of reason or rationality is something about which an arbitrator and a court might too easily differ because of their dissimilar frames of reference. Dean St. Antoine, however, would add such a "rationality" requirement because he believes "the parties presumably took it for granted that [their arbitrator] would not be insane and his decisions would not be totally irrational."[123] I would not be worried about courts setting aside a "totally irrational" award; I suspect there are not many such awards. It is the award which might seem to a court to be *partially* irrational that would give me pause. Better to rely on the "essence" requirement and look to the entire *Trilogy* to determine whether that standard has been met. For like reasons, a similar gloss on *Enterprise* suggested by Professor Bernard Meltzer[124] would seem to be inappropriate. He suggests that an award should be enforced "unless it clearly lacked a rational basis in the agreement read in the light of the common law of the plant where appropriate."[125] He asserts "that such limited judicial supervision would strengthen the institution of arbitration."[126] I fail to see how that conclusion would follow. Arbitration would certainly become more legalistic, more technical, and it would tend to lean more heavily on traditional judicial-type contract con-

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[119]*Ibid.*

[120]For a review of such standards, *see* Jones, *supra* note 32.

[121]6 C.J.S. Arbitration § 154.

[122]*Safeway Stores* v. *Bakery Workers Local 111,* 390 F.2d 79, 82, 67 LRRM 2646 (5th Cir. 1968), and *Ludwig Honold Mfg. Co.* v. *Fletcher,* 405 F.2d 1123, 1128, 70 LRRM 2368 (3d Cir. 1969). *See* St. Antoine, *supra* note 5 at 1148.

[123]*Id.*, at 1149. See *infra* notes 135–40, 151–52, 166–70.

[124]Meltzer, *supra* note 63.

[125]*Id.*, at 13.

[126]*Id.*, at 14.

struction. It would thus more nearly resemble statute-based labor arbitration in Canada.[127] More important, such a broadening of the scope of judicial review would be inconsistent with the arbitrator's proper role as described by the Court in the *Trilogy*, for it would seem to be at variance with the Court's effort to prohibit judicial second-guessing of the arbitrator as to the merits of the grievance.[128]

Thus, in his concluding rationale for the *Enterprise* standard, Justice Douglas expressly rejected a wide scope of judicial review. He pointedly refused to adopt an approach which would require an arbitrator to apply the "correct principle of law to the interpretation of the collective bargaining agreement," because:

> ". . . acceptance of this view would require courts . . . to review the merits of every construction of the contract . . . [making] meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. . . . It is the arbitrator's construction 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 of the contract is different from his."[129]

The maintenance of high standards of arbitral competence was thus not intended to be dependent on close scrutiny by judges. The integrity and competence of the decision-makers in this voluntary system would ultimately be guaranteed, not by judicial review but by the parties themselves through an informal marketplace screening: the process of selecting and rejecting arbitrators. Those persons who do not meet the rigorous requirements of a demanding constituency will not become—or will not

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[127] *E.g.*, *Outboard Marine Corp.* v. *Steelworkers Local 5009*, CCH Canadian Lab. L. Rep. ¶14,462 (1976); *Canadian Steelworkers* v. *Atlas Steel Corp.*, CCH Canadian Lab. L. Rep. ¶14,425 (1976); *Steelworkers Local 1005* v. *Steel Company of Canada, Ltd.*, CCH Canadian Lab. L. Rep. ¶14,257 (1976); *Toronto Civic. Employees Local 43* v. *Municipality of Metropolitan Toronto*, CCH Canadian Lab. L. Rep. ¶14,203 (1976); *Hospital Joyce Memorial* v. *Golinas*, CCH Canadian Lab. L. Rep. ¶15,367 (1975). *See generally* Canadian Industrial Relations, the Report of Task Force on Labour Relations (Woods, Chairman, 1968); Weiler, Reconcilable Differences: New Directions in Canadian Labour Arbitration, at 94–97 (1980); D. Brown and D. Beatty, Canadian Labour Arbitration, 22–35 (1977); Morris, *An Outsider's Affectionate View of Labor Trends in Canada—A Comparison of Development on Both Sides of the Border*, in The Direction of Labour Policy in Canada (Industrial Relations Centre, 1977), 82, 91–94.

[128] A review test suggested by another commentator is that of arbitral "honesty," "honest construction," "honest intellect," "honest arbitrator," and "honest decision" —which I would find too subjective notwithstanding the nonsubjective intent of its author. Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 Colum. L. Rev. 267, 297–98 (1980).

[129] 363 U.S. at 598–99.

remain—arbitrators. But as we all know too well, even the most competent and experienced arbitrator can and on occasion does make a serious mistake—or at least what one party perceives to be a serious mistake. Except for the limited situation where the arbitrator wholly strays from the "essence" of the agreement,[130] the Court intended that correction of mistakes would come from the parties' own appellate process, that is, from subsequent collective bargaining. Only the exceptional situation—the extreme error which could not meet the "essence" test—was reserved for judicial review. This was the real message of *Enterprise.*

A collateral benefit of the Court's sparse approach to judicial review was the avoidance of the phenomenon which Justice Frankfurter feared would occur if Section 301 were interpreted as a grant of federal substantive law: that it "would bring to the federal courts an extensive range of litigation . . . [and] open the doors of the federal courts to a potential flood of grievances. . . ."[131] It did not because an important by-product of the *Trilogy,* with its presumptions favoring the arbitral process but disfavoring judicial intervention in that process, was to protect the courts from excessive and congestive involvement in the settlement of grievances arising under collective agreements.

The *Enterprise* standard of judicial review was but the logical fulfillment of the *Trilogy*'s unitary concept of the collective agreement and the relation of arbitration to that agreement. And because the Supreme Court described that concept by means of interdependent statements in all three of the decisions, *Enterprise Wheel* was not meant to be read in isolation.

V. *Enterprise Wheel*—Twenty Years Later

A. Judicial Review of the Merits of an Award: The Prevailing View

A survey of the circuits covering cases which fall within the scope of this paper, that is, those which involved only the interpretations and applications of the collective agreement (not cases involving the impact of external law), reveals that in most

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[130]An example wherein an arbitrator dispensed his "own brand of industrial justice" and issued an order which did not draw its "essence" from the agreement can be found in *City Elec., Inc.* v. *Local 77, IBEW,* 517 F.2d 616, 89 LRRM 2535 (9th Cir. 1975), discussed in note 189 *infra.*

[131]*Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp., supra* note 54.

of the courts the *Enterprise* standard is alive and well. In several courts, however, the scope of judicial review has been stretched far beyond the limits countenanced by the *Trilogy* standard. The Fourth and Sixth Circuits,[132] in particular, have demonstrated a judicial reluctance to give full effect to the Supreme Court's "hands-off" review policy. While no circuit court admits to a revisionary policy—due allegiance is always declared to the general requirements of the *Trilogy*—the fact remains that several key decisions in the Fourth and Sixth Circuits cannot be reconciled with the unitary *Trilogy* concept described hereinabove. It is instructive to review what has happened in all the circuits, for the overwhelming judicial approach in the other nine circuits has been to leave to the arbitrators, who were chosen by the parties, the basic task of construing the collective agreement. The survey that follows reveals that the Fourth and Sixth Circuits are indeed revisionary in their approach.

This survey will examine only important and recent decisions of the federal circuit courts of appeals. Opinions of the federal district courts will not be examined, for those courts look to their immediate appellate courts for guidance and review. And while state courts also have jurisdiction to enforce Section 301 law,[133] the law which they apply must be the law fashioned by the federal courts.[134] Although some state court decisions may fail to measure up to the rigid *Enterprise* standard, state court decisions will not be included in this survey. The general state of the law under *Enterprise* can best be judged by looking at federal appellate cases. Except for the two maverick circuits, which I shall save for last, the circuits will be reviewed seriatim.

First Circuit: The standard in the First Circuit was expressed in *Bettencourt* v. *Boston Edison Co.*,[135] where the court relied on a phrase first articulated by the Fifth Circuit in a Railway Labor Act[136] case, *Railway Trainmen* v. *Central of Georgia Ry. Co.*[137] As

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[132] *See* notes 208–227 *infra* and accompanying text.

[133] *Smith* v. *Evening News, supra* note 49; *Teamsters Local 174* v. *Lucas Flour, supra* note 48.

[134] *Teamsters Local 174* v. *Lucas Flour, supra* note 48; *Textile Workers* v. *Lincoln Mills, supra* note 15.

[135] *Edward R. Bettencourt* v. *Boston Edison Co.*, 560 F.2d 1045, 96 LRRM 2208 (1st Cir. 1977).

[136] 45 U.S.C. §§ 151–88.

[137] *Railroad Trainmen* v. *Central of Ga. Ry. Co.*, 415 F.2d 403, 71 LRRM 3042 (5th Cir. 1969). *See* notes 166–70 *infra* and accompanying text.

applied, the statement neither adds to nor subtracts from the broad and basic *Enterprise* approach. According to the First Circuit concept, a party seeking to overturn an arbitration award under a collective agreement

> ". . . has to show far more than that the case might have come out the other way, or that there were gaps in the arbitrator's reasoning. At a minimum, he must establish that the award is 'unfounded in reason and fact,'[138] is based on reasoning 'so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling,'[139] or is mistakenly based on a crucial assumption which is 'concededly a non-fact. . . .' "[140]

In *Westinghouse Electric* v. *S.I.U. de Puerto Rico,*[141] the parties had renegotiated their agreement without modifying the language of a clause which had been construed in a previous arbitration. In a subsequent arbitration, the arbitrator refused to follow the earlier interpretation, and the company contended that he was thus modifying the terms of the contract. The First Circuit explained that while it might have disagreed with the arbitrator based on common law principles of construction, "arbitrators are not bound to follow judicial rules of construction and interpretation."[142]

Second Circuit: The basic approach of the Second Circuit is contained in Judge Kaufman's opinion in *Humble Oil & Refining Co.* v. *Teamsters Local 866,*[143] rather than in the more widely known *Torrington* decision,[144] which it distinguished. In *Torrington,* the court denied enforcement of an arbitration award which had found a prior practice between the parties that had allowed employees paid time off for voting on election day to be an implied provision in the collective agreement. In *Humble Oil,* Judge Kaufman stressed that this "unilateral" practice in *Tor-*

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[138] *Ibid.*

[139] *Citing Safeway Stores* v. *Bakery Workers Local 111, supra* note 122. *See* notes.

[140] *Citing Electronics Corp. of America* v. *International Union of Electrical Workers,* 492 F.2d 1255, 85 LRRM 2534 (1st Cir. 1974). *Supra* note 135 at 1050. *See also Union de Tronquistas de Puerto Rico, Local 901* v. *Flagship Hotel Corp.,* 554 F.2d 8, 95 LRRM 2334 (1st Cir. 1977); *Miller* v. *Spector Freight Systems, Inc.,* 366 F.2d 92, 63 LRRM 2222 (1st Cir. 1966).

[141] *Westinghouse Elevators of Puerto Rico, Inc.* v. *S.I.U. de Puerto Rico,* 583 F.2d 1184, 99 LRRM 2651 (1st Cir. 1978).

[142] *Id.,* at 1187.

[143] 447 F.2d 229, 78 LRRM 2123 (2d Cir. 1971).

[144] *Torrington Co.* v. *Metal Prod. Workers Union,* 362 F.2d 677, 62 LRRM 2495 (2d Cir. 1966). The *Torrington* decision has attracted more criticism than precedent. *E.g.,* Jones, *The Name of the Game Is Decision—Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration,* 46 Tex. L. Rev. 865 (1968); Aaron, *Judicial Intervention in Labor Arbitration,* 20 Stan. L. Rev. 41 (1967); Meltzer, *supra* note 63. *See also* notes 159–60, 191 *infra* and accompanying text.

rington had been terminated two years before the arbitrated dispute arose and the award was based on no specific language in the agreement. In the *Humble Oil* case, however, the arbitration board was "confronted with an opaque but 'express provision' in the contract [and] sensibly sought clarification in totally relevant evidence beyond the language of the contract."[144a] The court's opinion said that in order to discover the meaning of a provision,

> ". . . the Board was required to discover the intent of the parties, and to do this it looked to evidence and not merely the cold and cryptic words on the face of the agreement . . . . If the Board was barred from resorting to bargaining history [etc.] the parties would be remitted to securing arbitration only when there was a violation of a provision so plain and unambiguous as to require no collateral evidence of intent . . . . To emasculate the arbitration clause, absent a more clear and definite intent that the parties intended it to have such a wooden effect and to be construed so antiseptically, would be contrary to . . . the well-recognized presumption . . . favoring private settlement of labor disputes."[114b]

To discover the intent of the parties, the board had looked to bargaining history and to rights established under similar language in past contracts, not merely to the "cryptic" and "opaque" language of the contract being construed, and the circuit court affirmed the enforcement of the award.

In *Bell Aerospace Co.* v. *Local 516, U.A.W.,*[145] however, Judge Hays cautioned that the "[c]ourts will not enforce an award which is incomplete, ambiguous, or contradictory."[146] The circuit court thus refused to enforce an award which was "contradictory on its face," and remanded the matter for resubmission to arbitration. Judge Hays commented: "The purpose of arbitration is to resolve disputes, not to create new ones. An award which does not fulfill this purpose is unacceptable."[147] *Bell Aerospace* was narrowly confined to its facts in the Second Circuit's *Kallen* v. *District 1199*[148] decision, where the court rejected a rule which would require vacation of an award as "too vague and incomplete to merit enforcement"[149] and stressed that the

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[144a] *Supra* note 143 at 233.
[144b] *Id.*, at 232.
[145] *Bell Aerospace Co., Div. of Textron, Inc.* v. *Local 516 UAW,* 500 F.2d 921, 923, 86 LRRM 3240 (2d Cir. 1974).
[146] *Id.*, at 923.
[147] *Ibid.*
[148] 574 F.2d 723, 98 LRRM 2232 (2d Cir. 1978).
[149] *Id.*, at 726.

award in *Bell Aerospace* had been not only "ambiguous," but also "contradictory on its face."[150]

Third Circuit: The leading case in the Third Circuit is *Ludwig Honold Mfg. Co.* v. *Fletcher,*[151] where the court faithfully followed the *Enterprise* standard, but nevertheless felt compelled to frame a definition of what that standard meant. Recognizing the need for judicial restraint, the court stated:

> "[W]e hold that a labor arbitrator's award does 'draw its essence from the collective bargaining agreement' if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award."[152]

Most of that statement, particularly the first half, is innocuous enough; however, the reference to "principles of contract construction" would seem to add nothing except the need for future definition, for the principles of contract construction which an arbitrator might legitimately employ can be different from traditional principles, and that is what the *Trilogy* was all about.

Thus far, the Third Circuit has applied its definition consistent with the *Trilogy*'s unitary concept of the arbitrator's authority. However, the presence of the phrase "principles of contract construction" seems to have tempted at least two lower courts to substitute their contractual principles for those upon which arbitrators may properly rely. In *Acme Markets* v. *Bakery and Confectionary Workers,*[153] the arbitrator had found certain store closings to be "strategic" rather than "economic," and therefore he deemed them "lockouts" under the collective agreement, a construction which the district court said undermined the parties' expressed intent as to the meaning of "lockout." The circuit court reversed, finding the arbitrator's award not unreasonable, not irrational, and drawing its essence from the agreement. In *Johnson Bronze Co.* v. *U.A.W.,*[154] the circuit court reversed a district court for exceeding the permissible scope of review of an arbitration award. The arbitrator had used a "reasonableness"

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[150] *Ibid. See also Wire Service Guild Local 222* v. *United Press Int'l,* ___F.2d___, 104 LRRM 2955 (2d Cir. 1980).
[151] *Supra* note 122.
[152] 405 F.2d at 1128
[153] 613 F.2d 485, 103 LRRM 2394 (3d Cir. 1980).
[154] 621 F.2d 81, 104 LRRM 2378 (3d Cir. 1980).

requirement as a limitation on management's authority under a contractual provision, which the circuit court upheld as "not totally unsupported by principles of contract construction."[155]

Fifth Circuit: The Fifth Circuit has established a fine record of adherence to the basic principles of *Enterprise.*[156] The pattern was fixed early in a series of opinions written by Judge Brown.[157] In *Dallas Typographical Union* v. *Belo,*[158] he criticized the Second Circuit's *Torrington* decision,[159] saying that "it has to be very carefully confined lest, under the guise of the arbitrator not having 'authority' to arrive at his ill-founded conclusion of law or fact, or both, the reviewing court takes over the arbitrator's function."[160] Judge Brown's opinion in *Safeway* v. *Bakery Workers*[161] spelled out the Fifth Circuit's general attitude about judicial restraint in applying the *Enterprise* standard of review:

> "On its face the award should ordinarily reveal that it finds its source in the contract and those circumstances out of which comes the 'common law of the shop.' . . . But when it reasonably satisfies those requirements we think it is not open to the court to assay the legal correctness of the reasoning pursued. Arbitrators, as do Judges, can err. And the policy of the law . . . committing awesome questions of great intricacy and difficulty to lay persons who need not be and frequently are not, even lawyers, [has] to reckon with the likelihood that the chance—and gravity—of error will be greater, not less, than the traditional judicial process."[162]

Judge Brown stressed that inasmuch as the *Trilogy*'s admonitions were addressed primarily to judges, judges "should heed

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[155]*Id.,* at LRRM 2380, *citing* Restatement of Contracts § 236 (1932).

[156]The cases following demonstrate that record. However, in a case in a related area —judicial review of arbitral remedies where NLRB jurisdiction may be involved—the Fifth Circuit has departed widely from the *Enterprise* approach. Although this peripheral area is important to the operation of mature collective bargaining and the enforcement of collective agreements, the area does not fall within the scope of this paper. (*See* text preceding note 132 *supra.*) The opinions in *General Warehousemen, Teamsters Local 767* v. *Standard Brands, Inc.,* 579 F.2d 1282, 99 LRRM 2377 (5th Cir. 1978) should be noted, however, as a caveat to the accolades which the Fifth Circuit has earned in the area of "pure" *Enterprise* cases. See *Report of the Committee on Law and Legislation,* App. C in Arbitration of Subcontracting and Wage Incentive Disputes, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1980), at 257, 270; Kaden, *supra* note 126 at 287–88.

[157]*Int'l Ass'n of Machinists* v. *Hayes Corp.,* 296 F.2d 238, 49 LRRM 2210 (5th Cir. 1961); *A.H. Belo Corp.* v. *Dallas Typographical Union,* 372 F.2d 577, 64 LRRM 2491 (5th Cir. 1967); *Safeway Stores* v. *Bakery & Confectionery Workers Local 111,* 390 F.2d 79, 67 LRRM 2646 (5th Cir. 1968); *Gulf States Telephone Co.* v. *Local 1692, IBEW,* 416 F.2d 198, 72 LRRM 2026 (5th Cir. 1969).

[158]*Supra* note 157.

[159]*Supra* note 144.

[160]372 F.2d at 583.

[161]*Supra* note 157.

[162]390 F.2d at 82.

them by resisting the temptation to 'reason out' a la judges the arbiter's award to see if it passes muster."[163] He lectured employers on the reason behind the rule:

> "If such a result is unpalatable to an employer or his law-trained counsel who feels he had a hands-down certainty in a law court, it must be remembered that just such a likelihood is the by-product of a consensually adopted contract arrangement—a mechanism that can hold for, as well as against, the employer even to the point of outlawing labor's precious right to strike."[164]

He concluded with: "The arbiter was chosen to be the Judge. The Judge has spoken. There it ends."[165]

Another Fifth Circuit decision, *Railroad Trainmen* v. *Central of Georgia Ry.*,[166] contributed additional definitional language regarding the scope of judicial review, although the court was there construing the standard applicable to nonvoluntary arbitration under the amended Railway Labor Act.[167] Based on a phrase in a congressional report on the 1966 Railway Labor Act Amendments, Judge Wisdom blended RLA requirements with those under 301 of the LMRA (i.e., the *Enterprise* standard) and declared that "an award 'without foundation in reason or fact' is equated with an award that exceeds the authority or jurisdiction of the arbitrating body."[168] Other courts, particularly the First Circuit,[169] have picked up the language of the *Central of Georgia* case without recognizing the distinction between consensual arbitration under the *Trilogy* standard and the congressional standard which the Fifth Circuit was expounding for compulsory grievance arbitration under the RLA. Here was part of the genesis of the "rationality" concept which several courts have equated with the *Enterprise* standard and which Dean St. Antoine would add to that standard.[170]

In a 1974 Fifth Circuit decision, *Machinists* v. *Modern Air Transport*,[171] a case which might have arisen under the Railway Labor Act, although the opinion does not so state, Judge Lee quoted the "foundation in reason or fact" test, but applied a pure *Enter-*

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[163]*Id.*, at 83.
[164]*Ibid.*
[165]*Id.*, at 84.
[166]415 F.2d 403, 71 LRRM 3042 (5th Cir. 1969).
[167]45 U.S.C. §§ 151–88.
[168]415 F.2d at 411.
[169]*See* notes 136–40 *supra* and accompanying text.
[170]The other part seems traceable to the "rational" reference in the Third Circuit's *Ludwig Hanold* decision, *supra* note 152.
[171]495 F.2d 1241 (5th Cir. 1974).

prise standard to reverse a district court's vacation of an arbitrator's award. In *Bakery Workers* v. *Cotton Baking Co.*,[172] the court emphasized the arbitrator's broad authority to fashion remedies and approved an award of monetary damage to the union notwithstanding the district court's determination that such an award was punitive rather than remedial, noting that "[i]n view of the variety and novelty of many labor management disputes, reviewing courts must not unduly restrain an arbitrator's flexibility."[173]

In *Boise Cascade Corp.* v. *United Steelworkers*,[174] the Fifth Circuit repeated the "without foundation in reason or fact" paraphrasing of *Enterprise* standards, but, in the spirit of *Enterprise*, ruled that the "no additions or alterations" clause in a collective agreement must not be read as precluding an arbitrator from considering extrinsic evidence to explain an agreement that may rationally be considered ambiguous.[175]

In its most recent decisions, the Fifth Circuit continues to display a perceptive understanding of the respective roles of court and arbitrator in the interpretation of collective agreements that are not affected by external law.[176]

Seventh Circuit: The Seventh Circuit, in its review policy,[177] has faithfully followed *Enterprise*, though some recent decisions have added excess-baggage language about "principles of contract construction and the law of the shop," which the Third Circuit composed in the *Ludwig Honold* case.[178] In *Amoco Oil Co.* v. *O.C.A.W. Local 7-1*,[179] the circuit court upheld an arbitration award which reinstated a discharged employee, but without back

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[172]514 F.2d 1235 (5th Cir. 1975).

[173]*Id.*, at 1237.

[174]588 F.2d 127, 100 LRRM 2481 (5th Cir. 1979).

[175]*Id.*, at 130.

[176]*Alabama Power Co.* v. *Local 391, IBEW*, 612 F.2d 960, 103 LRRM 2691 (5th Cir. 1980), where the circuit court applied *Enterprise* standards to an arbitrator's finding of procedural arbitrability under the authority of *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 557, 55 LRRM 2769 (1964); *see* note 81 *supra*. *See also Johns-Manville Sales Corp.* v. *Local 1609, Int'l Ass'n of Machinists*, 621 F.2d 756, 104 LRRM 2985 (5th Cir. 1980), upholding an arbitrator's award denying a manufacturer of asbestos products the right to promulgate a unilateral rule prohibiting all smoking on company property; it was held that the award, itself the result of public policy favoring arbitration of labor disputes, did not offend the national policy against smoking in asbestos plants.

[177]*See Smith Steel Workers* v. *A.O. Smith Corp.*, 626 F.2d 596, 105 LRRM 2044 (7th Cir. 1980); *Amoco Oil Co.* v. *OCAW Local 7-1*, 548 F.2d 1288, 94 LRRM 2518 (7th Cir. 1977); *Int'l Ass'n of Machinists Dist. 8* v. *Campbell Soup Co.*, 406 F.2d 1223, 70 LRRM 2569 (7th Cir. 1969); *Local 7-644 OCAW* v. *Mobil Oil Co.*, 350 F.2d 708, 59 LRRM 2938 (7th Cir. 1965).

[178]*See Ludwig Honold* v. *Fletcher*, supra note 151 and text accompanying notes 151–155.

[179]*Supra* note 177.

pay, where the level of proof of the grievant's wrongdoing presented by the employer was deemed insufficient to support the discharge. The court refused to substitute its judgment "for that of the consensually appointed arbitrator. . . ."[180] In that case, as in the recent *A.O. Smith* case,[181] the court adopted the *Ludwig Honold* formula as its own, but interpreted the arbitrator's decision fully in accord with the broad policy approach of the *Trilogy's* unitary concept.

Eighth Circuit: The Eighth Circuit's approach to judicial review of arbitrators' awards has carefully tracked the *Enterprise* direction. For example, in a 1974 decision, *U.A.W.* v. *White Motor Corp.*,[182] the court noted that: "In interpreting a collective bargaining agreement it is often necessary [for the arbitrator] to go outside the four corners of the contract itself and examine the agreement history to ascertain the intent of the agreement and determine the rights and duties of the parties."[183] This court has recognized the unitary concept of the *Trilogy* decisions by stressing the unique characteristics of the labor contract and the arbitrator's source of law as expounded in *Warrior & Gulf,* rather than narrowly applying a few phrases in *Enterprise,* as some other courts have done.[184]

In its recent *Coca Cola Bottling* decision,[185] the Eighth Circuit provided an excellent example of the manner in which the developing common law of "just cause" discharges provides a basis, under the *Enterprise* standard, for upholding an arbitrator's decision in that area. The grievant had been discharged for dishonesty under a typical "just cause" discharge clause, but he had not been afforded an opportunity to present his side of the story prior to termination. The arbitrator's award stated that the weight of the evidence indicated that the grievant had been dishonest in that he had told his clerk-checker that he was short a case of soft drink, instead of truthfully telling him that he had broken the case. The arbitrator thus concluded that the termination was for just cause, but he added: "*provided* due process was followed in handling the discharge." Accordingly, because of

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[180]548 F.2d at 1296.
[181]*Supra* note 177.
[182]505 F.2d 1193, 87 LRRM 2707 (8th Cir. 1974).
[183]*Id.*, at 1197.
[184]See notes 98–101 *supra* and accompanying text.
[185]*Teamsters Local 878* v. *Coca Cola Bottling Co.*, 613 F.2d 716, 103 LRRM 2380 (8th Cir. 1979).

the employer's failure to provide the grievant with an opportunity to present his side of the case, he held that there was a lack of procedural fairness which caused the dismissal to fall short of the "just cause" standard. The circuit court rejected the employer's contention that the arbitrator's imposition of a due process standard was an attempt to "inflict his own brand of industrial justice onto the parties,"[186] in violation of the *Enterprise* prohibition. The court disagreed, noting that "arbitrators have long been applying notions of 'industrial due process' to 'just cause' discharge cases."[187] The opinion noted that while the court's "interpretation of 'just cause' may differ from that of the arbitrator . . . such disagreement is irrelevant," for it was not the court's function to review the merits.[188]

Ninth Circuit: The Ninth Circuit's approach to the application of *Trilogy* standards for judicial review of arbitration awards is also within the mainstream.[189] In its 1969 *Holly Sugar* decision,[190] the court criticized the Second Circuit's *Torrington* decision,[191] agreeing with Judge Feinberg's dissenting opinion, that "[w]hether the arbitrator's conclusion was correct is irrelevant because the parties agreed to abide by it, right or wrong."[192] The Ninth Circuit has also agreed with Judge Brown of the Fifth Circuit in the admonition that courts must resist "the temptation to 'reason out' a la judges the arbitrator's award to see if it passes muster."[193]

In *Riverboat Casino* v. *Local Joint Exec. Bd. of Las Vegas,*[194] the Ninth Circuit rejected the employer's argument that the arbitra-

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[186]613 F.2d at 719.

[187]*Ibid.*

[188]*Id.*, at 720.

[189]This court also provides a good example of a proper application of the *Enterprise* requirement that the award must draw its "essence" from the agreement and not be a product of the arbitrator's "own brand of industrial justice." See *City Elec., Inc.* v. *Local 77, IBEW,* 517 F.2d 616, 89 LRRM 2535 (9th Cir. 1975), where the court set aside a portion of an arbitration award which directed the parties to negotiate a travel allowance rate. The court stated: "It is not the function of an arbitrator, under this agreement or traditionally, to decide in what respects the contract in question should be modified in order to bring it into line with agreement of other employers. Contract modifications are not traditionally matters for arbitration." 517 F.2d at 619.

[190]*Holly Sugar Corp.* v. *Distillery & Allied Workers Int'l Union,* 412 F.2d 899, 71 LRRM 2841 (9th Cir. 1969). *See also Newspaper Guild* v. *Tribune Pub. Co.,* 407 F.2d 1327, 70 LRRM 3189 (9th Cir. 1969); *Anaconda Co.* v. *Great Falls Mill & Smeltermen's Union No. 6, Int'l Union of Mine, Mill & Smelter Workers,* 402 F.2d 749, 69 LRRM 2597 (9th Cir. 1968).

[191]412 F.2d 905, quoting from *Torrington Co.* v. *Metal Products Workers Union,* 362 F.2d 677, 683, 62 LRRM 2495 (2d Cir. 1966). See notes 144, 159–60 *supra.*

[192]412 F.2d at 905.

[193]412 F.2d 903, quoting from *Safeway Stores, supra* notes 161 and 163.

[194]578 F.2d 250, 99 LRRM 2374 (9th Cir. 1978).

tor exceeded his authority by failing to defer to a prior arbitration award that had interpreted the "good cause" provision of the same agreement. It said:

> "Absent a provision in the contract to the contrary, the arbitrator could reasonably conclude that strict adherence to the doctrine of stare decisis would impair the flexibility of the arbitral process contemplated by the parties. But even if the arbitrator were correct in this assessment of the parties' intent and erred in not following the prior arbitral award, we would not for that reason vacate the award."[195]

In its recent *San Diego Marine Construction Co.* decision,[196] that court noted that "[w]hen two plausible interpretations of a clause in a collective bargaining agreement exist, an arbitrator's choice of one or the other ought to be honored," and accordingly confirmed the enforcement of the award under the *Enterprise* standard.

Tenth Circuit: The case law regarding enforcement of the *Enterprise* standard in the Tenth Circuit is troubling. While *Enterprise* may be alive in that circuit, it has not always been well. Although the Tenth Circuit Court of Appeals has not indulged in second-guessing of arbitrators' findings and conclusions as extensively as have the Fourth and Sixth Circuits, it has nevertheless declined in several cases to enforce arbitration awards which appeared to be incorrect in their interpretation of the parties' contract. Five cases decided from 1975 through 1980 demonstrate that while there has been a general acceptance of *Enterprise* in easy cases, in the hard cases the court has been reluctant to recognize the arbitrator's right to be wrong.

The 1975 *Sav-on Groceries* case,[197] in one sense, was not an *Enterprise* case at all, but rather was based on a *Warrior & Gulf* issue. The court held that since the parties had agreed to a limited submission (whether the company had exercised fairness in not selecting a particular employee in a seniority dispute), the arbitrator exceeded his authority in awarding back pay to the successful grievant.

In *Campo Machinery Co.*,[198] the court enforced an award in

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[195]*Id.*, at 251.

[196]*Int'l Ass'n of Machinists, Dist. Lodge 50* v. *San Diego Marine Const. Corp.*, 620 F.2d 736, 104 LRRM 2613 (9th Cir. 1980).

[197]*Retail Store Employees Local 782* v. *Sav-On Groceries*, 508 F.2d 500, 88 LRRM 3205 (10th Cir. 1975).

[198]*Campo Machining Co., Inc.* v. *Local Lodge 1926, Int'l Ass'n of Machinists*, 536 F.2d 330, 92 LRRM 2513 (10th Cir. 1976).

which the arbitrator had found that the employee had breached the shop rule in question, but also found that there was not sufficient cause for discharge. Therefore, he reduced the penalty to one month's suspension and awarded partial back pay. The court deferred to the arbitrator's interpretation of the agreement regarding the effect to be given a breach of company rules.

In the *Mistletoe Express* case,[199] however, the court refused enforcement of an award which it held contravened an express provision in the agreement. The arbitrator had reduced a discharge penalty where the contract provided that employees "may be discharged for just cause," with certain causes specified. When one of those causes occurred, according to the court, the arbitrator had no choice but to sustain the discharge. In view of the specificity of the language in the contract, the court was deciding a "hard" case by relying on traditional rules of contract interpretation.

In *Fabricut, Inc.* v. *Tulsa General Drivers,*[200] the court refrained from reviewing the award on the merits and upheld the right of the arbitrator to fashion a "reasonable penalty"[201] in the absence of a penalty specified in the contract, finding that the award, unlike the award in *Mistletoe,* had "rational support."[202]

In *Operating Engineers, Local 670* v. *Kerr-McGee Ref. Co.,*[203] the court affirmed the vacation of an award where the arbitrator had set aside a discharge because of the employer's failure to submit sufficient evidence on one of the stated grounds for discharge (excessive absenteeism), although the other ground (false statements to obtain sick-leave benefits) had been proved. The collective agreement provided: "Any . . . false statements made to obtain benefits [for sick leave] will be cause for discharge." The Tenth Circuit held that it was clear that in requiring that all charges levied against the employee be proved in order to sustain the discharge, the arbitrator ignored the express terms of the agreement and thereby "violated the essense of the agreement."[204]

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

[200]*Fabricut, Inc.* v. *Tulsa Gen. Drivers Local 523,* 597 F.2d 227, 101 LRRM 2148 (10th Cir. 1979).

[201]*Id.,* at 229.

[202]*Id.,* at 230.

[203]*Int'l Union of Operating Engineers* v. *Kerr-McGee Ref. Corp.,* 618 F.2d 657, 103 LRRM 2988 (10th Cir. 1980).

[204]*Id.,* at 660.

District of Columbia Circuit: In view of the venue limitations within the District of Columbia, it is not surprising that very few Section 301 cases have arisen in that circuit. The only judicial review case to be noted is *Washington-Baltimore Newspaper Guild, Local 35* v. *The Washington Post Co.*[205] The court enforced an award where certain evidence had been evaluated and rejected by the arbitrator; the court stated that:

> "[E]ven if we felt that the [arbitrator] had committed an error of law in excluding this line of proof, we would not vacate this award and order another arbitration. The better view is that an award will not be vacated even though the arbitrator may have made, in the eyes of judges, errors of fact and law unless it 'compels the violation of law or conduct contrary to accepted public policy.' "[206]

B. The View From the Sixth and Fourth Circuits

Sixth Circuit: We have already noted in the *Detroit Coil*[207] case a leading example of the Sixth Circuit's failure to heed the Supreme Court's admonition in the *Trilogy* that courts should not substitute their judgment for that of the arbitrator on the merits of an award. *Detroit Coil* is not an isolated case. Rather, it is but one in a series of decisions, beginning at least with *Timken Co.* v. *Local 1123, Steelworkers Union*[208] in 1973, through which that circuit has chosen to redefine the meaning of *Enterprise,* ignoring the integrated aspects of the three *Trilogy* cases viewed as a whole. If the trend continues, the courts in that circuit, if not also in other circuits, may eventually be inundated with arbitration review cases; thus, for large numbers of grievances, arbitration will not be the final and binding determination that the Supreme Court said it was intended to be. Instead, the arbitration hearing will once again become the first step on the way to the courthouse.

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[205] *Washington-Baltimore Newspaper Guild Local 35* v. *The Washington Post Co.,* 442 F.2d 1234, 76 LRRM 2274 (D.C. Cir. 1971). This affirmative policy seems to be well entrenched in the circuit. *See* the recent district court opinion in *Metromedia* v. *Stage Employees Local 819,* ___F.Supp___, 105 LRRM 2908 (D.C. D.C. 1980).

[206] 442 F.2d at 1239, *citing Gulf States Tel. Co.* v. *Local 1692, IBEW,* 416 F.2d 198, 201, 72 LRRM 2026 (5th Cir. 1969).

[207] *Detroit Coil Co.* v. *Int'l Ass'n of Machinists,* 594 F.2d 575, 100 LRRM 3138 (6th Cir. 1979). *See* notes 100–103 *supra* and accompanying text.

[208] 482 F.2d 1012, 83 LRRM 2814 (6th Cir. 1973). Other cases prior to *Timken* which represented a strict construction approach to judicial review of arbitrators' awards included: *Local 342, UAW* v. *TRW, Inc.,* 402 F.2d 727, 69 LRRM 2524 (6th Cir. 1968), *cert. denied,* 395 U.S. 910, 71 LRRM 2253 (1969); *Amanda Bent Bolt Co.* v. *UAW Local 1549,* 451 F.2d 1277, 79 LRRM 2023 (6th Cir. 1971).

Although I shall list various offending Sixth Circuit decisions, it would serve no purpose to outline the facts of all of them. It will be instructive, however, to examine at least one case in detail to illustrate the general manner in which that court has been reviewing arbitration cases. Since *Timken*[209] was one of the earliest in the series, it will serve as the model for our examination.

The grievance in *Timken* concerned a determination of whether the grievant had voluntarily terminated his employment pursuant to a "voluntary quit" clause in the collective agreement or whether he was discharged. The discharge clause required the company to comply with certain procedural requirements, including notification of the reason for discharge presented in the presence of the union representative. The company contended that the discharge requirements did not have to be met because the employee was terminated pursuant to the "voluntary quit" provision, which provided that: "An employee's length of service shall be broken and credit for all previous service lost by . . . voluntary quitting the service of the Company (an unauthorized absence of seven (7) consecutive scheduled work days shall be considered a voluntary quit). . . ."[210]

The grievant had been unable to report for work for an extended period because he was in jail, having been sentenced to 117 days following a guilty plea to two traffic offenses. But on the next scheduled work day after he began serving his sentence, his wife informed the company that her husband would be unavailable for work, and she later advised of the reason. After 29 days of confinement, the grievant was released from jail, whereupon the company sent him a separation notice based on his "unexcused absence in excess of seven days."[211] The record in the ensuing arbitration hearing indicated that although the company had consistently denied authorized absences to employees in jail, it had nevertheless maintained a liberal authorization policy for employees absent due to illness or injury. According to the arbitrator, this inconsistency was deemed sufficient to invalidate the lack of authorization in the grievant's case; he therefore construed the "voluntary quit" provision as unappli-

[209] *Ibid.*
[210] *Id.*, at 1013.
[211] *Ibid.*

cable in cases, such as this, where the employee had no intention of quitting and had promptly notified the company of his predicament, which was the same interpretation the company had applied by waiver for absences due to illness or injury.

The district court vacated the award and the Sixth Circuit affirmed. After quoting extensively from *Enterprise,* the opinion concluded that the arbitrator exceeded his authority because "[t]he 'voluntary' quit provision specifically applies to unauthorized absences for seven (7) consecutive scheduled work days. Consequently there was no need to go outside the record and consider other definitions of the term 'quit.' "[212] Seemingly oblivious of what the Supreme Court had said about an arbitrator's permissible sources of information and authority to determine the meaning of collective bargaining provisions, and wholly overlooking what the Court had said about the nature of the collective agreement, the Sixth Circuit treated the issue as an ordinary contractual dispute, saying: "A collective bargaining agreement is after all a contract and the arbitrator is limited to the interpretation and application of that contract," and since this contract contained a definition of "unauthorized," the arbitrator "clearly exceeds his own authority by seeking conflicting definitions outside the record."[213] The court considered the language of the agreement unambiguous, but to the arbitrator it was ambiguous. There is no way to reconcile the court's action with the *Trilogy* requirements.

Following its *Detroit Coil* decision, the court decided *Storer Broadcasting Co.* v. *A.F.T.R.A.*[214] where it found "absolutely no evidentiary support" for the arbitrator's determination. Apparently the record was not all that clear, however, for in addition to the arbitrator's deeming the evidence sufficient, the dissenting judge noted that although the evidence was "[a]dmittedly . . . of marginal weight, it is not totally specious," and he further noted that the award was also supported by logic and analogy to specific provisions contained in a previous agreement. The majority of the court had indeed substituted its interpretations of facts and contractual language for that of the arbitrator chosen by the parties.

The *Storer* case provided the court with an opportunity to

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[212] *Id.*, at 1014–15.
[213] *Id.*, at 1015.
[214] 600 F.2d 45, 101 LRRM 2497 (6th Cir. 1979).

codify its revision of the *Enterprise* standard. Citing its 1979 *Detroit Coil* decision,[215] it announced two exceptions to the *Trilogy* prohibition regarding judicial review of the merits of an arbitration award:

> "First, 'the 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. . . .' Second, 'although a court is precluded from overturning an award for errors in the determination of factual issues, "[n]evertheless, if an examination of the record before the arbitrator reveals no support whatever for his determination, his award must be vacated." ' "[216]

These new rules, as might have been expected, are leading to the overturning of arbitrators' awards, especially on the basis of "plain" meaning in the contract—at least what a court, district or circuit, in disagreement with the arbitrator, deems to be plain meaning. For example, in the recent decision in *Firemen & Oilers, Local 935-B* v. *Nestle Co.*,[217] the Sixth Circuit reversed a district court that had enforced an arbitrator's award which reinstated a discharged employee without back pay. The circuit court ordered the entire award vacated, thereby confirming the discharge. This result was achieved by the circuit court's disagreeing with the arbitrator as to the meaning of the words "shall" and "insubordination." For the latter, the court relied upon the authority of Black's Law Dictionary.[218]

The real question in all of these revisionist cases[219] is not whether the court's interpretations of the contract and/or facts are correct or better than that of the arbitrator. The real question is: Who shall decide?

Fourth Circuit: The Fourth Circuit's record of deviation from the *Trilogy* standard of judicial review is not as structured as that of the Sixth Circuit. Although there are only a few recent cases on which to base judgment,[220] these cases suggest a possible

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[215] *Supra* note 207.

[216] 600 F.2d at 47, *citing Detroit Coil, supra* note 207, and dictum in *N.F. & M. Corp.* v. *Steelworkers Union*, 524 F.2d 756, 760, 90 LRRM 2947 (3d Cir. 1975).

[217] ___F.2d___, 105 LRRM 2715 (6th Cir. 1980).

[218] Fifth edition, 105 LRRM at 2717.

[219] *See also General Drivers Local 89* v. *Hays and Nicoulin, Inc.*, 594 F.2d 1093, 100 LRRM 2998 (6th Cir. 1979), where the lower court was affirmed in its intrepretation of language in the collective agreement which differed from that of the arbitrator.

[220] *See Baltimore Reg. Joint Bd.* v. *Webster Clothes, Inc.*, 596 F.2d 95, 100 LRRM 3225 (4th Cir. 1979); *Westinghouse Elec. Corp.* v. *IBEW*, 561 F.2d 521, 96 LRRM 2084 (4th Cir. 1977), *cert. denied*, 434 U.S. 1036, 97 LRRM 2341 (1978). *But see Crigger* v. *Allied Chem.*

recurrence of the negative attitude toward labor arbitration which was evident in the court's 1961 *American Thread*[221] decision. If that is so, it would seem that the Fourth Circuit has chosen to confine arbitral discretion more strictly than the *Trilogy* mandate contemplated. This has happened particularly with regard to the fashioning of remedies, notwithstanding that the Supreme Court in *Enterprise* expressly approved the application of a flexible "fair solution" approach by arbitrators in their ordering of appropriate remedies.

In *Westinghouse Electric Corp.* v. *IBEW*,[222] the circuit affirmed the vacating of an arbitrator's award of vacation pay, holding that because the record did not support a finding of actual damages, the award was "punitive." The court thus decided that only monetary loss was compensable, not loss based on inconvenience, a factor which another arbitrator had rejected in an arbitration decision which the circuit court cited.

In *Baltimore Regional Joint Bd. Amal. Clothing Workers* v. *Webster Clothes, Inc.*,[223] the circuit court again affirmed vacation of an award based on its holding that the remedy in question was punitive rather than compensatory. It disagreed with the arbitrator's evaluation of the evidence, finding instead that there was no "rationally probative evidence . . . of any sort traditionally justifying an award of compensatory damages."[224] The issue involved a breach of contract based on a plant shutdown and the

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Corp., 500 F.2d 1219, 86 LRRM 3162 (4th Cir. 1974). *Cf. Monongahela Power Co.* v. *Local 2332, IBEW*, 566 F.2d 1196, 91 LRRM 2583 (4th Cir. 1976).

[221] *Textile Workers Union* v. *American Thread Co.*, 291 F.2d 894, 48 LRRM 2534 (4th Cir. 1961). The Fourth Circuit denied enforcement of an arbitration award which had reduced a discharge penalty to a disciplinary suspension and had ordered the grievant reinstated. The arbitrator had found that the grievant's offense (improperly handling a function on a carding machine) did not amount to just cause for discharge, though it was basis for imposition of a lesser penalty. Interpreting the contractual language differently from the arbitrator, the court held that the arbitrator had exceeded his authority when he "went outside the record," i.e., relied on another arbitration award at the same company, to arrive at his decision. But the arbitrator specifically found that the evidence was insufficient to constitute "just cause for discharge." As Chief Judge Sobel noted in his dissenting opinion, regarding the *Enterprise* standard: "Never has the Supreme Court prescribed a guide more clearly or with more positiveness. Yet, the court's decision in the present case does precisely what the Court has prohibited." 291 F.2d at 905. Not only did the arbitrator specifically find "no just cause for discharge," the other arbitration award on which he had relied was actually "brought out *at the hearing*." 291 F.2d at 906. Not only is *American Thread* still followed in the Fourth Circuit, *e.g.*, *Monongahela Power Co., supra* note 220 at 1199, it has also furnished authority for some of the Sixth Circuit decisions. *See Local 342, UAW, supra* note 208 at 731; *Detroit Coil, supra* note 207 at 579.

[222] *Supra* note 220.

[223] *Supra* note 220.

[224] 596 F.2d at 98.

contracting out of bargaining unit work. The union responded with a strike which, as a result of emergency arbitration, the arbitrator order enjoined. The same arbitrator issued the award of damages, which he did not term punitive. However, the circuit court deemed it punitive and stated, based on its own interpretation of the agreement, that such "award of damages . . . does not draw its essence from the agreement, for the agreement's essence does not contemplate punitive but only compensatory awards."[225] The court did not order a remand to arbitration; therefore the union and the employees were left without a remedy for a substantial breach of contract.

I confess to some uncertainty in grouping the Fourth Circuit's record with that of the Sixth Circuit. But in view of the Fourth Circuit's early decision in *American Thread,*[226] to which that circuit still adheres, and the recent decisions noted above, this circuit seems revisionist in approach, at least with regard to arbitral remedial authority.

V. Conclusion

The American collective bargaining community has been served well by the legal rules and theories embodied in the *Steelworker Trilogy* decisions. For the most part, those doctrines are as viable today as they were 20 years ago. Unfortunately, a minority of circuit courts have not applied the full meaning of the decisions to cases involving enforcement of arbitration awards. Hopefully, however, those courts will see fit to return to the original *Trilogy* concepts which differentiate collective agreements and grievance arbitration from their counterparts in the commercial world.

This study of the *Trilogy* teaches that a grievance arbitration award arising solely under a collective agreement is entitled to greater deference than an ordinary contract for five principal reasons: (1) The arbitration is not a substitute for judicial determination, but a substitute for a strike or other industrial disruption. (2) The parties have voluntarily agreed to final and binding arbitration. (3) The parties have chosen and agreed upon the specific person who will serve as their arbitrator. (4) The parties and the industrial relations community, by operation of market-

[225] *Ibid.*
[226] *Supra* note 221.

place selection and rejection, maintain a high degree of control over the qualifications and identity of their arbitrators. (5) The parties, through further collective bargaining, retain the means to reverse whatever interpretation or order an arbitrator issues. Accordingly, what the Supreme Court said about the "essence of the agreement" and the arbitrator's "own brand of industrial justice" must be related to what the Court said elsewhere about the nature of the collective agreement, the arbitrator's authority, and the sources on which he may draw for his findings and interpretations.

Dean Shulman understood and explained why courts should stay out of arbitration, and except for the rare case where the arbitrator *wholly* ignores the agreement and decides the issue on a noncontractual basis—that is, by his own concept of "industrial justice"[227]—the Supreme Court agreed with that view and made it the law.

[227] *E.g., see* note 189 *supra.*