

CHAPTER 1

PRESIDENTIAL ADDRESS: BYE BYE *TRILOGY*, HELLO ARBITRATION

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I am glad that in introducing me Dana Eischen mentioned my role in the *Steelworkers Trilogy* because the principal thesis of my speech today is that *that* trilogy has become largely irrelevant. As far as the courts are concerned labor arbitration has become no different, and perhaps less to be respected, than other arbitration. My conclusion, however, is that, no matter what the courts may say or do, we remain something very special and different, worthy of respect and admiration without reliance on the language used by the Supreme Court in the *Trilogy*.

Let me start with some history. Forty-six years ago—or, to paraphrase Abraham Lincoln, two score and six years ago—our forebears, a really great group, formed an organization which they called the National Academy of Arbitrators. If looked at in terms of what now exists as arbitration the title they chose may appear to be a form of chutzpah. More aptly the organization might have been called the National Academy of Labor Arbitrators because that is what it was and is. But if one looks back at what existed in 1947, the title was not inappropriate. Labor arbitration *was* the only arbitration profession. True, arbitration as a method of settling disputes extrajudicially had existed for many years. Congress had passed a statute in 1925 which was then called the United States Arbitration Act (and is now generally referred to as the Federal Arbitration Act), making agreements to arbitrate enforceable. But there was no profession of arbitration as such. Commercial arbitration, to which the statute was really addressed, was performed by practitioners, sometimes without pay, as an alternative to litigation

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and was not widely used. The only really significant kind of arbitration with a cadre of experienced practitioners having its own standards and doctrines was labor arbitration. Labor arbitration was not what Mr. Justice Brandeis called "a domestic forum," which could serve as an alternative to the resolution of disputes in court, but, rather, a very special kind of arbitration designed and used as an alternative to the strike as a method of resolving disputes arising under collective bargaining agreements. So, appropriately, the organization which meets here today was called the National Academy of Arbitrators.

For many years after the Academy was founded, arbitration other than labor arbitration remained a stepchild. Despite the enactment of the Federal Arbitration Act (FAA), the courts remained hostile to it. Agreements to arbitrate would not be enforced in the federal courts unless the party seeking arbitration could "produce evidence which tends to establish his claim" before a court would compel it.¹ In New York, *Cutler-Hammer*² held that "if the meaning of the provision of the contract sought to be arbitrated is beyond dispute there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." The then hostility to arbitration was exemplified in the Supreme Court of the United States by the 1953 decision in *Wilko v. Swan*.³ In that case a customer sought damages for fraud from a brokerage firm under the Securities Act of 1933. The defendant claimed that arbitration, as provided in the agreement with the firm, was required. The court held that it was not and that the plaintiff could sue.

Then in 1957 came *Lincoln Mills*,⁴ the predicate for the *Steelworkers Trilogy*. The issue was whether a federal court could order an employer to comply with its agreement to arbitrate a grievance even though under Alabama law agreements to arbitrate future disputes were not enforceable. Arthur Goldberg and I could have rested our argument on the FAA. We didn't. We chose to rely on section 301 of the Taft-Hartley Act because of the then hostility of the courts to arbitration under the FAA. As a backup we also argued, persuasively I think, that the exclusion in section 1 of the FAA of contracts of employment applied only to individual contracts and was inapplicable to collective bargaining agreements.

¹*Engineers Ass'n v. Sperry Gyroscope Co.*, 251 F.2d 133, 41 LRRM 2272 (2d Cir. 1957), cert. denied, 356 U.S. 932, 41 LRRM 2821 (1958).

²271 App. Div. 917, 67 N.Y.S.2d 317, 318, 19 LRRM 2232, aff'd, 297 N.Y.2d 519, 74 N.E.2d 464, 20 LRRM 2445 (1947).

³346 U.S. 427 (1953).

⁴*Textile Workers v. Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957).

But our major thrust was on the difference between grievance arbitration and commercial arbitration. *Wilko* and commercial arbitration cases, we argued, were irrelevant. The argument was successful. The power of a court to enforce a collectively bargained agreement to arbitrate was firmly grounded not on the FAA but on the provisions of section 301.

The distinction between grievance arbitration and other arbitration was emphasized in the first two cases of the *Trilogy*: *American Manufacturing*⁵ and *Warrior & Gulf*.⁶ In *Warrior & Gulf*, Mr. Justice Douglas put it bluntly when he said:

[T]he run of arbitration cases, illustrated by *Wilko v. Swan*, 346 U.S. 427, becomes irrelevant to our problem. . . . In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.⁷

He might have added (but did not) that, under a collective bargaining agreement with a no-strike provision, a decision that a grievance was not arbitrable really meant that there was no remedy, while in commercial arbitration, as in *Wilko*, such a decision simply meant that the claimant could sue in court.

Much has changed since the *Steelworkers Trilogy*. The litigation explosion of recent years has imposed an enormous strain on both state and federal courts. As a consequence, the attitude of those courts toward the enforceability of agreements to arbitrate under the FAA has completely reversed course. There has been what has been called a second trilogy.⁸ *Wilko v. Sawn* has been overruled. Agreements to arbitrate all disputes have now been held to require arbitration rather than suit, of claims of violation of the antitrust laws, the Racketeer Influenced and Corrupt Organizations (RICO) statutes, the Security and Exchange Acts, and, most recently in *Gilmer v. Interstate/Johnson Lane Corp.*,⁹ the Age Discrimination in

⁵*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960).

⁶*Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).

⁷*Id.* at 578.

⁸See Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 Va. L. Rev. 1305 (1985).

⁹111 S.Ct. 1647, 55 FEP Cases 1116 (1991). The Court was able to avoid decision on the question of whether the exclusion in section 1 of the FAA barred the applicability of the FAA to the claim because it had not been litigated below and because the arbitration provision was not contained in a contract of employment but rather in plaintiff's securities registration application.

Employment Act. Further, the FAA has now been held to create a federal substantive law, binding on the states.¹⁰ The much disputed *Lincoln Mills* holding that section 301 created a federal substantive law governing collective bargaining agreements turns out to have been totally unnecessary for the result, except as a basis for use of a federal rather than a state forum to enforce a federal right.¹¹ As the Court said in *Rodriguez de Quijas v. Shearson/American Express*,¹² "the old judicial hostility to arbitration" has been steadily eroded over the years, and the "outmoded presumption of disfavoring arbitration proceedings"¹³ has now been set aside.

What, then, of our trilogy? Bill Murphy put it elegantly in his presidential address at the 40th Annual Meeting: "Harry Shulman . . . in a famous speech at Harvard had urged that the law leave arbitration alone. Instead the Supreme Court and the law intervened [in the *Trilogy*] for the very purpose of achieving Shulman's goal, to keep the law out. The *Trilogy* elevated arbitration to a new status."¹⁴ When he said that, Bill Murphy was speaking, as we are often wont to do, about labor arbitration. But recent developments which I have just described have elevated all arbitration to a new status, not as Bill said, "as an integral part of the industrial self-government created by a collective bargaining relationship,"¹⁵ but as a method of relieving the courts of an ever-increasing load of litigation.

The title National Academy of Arbitrators has thus become almost a misnomer and, as I have seen in the advertisements for American Arbitration Association conferences, we are sometimes referred to as "The National Academy of Labor Arbitrators," so as to avoid misrepresentations of what we are.

What I have said so far relates only to the first two thirds of the *Steelworkers Trilogy*—the enforcement of an agreement to arbitrate. We have much celebrated the statement in *Warrior & Gulf*¹⁶ that "An order to arbitrate should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should

¹⁰*Southland Corp. v. Keating*, 465 U.S. 1 (1984).

¹¹That the FAA does not constitute an independent basis for federal jurisdiction has been described by the Court itself as an "anomaly." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25, n.32 (1983).

¹²490 U.S. 477, 480 (1989) (quoting *Kulukundis Shipping Co. v. Amatorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

¹³*Id.* at 481.

¹⁴Murphy, *The Presidential Address: The Academy at Forty*, in *Arbitration 1987: The Academy of Forty*, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1988), 1, 4.

¹⁵*Id.*

¹⁶*Supra* note 6.

be resolved in favor of coverage.”¹⁷ But that statement has now been virtually replicated by the Supreme Court in a commercial case under the FAA. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,¹⁸ the Court said that “as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . .”

What then about the third case in the Trilogy, *Enterprise Wheel*, dealing with the scope of judicial review in actions to enforce awards already entered? As to commercial arbitration of the old-fashioned sort there is, as then Dean St. Antoine said at the 30th Annual Meeting in response to my “Golden Age” paper,¹⁹ a long tradition of judicial enforcement of awards once rendered without review on the merits.²⁰ He cited an 1885 Supreme Court case. He could have added the last word of the Supreme Court on the subject in 1956, *Bernhardt v. Polygraphic Co. of America*,²¹ where the Court said, “Whether the arbitrators misconstrued a contract is not open to judicial review.”²² So, St. Antoine concluded, the third case in the Steelworkers Trilogy simply embodied a long-standing proposition that when the parties state an arbitration award is final the courts have no business reviewing the merits of the arbitrator’s decision, whether involving questions of law or fact. Labor arbitration was in this respect no different from any other.

Are the standards for review really the same? In the now-overruled case of *Wilko v. Swan*,²³ Mr. Justice Reed, in holding that arbitration of a claim based on statute would not be required, said in almost an aside that “manifest disregard” of the law by arbitrators “would be subject to judicial review for error.”²⁴ The “manifest disregard” standard has been accepted by some of the courts of appeals²⁵ but rejected by others²⁶ as a ground for setting aside a

¹⁷*Id.* at 582–83.

¹⁸*Supra* note 11, at 24–25.

¹⁹Feller, *The Coming End of Arbitration’s Golden Age*, in Arbitration 1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Stern (BNA Books, 1976), 97.

²⁰St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, in Arbitration 1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Stern (BNA Books, 1978), 29, 33.

²¹350 U.S. 198 (1956).

²²*Id.* at 203 n.4.

²³*Supra* note 3.

²⁴*Id.* at 436–37.

²⁵*Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir. 1991).

²⁶*Chameleon Dental Prods. v. Jackson*, 925 F.2d 223 (7th Cir. 1991). The case against the “manifest error” doctrine was best stated by Chief Justice Wilentz of the New Jersey Supreme Court in his concurring opinion in *Perini Corp. v. Great Bay Casino*, 610 A.2d 364 (N.J. 1992):

The [New Jersey] rule purports to distinguish legally erroneous arbitration decisions which will be sustained, from grossly, or clearly, or indubitably, erroneous arbitration

commercial arbitration award. As to labor arbitration, the Supreme Court has remained firm in its adherence to the *Enterprise Wheel* doctrine. Indeed, as recently as in *Misco*, the Supreme Court said that a court's conviction that an arbitrator "committed serious error does not suffice to overturn his decision . . . as long as the arbitrator is *even arguably construing or applying the contract and acting within the scope of his authority*" (emphasis added).²⁷

What matters, however, is not what doctrine is expressed in the cases but how they actually come out. Even the courts that accept the "manifest disregard" standard do not read it as authorizing review of an arbitrator's interpretation of a contract in commercial cases. The Second Circuit, one of those which accepts the "manifest disregard" notion, said it would not "reverse the award even though it is based on a clearly erroneous interpretation of the contract. Whatever mistakes of law may be corrected, simple misinterpretations of contract do not appear one of them."²⁸ I do not pretend to have reviewed all of the cases in which review was sought of commercial arbitration awards. I have read most of them decided in the past few years and it is fairly clear that the results are in accordance with that statement.

The matter is otherwise, however, with respect to labor arbitration. I think I have read almost all the reported cases in which attempts have been made to set aside an award interpreting and applying a collective bargaining agreement. There are certainly more of them than cases in which commercial arbitration awards are sought to be set aside. The lower federal courts, however, while reciting the doctrine of *Enterprise Wheel* and *Misco*, appear increasingly willing to set aside arbitration awards they think are clearly wrong. Sometimes they do it in the guise of the "public policy" exception, but the tendency is there even where there is no public policy question.

decisions which will not. Judges are not adept at making such distinctions. . . . Judges sometimes experience considerable difficulty in deciding what is wrong; our uncertainty would escalate were we required to decide what is very wrong. The concept of degrees of legal wrongness is foreign to us, it is not our stock-in-trade. . . . In most cases we have no standard other than the strength of our own convictions for whether an error is clear. Often it is not at all clear to one Justice that there is an error, while three others are convinced the error is crystal clear, and the other three convinced that beyond doubt there was no error. If you add to these difficulties concerning legal error, those that will face judges trying to characterize factual error, the picture of an unworkable system of judicial review of arbitration awards is clear. *Id.* at 390.

²⁷*Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38, 126 LRRM 3113 (1987).

²⁸*I/S Stavborg v. National Metal Converters*, 500 F.2d 424, 432 (2d Cir. 1974).

I will not review the cases. George Cohen gave you many of them in his address to the Academy last year in Atlanta.²⁹ Most of them take advantage of the loophole in Mr. Justice Douglas's opinion in *Enterprise*. In order to emphasize the holding that an award must be based on an arbitrator's reading of the contract, Mr. Justice Douglas said that an arbitrator "does not sit to dispense his own brand of industrial justice . . . [H]is award is legitimate only so long as it draws its essence from the collective bargaining agreement."³⁰ That language was, unfortunately, quoted by Mr. Justice White in *Misco*. It is possible for a court to conclude that the arbitrator's reasoning does not comport with its reading of the agreement and therefore does not draw its "essence" from it, or to say that arbitrators have exceeded their jurisdiction because they so misread it that they must have been dispensing their "own brand of industrial justice." That is exactly what some of the lower courts have done. As the Sixth Circuit saw it in a pre-*Misco* decision:

[T]here may be a departure from the essence of the agreement if (1) an award conflicts with the express terms of the collective bargaining agreement, (2) an award imposes additional requirements that are not expressly provided in the agreement, (3) an award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement.³¹

Misco did not change the situation. As the Eighth Circuit said, post-*Misco*, "where an arbitrator fails to discuss a probative contract term and at the same time offers no clear basis for how he construed the contract to reach his decision without such consideration, there arises a strong possibility that the award was not based on the contract."³² The trend was summarized by the Fifth Circuit in *Delta Queen*:³³ "We agree with the company that the rule in this circuit, and the emerging trend among other courts of appeals, is that arbitral action contrary to express contractual provisions will not be respected."³⁴

²⁹*Erosion of the Arbitration Process by the Courts: Can the Award and Opinion Be Immunized*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1993), 149.

³⁰*Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2423 (1960).

³¹*Dobbs, Inc. v. Teamsters Local 614*, 813 F.2d 85, 86, 124 LRRM 2827 (6th Cir. 1987).

³²*George A. Hormel & Co. v. Food & Commercial Workers Local 9*, 879 F.2d 347, 351, 131 LRRM 3068 (8th Cir. 1989).

³³*Delta Queen Steamboat Co. v. Marine Eng'r's Dist.* 2, 889 F.2d 599, 133 LRRM 2077 (5th Cir. 1989), *reh'g denied en banc*, 897 F.2d 746, 134 LRRM 2080 (5th Cir.), *cert. denied*, 498 U.S. 853, 135 LRRM 2464 (1990).

³⁴*Id.* at 600.

It is not that the courts of appeals ignore the doctrine announced in *Enterprise Wheel* and reiterated in *Misco*. They duly recite it. But then, under one guise or another, they proceed to reach a conclusion precisely contrary to that doctrine. Perhaps the most vivid demonstration was in the 1992 decision of the Court of Appeals for the Seventh Circuit in *Polk Brothers v. Chicago Truck Drivers*.³⁵ The union there claimed that the company violated the collective bargaining agreement by subcontracting some work. After the contract expired the arbitrator found that there was a violation and ordered reinstatement of the displaced employees with back pay. On review there was no disagreement with the arbitrator's finding of violation. But the Court of Appeals, after first reciting that it was bound by *Enterprise Wheel*, set aside the order of reinstatement and back pay. It did so on the ground that the arbitrator had no authority to award reinstatement or back pay beyond the termination date of the agreement. But what *Enterprise Wheel* actually held was precisely that an arbitrator *did* have authority to award reinstatement and back pay for a period after the agreement had expired, even where there was an ambiguity as to whether he did so as a matter of contract interpretation! The Court of Appeals in *Polk Brothers* thus came to a result exactly contrary to that of *Enterprise Wheel*,³⁶ while reciting its adherence to the doctrine of that case.

The union apparently did not seek review in the Supreme Court in the *Polk Brothers* case. But it didn't matter. The plain fact is that so long as a court of appeals appropriately recites the applicable doctrine the Supreme Court will not grant review simply because the doctrine has been misapplied. Even where there is a square and irreconcilable conflict in terms of result the Court will simply not take the case. The D.C. Circuit refused to set aside on public policy grounds George Nicolau's decision in a Northwest Airline case reinstating a pilot who had been discharged for drinking and the Supreme Court refused review.³⁷ Then the Eleventh Circuit set aside a similar award by Mark Kahn at Delta Airlines on public policy grounds but the Court again refused review.³⁸ There are at

³⁵973 F.2d 593, 141 LRRM 2172 (7th Cir. 1992).

³⁶And, as well, the earlier decisions of the circuits in the days when *Enterprise* was really followed: *Mogge v. Machinists Dist. 8*, 454 F.2d 510, 78 LRRM 2939 (7th Cir. 1971); *Longshoremen (ILWU) Local 142 v. Land & Constr. Co.*, 498 F.2d 201, 86 LRRM 2874 (9th Cir. 1974).

³⁷*Northwest Airlines v. Air Line Pilots*, 808 F.2d 76, 124 LRRM 2300 (D.C. Cir. 1987), cert. denied, 486 U.S. 1014, 128 LRRM 2296 (1988).

³⁸*Delta Air Lines v. Air Line Pilots*, 861 F.2d 665, 130 LRRM 2014 (11th Cir. 1988), cert. denied, 493 U.S. 871, 132 LRRM 2623 (1989).

least nine circuit courts of appeals decisions on the question of whether a provision in an agreed-upon rule designating certain offenses as grounds for immediate discharge removes the question of "just cause" from the arbitrator's jurisdiction. Four refused to set aside arbitration awards reinstating employees in that situation, while at least five have set them aside. Yet the Supreme Court refused to review the question in *S.D. Warren Co. v. Paperworkers Local 1069*³⁹ and the *Delta Queen* case.

Failing any reasonable expectation that the Supreme Court can be persuaded to again address the question of the reviewability of labor arbitrators' awards, we must content ourselves with what I believe to be the fact: The courts will very rarely set aside a commercial award on the ground that it is contrary to the terms of the contract, but when it comes to labor arbitration the courts will, in one guise or another, set aside awards that offend them deeply.

I once wrote, in a paper I delivered to the Industrial Relations Research Association, that canvassing the labor arbitration cases, even those after *Misco*, to find a guiding principle is to chase a will-o'-the-wisp. For every case setting aside awards, there are twice as many enforcing them. There are even some cases enforcing awards that the court agrees are irrational.⁴⁰ I am working on a theory which may serve to predict those cases in which a court will set aside an arbitrator's award and those in which it will not. That theory remains for explication on a different occasion, but I will give you one, perhaps cynical, insight. The judges in the Eleventh Circuit who decided the *Delta* case live and have their offices in three different states. They have to travel to hold court. The judges in the D.C. Circuit who decided the *Northwest* case all live in the Washington, D.C., area and the court sits only there.

The important conclusion I want to draw now is that there is reason no longer to celebrate the *Steelworkers Trilogy*, as Charlie Morris did more than 10 years ago at our 33rd Annual Meeting.⁴¹ The distinction between labor arbitration and commercial arbitration has ceased to have any significance. The two are now the same when the question is whether to compel arbitration. When the issue

³⁹845 F.2d 3, 128 LRRM 2175 (1st Cir.), cert. denied, 488 U.S. 992, 129 LRRM 3072 (1988).

⁴⁰See, e.g., *Air Line Pilots v. Aviation Assocs.*, 955 F.2d 90, 139 LRRM 2454 (1st Cir. 1992). The award was contrary to the text of the agreement and conflicted with both the theories argued by the company and the union. The court, however, enforced the award because it was unambiguous.

⁴¹Morris, *Twenty Years of Trilogy: A Celebration*, in *Decisional Thinking of Arbitrators and Judges*, Proceedings of the 33d Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books, 1981), 331.

is enforcement of arbitrators' decisions already made, labor arbitration is disfavored as compared with commercial arbitration.

There is now, however, yet a third kind of arbitration—the arbitration of claims of violation of statutory law. We now know that, contrary to *Wilko v. Swan*,⁴² the courts will use the FAA to compel arbitration of claims that a statute has been violated. We simply do not know, however, what standard the courts will adopt in reviewing the decisions of arbitrators construing and applying the provisions of a statute. My guess is that a court which believes that an arbitrator has misapplied the provisions of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, or the Americans with Disabilities Act will not be inclined to adopt the reverential attitude which the court announced, but which some courts of appeals have circumvented, in labor arbitration cases. The "manifest disregard" notion, suggested by Mr. Justice Reed in his aside in *Wilko* (which was indeed a statutory case) and accepted by some courts in commercial cases, may well become the standard. By "manifest disregard" I do not refer to a decision which says what the law is and then explicitly decides to the contrary but, rather, "disregard" in the sense that the arbitrator does not construe the statute in a way that a court thinks is proper. And, if I am correct that the distinction between labor arbitration and other arbitration is disappearing, it may well also be that the doctrine to emerge will be that an arbitrator's decision in "manifest disregard" of the provisions of the collective bargaining agreement, i.e., one that is sharply and plainly different from the court's reading of the contract, will become the standard for review of labor arbitration awards. This is particularly true because labor arbitration awards, unlike commercial arbitration awards, must of necessity be accompanied by opinions setting forth the basis on which the arbitrator came to the conclusion, and this does not provide the easy escape which courts reviewing commercial arbitration awards have because an opinion is absent in most of those cases. Whether it will be under the rubric of "manifest disregard of the law," or public policy, or some other doctrine, I do not know. But I am convinced that a court, faced with an arbitration decision which denies an individual claimant a right which the court believes the statute being interpreted grants, will not allow that decision to stand.

I have not been able to find any reported decision in a case in which review was sought of a decision issued pursuant to an

⁴²346 U.S. 427 (1953).

agreement to arbitrate a claim of violation of a statute providing remedies for individual members of a protected class. In searching for one, I did find two cases involving arbitration decisions interpreting statutes that are interesting, but each is distinguishable—and they look in different directions.

The first is a labor arbitration case, *Jones Dairy Farm v. Food & Commercial Workers Local P-1236, UFCW*.⁴³ The statutory question came in by the back door. In arbitration the parties stipulated that if the company's action violated the National Labor Relations Act it also violated the collective bargaining agreement. The arbitrator dutifully, and correctly, looked to the law as announced by the National Labor Relations Board, and decided that the company's action had indeed violated the Act and therefore the agreement. Unfortunately, after the arbitrator's decision the Board withdrew its decision in the case he had relied on and came to the opposite conclusion. Furthermore, the D.C. Circuit affirmed the Board's second decision. Then the question of the enforceability of the arbitrator's award reached the Seventh Circuit. The question was whether a decision as to what the law was should be enforced even though, as it turned out, the decision was clearly and demonstrably wrong. Exactly contrary to what I predicted would occur in my *Golden Age* speech to the Academy in 1976, the Seventh Circuit said that if the parties agreed to be bound by the arbitrator's interpretation of the law, they were stuck with it, right or wrong. The case is distinguishable, I believe, because the statute involved was the National Labor Relations Act, in the enforcement of which the courts are demonstrably not much interested, and because it involves collective rights rather than rights of individuals of a protected class.

The second case is *Trustees of Amalgamated Insurance Fund v. Geltman Industries, Inc.*⁴⁴ There the court said flatly: "Statutory interpretation is a question of law subject to *de novo* review."⁴⁵ But the arbitration involved was not pursuant to agreement but pursuant to the Multi-Employer Pension Plan Amendments Act of 1980. That Act, which amended the Employee Retirement and Income Security Act (ERISA), provided that a withdrawing employer who contested the determination of its liability by the plan's sponsor, was required to arbitrate the issue before going to court.

⁴³760 F.2d 173, 119 LRRM 2185 (7th Cir. 1985).

⁴⁴784 F.2d 926, 7 EB Cases 1303 (9th Cir. 1986).

⁴⁵*Id.* at 929.

The arbitration was to "be conducted in the same manner, subject to the same limitations, carried out with the same powers . . . and enforced in United States courts as an arbitration proceeding carried out under" the FAA. After the award was issued, any party could bring an action to enforce or vacate the award. The statute provided that there should be a presumption, rebuttable only by a clear preponderance of evidence, that the findings of fact made by the arbitrator were correct. As to questions of law, however, the Ninth Circuit and other circuits that have passed on the question have concluded that there was no such presumption and that a court is free to make its own independent interpretation of the statute. Again, the case is distinguishable because of the statutory statement as to questions of fact only and because the arbitration was not one agreed to by the parties but compelled by statute.

What does all this mean to those who are gathered here today? To those representing parties who are unhappy with the results of an arbitration award (and that includes most of you in this audience) and who wish to seek review in the courts of the merits of the award (of whom I hope there are only a few in the audience), it means that all hope is not lost when the award is issued. On one theory or another you may be able to persuade a court to set aside the award. The odds will be against you,⁴⁶ but there is a chance. That is, I believe, unfortunate and undesirable, not only for arbitrators but for the collective bargaining process. But it is a fact.

To arbitrators it means, first, as Mr. Justice Brennan told us two years ago, that "arbitrating within the constraints of diminished finality and increased regulation is a challenge. . . . It requires more work, more study, more ingenuity."⁴⁷ Second, it means that as labor arbitrators we should read, reread, and observe the admonitions given to us by George Cohen last year in Atlanta in writing our opinions.⁴⁸

What does it mean for the Academy? As far as the courts are concerned labor arbitrators may be treated the same as, or perhaps less reverentially than, other arbitrators. But that does not mean that we are the same. It means only that we need not look to the

⁴⁶See LeRoy & Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 Indus. Rel. L.J. 78 (1991). Their statistical review indicates that, in the perhaps 1 percent of arbitration awards that are contested in the courts, the odds against setting aside the award, while diminishing, are still in the order of 2 to 1.

⁴⁷Brennan, *Arbitration in a Changing Environment*, in *Arbitration 1991: The Changing Face of Arbitration in Theory and Practice*, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1992), 2, 10.

⁴⁸Supra note 29, at 156.

courts for recognition of our status. We perform a function very different from those who arbitrate disputes between parties who have severed their relationships and who seek a faster and cheaper alternative to litigation. We work with parties who must live together after we have decided and whose continuing relationship we must consistently keep in mind when deciding cases. Labor arbitration, unlike other arbitration, remains a distinct profession with its own traditions and with a common bond of precedent and practice. Misnamed as it may be, the Academy remains an association of labor arbitrators bound by ties of experience and familiarity with the collective bargaining process. As unionism and collective bargaining decline, in the private sector at least, many of our members will inevitably engage themselves in other kinds of dispute resolution. When they do so, particularly in statutory disputes, they will face different problems perhaps requiring different techniques.⁴⁹ As an institution, as we decided only this week, we must expand our educational efforts and our Code of Ethics, to cover arbitration not falling within the traditional kind that binds us together. But the Academy must remain, and will remain, a unique institution consisting of men and women doing the specialized work of arbitration of union-management disputes.

I belong to a great many organizations and I attend a great many meetings. There is not one, however, whose meetings I cherish and look forward to as much as the meetings of this Academy. Nothing that the courts can say or do can take away the very special function which the Academy performs or the very special joy that we partake of in meeting together and perfecting our understanding of the very special kind of work that we do. My wife, who is my editor and severest critic, pointed out to me that, in writing this last sentence, I had used the word "special" three times. So be it. I can think of no word that better describes what we do and are, and I hope that it will remain so forever.

⁴⁹See Jaffe, *The Arbitration of Statutory Disputes: Procedural and Substantive Considerations*, in *Arbitration* 1992, *supra* note 29, at 110.