

CHAPTER 8

JUDICIAL REVIEW OF LABOR ARBITRATION AWARDS:
A VIEW FROM THE BENCH

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I must say that I am indeed honored to be a part of this distinguished panel of Federal Circuit Judges who have agreed to speak to the academy from their perspectives about an issue of great legal significance under our national labor policy—the judicial review of labor arbitration awards. As members of the National Academy of Arbitrators, an organization with a long and stellar scholarly tradition, we have a strong intellectual interest in this topic; and as professionals charged with carrying out the mission of arbitration envisioned in the *Steelworkers Trilogy*¹ we have a deep practical interest as well.

The scope of review to be exercised by judges considering the enforcement of labor arbitration awards has been a difficult issue since the U.S. Supreme Court enunciated the standard in *Steelworkers v. Enterprise Wheel & Car Corp.*² Several members of this body have figured prominently in the fashioning and elucidating of the standard. Of course, David Feller argued the case before the Supreme Court, and Ben Aaron, Ted Jones, Ted St. Antoine, and, more recently, Timothy Heinsz have written classic articles seeking to clarify the parameters of the Court's decision.³ Also, many judges in judicial opinions have contributed substantially to this enterprise. Yet the problem of judicial review of labor arbitration

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¹*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

²*Supra* note 1.

³See Heinsz, *The Enterprise Wheel Goes Around and Around*, 52 Mo. L. Rev. 243 (1987); St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look*, at *Enterprise Wheel and Its Progeny*, 75 Mich. L. Rev. 1137 (1977); 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).

awards remains a vexing issue. The major source of difficulty lies at the feet of the Supreme Court itself and the ambivalence of the *Enterprise Wheel* decision.

Stephen Hayford,⁴ in his paper on the relationship between section 10(a) of the Federal Arbitration Act (FAA)⁵ and the essence test, discusses the *Enterprise Wheel* and *Misco*⁶ cases generally in connection with the standard for vacating arbitration awards under section 10(a) of the FAA. In this paper, I spend more time discussing the cases descriptively, because their facts and reasoning shed considerable light on the task of judges in hard cases such as some decided recently by the Fifth Circuit.

Enterprise Wheel

Enterprise Wheel involved the discharge of a group of employees who left their jobs to protest the discharge of a fellow employee. The arbitrator found the conduct of the employees improper but discharge unjustified. He found that a 10-day suspension was appropriate. The collective bargaining agreement had expired between the date of the discharges and the arbitrator's award, creating an at-will relationship between the employer and its employees at the time of the award. Even though the expired agreement did not specifically provide for a remedy of reinstatement and back pay up to the date that any wrongfully discharged employees were actually returned to work and despite the at-will status of the employees at the time of the award, the arbitrator ordered reinstatement and back pay minus pay for the 10-day suspension. In arriving at this award the arbitrator rejected the employer's argument that the expiration of the agreement barred the reinstatement of the discharged employees. Although the district court⁷ had enforced the arbitrator's award, the Fourth Circuit⁸ reversed in part based on its view that the arbitrator's order of reinstatement of at-will employees and back pay for a period covering their at-will status exceeded the scope of the submission.

⁴Hayford, *How the Federal Arbitration Act Will Stabilize and Strengthen the Law of Labor Arbitration*, *infra*, this Proceedings.

⁵9 U.S.C. §§1 et seq.

⁶*Paperworkers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1987).

⁷*Steelworkers v. Enterprise Wheel & Car Corp.*, 43 LRRM 2291 (S.D. W. Va. 1958).

⁸See *Enterprise Wheel & Car Corp. v. Steelworkers*, 269 F.2d 327, 44 LRRM 2349 (4th Cir. 1959).

Essentially, the case involved the question of whether the court could refuse to enforce the arbitrator's award because it disagreed with the part of the award that ordered reinstatement and back pay to the discharged employees beyond the expiration date of the agreement—that is, the court disagreed with the arbitrator's construction of the agreement. Reversing the Fourth Circuit, the Supreme Court in *Enterprise Wheel*⁹ wrote a decision strongly endorsing the finality of the arbitration award and the impropriety of judicial review of the merits. The following language is exemplary:

The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.¹⁰

A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award.¹¹

[Accepting the employer's view that the arbitrator's award incorrectly interpreted the agreement] would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. . . . [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator.¹²

The Court of Appeals' opinion refusing to enforce the reinstatement and partial back pay portions of the award was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction of it.¹³

It is the arbitrator's construction [of the agreement] which was bargained for; . . . the courts have no business overruling him because their interpretation of the contract is different from his.¹⁴

This is strong language, indeed, endorsing the finality of arbitration awards and the impropriety of judicial review of the merits of arbitration awards.¹⁵ Despite this ringing endorsement, the Court qualifies this sweeping concept of finality and dispels any notion that a refusal to enforce the award is never appropriate. It says:

⁹*Steelworkers v. Enterprise Wheel & Car Corp.*, *supra* note 1.

¹⁰*Id.* at 596.

¹¹*Id.* at 598.

¹²*Id.* at 598–99.

¹³*Id.* at 598.

¹⁴*Id.* at 599.

¹⁵*Id.* at 598.

Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.¹⁶

On the one hand, the Supreme Court makes it quite clear that reviewing courts are to adopt a "hands-off" policy on the merits of arbitration awards in the interest of finality and giving effect to the parties' chosen settlement procedures and, on the other hand, that there is some indeterminate line that courts should not permit arbitrators to cross.

The legacy of this "hands-off/hands-on" ambivalence in *Enterprise Wheel* is the uncertainty among some reviewing judges about where the line is. When does an award not "draw its essence" from the agreement? Does an award that the court regards as based on an implausible interpretation of the agreement reflect the arbitrator's "brand of industrial justice"? Is it enough that the arbitrator's effort (however misguided) was directed at reaching a conclusion thought to be required by the agreement?

Public Policy Review

It seems that the answers to these questions are informed by considering briefly the other branch of judicial review doctrine—public policy. *Enterprise Wheel* addresses the scope of review on issues of the arbitrator's authority under the agreement. Other cases involve the enforceability of awards that violate public policy, even though they do not exceed the arbitrator's authority under the agreement.¹⁷ In public policy cases courts have a special function of protecting the interests of the public that is not represented in private collective bargaining.¹⁸ However, despite this pressure for greater intervention in public policy cases, the Supreme Court has been very careful to enunciate a doctrine that preserves the finality of arbitration by limiting judicial review.

¹⁶*Id.* at 597.

¹⁷Neither of these branches deals with the nonenforcement of awards tainted by arbitral misconduct such as fraud, corruption, or mishandling of the hearing. For examples of such misconduct in the context of commercial arbitrations, see Federal Arbitration Act, 9 U.S.C. §10(a) (1994).

¹⁸See *Paperworkers v. Misco, Inc.*, *supra* note 6.

In *Misco*, a management rights clause in the agreement between Misco and the United Paperworkers gave management the right to promulgate rules regulating discipline. One of these rules listed “bringing of intoxicants, narcotics, or controlled substances on to plant property or consuming any of them there, as well as reporting for work under the influence of such substances”¹⁹ as one of the causes for discharge. One employee, Isiah Cooper, was discharged for having drugs on plant premises, because he had been discovered in the back seat of a car, a white Cutlass, without marijuana on his person but with marijuana smoke in the air and a lighted marijuana cigarette in the front seat ashtray. Later, following the discharge, the company learned that police had discovered marijuana in Cooper’s car on the evening in question. The arbitrator upheld the grievance finding that the company had failed to produce sufficient proof that Cooper used or possessed marijuana in the white Cutlass. The arbitrator also excluded the after-discovered evidence of marijuana in Cooper’s car, since the company did not know of this evidence at the time of the discharge. The Fifth Circuit affirmed the district court’s refusal to enforce the award on the grounds that the reinstatement would violate the public policy “against the operation of dangerous machinery by persons under the influence of drugs or alcohol.”²⁰ The Supreme Court reversed.

Citing *W.R. Grace*,²¹ the Court conceded that a court may refuse to enforce a collective bargaining agreement when its specific terms violate public policy. It went on to caution that the Court in its *W.R. Grace* decision did not “sanction a broad judicial power to set aside arbitration awards as against public policy.”²² Rather courts were to more narrowly examine “whether the award created any explicit conflict with other ‘laws and legal precedents’ rather than an assessment of ‘general considerations of supposed public interest.’”²³ Under *W.R. Grace* the public policy was to be “well-defined and dominant.” The Court added that “[a]t the very least, an alleged public policy must be properly framed under the approach set out in *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced.”²⁴ The

¹⁹*Id.* at 32.

²⁰*Misco, Inc. v. Paperworkers*, 768 F.2d 739, 743, 120 LRRM 2119 (5th Cir. 1985).

²¹*W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 113 LRRM 2641 (1983).

²²484 U.S. at 43.

²³*Id.* (quoting *W.R. Grace & Co. v. Rubber Workers Local 759*, *supra* note 21, at 766, which quoted *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

²⁴484 U.S. at 43.

Court cited as a shortcoming in the lower court the absence of an “attempt to review existing laws and legal precedents in order to demonstrate that they establish a ‘well defined and dominant’ policy against the operation of dangerous machinery while under the influence of drugs.”²⁵ Acknowledging that the finding of such a policy would be firmly rooted in common sense, the Court reiterated the teachings of *W.R. Grace* that “a formulation of public policy based only on ‘general considerations of supposed public interests’ is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement.”²⁶

Not only did the Court in *Misco* limit judicial review of arbitration awards in public policy cases by narrowing the definition of public policy, it also reserved the factfinding process in public policy cases to the arbitrator, making it off limits to the courts. It was the arbitrator who was to determine whether Cooper had been under the influence of marijuana while on the job and operating dangerous machinery. Also, importantly, the Court found that the arbitrator could find that Cooper had possessed drugs yet impose discipline short of discharge without triggering a court of appeals reversal based on the court’s view “that public policy about plant safety was threatened.”²⁷ The Court went so far as to say that the appellate court “exceeds its authority” when it usurps the arbitrator’s factfinding role in these cases. The Court also says explicitly that the fact that the court is “inquiring into a possible violation of public policy [does not] excuse a court for doing the arbitrator’s task.”²⁸ The following passage nicely captures the Court’s rationale:

Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them.²⁹

²⁵*Id.* at 44.

²⁶*Id.*

²⁷*Id.* at 45.

²⁸*Id.*

²⁹*Id.* at 37–38.

The Court in *Misco* also reaffirmed the arbitrator's authority to interpret the contract and determine remedies for contract violations, saying that "courts have no authority to disagree with [an arbitrator's] honest judgment [on these matters]." ³⁰ Says the Court in *Misco*:

[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision. ³¹

The Court's deference to arbitration even in public policy cases, where the Court feels a special responsibility, seems to underscore dramatically the limited role for the judiciary envisioned in *Enterprise Wheel*.

The reasons that judicial intervention is thought to be unnecessary, even in cases where the arbitrator is wrong on the merits, grow out of the parties' autonomy over the collective bargaining process. First, the parties mutually select arbitrators; hence, a party's veto of an unacceptable arbitrator—as demonstrated by the arbitrator's reputation or past experience with the parties—gives the parties considerable control over the quality of arbitration. Second, parties dissatisfied with an arbitrator's decision may change it during the next round of negotiations. While the arbitrator's decision may affect the relative bargaining leverage of the parties, it does not tie their hands. Third, judicial review of the merits of an arbitration award creates a disincentive for writing awards that reveal the arbitrator's reasoning. Though the Court in *Enterprise Wheel* sanctioned the discretion of the arbitrator to dispense with an opinion without judicial censure, such a result would disserve the interests of the parties while, perhaps, preserving the finality of the award. ³²

Application of the "Essence" Test

A Legacy of Ambivalence

What kinds of decisions would justify judicial intervention under the narrow scope of review contemplated by the *Trilogy*³³ and

³⁰ *Id.* at 38.

³¹ *Id.*

³² See *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598, 46 LRRM 2423 (1960).

³³ *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, *supra* note 32.

*Misco*³⁴? In light of the strong statements in *Enterprise Wheel*³⁵ and *Misco* mandating judicial restraint and the Court's treatment of an ambiguous exclusion clause in *Warrior & Gulf*,³⁶ an agreement providing a *clear* limitation on the authority of the arbitrator would warrant judicial intervention when that authority is exceeded.³⁷ Such a clear limitation on the arbitrator's authority would have existed in *Enterprise Wheel*, for example, if the agreement had specifically prohibited reinstatement and back-pay remedies in cases of unjust discharges beyond the expiration date of the agreement. The arbitrator's award in that case ordering reinstatement and back pay beyond the expiration of the agreement would have exceeded his authority. Similarly, where the contract only permits the arbitrator to determine whether cause for discipline exists, leaving the question of appropriate punishment to management, the arbitrator's modification of the penalty is without authority in the agreement.³⁸ Also, if an agreement prohibited the arbitrator from considering any factors beyond the four corners of the agreement, including past practice, an arbitrator would have no authority to uphold a grievance based on past practice. The familiar language found in many contracts preventing the arbitrator from "adding to, deleting from, or modifying in any way, any of the provisions of the agreement" is sometimes thought to prevent arbitrators from considering past practice,³⁹ but it fails the test of clarity suggested by the *Trilogy*.⁴⁰

Torrington and Bruce Hardwood Floors. Judicial disagreements with an arbitrator's interpretation of the agreement, on the other hand, fall squarely within the *Enterprise Wheel* mandate against

³⁴*Paperworkers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1987).

³⁵*Steelworkers v. Enterprise Wheel & Car Corp.*, *supra* note 32.

³⁶*Steelworkers v. Warrior & Gulf Navigation Co.*, *supra* note 33.

³⁷*Warrior & Gulf* involved a broad arbitration clause encompassing differences as to the meaning and application of the agreement and an ambiguous exclusion from arbitration of matters that are strictly a function of management. *Id.* at 576. Worried about deciding the merits of the grievance, the Court held that the ambiguity created by a broad arbitration clause and uncertain exclusion warranted a presumption of arbitrability. It also noted that a clearer exclusion would have been effective.

³⁸*See, e.g., Magnavox Co. of Tenn. v. Electrical Workers (IUE)*, 287 F. Supp. 47, 68 LRRM 2846 (E.D. Tenn. 1968) (where the agreement prevented the arbitrator from entering an award regarding disciplinary action for failure to perform assigned job tasks except where performance would have created a serious health hazard).

³⁹*See, e.g., Torrington Co. v. Metal Prods. Workers Local 1645*, 362 F.2d 677, 680, 62 LRRM 2495 (2d Cir. 1966) (where the court read the language as a mandate that the arbitrator stay within "the confines of the agreement" and refrain from expanding its "express terms on the basis of the parties' prior practice").

⁴⁰*See id.*

judicial intervention. The famous *Torrington*⁴¹ case is an example. There the employer discontinued the 20-year-old policy of granting employees paid time off for voting before the agreement expired. During the next round of negotiations the employer stated its intention not to reinstitute the practice and the union demanded the continuation of the practice. The new agreement did not contain a provision for paid time off for voting. When the employer did not grant paid time off for voting under the new agreement, the union grieved and the arbitrator found a contract violation. Reading the same contract, bargaining history, and past practice read by the arbitrator, the court disagreed with the arbitrator's finding of a violation and held that the arbitrator had exceeded his authority under the agreement. While commentators tend to agree with the Second Circuit that the *arbitrator's* decision was questionable in *Torrington*, they also argue that the arbitrator's error did not justify vacating the award under the *Trilogy*.⁴²

In my view, the Fifth Circuit's 1997 decision in *Bruce Hardwood Floors v. UBC, Southern Council of Industrial Workers Local 2713*,⁴³ is, like *Torrington*, a judicial disagreement with the arbitrator's interpretation of the agreement. In that case Sheila Dixon, a production employee asked her supervisor for leave "to take her truck to her daughter who needed it to go to the doctor."⁴⁴ Dixon's supervisor approved her request and learned from Dixon's fellow employee while Dixon was gone that she actually needed the time off to pay an electric bill. The next day she admitted to her supervisor that she had fabricated the story about her daughter's appointment. Dixon's supervisor then discharged her "for obtaining time off from work under false pretenses."⁴⁵ The agreement listed among the offenses that "will" result in immediate discharge without prior warning: "Stealing, immoral conduct, or any act on the Company premises intended to destroy property or inflict bodily injury."⁴⁶ It also listed as subject to progressive discipline absenteeism, tardiness, inefficiency or poor work performance, abuse of rest periods and lunch periods, and neglecting duty or failing to maintain work standards.

Finding the discharge unreasonable, the arbitrator found that Dixon had fabricated the story but held that the company should

⁴¹*Id.*

⁴²See Dunau, *Three Problems in Labor Arbitration*, 55 Va. L. Rev. 458 (1969); Aaron, *Judicial Intervention in Labor Arbitration*, 20 Stan. L. Rev. 41, 48-49 (1967).

⁴³103 F.3d 449, 154 LRRM 2207 (5th Cir. 1997).

⁴⁴*Id.* at 450.

⁴⁵*Id.*

⁴⁶*Id.* at 450 n.1, 154 LRRM at 2208 n.1.

have applied the progressive discipline provisions of the agreement rather than the discharge provisions. The district court enforced the award, but the court of appeals reversed.

Judge Garza, writing for the panel majority used, what he referred to as an “essence” test enunciated in a 1994 decision⁴⁷ that an arbitration award “‘must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. . . . [T]he award must, in some logical way, be derived from the wording or purpose of the contract.’”⁴⁸ Noting that deference to the arbitration award is inappropriate where the agreement expressly limits the arbitrator, the majority found that the award was not “‘derived from the wording or purpose of the contract.’”⁴⁹ The court cited the familiar “no authority to add to, amend or depart from the terms of the agreement”⁵⁰ as binding the arbitrator to the terms of the agreement. Next, the court cited the contractual provision mandating immediate discharge for immoral conduct as an express limitation on the arbitrator’s authority. Finally, the court concluded that “lying” is immoral conduct and said that the arbitrator’s refusal to uphold the discharge exceeded his authority.

Judge Benavides, a member of today’s panel of distinguished judges, wrote a dissent in *Bruce Hardware Floors* that demonstrates, I believe, the wisdom of *Enterprise Wheel*. The dissent first supplies factual detail that shows the arbitrator’s fidelity to his obligation under the agreement and the majority’s disagreement with the arbitrator as grounded in a different view (interpretation) of the contract. Dixon’s termination arose from an unpaid 45-minute absence from work. Her electricity had been disconnected because she had failed to pay the utility bill. She had planned to pay the bill at the end of the workday after she received her check, but learned that she would have no electricity for the entire weekend if she did not pay by noon. Dixon’s initial request to her supervisor was for 1 hour off for a personal reason. The supervisor demanded details about why she needed the time. Instead of admitting the embarrassing facts about her electricity bill, she said she needed to take her truck to her daughter who had a doctor’s appointment. The

⁴⁷*Executone Info. Sys. v. Davis*, 26 F.3d 1314 (5th Cir. 1994).

⁴⁸*Id.* at 1325 (quoting *Railroad Trainmen v. Central of Ga. Ry.*, 415 F.2d 403, 412, 71 LRRM 3042 (5th Cir. 1969)).

⁴⁹*Id.*

⁵⁰103 F.3d at 452.

supervisor told her that it would be an unexcused absence. She clocked out, paid the bill, and returned within 45 minutes.

At the time of her discharge the company told Dixon that she was being discharged for “obtaining a leave of absence under false pretenses.”⁵¹ Under the agreement, obtaining a leave of absence under false pretenses is not listed as a dischargeable offense but rather as a ground for loss of seniority. So the arbitrator reasonably concluded (as pointed out by Judge Benavides) that this reason given by the company for termination did not provide just cause for termination. Though the company continued to press the “obtaining a leave of absence under false pretenses” grounds as just cause on appeal, the majority did not rely upon that provision in its ruling.

The dissent argues that the majority substituted its own interpretation of the agreement for that of the arbitrator. Noting that neither the list of dischargeable offenses nor the list of progressive discipline offenses covered Dixon’s conduct, the dissent pointed out that both were nonexhaustive lists that allowed punishment for similar offenses. It was the arbitrator’s job, said the dissent, to determine whether Dixon’s conduct was more analogous to a dischargeable offense or a progressive discipline offense. And the arbitrator apparently decided that fabricating a story to get a 45-minute unpaid break to pay her electricity bill was more similar to a progressive discipline offense like absenteeism or abuse of a rest or lunch period than to any dischargeable offense. The dissent also pointed out that “lying” is not covered in the dischargeable offense provision and “immoral conduct” is not defined; therefore, in order for the majority to conclude that “lying” is “immoral conduct,” it must take an inferential step. For the dissent, this step constituted interpretation, which is not the court’s proper role.

Importantly, the dissent goes on to argue the plausibility of the arbitrator’s interpretation making the following points. Evaluating the term “immoral conduct” in the context of “stealing” and “any act on the Company premises intended to destroy property or inflict bodily injury,”⁵² also found in the provision, the arbitrator could have plausibly concluded that the category did not include Dixon’s offense. This is particularly true in light of the provision making “obtaining a leave of absence under false pretenses” a basis for loss of seniority but not discharge. The dissent noted that a

⁵¹*Id.* at 454.

⁵²*Id.* at 455.

different conclusion would have been required if the arbitrator had found that Dixon's lying was immoral conduct or lying had been specifically set forth in the provision.

The majority in *Bruce Hardwood Floors* challenged the dissent's claim that it was interpreting the term "immoral conduct" citing *Black's Law Dictionary* and saying that "by definition, lying is immoral conduct—that is, it is inconsistent with principles of morality."⁵³ In the very next footnote the majority notes the arbitrator's conclusion that the company should have applied progressive discipline policy to Dixon's conduct and criticizes the arbitrator's reasoning, saying that he did not specify which of the five progressive discipline offenses incorporated or implicated Dixon's lie.⁵⁴ The majority then asserted that it saw no similarity between lying and the five progressive discipline offenses. *Enterprise Wheel* reinforced by *Misco* seems pretty clearly to prevent just this sort of judicial standing in the interpretive shoes of the arbitrator in cases that test judicial resolve the most—cases where judges believe that arbitrators are wrong on the merits.

These criticisms of *Bruce Hardwood Floors* seem equally applicable to the *Houston Lighting & Power Co. v. Electrical Workers (IBEW) Local 66*,⁵⁵ and *Operating Engineers Local 351 v. Cooper Natural Resources*,⁵⁶ cases described in the Appendix, *infra*.

Interpretation as Review on the Merits

Part of the debate between the majority and dissent in *Bruce Hardwood Floors* focused on whether the majority's finding that Dixon's lie was "immoral conduct" under the contract constituted interpretation. Similarly, the panel in *Cooper Natural Resources* argued that the question of notice was not an issue of interpretation.⁵⁷ This raises a definitional issue that could be pivotal to a court's understanding of the limitations imposed by *Enterprise Wheel* in a given case.

Interpretation is a familiar characteristic of deductive reasoning from enacted rules such as those found in federal and state

⁵³*Id.* at 452 n.4.

⁵⁴*Id.* at n.5.

⁵⁵71 F.3d 179, 151 LRRM 2020 (5th Cir. 1995). See case summary in the Appendix, *infra*.

⁵⁶163 F.3d 916, 160 LRRM 2241 (5th Cir. 1999). See case summary in the Appendix, *infra*.

⁵⁷Implicit in these arguments is a recognition that "interpretation" involves a prohibited review of the merits.

legislation.⁵⁸ In the case of collective bargaining contracts, these rules take the form of private law enacted by the parties.⁵⁹ Professor Steven J. Burton defines interpretation as follows:

Interpretation, in a narrow sense, is the intellectual process of giving meaning to linguistic symbols, such as the words or combinations of words that are found in legal rules. Certain common problems of language make interpretation necessary. Few, if any, words have one and only one meaning so that they refer to some object in the world with certainty. Proper names come closest to that ideal. Most words, however, suffer from a lack of clarity in one or more of several ways. Words may have two or more identifiable meanings . . . Such words are called *ambiguous*. Words may have meanings that shade continuously from one to another with no line of demarcation . . . Such words are called *vague*. And groups of words in a sentence may cause similar clarity problems. . . . Such a lack of clarity may be called *sentence ambiguity*. All three kinds of unclear meaning can require interpretation of a legal rule.⁶⁰

Burton notes that while definitions of such words may “narrow the scope” of interpretive problems, they typically insert a new layer of generality that requires further interpretation. He observes that other source materials such as reading the statute (contract) as a whole and considering legislative (negotiating) history, legal history, historical, economic, and social circumstances also aid the process of interpreting legal rules.

In *Enterprise Wheel*,⁶¹ the Court emphasized the primacy of arbitral interpretation of the agreement, noting the appellate court’s error in refusing to enforce the award in that case because of its disagreement with the arbitrator’s construction of the agreement. Even in the language limiting the arbitrator to an interpretation of the agreement, the court conceded the arbitrator’s discretion to look for guidance from sources outside the agreement in this interpretive enterprise. In affirming the arbitrator’s exclusive jurisdiction to interpret the agreement the Court chose the following language:

[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator’s construction which was bargained for; and so far as the arbitrator’s decision con-

⁵⁸ See Burton, *Law and Legal Reasoning*, 2d ed. (Little, Brown 1995), at 25–58.

⁵⁹ *Id.* at 43.

⁶⁰ *Id.* at 52 (emphasis in original).

⁶¹ *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

cerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.⁶²

The question of whether Dixon's lie to secure an excused absence in order to pay a utility bill was "immoral conduct" involved the process of supplying meaning to an otherwise unclear contractual rule. This involved an assessment of the parties' intention using source materials such as the full context of the agreement and negotiating history. The majority's opinion challenges and ultimately disagrees with the arbitrator's interpretation of the agreement. Its refusal to enforce on that basis contravenes the clear directive of *Enterprise Wheel*.⁶³

Similarly, whether the language "subject to an employee's right to assert a grievance" in *Houston Lighting & Power*⁶⁴ entitled the employee to the arbitrator's reevaluation of his qualifications vis-à-vis a junior employee is a question of interpretation. The court went so far as to disapprove of the arbitrator's use of his experience in other arbitrations as source material in interpreting the relevant language. A telling point in the court's reasoning is its express conviction that "[t]he company has the exclusive right to make the employee qualification determinations."⁶⁵ Such an assertion is strangely reminiscent of the Academy debate in Volumes 9 and 22 between Jim Phelps and Charles Killingsworth, regarding "reserved rights" and "shared sovereignty" views of management rights.⁶⁶ Philosophical differences not only inform arbitral interpretation of ambiguous contractual provisions, they also influence party decisions about arbitrator selection. *Enterprise Wheel* contemplates that the parties' choices about arbitral interpretation will not be nullified by the courts.

Finally, the question of whether the grievant received notice of the drug policy in *Cooper Natural Resources* seems to be a garden

⁶²*Id.* at 599.

⁶³As several commentators have noted, the question of whether the contract in *Torrington Co. v. Metal Prods. Workers Local 1645*, 362 F.2d 677, 62 LRRM 2495 (2d Cir. 1966), gave employees the right to paid time off for voting involved a similar problem of interpretation. See Aaron, *Judicial Intervention in Labor Arbitration*, 20 Stan. L. Rev. 41 (1967).

⁶⁴*Houston Lighting & Power Co. v. Electrical Workers (IBEW) Local 66*, *supra* note 55.

⁶⁵*Id.* at 184. See case summary in the Appendix, *infra*.

⁶⁶Phelps, *Management's Reserved Rights: An Industry View*, in *Management Rights and the Arbitration Process*, Proceedings of the 9th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books 1956); Killingsworth, *The Presidential Address: Management Rights Revisited*, in *Arbitration and Social Change*, Proceedings of the 22nd Annual Meeting, National Academy of Arbitrators, eds. Somers & Dennis (BNA Books 1970).

variety interpretation issue. If notice is a part of the just cause rule, the factual question of whether the circumstances of promulgation gave notice to the grievant is a classical problem of discerning the meaning of a rule in specific factual context. That the arbitrator may be wrong should not be dispositive.⁶⁷

U.S. Postal Service. Having critiqued the *Bruce Hardware Floors* decision and by reference the *Houston Lighting & Power* and *Operating Engineers Local 351 v. Cooper Natural Resources* decisions, I think it is important to point out that the Fifth Circuit declines to enforce some arbitration awards in decisions that seem correctly decided. For example, the decision in *U.S. Postal Service v. Postal Worker*,⁶⁸ authored by today's distinguished panelist Judge Wiener, seems to be on firm footing in holding that the arbitrator's award exceeded a jurisdictional limitation.

In that case the grievant, a postal distribution clerk, was injured in a work-related accident during his 90-day probationary period as a new employee. The employee's supervisor had said in his 30-day evaluation that he was not meeting expectations but had not terminated him at the time of his accident. As a result of the accident, the employee was placed on compensable leave under the Federal Employees' Compensation Act (FECA).⁶⁹ The Postal Service fired the employee on the grounds of unsatisfactory performance while he was on compensable leave.

Article 12.1.A of the National Agreement between the Postal Service and the Postal Workers provides as follows:

The probationary period for a new employee shall be ninety (90) days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these *probationary employees shall not be permitted access to the grievance procedure in relation thereto.*⁷⁰

The agreement also incorporated the FECA, which protects employees (probationary and nonprobationary) who suffer work injuries with a right to resume employment upon overcoming an injury or disability within 1 year. Another provision permitted submission of arbitrability disputes to arbitration and provided that the arbitrator's determination "shall be final and binding."

⁶⁷ *Operating Eng'rs Local 351 v. Cooper Natural Resources*, *supra* note 56. See case summary in the Appendix, *infra*.

⁶⁸ 922 F.2d 256, 136 LRRM 2334 (5th Cir. 1991).

⁶⁹ 5 U.S.C. §§8101 et seq.

⁷⁰ 922 F.2d at 258 (emphasis in original).

Following the discharge, the union filed a grievance on the employee's behalf, which led to arbitration. The arbitrator found the dispute to be arbitrable and the agreement violated. He ordered reinstatement of the employee as a probationary employee with full back pay.

The Fifth Circuit affirmed the district court's vacation of the award, finding the restriction of the grievance procedure to nonprobationary employees in Article 12 to be a specific limitation on the arbitrator authority. The court used the well-known principle of contract construction—specific provisions govern where they conflict with general ones—to find that the restriction trumped the general FECA protective provisions covering nonprobationary employees and the arbitrability provision. Probationary employees were required to press their FECA claims before the Merit System Protection Board rather than the arbitrator. The jurisdictional restriction prevented the arbitrator from even considering the arbitrability issue, the court held.

It is certainly arguable that the coexistence of the exclusion for probationary employees and the FECA provision created an ambiguity on the question of access to the grievance procedure for probationary employees asserting FECA claims that only the arbitrator could resolve. However, the combination of a clear exclusion of probationary employees from the grievance procedure and the availability of the Merit System Protection Board to hear the FECA claims of probationary employees constitutes strong evidence of the parties' exclusionary intent. The same favorable assessment seems applicable to the *Delta Queen Steamboat Co. v. Marine Engineers District 2*,⁷¹ and *Container Products v. Steelworkers*,⁷² cases set forth in the Appendix, *infra*.

Statistics

Authors Samuel Estricher and Michael Harper have reported that less than 1 percent of private-section arbitration awards are appealed.⁷³ The statistics do reveal that most appeals are not successful.

⁷¹889 F.2d 599, 133 LRRM 2077 (5th Cir. 1989). See case summary in the Appendix, *infra*.

⁷²873 F.2d 818, 131 LRRM 2623 (5th Cir. 1989). See case summary in the Appendix, *infra*.

⁷³Estricher & Harper, *Cases and Materials on the Law Governing the Employment Relationship* (The West Group, 2d ed. 1993).

This combination of a minuscule number of appeals and enforcement of a substantial majority of those awards that are appealed suggests that the finality of arbitration awards has been firmly rooted since *Enterprise Wheel*.⁷⁴ However, cases like *Bruce Hardwood Floors*⁷⁵ support a growing concern about judicial encroachment upon arbitration. The Barron data⁷⁶ focusing on approximately 11 years of post-*Misco* cases show that 73.97 percent of the appealed awards were enforced and only 26.03 percent were overturned. However, an examination of each of the circuits shows that these percentages vary greatly among circuits from a low of 10.53 percent overturned in the Tenth Circuit to a high of 42.86 percent in the Fifth Circuit. The data also show no particular relationship between number of cases and reversal percentages with both the highest volume Second Circuit and the lowest volume District of Columbia Circuit reversing at a rate of between 16 percent and 17 percent.

Evaluating the Fifth Circuit as a microcosm of this phenomenon, the court reviewed 35 cases and overturned 15 (42.86 percent) during the period of the study. Of the 15 decisions overturning arbitration awards, 2 involved determinations that the awards violated public policy (drug use), 2 involved arbitrator misconduct (improper exclusion of evidence), and 11 involved determinations that the award exceeded the arbitrator's authority under the contract. These 15 cases include both district and appellate court decisions. In fact, federal district courts made 6 of the 15 decisions.

Limiting this analysis to the six circuit court decisions that are based on the arbitrator's authority, it appears that the greatest threat to the finality of arbitration awards under *Enterprise Wheel* in the Fifth Circuit comes from two sources. First, the *Executone* restatement of the "essence review" standard as follows:

[A]n arbitration award "must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement The award must, in some logical way, be derived from the wording or purpose of the contract."⁷⁷

⁷⁴*Steelworkers v. Enterprise Wheel & Car Corp.*, *supra* note 61.

⁷⁵*Bruce Hardwood Floors v. UBC, Southern Council of Indus. Workers Local 2713*, 103 F.3d 449, 154 LRRM 2207 (5th Cir. 1997).

⁷⁶These data are from the initial findings of an empirical study, by Paul Barron, of all cases in which the final award of a labor arbitrator has been reviewed by a district or circuit court since the December 1, 1987, *Misco* decision (*Paperworkers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1987)). The data do not indicate the number of private-sector arbitration awards that are appealed to the federal courts.

⁷⁷*Executone Info Sys. v. Davis*, 26 F.3d 1314, 1325 (5th Cir. 1994) (quoting *Railroad Trainmen v. Central of Ga. Ry.*, 415 F.2d 403, 412, 71 LRRM 3042 (5th Cir. 1969)).

This standard seems to invite reversals based on disagreements with the arbitrator's reasoning.

Second, the language from *Houston Lighting & Power*⁷⁸ that recurs in *Bruce Hardwood Floors* and *Cooper Natural Resources*⁷⁹:

[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.⁸⁰

More than a merely descriptive statement, this observation seems to reflect a judicial mood toward intervention. When the language appears in a case like *Cooper*, where the "express" contractual provision that the court says is violated is not discussed or even noted, it seems to justify disagreements about interpretation. And while the court in *Cooper* says that the question of whether the grievant had notice of the drug policy was not an issue of interpretation, the conclusion is not obvious and the court offers no supporting explanation.⁸¹

Conclusion

Judge Harry T. Edwards pointed out in an article that he wrote in 1985 that the values and personal views of judges are much more likely to be interjected into deciding hard cases, where no clear rules govern or no clear application of the law can be discerned.⁸² That point seems particularly applicable to the law of judicial review of labor arbitration awards, where the standard is not without ambiguity. A judge's personal and philosophical views on labor relations or judicial review in general are likely to influence decisions to review the merits of labor arbitration awards in hard cases.

In the context of judicial review of arbitration awards, hard cases are those involving arbitral authority where the arbitrator traverses no specific jurisdictional limitations in the contract and the judge's sense of justice is piqued by disagreement with the arbitrator's decision on the merits. Yet, it is precisely in those cases that the *Trilogy* and *Misco* require judicial restraint.

⁷⁸*Houston Lighting & Power Co. v. Electrical Workers (IBEW) Local 66*, 71 F.3d 179, 151 LRRM 2020 (5th Cir. 1995).

⁷⁹163 F.3d 916, 160 LRRM 2241 (5th Cir. 1999).

⁸⁰71 F.3d at 182 (quoting *Delta Queen Steamboat Co. v. Marine Eng'rs Dist. 2*, *supra* note 71, at 604).

⁸¹See text accompanying *supra* note 67 and case summary in the Appendix, *infra*.

⁸²Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. Colo. L. Rev. 619, 630-33 (1985).

APPENDIX

FIFTH CIRCUIT DECISIONS SINCE *MISCO*
REFUSING TO ENFORCE AWARDS UNDER
THE “ESSENCE” STANDARD**1. Container Products v. Steelworkers Local 5651**
873 F.2d 818, 131 LRRM 2623 (5th Cir. 1989) (Johnson, J.)

The agreement provided: “[s]hould it be determined by the arbitrator that an employee has been suspended or discharged for proper cause therefor, the arbitrator shall not have jurisdiction to modify the degree of discipline imposed by the Company.” (*Id.* at 818–19). Without specifically making a finding on the issue of just cause, the arbitrator reinstated an employee who had been discharged for disputing a work assignment with his foreman, noting that the alternative remedy might well “promote good labor relations.” Focusing on whether the “jurisdictional prerequisite” had been satisfied and not the merits, the court found that the arbitrator implicitly found just cause for dismissal. The court of appeals affirmed the district court’s vacation of the arbitration award, agreeing that the arbitrator exceeded his authority by finding just cause for the discharge and modifying the remedy.

2. U.S. Postal Service v. Postal Workers
922 F.2d 256, 136 LRRM 2334 (5th Cir. 1991) (Weiner, J.)

The grievant, a postal distribution clerk, was injured in a work-related accident during his 90-day probationary period as a new employee. The employee’s supervisor had said in his 30-day evaluation that he was not meeting expectations but had not terminated him at the time of his accident. As a result of the accident the employee was placed on compensable leave under the Federal Employees’ Compensation Act (FECA) (5 U.S.C. §§8101 et seq.). The Postal Service fired the employee on the grounds of unsatisfactory performance while he was on compensable leave. Article 12.1.A of the National Agreement between the Postal Service and APWU provides as follows:

The probationary period for a new employee shall be (90) days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these

probationary employees shall not be permitted access to the grievance procedure in relation thereto. [922 F.2d at 258.]

The agreement also incorporated the FECA, which protects employees (probationary and nonprobationary) who suffer work injuries with a right to resume employment upon overcoming an injury or disability within one year. Another provision permitted submission of arbitrability disputes to arbitration and provided that the arbitrator's determination "shall be final and binding." Following the discharge the union filed a grievance on the employees behalf, which led to arbitration. The arbitrator found the dispute to be arbitrable and the agreement violated. He ordered reinstatement of the employee as a probationary employee with full back pay.

The Fifth Circuit affirmed the district court's vacation of the award, finding the restriction of the grievance procedure to nonprobationary employees in Article 12 to be a specific limitation on the arbitrator's authority. The court used the well-known principle of contract construction—specific provisions govern where they conflict with general ones—to find that the restriction trumped the general FECA protective provisions covering nonprobationary employees and the arbitrability provision. Probationary employees were required to press their FECA claims before the Merit System Protection Board rather than the arbitrator. The jurisdictional restriction prevented the arbitrator from even considering the arbitrability issue.

3. Delta Queen Steamboat Co. v. Marine Engineers District 2 889 F.2d 599, 133 LRRM 2077 (5th Cir. 1989) (Smith, J.)

The captain of a passenger excursion vessel carrying 350 passengers from New Orleans to Memphis was discharged for a near-miss incident involving a tow of river barges near Mason's Landing on the Mississippi River. The captain had attempted to overtake the tow despite the tow operator's advice to the captain that the tow's position was unstable and that it would be unsafe for the excursion vessel to overtake the barges. The agreement stated in part that "[n]o Officer shall be discharged except for *proper cause* such as, but not limited to, inefficiency, insubordination, *carelessness*, or disregard of the rules of the Company." (*Id.* at 601; emphasis in original). The arbitrator found that the captain had been "grossly negligent" but reinstated him without loss of seniority and with most of his back pay.

Though the arbitrator did not make an express finding of proper cause, the court found that the finding of “gross carelessness” amounted to such a finding.

In affirming the district court’s vacation of the award, the court said the following:

[W]here an arbitrator fails to make an express finding of proper cause, he nevertheless will be so bound if he finds that the employee committed certain underlying acts that constitute proper cause under the collective bargaining agreement. [*Id.* at 604.]

**4. Houston Lighting & Power Co. v. Electrical Workers
(IBEW) Local 66
71 F.3d 179, 151 LRRM 2020 (5th Cir. 1995)
(Demos, J., Lay, J., dissenting)**

The grievant, a heavy equipment operator at one of the Houston Lighting & Power facilities in Texas, was terminated in a reduction in force of 1,100 workers. The union grieved the termination as a violation of the agreement, because Houston Lighting had retained less senior employees. Though the union challenged both the evaluation process and its application to the grievant, the arbitrator found that the evaluation process was facially valid but unreasonably applied to the grievant. The arbitrator reached this conclusion by determining that the grievant “should have received the same credit for low absenteeism as was assigned another [employee]” (*id.* at 183) and should have “been awarded credit for having trained others as was given to [another employee].” (*Id.*) Following the arbitrator’s independent evaluation and reassessment of the grievant’s qualifications, the arbitrator found that the grievant deserved a higher rating under the seniority provision and should not have been laid off. He ordered reinstatement and back pay.

Houston Lighting sought to overturn the award in federal district court and the judge upheld the award. The company then appealed to the Fifth Circuit. The only issue in the Fifth Circuit was whether the arbitrator exceeded his authority when he reevaluated the grievant’s qualifications and recalculated his performance rating. The agreement contained an antidiscrimination provision; a standard arbitration clause encompassing disputes involving the proper application or interpretation of the agreement or unjust discrimination claims; a clause limiting the arbitrator to determin-

ing the proper application and interpretation of the agreement and prohibiting the arbitrator from changing, amending, or modifying the agreement; a management rights clause; and the following seniority provision:

Seniority. . . . In the event of . . . layoffs, or a permanent reduction in the working force at the facility, where ability, skill and qualifications are equal, length of service at that facility shall govern. . . . The Company shall determine ability, skill and qualifications, subject to an employee's right to assert a grievance under Article II. [*Id.* at 182.]

The Fifth Circuit focused on the question of whether the language "subject to an employee's right to assert a grievance" (*id.*) in the seniority provision entitled the arbitrator to determine an employee's qualifications instead of the company. In upholding the award the district court had relied in part on the representation of Houston Lighting's counsel that the arbitrator's sole function was "to determine whether the Union or [Houston Lighting] was correct in deciding that [the grievant] was less qualified than the junior employees whom [Houston Lighting] retained over him." (*Id.* at 183). The district court had concluded that the arbitrator had done precisely that. Drawing strong criticism from the dissent, the circuit court majority refused to rely on counsel's representation, calling them inaccurate and voicing reluctance "to rely upon what appears to be an obvious misstatement by counsel to support a decision which is adverse to that counsel's client." (*id.* at 183 n.4). The Fifth Circuit held that the arbitrator's reevaluation of the grievant's qualifications did not draw its essence from the agreement. The majority reasoned as follows:

The phrase "subject to an employee's right to assert a grievance" does not mean that the Company loses its right to make the qualification determination once an employee asserts a grievance. That phrase does not confer upon the arbitrator the right to make a *de novo* determination of the employee's qualifications. It is important to note that nothing in the Article II, Section I definition of "a grievance" can be rationally interpreted to include the concept that a grievance includes a claim that an employee has been unfairly or incorrectly evaluated for lay off. Furthermore, the arbitrator's reliance upon his experience and practice in other arbitrations in the "federal public sector" is clearly outside the language of the Agreement. The right to make the ultimate determination remains with the Company.

If the language of the agreement is clear and unequivocal, an arbitrator is not free to change its meaning. . . . The company has the exclusive right to make the employee qualification determinations. Nowhere in the Agreement does it state that redetermination shall be

made by the arbitrator. If the arbitrator had found that the evaluation process was not consistent with the Agreement, then the Arbitrator should remand the matter to the Company so that *the Company* can make the re-determination of the employee's qualification under another valid process.

By performing his own re-evaluation, the arbitrator went beyond the scope of his authority, and beyond the parties' contractual agreement. [*Id.* at 184; citation omitted; emphasis in original].

Judge Lay in his dissent makes five points. First, by not affirming the district court's reliance on the representations of company counsel, the majority disserves the policy of conserving judicial resources, undermines the authority of the district court, and creates uncertainty about whether the district court may rely on the representations of counsel. Second, company counsel was correct in framing the issue before the arbitrator as determining whether the company was correct in concluding that the grievant was less qualified than junior employees, based on the seniority, grievance definition, and arbitral function provisions of the agreement. Third, the arbitrator's language showed that his award relied upon the seniority provision and, therefore, that the arbitrator was acting within the scope of his authority. Fourth, the dissent criticizes the majority's acceptance of the company's view that the agreement's silence on the arbitrator's authority to reevaluate an employee's qualifications deprived the arbitrator of the authority to order reinstatement and back pay. He reiterates the *Misco/Enterprise Wheel* teaching that the arbitrator's informed judgment is especially needed in formulating remedies. (*Paperworkers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1987); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).) Fifth, the dissent takes issue with the majority's inference of no authority from the absence of an explicit requirement that the arbitrator redetermine employee qualifications. The dissent points to the language in *Enterprise Wheel* charging that a refusal to uphold the award of reinstatement and back pay in that case because of the absence of contractual language authorizing such a remedy would constitute a review on the merits.

**5. Bruce Hardwood Floors v. UBC, Southern Council of
Industrial Workers Local 2713
103 F.3d 449, 154 LRRM 2207, revised by 1997 U.S.
App. Lexis 12687 (5th Cir. 1997) (Garza, J.)**

In that case Sheila Dixon, a production employee asked her supervisor for a leave “to take her truck to her daughter who needed it to go to the doctor.” (*Id.* at 450). Dixon’s supervisor approved her request and learned from Dixon’s fellow employee while Dixon was gone that she actually needed the time off to pay an electric bill. The next day she admitted to her supervisor that she had fabricated the story about her daughter’s doctor’s appointment. Dixon’s supervisor then discharged her “for obtaining time off from work under false pretenses.” (*Id.*) The agreement listed among the offenses that “will” result in immediate discharge without prior warning: “Stealing, immoral conduct, or any act on the Company premises intended to destroy property or inflict bodily injury.” (*Id.* at 450 n.1) It also listed as subject to progressive discipline absenteeism, tardiness, inefficiency or poor work performance, abuse of rest periods and lunch periods, and neglecting duty or failing to maintain work standards.

Finding the discharge unreasonable, the arbitrator found that Dixon had fabricated the story but held that the company should have applied the progressive discipline provisions of the agreement rather than the discharge provisions. The district court enforced the award, but the court of appeals reversed. Judge Garza writing for the panel majority used what he referred to as an “essence” test enunciated in a 1994 decision (*Executone Info Sys. v. Davis*, 26 F.3d 1314, 1325 (5th Cir. 1994)), that an arbitration award “‘must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. . . . [T]he award must, in some logical way, be derived from the wording or purpose of the contract’” (*id.* at 1325, quoting *Railroad Trainmen v. Central of Ga. Ry.*, 415 F.2d 403, 412, 71 LRRM 3042 (5th Cir. 1969)). Noting that deference to the arbitration award is inappropriate where the agreement expressly

limits the arbitrator, the majority found that the award was not “derived from the wording or purpose of the contract.” (*Id.*) Citing the contractual provision mandating immediate discharge for immoral conduct as an express limitation on the arbitrator’s authority, the court concluded that “lying” is immoral conduct and said that the arbitrator’s refusal to uphold the discharge exceeded his authority.

Judge Benavides wrote a dissent that first supplied greater factual detail tending to show the arbitrator’s fidelity to his obligation under the agreement and then argued that the majority substituted its own interpretation of the agreement for the arbitrator’s interpretation. Most notably the dissent pointed out that “lying” is not covered in the dischargeable offense provision and “immoral conduct” is not defined; therefore, in order for the majority to conclude that “lying” is “immoral conduct,” it must make an inferential step. That step in the dissent’s view constituted interpretation, which is not the court’s proper role.

**6. Operating Engineers Local 351 v.
Cooper Natural Resources
163 F.3d 916, 160 LRRM 2241 (5th Cir. 1999) (Stewart, J.)**

The company produces sodium sulphate, a mineral used in detergents, at its facility in Sea Graves, Texas. The manufacturing process is inherently dangerous, and the company has an extensive safety policy and training program. The 1993 agreement ratified by Operating Engineers members incorporated by reference an alcohol and drug policy requiring submission to periodic, random drug tests, including during annual physicals. During a random drug screening conducted at an annual physical a 14-year employee tested positive for barbiturates. The company decided to discharge the employee, but the union negotiated a last chance agreement (LCA) on the employee’s behalf. Immediately following the execution of the LCA the union filed a grievance requesting that the LCA be set aside. The matter proceeded to arbitration.

The arbitrator’s sole function under the agreement was to determine whether Cooper Natural Resources or the union was correct with reference to the proper application and interpretation of the agreement. The arbitrator had no “authority to change, modify, amend, or supplement” the agreement. (*Id.* at 918) At the arbitration the union conceded that the grievant had tested positive but argued that he should not have been disciplined because

he lacked notice of the drug policy. The company introduced two memoranda showing that the employees had been given notice of the policy when it was enacted in 1992 and incorporated into the agreement. The arbitrator held that the grievant had not been given notice of the drug policy, because the policy had not been attached to the memoranda. He ordered the LCA set aside and the grievant be made whole.

The district court vacated the award holding that it was contrary to express contractual provisions and that the notice question was not an interpretation issue for the arbitrator to determine. The court of appeals affirmed reiterating the language from *Delta Queen* (*Delta Queen Steamboat Co. v. Marine Engr's District*, 889 F.2d 599, 133 LRRM 2077 (5th Cir. 1989)) that "arbitral action contrary to express contractual provisions will not be respected" (163 F.3d at 919, quoting *Delta Queen Steamboat Co. v. Marine Engr's Dist. 2, supra*, at 604) and holding that the arbitrator's finding of no notice "ignored the plain language of the contract." (163 F.3d at 919) Based on the grievant's ratification of the 1993 agreement, his receipt of memorandum, and his consent to have his urine sampled, the court (disagreeing with the arbitrator) found that the grievant had effective notice. Finally, the court held that the LCA superseded the agreement and said that "an arbitrator ignoring the explicit terms of a last chance agreement is owed no deference." (*Id.*) The Court concluded:

By ignoring the LCA and substituting his own impressions in the arbitration, the arbitrator fundamentally ignored his responsibility to construe the parties' agreements in an evenhanded way. (*Id.* at 920).

Comment

JAMES SHERMAN, MODERATOR*
W. EUGENE DAVIS
JACQUES L. WIENER, JR.
FORTUNATO P. BENAVIDES

Judge W. Eugene Davis: First I want to disabuse anybody of the idea that I have any special expertise in this field. As a matter of fact,

*James Sherman, Member, National Academy of Arbitrators, Tampa, Florida; W. Eugene Davis, Circuit Judge, U.S. Court of Appeals for the Fifth Circuit, LaFayette, Louisiana; Jacques L. Wiener, Jr., Circuit Judge, U.S. Court of Appeals for the Fifth Circuit, New Orleans, Louisiana; Fortunato P. Benavides, Circuit Judge, U.S. Court of Appeals for the Fifth Circuit, Austin, Texas.

I think that the Supreme Court has taken four cases I've written opinions in, two of which were labor cases, and they reversed me on both of them, so my value on the panel may be if you've got an issue you want to get to the Supreme Court try to get me on your panel. I'll just wait for questions.

James Sherman: Judge Davis let me ask you this question. I understand you have something to do with assigning judges. Is there any attempt to get a judge who has a particular expertise in labor, for example, to hear a case on labor.

Judge W. Eugene Davis: We make great efforts to avoid that. All of our cases are assigned strictly at random. One person in our clerk's office picks. Say we have 100 cases in inventory ready for argument, and we have three panels, each is going to have a docket of 20 cases. She'll pick three dockets of 20 cases and then someone else matches those dockets with the three-judge panel. So it's just completely at random.

Judge Jacques L. Wiener, Jr.: I'm with Judge Davis as far as the total absence of expertise in this area, and maybe that correlates with the way it should be. The statistics show that since 1987, when *Misco*¹ was decided, we've had only 35 labor arbitration cases. Not all of them were in our court, so we have almost no experience on the court with these kinds of cases. That too is apparently the way it's supposed to be. I have the feeling that the title of our panel today, "Judicial Review of Labor Arbitration Awards," is considered by almost everyone in the room to be an oxymoron; there just shouldn't be any. We'll see how that works out and wait for the questions.

Judge Fortunato P. Benavides: I'm from Texas and we do have some labor unions. But it's not the most receptive state. I'm from South Texas, about 8 miles from the border, far away from Houston and Dallas, where we have even fewer traditional labor-management collective bargaining agreements that provide for arbitration. So if Judge Davis and Judge Wiener don't have a strong background in labor law in this area, you can imagine a fellow from the orange groves in Mission, Texas, winding up on the Fifth Circuit reviewing these cases.

Luckily for us, the Supreme Court has articulated a preference for arbitration and a preference for nonreview. So I don't think

¹*Paperworkers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1987) (award may be held to be in excess of arbitrator's power if it violates a well-defined and dominant public policy as ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest).

that the field of law really gets us in a position where we're really going to have a whole lot of disputes about the law. There's very little controlling law out there. And there's some pretty specific principles that we're supposed to apply. Insofar as we have differences, I guess we have differences because of our perspectives about that law. But not because, as I view the cases, that we have great disputes about the law. That being said, I think I'll wait for the questions.

James Sherman: I'll entertain questions from the floor. Do we have microphones out there? I invite you to come up and ask questions. This is a wonderful opportunity to ask the judges questions.

Question: One of the things that is particularly required of labor arbitrators is expertise in that field. Why do you think the *tabla rosa* approach is the best thing?

Judge Jacques L. Wiener, Jr.: The whole concept of the federal judiciary is that we are generalists and we don't have specialized courts. We don't have a court of appeals for bankruptcy cases, and a court of appeals for personal injury cases, or criminal cases. The idea is that you have somebody who can have a good overview. I suppose the idea is that we can see the forest apart from the trees. You know whether that's the right approach, you can make as good a judgment as I can, but that's the idea.

Question: Judge Benavides, when the *Bruce Hardwood Floors*² case was working its way through decision, I'm interested in knowing how the dialogue worked. When you decided to dissent, was there a conference where you talked it over?

Judge Fortunato P. Benavides: That particular case followed the normal procedure. Prior to argument, we read briefs, read record excerpts. I think in that case Judge Barksdale³ and I exchanged memos. Judge Garza⁴ and I exchanged memos. It varies from court to court. We heard the arguments and, in all cases, we had a postargument discussion where the judges noted their tentative views and general feelings about how the case should go. In some cases, it's very firm and in some cases it's very tentative. In some cases it's open.

²*Bruce Hardwood Floors v. UBC, Southern Council of Indus. Workers Local 2713*, 103 F.3d 449, 154 LRRM 2207 (5th Cir.), *cert. denied*, 522 U.S. 928, 156 LRRM 2608 (1997).

³Rhesa Hawkins Barksdale, Circuit Judge, U.S. Court of Appeals for the Fifth Circuit.

⁴Emilio M. Garza, Circuit Judge, U.S. Court of Appeals for the Fifth Circuit.

I think it's clear from the opinion that two of the judges had a strongly held belief that this type of activity relating to a false reason for an extended lunch period was just plain immoral. I can't remember specifically, I know that there was a majority opinion written by Judge Garza. I dissented. Then there was a response to that and I added something back. We changed it two or three times before it came up. So it's fairly standard in that respect.

Question: The one thing that took our attention from amongst the comments of the judges was precisely, and it was Judge Davis who first said it, apart from being modest about lack of expertise, that expertise in labor relations was not something looked for in establishing a judicial panel.

Unidentified Judge: That's right, but I think there's a certain false modesty, if I may say so. Judges, like arbitrators, are not experts in the particular subjects that are being laid out before them in the evidence in any particular case. However, all adjudicators should have a degree of expertise. If they're lucky, they will develop quite a lot of experience in analyzing the matters before them and thinking them through. There may be a little confusion between the notion of expertise in labor relations and the appropriate readiness in having someone decide a case who has already developed a specific ideological approach to the decision of that matter, so that independent thinking is not quite the same thing as lack of expertise.

Question: I was surprised by the statistics. I've done a similar survey the last 2 years and found about 35 percent of cases overturned, which seemed surprising in light of the Supreme Court's emphasis on finality. Looking at the statistics, it's apparent that in many courts of appeals, most of the reversal is done by the court of appeals itself not by the district court. It prompted me to wonder how these statistics compare with the reversal rate of judges. I would have been surprised if district courts were overturned 35 percent of the time, and if arbitrators are overturned 35 percent of the time and even 26 percent of the time. It would suggest to me an indication that the courts of appeals feel arbitrators are doing a poor job, then district court judges also, in getting it right the first time, even recognizing that only 1 percent of the cases are actually appealed.

Paul Barron: May I say something about the statistics since I put them together? What I did was to show the final opinion in the case. So it may well be that the circuit court is affirming a district court's reversal of the arbitrator. In many cases that is so. It's not a

suggestion that the district court affirmed the arbitrator and then the circuit court overruled the arbitrator. That may have happened but what the numbers show was the final court in which an opinion was written on that particular case, so it doesn't mean that in every case the district court had gone one way and the circuit court had gone a different way.

Judge Jacques L. Wiener, Jr.: I think all of us know that when you start dealing with statistics without a lot more expertise than any of us have in that field, you can manufacture almost any conclusion you want out of them. There's no question that the reversal rate that we have overall is nothing like 42 percent, it's closer to 10–15 percent, and even that is misleading. What I think has to be done is put in the context what several of the speakers and questioners have noted, and that is when you start out with only 1 percent of the awards ever getting into the court system, you have to assume the parties are very wary about the cases they do bring. They're not going to waste their time or their money; they're going to keep their powder dry. So the cases that get here have been preselected, very much so. Even though I'm not an apologist for what we do as what Judge Davis called generalists, when we get one of these rare birds—what we think averages one a year since the *Misco* case—I don't think anything particularly strong can be read into it. Another statistic I would note. I think of the 12 circuits only 3 had fewer cases than we did; 1 tied us. Yet, behind the Ninth Circuit, we have the highest caseload of any circuit. We see very few, and that's because, as I say, they are preselected.

One of things we do have a heavy caseload on are discrimination cases that deal with the hostile workplace. We felt maybe we should experience one, so that's why we came today.

Question: A comment and a question. The comment refers to your comments about federal circuit judges being generalists. There's a quote, I think I'm attributing it properly to Woodrow Wilson and I think I have it substantially correct. He said that the business of modern government was the control of experts by men of ordinary ignorance.

Unidentified Judge: We have extraordinary ignorance.

It's apparent that arbitration in this country has widely divergent sources, one is labor arbitration under a collective bargaining agreement, growing out of *Lincoln Mills*⁵ and the *Steelworkers Tril-*

⁵*Textile Workers v. Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957) (National Labor Relations Act gives a party to a collective bargaining agreement the right to sue to compel arbitration).

ogy.⁶ The others are different kinds of arbitration under the Federal Arbitration Act⁷ and under state arbitration statutes dealing with employment claims and securities acts claims. I've seen arbitration in matrimonial matters, custodial matters, that have come before a federal court of appeals. They do present questions of reviewability.

Question: An arbitrator arbitrating disputes under a collective bargaining agreement has in mind the fact that his decision is an incident in an ongoing relationship between the parties. A commercial arbitration, even an employment arbitration, may not involve any continuing relationship; it may involve adjudication of statutory causes of action or common law ones. I'm wondering if you feel any difference in the scope of review and how you would articulate that difference if you see one.

Unidentified Judge: Scope of review in those cases as opposed to?

Unidentified Judge: Scope of review as compared with labor arbitration and all others, as opposed to commercial arbitration. I would include within commercial arbitration, employment arbitration such as a business executive who'd been fired and claims that he'd been discharged in violation of a personal employment contract and, in addition, in violation perhaps of the age discrimination act, state statutes, etc.

Judge Fortunato P. Benavides: Probably the biggest problem I have is the labor collective bargaining cases, arbitration cases that we get very few of. You have to take this in the context that we have thousands of cases and we hardly see any appeals from decisions by labor arbitrators. There are some presumptions there from the very beginning that we don't ordinarily have in other employment causes of action that wind up before us. The whole idea from the very beginning is that the employer can't fire someone without just

⁶*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-68, 46 LRRM 2414 (1960) (in reviewing questions of arbitrability, court is confined to ascertaining whether the party seeking arbitration is making a claim that on its face is governed by the contract); *Steelworkers v. Warrior & Gulf Navigation Co.* 363 U.S. 574, 582-83, 46 LRRM 2416 (1960) (arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute that the party had not agreed to arbitrate); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2423 (1960) (court must enforce an arbitration award even if the court disagrees with the arbitrator's interpretation of the contract, so long as the award "draws its essence from the collective bargaining agreement").

⁷9 U.S.C. §§1-301.

cause. From the very beginning you start out with the burden on an employer. It's a completely different situation when we have things coming out of the business sector and lawsuits about wrongful termination, where we're trying that from the very get-go. The person who is complaining has the burden of proof. The employer doesn't have to show he has just cause, especially in at-will states. The employee has the burden of proof in coming forward and showing that the employer did something wrong. I'm not too sure I'm answering your question. When you are talking about scope, I am interpreting it as kind of our perception. There are different perceptions that are involved depending upon the type of case that comes up. I think that the cases that come out of arbitration collective bargaining agreements cause us to have to change gears and start looking at things from a different perspective.

Judge Jacques L. Wiener, Jr.: Let me take another slightly different perspective on your question. In every case we hear, one of the first things we have to ask ourselves is what is the standard of review for this case. When we get to arbitration cases, this is rarely an appeal challenging a labor arbitration under a collective bargaining agreement. We look for the standard of review and whether it's the *Trilogy* or *Misco* or whatever, we try to form our framework from that. If we have an arbitration case that arises out of the construction industry normally that will be under the American Arbitration Association Rules and so specified. We take our standard of review from that. So if you're asking how do we treat collective bargaining in arbitration cases and the other arbitration cases, I think probably the best understanding is how we start our analysis for standard of review and look to the sources that provide the scope of review. So there will be a difference between the categories.

Judge W. Eugene Davis: My general impression is that black-letter law on the standard of review, if we're reviewing a securities case as opposed to a labor case, is fundamentally the same thing. I may be wrong on the law about that, that's just my impression, but we owe great deference to that arbitrator. Assuming the standard of review is the same, I would probably apply roughly the same deference to both arbitrators.

Question: As you know the *Misco* case involved drug abuse in the workplace. Notwithstanding the Supreme Court's decision in that matter, the most stunning reversals of arbitrator opinion have come in drug cases, including decisions rendered by the First Circuit, the Third Circuit, the Eleventh Circuit, the Ninth Circuit,

and the Fifth Circuit in the *Exxon*⁸ case. Judge Reinhardt on the Ninth Circuit has gone so far as to suggest that some of the reversals of arbitral opinions stem from a current judicial hostility toward the labor movement.

My own take on the situation is that there is not so much a current hostility toward the labor movement as there is toward lawlessness in the workplace. I think the problem that we see with respect to the dichotomy of views among the courts of appeals is that some of the courts seem to focus on whether the employee's misconduct violated public policy. Whereas other courts of appeals, particularly those that have upheld arbitration awards involving drugs and alcohol in particular, have focused on whether the arbitrator's award compelled the employer to violate public policy. In other words, it raises the question of whether, if you have an employee who smokes marijuana in the workplace, one, did the employer have to fire him in the first place, and two, if the employer is compelled to take him back, is there really a violation of public policy? The Supreme Court stopped short of deciding this issue in *Misco*. It acknowledged that the question hung out there but it never went so far as to say that an award will be upheld unless the award itself violates public policy, or compels the employer to violate public policy. In light of the dichotomy that still exists among the courts of appeals today, in interpreting the *Misco* standard, do you think the U.S. Supreme Court should bite the bullet and give us a clear standard of review, particularly with respect to these drug and alcohol cases?

Unidentified Judge: Yes, it would be nice, but they take so few cases. We have conflicts out there in lots of areas of law that we'd love them to take a case and straighten it out. I don't know what you do about it.

Judge Jacques L. Wiener, Jr.: I think you might have put your finger on something that is overarching not just this area that you've described as the drug-related public policy reversals in the various courts of appeals, but the preoccupation with the war on drugs, and drugs generally in the country affect not just this area, but virtually in every area that we are called upon to make decisions. If you want to see what the drug problem in the country has

⁸*Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850, 151 LRRM 2737 (5th Cir. 1996).

done, read our and the Supreme Court's cases on the Fourth Amendment Search and Seizure. There's virtually no Fourth Amendment within 50 miles of the border. So it's hard to look at any drug-related case and put that into the mix.

Question: I have a question down at the working level we might say for the guidance of arbitrators. Obviously, our long-time tradition has been that we decide cases on the basis of the record developed before us at the hearing. This is relatively easy to do and we are interpreting and applying the terms of collective bargaining agreement. Now that we are being pulled more and more into deciding matters of law, to what extent are we (1) entitled or (2) obligated to do legal research beyond that which the parties have presented to us in the course of the hearing and in their briefs. I can tell you that my bias in order to continue to keep arbitration expeditious and economical, is to decide those cases on the basis essentially of the record developed in front of me by the parties at the hearing, and, in their briefs, not to do a lot of independent, costly additional legal research before issuing my decision. I'd like the judges' view on that.

Judge W. Eugene Davis: Ordinarily, when a case is tried in a court, that's exactly what the court does. It tries a case based on the arguments by the parties and the evidence that the parties put in. That record is what comes to us on appeal. We look at it in that light: if a party didn't make a certain argument in the trial court, we ordinarily don't consider it. We see whether the trial judge made an error. If the issue wasn't argued to him, then we can't say it was an error. That's a proposition we generally start from. Let me say one thing about the way we operate. As everybody has noted, we get a stack of cases with a lot of variety. We get direct criminal appeals and we have bankruptcy cases, employment discrimination lawsuits, and, stuck in the middle of those, is a very rare appeal from an arbitration award. Ordinarily we get reasons from the judge whose opinion we're reviewing. In other words, a trial judge who writes and makes an order should explain it enough so that we can review it. We have the option of sending that case back, if the explanation is so vague or inadequate for us to be able to determine the reason he rendered his order. When we get one of the rare appeals from an award, you have to understand that that's our mindset. We ordinarily are reviewing judgments where we've got fairly detailed reasons. We go through those reasons and evaluate whether we think the judge made a mistake. I would just say from my vantage point when I see an award where the arbitrator has

given almost no reason for it and it is not apparent on the record, then my discomfort level is raised. It may be that after we get into it it becomes obvious what the reason was. The first thing I read is the decisionmaker's opinion. If it is not apparent to me that the judgment made follows from the problem in front of him, my discomfort level is raised. I know some of these awards are very brief or have almost no opinions. So I'm just telling you that because it is a different kind of document from what I'm accustomed to reviewing; it sticks out.

Question: I think that judge's last comments answer my question or confirm my opinion, but I would like to make a couple of further comments about that. I believe the caliber of the opinion has a lot of impact on the likelihood of reversal if the award is challenged. I note that the statistics on the reversals show 11 out of the 15 were reversed on excessive jurisdiction. So one might infer from that that there was a difference in opinion between the reviewing judge or judges and the arbitrator as to what the extent of that authority was. My personal practice when I write an award, particularly if I suspect that it's of a nature that one party or the other might want to challenge it, is to be very careful to try to explain in my opinion how I derive the essence from the collective bargaining agreement. From the judge's comments, I think that's probably a wise approach for us all to take. If we write our decisions carefully and thoughtfully we probably lower our chance substantially of being reversed on appeal. I'd be interested if any of the other judges have any comments on that.

Judge Jacques L. Wiener, Jr.: I think that's correct. That's basically what Judge Davis said. Of course, when you do write your opinion correctly, then it's easy for us to say this is beyond our scope of review. But, if you are wrong, it's there for all the world. I would agree that a carefully thought out, carefully approached decision and opinion, and particularly pushing all the right buttons on the scope of the submission or what the collective bargaining agreement says is available for arbitration and how this fits in makes it a lot easier for us. This goes partly to the previous question. We try very hard to restrict our work to the record that was before the arbitrator. When things are sought to be raised for the first time in the district court or our court, we try to avoid that because we are only supposed to be reviewing your work and your work is what you had before you.

James Sherman: That's a very good point for the judges to know that there are times, although they are a minority of times, that we

get signals from the parties that this is an important case and we may very well appeal if we don't get the decision we want.

Judge Fortunato P. Benavides: The only thing that I would add is this specific thing that would have been helpful to me in a specific case. We had a dispute in a case I was involved in where the attorneys were telling me that the particular issue as framed was not something that was given to the arbitrator—that the arbitrator went beyond what they had agreed they had given to him. The record was very unclear. If you are in one of those situations where it's unclear, it would help in an opinion to tell us a little bit about what the parties agreed to. If it's something beyond the contract itself and by agreement they ask you to do something or whatever, maybe you could record that or place that somewhere in the opinion so I won't have to figure out whether they agreed to it or not. This would help quite a bit.

Question: This is more of a comment than a question although it may elicit some comments. It's really well understood in the labor relations field that absent explicit language to the contrary there are two questions that an arbitrator has to answer in a discipline case that involves a just cause standard. Whether the employee did it, and, even if she did, whether the discipline imposed by the employer is appropriate under all the circumstances of the case. What I just heard indicates to me that anybody who writes an award of a discipline case might be well to state that axiom again. I've been waiting for Paul Barron's statistics for a long time and what jumps out of these statistics as far as I'm concerned is that 45 percent of the cases in which a decision of an arbitrator has been overturned deal with cases in which an arbitrator has modified the discipline. In the Fifth Circuit, 14 of the 15 cases in which an arbitrator's decision has been overturned, the arbitrator has modified the discipline; in the Eleventh, it's 6 out of 8. I was wondering whether the judges have any comment on that, whether it's your view that the arbitrator shouldn't have done what she did or just what it is that accounts for that kind of statistic.

Judge W. Eugene Davis: I can't tell from that kind of statistic. What it should tell you is be careful about modifying once you find a violation. That's the only thing you can draw from that. That you're more at risk there than you probably are in finding a violation or not. Without knowing about a particular case, I wouldn't know what to say.

Judge Jacques L. Wiener, Jr.: I don't know that any conclusion can really be drawn from that, but maybe it's just natural that when

there is a modification it raises the profile and gets a closer look.

Judge W. Eugene Davis: Let me ask you this. How often do you think you modify the punishment? Is it more than half the time?

Question: Oh, I can't tell you that in my own cases, but the point I was trying to make is that both employers and unions understand that, absent something to the contrary in an agreement, the arbitrator has the authority, even if the employee has done what she has been accused to modify the penalty if the circumstances warrant it. The employer understands that that authority resides in the arbitrator under the just cause standard that has been enunciated over the last 50 years or so.

Unidentified Judge: Would you educate me? Is that in all cases? Isn't that going to depend upon the contract? For instance, let's take the *Bruce Hardwood Floors* case that I was involved in. If it clearly came under a condition they had bargained for that said if this person does this that's cause for termination and it clearly was a cause for termination, would you say then that you still have that same discretion?

Question: Judge, there are contracts that say stealing is just cause for termination and in such cases the arbitrator shall have no authority to go beyond one question: whether the act was committed or not. Now, even in *Bruce Hardwood*, where the contract says that stealing is immediate cause for discharge, an arbitrator may be able to modify the penalty because that language is not as clear as the language that I have just stated. But employers and unions understand that and they can write their contracts in such a way as to limit the arbitrator's authority. If there is no such limitation other than the just cause standard, that's where an arbitrator can exercise her judgment looking at all the circumstances after giving deference to the employer's decision and determining whether that penalty was appropriate. I'm not so certain that the judiciary understands that underlying concept.

Unidentified Judge: I don't know how I can convince you, but can we focus a bit at what I was trying to get to. You brought home to me this idea that these people are still going to bargain the next year or maybe the next month or 2 years down the road, and some of your decisions will be either incorporated or corrected if it's important enough.

Unidentified Judge: In the drug area, the lady brought up a question about public policy and how the circuit courts were split. I think Congress has taken some action and given the specific

public policy an outline in certain safety-sensitive positions. Congress has made it pretty easy.

Unidentified Judge: What is happening out there in the collective bargaining agreements between labor and management with respect to drugs, in the area that you're talking about—mandatory termination—the drug issue is having an effect in the cases that are being negotiated now.

Question: Again, that depends upon everyone's experience here. There are some employers who have a very explicit drug policy that allows one or two chances. Beyond that, there are others that say once you are found guilty of possession or use you're out. The arbitrator can't do anything else. Then there are others that simply say, as they do in all other discipline cases, just cause and the arbitrators have to make their way through that.

James Sherman: I think that's the answer—that it is being addressed in the contracts and it is being taken care of. Let me exercise a prerogative here. Back in the other life I lived, when I was a professor, I often brought in judges. None were federal judges, but I kind of put judges into categories. The first category was they really don't know arbitration or arbitrators. They've never been to a situation like this; they've never shaken hands with an arbitrator; they've never known one; they've never spoken to one. The second category, there's a kind of built-in bias against arbitration because arbitration is seen as pro-union, empowering the employees, and the judges might be very conservative. In fact, one judge asked me a bunch of questions, and she started out by asking me what I did, and when I said I'm the middle man between unions and companies, she said, "Oh my God, I hate unions." And then she went on to ask me questions about my business and so forth. When I explained that I was able to set my own work schedule, as well as fees, she ended up commenting that she should like to arbitrate when she retires from the bench.

Third category respects arbitrators and believes they have great integrity and great judgment and so forth. They acquired this attitude as many of us did, by having a favorite professor who arbitrated. We wanted to be like that person. So we have a built-in bias in favor of arbitration. I suspect that judges fall into one of those three categories that I'm describing. Would anybody care to comment on that?

Judge Jacques L. Wiener, Jr.: Without temerity, I'll jump in. I can only speak for myself. I don't think it's far from a prejudice. I think generally I view, and I think most of my colleagues view, arbitration

as a very important dispute resolution mechanism in this country. In fact, it makes our job easier. We already have, as I mentioned, a heavy caseload and all the district courts do in this circuit. A litigious society like ours needs this type of mechanism and other forms of alternative dispute resolution. So, from a standpoint of our work and as well as our philosophy, I don't think there's a hostility at all toward arbitration or arbitrators or that we view it as something that's a tool for the unions to manipulate or pro-union or anything else like that. We may come across that way in some of our opinions, but again it gets back to some of the statistics in Professor Barron's research paper and the kind of cases that reach us. We are aware of the 99 percent that don't get here and how thankful we are about that.

Judge W. Eugene Davis: I don't have any hostility toward arbitration either. I'm glad somebody's disposing of all these conflicts that don't have to come to us. But I must say that I also think it's healthy to have some review. I don't think anybody making decisions like this, like we make or you make, ought to be completely insulated from review. Nobody ought to be able to just go out and do what they want to do regardless of the language of the contract or the equities of the dispute. So I think the Supreme Court has had a pretty nice balance here. Give you great deference but not completely shield you from review.

Question: As I look at Paul Barron's statistics, I see that of the four circuits that exceed 40 percent reversal rates of arbitration awards, three are in the south including the Eleventh Circuit, which, of course, was historically affiliated with the Fifth Circuit. I also note that in those circuits the majority of awards that are overturned are in the disciplinary area. In the other circuits, which have a much lower percentage, most of the awards that were overturned are in the contract interpretation area. So the obvious question to me is what is the reason that the Fifth Circuit has this dubious distinction of having the highest reversal rate of arbitrators? Is it the high humidity in the south? Heaven forbid it would be the incompetence of the arbitrators in this area. Certainly, most clearly, it can't be the incompetence of the judiciary. So the thing that strikes me from the statistics, is it perhaps the politics of the South and to some extent anti-union feeling that causes reversal whereas in the other circuits, which have lower reversal rates, it seems to be more neutral in terms of conservative versus liberal? Do you consider as part of the conservative tradition a respect for precedent and following the law.

Judge Jacques L. Wiener, Jr.: Yes [lots of laughter].

Judge Fortunato P. Benavides: If I batted .950 every year, I think I'd feel pretty good. Then somebody said, "Well, wait a minute somebody in another league over there is hitting .980." I'd still think I'd feel pretty good about hitting .950. I can't explain that we have 35 cases that have been logged on this since this opinion. I don't know if you could draw any conclusions. I don't know if that sample is big enough; maybe Paul Barron should do another study. I don't really know what the reason is. Certainly, historically we have a stronger at-will history with less exceptions to at-will in the South. I don't know what those factors are: the level of the advocacy, the lawyers that appear, the quality of the opinion that is written in the particular case.

Judge Jacques L. Wiener, Jr.: I think the whole answer is you don't have an average, all you've got is a score.

Question: I would like to point at a question that's not asked and never seems to be asked in the discussion of the public policy cases. That is why in the world do you suppose the Supreme Court would have done anything quite as apparently silly as letting loose the notion of public policy? We always have this discussion as if the notion of public policy had been created in the context of a review of an arbitral award. It's not true but for some reason we never look backwards and look at the one and only citation to the actual case in which the Supreme Court developed and used the public policy notion. It's a very interesting case because it comes from the time that the Court was dealing with racially restrictive real property covenants.⁹ Everyone remembers the state case, because real property cases are always state cases and it was a sort of a judicial no-brainer. The Court simply pointed to the post-Civil War amendments specifically depriving the states of the power to do that sort of thing.

But if you flip the page and go to the companion case, that's a very interesting case that arose in the District of Columbia.¹⁰ The

⁹See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (state court enforcement of restrictive covenants that have for their purpose the exclusion of persons of designated race or color from ownership or occupancy of real property could not be justified as proper exertion of state police power).

¹⁰*Hurd v. Hodge*, 334 U.S. 24 (1948) (power of federal courts to enforce private agreements is exercised subject to restrictions of public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents; where enforcement of private agreements would be violative of that policy, courts must refrain from such exertions of judicial power).

poor purchaser claimed to be 100 percent Indian. The district court disagreed and found that he was in fact black and applied a racially restrictive covenant. No state action—Civil War amendments didn't apply. The Supreme Court got to the same place and it got there on its two-prong analysis, first by pointing to the original post-Civil War civil rights act and then it reached into the air and pulled out the doctrine of public policy.

I want to suggest to you that the whole notion of the doctrine of public policy is very strange if you look it as a warrior because the Court did come up with an obviously mischievous, nasty, hard to control notion that it introduced into the field of property decisions.

That's very odd but if you look at it as a labor arbitrator, it makes perfectly good sense. It's a written reprimand. It's a clear example of the Supreme Court issuing a very public written reprimand to the D.C. district and circuit courts saying 80 years after the Civil War you should have known better. The public policy of the United States does not allow courts to apply racially restrictive covenants at this point in our history.

If you look at the doctrine of public policy in that respect, it makes perfectly good sense, but I wonder if you gentlemen have some other answer to the question why would the Supreme Court come up with the public policy notion when it seems so obviously mischievous.

Judge Fortunato P. Benavides: I don't have any problems with the public policy notion. I think it's a tool. The Supreme Court tells us to be very careful, for instance, in this area; it has to be very specific. Congress passes laws that may be seen as statements of public policy. They've set certain safety-sensitive positions involving transportation: they pretty much said you know you shouldn't have people out there who are using alcohol or using drugs. Now if an arbitrator comes around and says there has been this violation and nonetheless we're going to give him another chance, I think you got clear statement from Congress about the safety-sensitive positions that are involved here: Do you have an announced specific public policy about this to protect people? I think it's a legitimate tool now, when it should be used, how it should be used, the extent it should be used. In a particular given case, under particular facts and circumstances that's something you wrestle with and I guess we'll wrestle with. Frankly, I have no problems with the idea, that as a tool carefully used, I don't know why that shouldn't be in our quiver and why the Supreme Court shouldn't

have given us the tool. I think there are problems with it. Yes, it could be mischievous. It can be overused, but you can say that about almost anything but it's still a tool as long as it's properly used. I don't see why we should be limited across the board from it. I don't know how anybody else feels about it.

Question: I've been listening with interest, and I note essentially that the twin beliefs that some right of review is dictated at least in the public policy area, and that the just cause analysis may not include inherently the right to assess an appropriate remedy at our level. I think for most of us, it is our understanding that there is a unique quality to labor arbitration and that unique quality is at the time the legislation or statutes were passed, it was in lieu of strike. It was not in lieu of the courts. At that time, the federal judiciary was considered to be the enemy and it was a very intentional movement away from a court and any court review. That's the basic presumption of labor arbitration, at least in its beginnings. The second thing was, it was a nonlegal structure at least to the extent that it was an extension of collective bargaining. And the third thing is that for 40 years at least just cause has come to have a meaning. Unless the parties say something different, the twin issues are did he do it or did she do it and is the discipline a reasonable response or penalty. Now we accept those as truths. I guess the question is would it make a difference if that was a basic presumption of your analytic framework as well as in the *Misco* public policy exception?

Judge Jacques L. Wiener, Jr.: Insofar as what the law requires, I think all the judges are going to make that presumption. I think there's a difference though if you look back at the *Trilogy*, that was especially the main one that was cited by Professor Sharpe.

Judge Fortunato P. Benavides: The contracts at that time basically just incorporated just cause. Those are not the contracts that we have at this time. They're different. There're restrictions, perception of the law. I think that the law is fairly clear. I think individually we as judges have a different view of what's the essence of that contract. I wrote the dissent in *Bruce Hardwood*. I really do feel that the judges, even the majority in *Bruce Hardwood* had a sincere belief that what they were doing in that case was the right thing under the law. I tend to look at the law as being very simple. Maybe it's easier for me because I have a bigger threshold in my mind of what discretion means in what the Supreme Court was saying. Does that mean that everybody who doesn't have that threshold or that spectrum that I have is wrong? I really can't say that. I just do what I do and I think the other judges do what they

do, and it's really hard for me to classify all judges as having one particular trait or hostility or misunderstanding. We do the best we can.

James Sherman: We all want to thank these judges.