II. EXTERNAL LAW AND THE INTERPRETIVE PROCESS

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When originally approached on talking before the Academy, Syl Garrett had indicated that the topic was "The Interpretive Process: Myths and Reality." I subsequently learned that the topic was styled "Contract Interpretation," a subject so broad that it took one of my law school professors nine months to cover. Since nine months is a long time for even a management labor lawyer to talk, my remarks today, while relating to contract interpretation, will, following Syl's thoughts, deal with the subject from the perspective of training new arbitrators.

To me, the interpretive process involves an arbitrator giving meaning to the words and conduct used by the parties in their collective bargaining agreement. How the arbitrator performs this task is and has been subject to important external factors. Judical decisions, decisions of the NLRB, and decisions of other arbitrators all have become central to the construction of a labor agreement. This is not a result of *stare decisis* or the mechanical application of precedents in other cases. Rather this is the result of judical perceptions of the collective bargaining process and the role of arbitration within this process.

The Reality of Federal Intervention

National labor policy is predicated on the notion of free collective bargaining. Employers and unions are free "to establish, through collective negotiations, their own charter for the ordering of industrial relations. . . ."[1] Attempts to regulate the terms of an agreement have been uniformly struck down.

In reality, however, while federal policy is against interference with what is contained in a labor agreement, there is a countervailing federal policy of intervention as to how these terms will be interpreted and enforced. Section 301 of the Labor Management Relations Act[2] has become a critical tool of federal policy in

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[1] *Teamsters Local 24 v. Oliver*, 358 U.S. 283, 295, 43 LRRM 2374, 2379 (1959).

[2] 29 U.S.C. § 185.

this regard, along with the NLRB's deferral policies. All of this has direct implication to the interpretive process.

While the charter for arbitral interpretation is delimited by the collective bargaining agreement, the arbitrator is nonetheless cloaked with substantial discretion and deference. This results not so much from the agreement of the parties but from the law that has developed under Section 301. Having established arbitration as "a kingpin of federal labor law policy,"[3] the Supreme Court has directly affected the interpretive process. Indeed, arbitrators perform their roles under a statutory scheme which requires "that the meaning given a contract phrase or term be subject to uniform interpretation."[4]

Starting with its decision in *Textile Workers Union v. Lincoln Mills of Alabama,*[5] the Supreme Court has developed under Section 301 a federal "common law" which reflects an enthusiasm for arbitral discretion and a disinclination for judicial involvement in the arbitral process. Critical to its holdings is the belief that arbitration is an important tool of promoting industrial peace,[6] that the labor agreement "is more than a contract,"[7] that the labor arbitrator is better equipped to decide disputes under the agreement than judges,[8] and that the arbitrator "performs functions which are not normal to the courts."[9]

To the Supreme Court, arbitration is a part of the collective bargaining process; and to me, this has meant that twenty-five years after the Steelworkers Trilogy parties should have presumptive knowledge that part and parcel of their agreement is the body of law created by *Lincoln Mills* and its progeny. As a management lawyer, part and parcel of an agreement to arbitrate is that, with rare exception, the arbitrator's view will be final and judicial review is, as a practical matter, a very limited right. Thus, how the arbitrator interprets the agreement in the first instance takes on critical and lasting importance.

Starting with the decision in *Steelworkers v. Enterprise Wheel & Car Corp.,*[10] the federal judiciary has shown great deference to

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[3]*Sinclair Ref. Co. v. Atkinson,* 370 U.S. 195, 226, 50 LRRM 2420, 2427 (1962).
[4]*Allis-Chalmers Corp. v. Lueck,* 53 USLW 4463, 118 LRRM 3345 (1985).
[5]353 U.S. 448, 40 LRRM 2113 (1957).
[6]*Boys Markets, Inc. v. Retail Clerks Local 770,* 398 U.S. 235, 74 LRRM 2257 (1970).
[7]*Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578, 46 LRRM 2416, 2418 (1960).
[8]*Id.* at 578–80, 46 LRRM at 2418.
[9]*Id.* at 581, 46 LRRM at 2419.
[10]363 U.S. 593, 46 LRRM 2423 (1960).

an arbitrator's construction of a labor agreement. In *Enterprise Wheel,* the Supreme Court rejected the contention that an arbitrator had exceeded his authority by ordering the reinstatement of employees after the bargaining agreement had expired. While holding that the arbitrator "is confined to the interpretation and application of the collective bargaining agreement"[11] and that the award must "draw its essence from the . . . agreement,"[12] the Court chose to define a limited form of review:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. . . . [T]he arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.
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> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem.[13]

Twenty-five years of experience under this standard has proven to me that judicial deference extends equally to the presumption of arbitrability as well as to the enforcement of the award.

The Supreme Court is not alone in promoting deference to the arbitral process. Five years before the Trilogy, the NLRB in *Spielberg Mfg. Co.*[14] had decided that it would decline to exercise its jurisdiction in the presence of an arbitration award upholding an employer's discharge of employees for strike misconduct. In the thirty years since *Spielberg,* the Board's position on arbitral deferral has hardly been the model of consistency.[15] The Board has vacilated on what types of cases should be deferred,[16] on what standards should be employed in reviewing awards,[17] and whether deference should be extended before the arbitral process is even invoked.[18] Today, however, we have the Board

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[11]*Id.* at 597, 46 LRRM at 2425.
[12]*Id.*
[13]*Id.* at 596–7, 46 LRRM at 2425.
[14]112 NLRB 1080, 36 LRRM 1153 (1955).
[15]*See, Schaefer v. NLRB,* 464 U.S. 945 (O'Connor, J., dissenting), 114 LRRM 2973 (1983).
[16]*Compare, General Am. Transp.,* 228 NLRB 808, 94 LRRM 1483 (1978) *with United Technologies Corp.,* 268 NLRB 557, 115 LRRM 1275 (1984).
[17]*Compare, Suburban Motor Freight,* 247 NLRB 146, 103 LRRM 1113 (1980) *with Olin Corp.,* 268 NLRB 573 (1984), 115 LRRM 1056 (1984).
[18]*Collyer Insulated Wire,* 192 NLRB 837, 77 LRRM 1931 (1971).

adopting broad deferral policies, but past experience makes it difficult to predict how long this might last.

The Board's position in this area has generated much debate. It is not my intent today to participate in this debate, but certain comments are relevant from the perspective of an arbitrator's role in the deferral process. The test of deferral to an arbitrator's award under current Board law is set forth in the Board's 1984 decision in *Olin Corp.*[19] In *Olin,* the Board stated that it would defer to an award if "the contractual issue is factually parallel to the unfair labor practice issue"[20] and the facts presented were generally relevant to resolving the unfair labor practice.[21] The Board does not require the award to be "totally consistent"[22] with its own precedent and except where the decision is "'palpably wrong', i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act,"[23] it will defer.

While, as a general rule, I believe that the Board's deferral policies are appropriate insofar as they give support and encouragement to having parties resolve disputes under procedures they themselves have established, there are certain tensions present. Deferral in certain cases poses difficult problems for the arbitrator and the parties. One such area deals with plant closures, work transfers, and subcontracting.

As most of you are well aware, there has been a great deal of controversy over the past several years with respect to the Board's position on an employer's decision to transfer work, subcontract, or discontinue operations. These cases generally involve allegations that such decisions are mandatory subjects of bargaining under Section 8(a)(5) and that Section 8(d) bars employer action absent union agreement during the term of the contract.

Without going into exhaustive detail, it is fair to state that the current Board will find no violation of Section 8(d) if the employer's action does not modify a specific contract term in the collective bargaining agreement.[24] While the Board's analysis of alleged midterm modifications has never been a model of clarity,

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[19]268 NLRB 573, 115 LRRM 1056 (1984).
[20]*Id.* at 574, 115 LRRM at 1056.
[21]*Id.*
[22]*Id.*
[23]*Id.*
[24]*Otis Elevator Co.*, 269 NLRB No. 162, 116 LRRM 1075 (1964); *Illinois Coil Spring Co.*, 268 NLRB No. 87, 115 LRRM 1065 (1984), *aff'd sub nom. Automobile Workers v. NLRB*, 119 LRRM 2801 (D.C. Cir. 1985).

the current view requires a finding that an express provision of the agreement has been modified by the closure, transfer, or subcontract in order for Section 8(d) to be violated.

Assuming no such finding has been made, the Board then determines whether there is a duty to bargain over the decision under Section 8(a)(5) of the Act. This analysis, depending on the views of given Board members, turns on the reasons for the employer's action. If the decision is unrelated to labor costs and represents a fundamental change in the "nature and direction" of the business, at least two members of the Board will find no duty to bargain over the decision.[25] Another member will analyze whether there is a chance for union concessions, which could cause a change in the decision, and if the benefit of bargaining is greater than the burden placed on the employer.

Arbitrators, of course, are quite familiar with subcontracting, work transfer, and plant closure cases.[26] Board deferral in such cases raises serious questions to me as to how an arbitrator is capable of resolving the dispute under the framework presented by the Board. Is the arbitrator going to hear evidence as to the employer's motivation for the particular decision so that the duty-to-bargain question can be answered? Or, is an arbitrator's decision that the contract permits the employer's action a finding that the union has waived its right to bargain regardless of labor cost considerations? These are just a few of the questions presented.

To me, there are no easy answers. Certainly, the expertise of the arbitrator is to interpret the contract—not the scope of the duty to bargain under Sections 8(a)(5) or 8(b)(3). Indeed, while the Board will look to see if a specific provision of the contract is being modified, many arbitrators have shown no reluctance to imply duties from much less than an express provision. Thus, whether the employer's action violates the contract is certainly "grist in the mills of the arbitrators." Conversely, the determination of why certain actions were taken for purposes of the duty-to-bargain obligations posed under the Act are generally outside the scope of an arbitrator's domain and expertise.

That it is difficult for an arbitrator to predict what the law is under Section 8(a)(5) was recently demonstrated in *Jones Dairy*

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[25]*Id. See also, First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 107 LRRM 2705 (1981).

[26]*See, e.g., Cannon Elec. Co.*, 26 LA 870 (Aaron, 1956); *Olin Mathieson Chem. Corp.*, 52 LA 670 (Blodek, 1969); *Stoneware, Inc.*, 49 LA 471 (Stouffer, 1967).

Farm v. Local P–1236, Food Workers.[27] In that case the collective bargaining agreement provided that with respect to the question of subcontracting, each party retained its legal rights and that nothing in the Agreement was to be construed as adding to or subtracting from those rights. An arbitrator, relying on the Board's initial decision in *Milwaukee Spring Division,* found that the contract barred the employer from contracting out janitorial work.

Arguing that the Board had subsequently changed its position in *Milwaukee Spring Division* and that the contract provided it with the absolute right to subcontract, the employer sought to set aside the award. The district court agreed with the employer, as did initially a divided panel of the Seventh Circuit. On rehearing, however, the original panel decision was reversed and the award enforced. Writing for the court, Judge Posner noted that if the company believed that it had the legal right to subcontract and that the agreement was drafted to prevent the union from asserting a contrary claim, it should not have consented to arbitration, or at the very least raised the issue of arbitrability at the arbitration hearing. The failure to do this was deemed a bar to the argument that the arbitrator had no authority to resolve the dispute.[28]

Concerning the Board's change of position, the court noted that "the arbitrator cannot be seriously faulted . . . for failing to predict the Board's change of heart or refusing to be bound (as the Board itself refuses to be bound) by circuit precedent."[29] Moreover, the question of subcontracting was not viewed as being one of pure law, but also involved the terms of the contract, past practice, and the reasons for the employer's actions.

Actually, the arbitrator's authority in *Jones Dairy* to consider external law is much easier to defend since the contract in question made specific reference to the retention of legal rights. Most contracts, however, do not incorporate such a standard and an arbitrator should be reluctant to presume that the parties want a legal determination made. Indeed, while arbitrators have debated over the issue of whether they should consider external law, it is better for them first to ask the parties if they want such

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[27]119 LRRM 2185 (1985).

[28]*See also, Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120,* 647 F.2d 372, 107 LRRM 2312 (3rd Cir. 1981).

[29]119 LRRM at 2187.

consideration in the first place. They might be surprised to find out that the answer is no.

Where given a choice I would not have an arbitrator rule on the scope of an employer's statutory bargaining obligations. To me, the deference extended by the *Trilogy* was based on factors unrelated to an arbitrator's understanding of external law and was based in large measure on the notion that the arbitrator was being used to deal with the "common law" of the plant, not the NLRA. Where a case is deferred, I think that the arbitrator can indicate that the award is based on contractual considerations and not what the NLRB or a reviewing court might decide. It is then up to the Board to determine what weight the award should be given.

That the Board itself looks for an arbitrator's contractual, not statutory, expertise is evident from its decision in *Radioear Corp.*[30] *Radioear* involved the elimination of a $30 turkey bonus, an issue familiar to arbitrators, and the question of whether the case should be deferred to arbitration under *Collyer.* Rejecting the argument that absent a clear and unequivocal waiver the Board should not defer, the Board set forth the following factors that it believed were relevant to an arbitral determination of the dispute:

> While in some situations the rule of "clear and unequivocal" waiver may be a realistic appraisal of the bargain reached, in other situations it may not be. The answer does not, in our view, call for a rigid rule, formulated without regard for the bargaining postures, proposals, and agreements of the parties, but rather, more appropriately should take into consideration such varied factors as (a) the precise wording of, and emphasis placed upon, any zipper clause agreed upon; (b) other proposals advanced and accepted or rejected during bargaining; (c) the completeness of the bargaining agreement as an "integration"—hence the applicability or inapplicability of the parol evidence rule; (d) practices by the same parties, or other parties, under other collective-bargaining agreements. These are but a few of the many factors that could and would be considered by an arbitrator. Since the collective-bargaining agreement, and the events surrounding its execution, are at the heart of the disagreement, we would, as we did in *Collyer Insulated Wire*, . . . defer our decision to the parties' contractual settlement procedures.[31]

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[30]199 NLRB 1161, 81 LRRM 1402 (1974).
[31]*Id.* at 1161, 81 LRRM 1403.

All of these factors are integral to an arbitrator's interpretation of the obligations imposed under a collective bargaining agreement. Central to the utilization of such factors is an ascertainment of the parties' intent with respect to the issue in dispute. Such factors are directly related to the question of contractual obligation and *not* to generalized notions of what statutory standard should control. That is for the Board to decide once an award has been issued.

That there are very fine lines in this area is shown by the Supreme Court's decision in *Metropolitan Edison Co. v. NLRB.*[32] While this was not a deferral case, it, in my opinion, should have been treated as one.

On various occasions, the Supreme Court has implied duties and obligations under a labor agreement. It has implied the existence of a no-strike clause from an agreement to arbitrate,[33] it has implied an obligation not to strike over safety disputes in light of a broad grievance-arbitration procedure,[34] and it has implied a duty of fair representation.[35] Only this term it had occasion to state that "[t]he assumption that the labor contract creates no implied rights is not one that state law may make. Rather it is a question of federal contract interpretation . . . ."[36]

Arbitrators have on numerous occasions also implied duties and obligations under a labor agreement. One such duty is the obligation of union officials to take affirmative steps to end illegal work stoppages. Failure to do so has been reason enough for arbitrators to sustain harsher discipline:

> As Union officials (alternate stewards, stewards, and committeemen) these people have a special obligation to refrain from committing overt acts designed to encourage others to walk out or stay out. That special obligation arises out of the very fact of their stewardship. They were chosen to be custodians of the agreement, guardians of its rights and monitors of its obligations within the prescribed procedures. Hence[,] if they engage in overt acts which flout the Agreement's solemn obligations, they engage in a special class of acts which set them apart from the rank and file.[37]

In *Metropolitan Edison,* the employer imposed greater discipline on union officials for participating in an unauthorized

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[32]460 U.S. 693, 112 LRRM 3265 (1983).
[33]*Teamsters Local 174 v. Lucas Flour Co.,* 369 U.S. 95, 49 LRRM 2717 (1962).
[34]*Gateway Coal Co. v. Mine Workers,* 414 U.S. 368, 85 LRRM 2049 (1974).
[35]*Vaca v. Sipes,* 386 U.S. 171, 64 LRRM 2369 (1967).
[36]*Allis-Chalmers Corp. v. Lueck,* 118 LRRM at 3350.
[37]*Mack Trucks, Inc.,* 41 LA 1240, 1243–1244 (Wallen, 1964).

work stoppage than the discipline imposed on other participants. Under earlier contracts, but with the same contract language in place, two arbitrators had found that union officials had higher duties than other employees and affirmed greater discipline for these officials in similar circumstances.

The union this time, however, went to the Board which found a violation of Sections 8(a)(1) and (3) of the Act. In affirming the Board, the Supreme Court rejected the argument that the prior awards waived the union's right to protest the imposition of greater discipline to its officials. While agreeing that an employer and union can negotiate a requirement imposing higher standards on union officials, the Court found no such explicit agreement present in this case.

Troublesome to me was the Court's reasoning that while "prior arbitration decisions may be relevant—both to other arbitrators and to the Board—in interpreting bargaining agreements,"[38] such decisions can only show waiver "when the arbitrator has stated that the bargaining agreement itself *clearly and unmistakably* imposes an explicit duty on union officials to end unlawful work stoppages."[39] This rejection of the two prior awards is inconsistent with the standards of the *Trilogy* and the realities of the work place.

In *Warrior & Gulf Navigation Co.*, the Court had recognized that the 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."[40] If this is so, how then is there a requirement that the waiver must come from "clear and unmistakable" language? Indeed, this standard is seemingly at odds with the broad deferral standard set forth in *Olin*. Thus, while *Metropolitan Edison* was not a deferral case, it points out the problems facing arbitrators, the Board, and courts in interpreting rights and responsibilities under a labor agreement which is set against a statutory backdrop.

The Myth or Reality of a "Complete" Agreement

It is evident from this discussion that the development of law under Section 301 and the NLRA affects the interpretive pro-

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[38]460 U.S. at 708, 112 LRRM at 3271.
[39]*Id.* at 709, n.13, 112 LRRM at 3271 n.13.
[40]363 U.S. at 581–582, 46 LRRM at 2419.

cess and requires parties to negotiate with a specific reference to these developments. For example, after the Supreme Court's decision in *Boys Markets,* it was in the interest of employers to negotiate very broad grievance and arbitration clauses so that the opportunity of securing injunctive relief against illegal work stoppages would be enhanced. Similarly, if parties want to exclude a matter from arbitration, there should be express language present in the agreement. And, if parties want to limit the application or consideration of past practices, it is best to negotiate a provision dealing with the subject. Failing to do so gives an arbitrator the basis to rely on the "common law" of the shop.

It is against this legal framework that one can explore some of the myths and realities of the interpretive process. One of the first questions raised is whether the labor agreement is an ordinary contract and should be interpreted as such. To me, a labor contract is not simply an ordinary contract, but is, as Professor Corbin stated, "a contract of a very special kind."[41] Indeed, that the labor agreement is something more than an ordinary commercial contract was expressly recognized by the Supreme Court in the *Trilogy.* This recognition, however, should not automatically mean that there is no usefulness to certain basic contract principles of interpretation.[42]

Over the years, certain principles of contract interpretation have been historically applied by arbitrators. These include, for example, that parties are not presumed to use superfluous language; that a specific provision normally governs the general; that an agreement should be construed as a whole; and that words should, absent agreement to the contrary, be given their plain and ordinary meaning. Utilization of these principles are found in numerous cases.

While these general interpretive guidelines have been applied by arbitrators, there has been a belief that, being a different kind of contract, a labor agreement calls for different interpretive policies. One of the reasons for this perception is that the process of how parties negotiate a labor agreement is viewed differently from an ordinary commercial setting. For example, in 1959, Professor Cox, like Dean Shulman before him, expressed the view that parties to a labor agreement "are often willing to

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[41]Corbin on Contracts § 1420, quoted in Summers, *Collective Agreements and the Law of Contracts,* 78 Yale L.J. 525 (1969).

[42]*Id.*

contract although each knows that the other places a different meaning upon the words and they share only the common intent to postpone the issue and take a gamble upon an arbitrator's ruling if decision is required."[43] With this view in mind, it is not surprising that Professor Cox went on to state:

> The generalities, the deliberate ambiguities, the gaps, the unforeseen contingencies, and the need for a rule even though the agreement is silent all require a creativeness in contract administration which is quite unlike the attitude of one construing a deed, a promissory note, or a 300-page corporate trust indenture. The process of interpretation cannot be the same because the conditions which determine the character of the instruments are different.[44]

Dean Shulman expressed a similar view when he stated:

> To be sure, the parties are seeking to bind one another and to define "rights" and "obligations" for the future. But it is also true that, with respect to non-wage matters particularly, the parties are dealing with hypothetical situations that may or may not arise. Both sides are interested in the welfare of the enterprise. Neither would unashamedly seek contractual commitments that would destroy the other. Each has conflicts of interests in its own ranks. Both might be content to leave the future to discretion, if they had full confidence in that discretion and in its full acceptance when exercised. And even when the negotiating representatives have full confidence in each other as individuals, they recognize that it will be many others, not they, who will play major roles in the administration of the agreement. So they seek to provide a rule of law which will eliminate or reduce the areas of discretion. The agreement then becomes a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith.[45]

From this perspective, it was logically consistent to advance the theory that there should be a "common law" of the shop which enables an arbitrator to furnish the context and meaning of the agreement. This common law includes a consideration of the practices of the shop and industry and the presence of obligations not expressly stated in the agreement. Indeed, both before and after the *Trilogy*, arbitrators have looked and given meaning

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[43]Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1491 (1959).
[44]*Id.* at 1493.
[45]Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1005 (1955).

to the practices of the parties and have implied certain obligations under the parties' agreement.

Some people, as Syl has discussed, have urged that arbitrators should not imply obligations out of a collective bargaining agreement. To me, this point was lost years ago. In *Local 174, Teamsters v. Lucas Flour Co.*, the Supreme Court itself implied the existence of a no-strike clause from an agreement to grieve and arbitrate. To the Court "a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare."[46]

The Court in *Lucas Flour* also took the view that a contrary holding would "do violence to accepted principles of traditional contract law."[47] Justice Black in dissent thought otherwise. Justice Black's view of freedom of contract and implied obligation stood in marked contrast to the majority.

> I have been unable to find any accepted principle of contract law—traditional or otherwise—that permits courts to change completely the nature of a contract by adding new promises that the parties themselves refused to make in order that the new court-made contract might better fit into whatever social, economic, or legal policies the courts believe to be so important that they should have been taken out of the realm of voluntary contract by the legislative body and furthered by compulsory legislation.[48]

The majority's finding of an implied obligation, however, was hardly surprising in light of the sweeping language of the Trilogy decisions.

Nonetheless, it has been argued that to imply an obligation runs counter to the parol evidence rule and the reserved rights doctrine. With respect to reserved rights it has been stated that management is free to act unless limited by a specific term of the agreement. This argument is bolstered by the view that the presence of language indicating that an arbitrator will not "add to, subtract from or modify the agreement" incorporates the parol evidence rule and thereby bars an award from being based on evidence or conduct outside the express terms of the agreement.

While it would make my job much easier if you believed that management retained all rights except those expressly delimited

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[46]369 U.S. at 105, 49 LRRM at 2722.

[47]*Id.*, 49 LRRM at 2721.

[48]*Id.* at 108, 49 LRRM at 2723. *See also*, Wellington, *Freedom of Contract And The Collective Bargaining Agreement*, 112 U. Pa. L. Rev. 467, 484–487 (1964).

in the agreement, this is generally an unrealistic assumption. Similarly, it is unrealistic to ignore the fact that except when otherwise provided, practices and conduct are generally part of the agreement and will be considered as such by an arbitrator. Nevertheless, there are certain aspects of these positions which deserve attention.

Part of the concept of implied obligation seems to be based on the notion that parties give the arbitrator authority to fill in the "gaps" of their agreement. I must seriously question whether it is still appropriate, twenty-five years after the Trilogy, to assume that in all cases parties still intend to leave such "gaps" in their agreement for an arbitrator to fill. In cases where you have sophisticated parties who have negotiated for many years, I think it is unrealistic to assume that they have not given conscious and serious thought to both what is, and is not, contained in their agreement.

Parties who have executed numerous agreements governing myriad issues should not be presumed to have ignored industrial realities when a particular item is absent and there is a subsequent dispute over alleged implied obligations. Normally parties do not negotiate in a vacuum and the failure to include certain restrictions in an agreement can be proof in and of itself of an *intent* not to limit management's freedom of action.

In cases involving fundamental questions such as subcontracting, work transfers, and elimination or combination of job classifications, I believe that it is unrealistic to assume as a general rule an implied restriction against management action absent evidence of an agreement or understanding to do otherwise. I am not suggesting that there cannot be implied obligations which restrict such action, or that parties for tactical reasons might want to be silent, but only that the foundation for an award be bottomed on the parties' intent and not on notions unrelated to the world in which they negotiate. As a negotiator, I think it is unrealistic to assume that when parties normally negotiate a standard recognition, wage, or seniority article there is also the intent to bar work transfers or subcontracting. Perhaps some parties do have such an intent, but some evidence beyond the mere clause should exist. You have all seen enough agreements to know that when parties want to address such issues, they know how.

My views on contract silence take into account that the failure to address an issue in the agreement can give rise to an arbitrator

relying on the body of arbitral law which furnishes support for implying a restriction on management action. Certainly, there are enough reported cases to show that contract silence will not automatically assure a finding that a particular right exists or is reserved to management. Yet, I think that an arbitrator today should be careful not to imply a restriction on certain fundamental issues without carefully analyzing whether the silence is actually a recognition that management's action was intended to be proscribed.

In analyzing such issues an arbitrator must often look to the use of extrinsic evidence. The rationale for why such evidence should be considered was well stated by Clyde Summers in the following terms:

> One general principle of contract interpretation vigorously articulated by Professor Corbin is that meaning cannot be discovered "by poring over the words within the four corners of the paper." Before a court can select one meaning in preference to other possible ones, "extrinsic evidence shall be heard to make the court aware of the 'surrounding circumstances,' including the persons, objects and events to which the words can be applied." This principle of looking beyond the bare words to the surrounding circumstances is of fundamental importance in interpreting collective agreements. The words used may be common words which have uncommon meanings; the provisions are often sparsely stated without the adornment of definitions, qualifications, or specifications of scope; and the surrounding circumstances encompass the whole employment relationship—the processes of production, the history of the bargaining relationship, the past practices of the parties, and even the industrial jurisprudence which has evolved under other bargaining relationships.
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> More narrowly, certain principles relating to the interpretation of integrated contracts and the application of the parol evidence rule have particular relevance for collective agreements. Arbitrators, like courts, are constantly bombarded by one party or the other with arguments that the parties' intent cannot be shown by extrinsic evidence unless the words of the agreement are ambiguous, or that parol evidence cannot be used to vary the plain meaning of the agreement. These arguments are invoked to exclude consideration of past practices, negotiating history, oral side agreements, or prior grievance settlements. But as Professor Corbin has so forcefully demonstrated, the meaning the parties intended to give the words cannot be known until one knows the circumstances surrounding their use of those words. Only then can it be determined whether the words are ambiguous or whether they have one plain meaning rather than another. The fact that an arbitrator or court, in looking

at the naked words, can see only one meaning does not justify the imposition of that meaning on the parties.[49]

These views aptly illustrate the types of evidence arbitrators consider in ascertaining the intent of the parties. Past practice, bargaining history, prior grievance resolutions, and other factors can be highly relevant in ascertaining the meaning of the parties with respect to both the language in the agreement and the absence of such language.

In the same article in which these views were expressed, Professor Summers went on to discuss the problem of filling in contractual gaps and related the problem within the context of a subcontracting dispute. For Professor Summers, the arbitrator's role, in the absence of specific language and meager bargaining history, is to complete the parties' agreement and *create* a "result which will maximize the competing interests on both sides."[50] In his example, the union had proposed a no-subcontracting clause which had been rejected as being "unrealistic" and "borrowing trouble."

This analysis, in my opinion, extends beyond the concept of accepting extrinsic evidence to determine the intent of the parties. Having an arbitrator "create" an agreement implies authority that most agreements do not give. While it is understandable and correct that arbitrators, as Professor Summers stated, have for years looked to extrinsic evidence to ascertain the meaning and application of the agreement, this should not be a license to engraft obligations that the parties themselves have not reasonably intended.

More in line with my views is the standard Syl describes. Syl notes that "management should be free to act where no limitation can be found to have arisen either from an express or *implied* term in the written collective bargaining agreement." This standard expressly recognizes that the arbitrator's benchmark is ascertaining the parties' intent and not creating an agreement that might otherwise fit the arbitrator's personal concept of industrial fairness.

As you know too well, discussing such distinctions is far easier than applying them. Certainly in the area of past practice, there is a recurring question of whether a given practice is truly

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[49]Summers, *supra* note 41, at 549–550.
[50]*Id.* at 552.

reflective of mutual understanding or is nothing more than a series of independent acts with no thought as to possible future precedent or binding effect. Similarly, there is the problem of distinguishing between practices which have consequential meaning and those which are discretionary or simply related to the normal functioning of an industrial enterprise, and which have no lasting meaning from an interpretive standpoint. Arbitrators should be sensitive to these distinctions and to the type of evidentiary burdens they present.

One area relating to past practice which I think is worthy of some comment is the case of using a practice to modify the written language of the agreement. Some arbitrators believe that a past practice cannot overcome the specific language of the agreement, others have held otherwise.[51]

Arbitrators who have held that a past practice can overcome unambiguous contract language generally rely on a finding that there has been a mutual understanding resulting in a modification of the agreement. The finding of such understandings is to me highly questionable.

In his article on the use of past practice, Dick Mitthenthal discusses the rationale employed in such cases:

> But what of a situation where practice conflicts with the real meaning of a truly unambiguous provision? Suppose, for instance, that a contract says "seniority shall not govern the assignment of overtime work," that the parties meant to restrict the application of seniority, that a practice of distributing overtime according to seniority later developed, and that this practice was not initiated until the union had stated in discussions with the employer that it approved of this means of distributing overtime. On these facts, would the employer's unilateral discontinuance of the practice constitute a contract violation? Applying the rationale stated in Aaron's paper, I would find no violation on the ground that practice can be decisive only if there is some uncertainty, however slight, with respect to the parties' original intention. My hypothetical case contains no such uncertainty, the parties' intention being perfectly obvious. Yet, if the "living document" notion is carried to its logical conclusion, a violation may exist on the ground that the practice, being a product of joint determination, amounts to an amendment of the contract and that thereafter the practice could be changed only by mutual agreement. Some may complain that the contract is so clear and compelling here that no room is left for consideration of past practice. However, as Williston has explained in his famous treatise on con-

[51]For a full discussion of this issue, *see* Mittenthal *Past Practice And The Administration of Collective Bargaining Agreements,* 59 Mich. L. Rev. 1017 (1961).

> tracts, "if the meaning of the contract is plain, the acts of the parties cannot prove an interpretation contrary to the plain meaning" but nevertheless "such conduct of the parties . . . may be evidence of a subsequent modification of their contract.[52]

I do not believe that in the absence of express agreement on the issue of modification (presumably absent or there would be no need for an arbitrator), it is proper to reach a result based on a past practice which is directly contrary to the language of the agreement. For me, the test would have to be analogous to the showing of a waiver of a statutory right and would require a finding that there has been a clear and unmistakable modification by the parties.

Proving this would be exceedingly difficult and the issue itself places the arbitrator in uncharted waters. Using Dick Mittenthal's hypothesis of contract language stating that the assignment of overtime work is not based on seniority helps illustrate the problem presented. An arbitrator might find a long-standing practice of assignments based on seniority with the union indicating that this was a correct approach. This practice, however, might result from convenience, supervisory considerations, or a host of other factors totally unrelated to the contractual provision. How is the arbitrator to find modification absent specific evidence that the practice was followed with an intent to modify the contractual right to make assignments on a nonseniority basis?

For an arbitrator to ignore such a clause and rely on past practice represents an amendment to the parties' agreement. This requires much more than the existence of a practice—regardless of duration. Nonetheless, since I believe that practices have and will continue to be relied upon both from the standpoint of interpreting contract language and to imply terms and conditions of employment outside of the contract, it is best for the parties themselves to recognize and deal with this issue in negotiations. Failing to do so will normally bring the "common law" of past practice into the plant.

Another issue presented within the context of implying obligations or restrictions is the issue of bargaining history. Obviously, such history takes on greater significance where the contract is silent or the language ambiguous. Employers and unions will generally rely on bargaining history to show that the

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[52]*Id.* at 1029–1030.

opposing party is seeking to achieve a result contrary to that obtained in negotiations. In many cases, this may be correct.

There are, however, certain practical caveats that I think are important to note when evaluating bargaining history. Situations occur where a party to an agreement might want to clarify certain rights in light of judicial or statutory considerations. While the party believes that the right or obligation already exists under the agreement, it is now concerned about its interpretation by an arbitrator, a court, or the NLRB.

Examples of this arose after the Supreme Court's decision in *Buffalo Forge.*[53] After this decision, the Board, which has now altered its views, held that there had to be an express waiver of the right to honor a picket line and the language of a general no-strike clause was insufficient. To me, the Board was wrong, but the question arose as to whether one should propose specific language or rely on the old language and hope for a change in Board position or judicial reversals.

The problem, of course, is the concern that an unsuccessful attempt to clarify will be relied upon as evidence that you did not have the right in the first place. For me, it is important in such a case for an arbitrator to evaluate the context in which the proposal was made so that parties are not unnecessarily inhibited from taking such action.

Questions are also raised as to the effect of arbitral decisions on the interpretive process. My view as an advocate is to set forth those cases which support my position. To an experienced arbitrator, it is doubtful that a decision will be affected one way or another by another arbitrator's ruling. Nonetheless, there are certain standards or definitions which enjoy fairly universal recognition and reference to them can be helpful and appropriate. In the final analysis, however, the parties are asking for an interpretation of their agreement and while other awards might be helpful, they are not dispositive.

The above discussion illustrates that the interpretation of a labor agreement is perceived as being something more than simply construing the words found in a contract. Arbitrators can choose from a variety of menu offerings which have become part of the arbitral law of the shop, e.g., past practices, implied obligations. Caution is important, however, since the parties might have negotiated without knowledge or regard for this

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[53]*Buffalo Forge Co. v. Steelworkers*, 428 U.S. 397, 92 LRRM 3032 (1976).

"common law" menu and might not understand its significance. For them, the issue is not related to notions or concepts which have developed under Section 301 but to the agreement they negotiated, or at least thought they did. Other, perhaps more sophisticated, parties might negotiate with express knowledge of the impact of this law of the shop and choose to negotiate out of or around it.

For these reasons, I think it is important that in interpreting collective bargaining agreements, arbitrators consider certain basic principles—principles that most arbitrators follow. First, an arbitrator should set forth the provision(s) or mutual understanding that governs the resolution of the dispute. Second, the arbitrator should base his award on the provision, understanding, or lack of such, and indicate that as the basis for the award. Third, the arbitrator should note, where appropriate, what he or she is not deciding. Following these principles helps the parties understand that the arbitrator's award is drawn from the agreement. Failure to follow such principles can leave the parties in the unsatisfactory state of trying to unscramble the award and attempting to ascertain not just the basis for the current holding, but how it affects future conduct.

Conclusion

The law which was developed under Section 301 makes it clear to me that the answer to most important interpretive questions lies at the negotiating table, not before an arbitrator. Arbitral discretion and deference has become the rule, not the exception.

Concepts of implied obligation and past practice have become part of the "common law" of the shop whether the parties like it or not. This should not mean, however, that an arbitrator should ever forget that his or her role is to interpret a specific agreement, not to simply insert concepts which the parties themselves have rejected. The interpretive process holds no easy answers and is ill-suited to generalized concepts. While the Trilogy represents the Supreme Court's view of what it thought parties intended some twenty-five years ago, it is important to recognize that the concepts incorporated under Section 301 are not immutable. The result the parties want is an award based on *their* agreement and understandings, not those of the arbitrator, the courts, or the Board.