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NOTES

JUDICIAL REVIEW OF LABOR ARBITRATION AWARDS AFTER THE TRILOGY

In the landmark *Steelworkers* Trilogy of 1960,¹ the Supreme Court announced a decisive policy favoring arbitration as a means of settling labor disputes.² The Court determined that arbitration constitutes a "major factor in achieving industrial peace,"³ which should not be undermined by judicial interference. In submitting their problem to arbitration, the parties rely upon the personal judgment of an arbitrator who is endowed with an expertise judges lack.⁴ A dispute is deemed arbitrable unless the contract specifically excludes it from arbitration,⁵ and once an arbitrator has made his award the judiciary must normally refrain from overruling his judgment.⁶

¹ *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

² The Court had previously held, in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), that a provision for arbitration in a collective bargaining agreement could be enforced under Labor Management Relations Act § 301, 29 U.S.C. § 185 (1964). Federal labor law controls whether the suit is commenced in the state or federal courts. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962); see *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

³ *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960).

⁴ The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

Id. at 582.

⁵ Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions of the collective agreement. . . .

. . . .
. . . . An order to arbitrate the particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*

Id. at 581-83 (emphasis added).

⁶ The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).

An arbitrator's power is not, however, unlimited. The Court recognized that, since the arbitrator's adjudicative authority stems from the agreement of the parties to submit their disputes to arbitration, his power is limited to interpreting and applying the bargaining agreement. Thus, while setting down the general rule of judicial nonintervention in the arbitration process, the Court issued the following caveat in the last of the three cases, *United Steelworkers v. Enterprise Wheel & Car Corp.*:⁷

[A]n 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.*⁸

Because of the Court's broad view of collective bargaining agreements, it is difficult to determine the practical implications of the statement that the award is enforceable only insofar as it "draws its essence from the . . . agreement." The Court conceives of such an agreement as "more than a contract; it is a generalized code"⁹ which extends far beyond the words the parties actually write into their contract. The arbitrator is expected to interpret the contract in light of the "common law of the shop which implements and furnishes the context of the agreement."¹⁰

Since the Trilogy, some courts,¹¹ and at least one commentator,¹² have suggested that the presumption in favor of arbitrability is justifi-

⁷ 363 U.S. 593 (1960). This case, the last of the Trilogy, actually concerned the enforcement of an award. The first two cases dealt with the union's demand for specific performance of the agreement to arbitrate.

⁸ *Id.* at 597 (emphasis added).

⁹ *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960).

¹⁰ *Id.* at 580, quoting Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1499 (1959).

¹¹ To compel arbitration in the first instance is not to approve *carte blanche* in advance any decision which might be reached. The arbitrator is not a free agent dispensing his own brand of industrial justice. And if the award is arbitrary, capricious or not adequately grounded in the basic collective bargaining contract, it will not be enforced by the courts.

International Ass'n of Machinists Local 2003 v. Hayes Corp., 296 F.2d 238, 242-43 (5th Cir. 1961) (emphasis in original); *accord*, *Carey v. General Elec. Co.*, 315 F.2d 499, 508 (2d Cir. 1963).

¹² P. HAYS, *LABOR ARBITRATION: A DISSENTING VIEW* 80 (1966): "No great harm is done by applying a liberal rule as to arbitrability, if the court carefully scrutinizes what the arbitrator later decides." The author points out the distinction between these two problems by stating that there is no doubt that "the arbitrator has *jurisdiction* to be

able only if there is meaningful judicial review of the arbitrator's award. Several circuits of the United States Court of Appeals have expressly reserved the right to review and vacate an award in certain situations.¹³ The *Enterprise Wheel* caveat has provided the courts with a means of avoiding the thrust of the Trilogy by allowing them to strike down awards on the ground that they do not draw their "essence" from the contract. Although the lower courts are bound by the Trilogy, their willingness at times to indulge in a review of the merits indicates some dissatisfaction with the Supreme Court's decisions. This Note will investigate the problems faced by the courts in the post-Trilogy era, and attempt to pinpoint the reasons for the refusal of some courts to implement fully the policy of those cases.

I

PROBLEMS IN JUDICIAL INTERVENTION

When an arbitrator decides issues other than those submitted by the parties,¹⁴ or when his decision requires one party to violate a federal or state statute,¹⁵ the award will not be enforced. Closer questions arise when the losing party asserts that the award is not supported by the contract,¹⁶ is contrary to an express limitation on the arbitrator's authority,¹⁷ or is contrary to some public policy.¹⁸

wrong. The question is whether he has *authority* to decide issues contrary to the provisions of the contract." *Id.* at 82 (emphasis in original); see Cox, *supra* note 10, at 1517.

¹³ Torrington Co. v. Metal Prods. Workers Local 1645, 362 F.2d 677 (2d Cir. 1966); H. K. Porter Co. v. United Saw Workers, 333 F.2d 596 (3d Cir. 1964); Truck Drivers Local 784 v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964); International Ass'n of Machinists Local 2003 v. Hayes Corp., 296 F.2d 238, 242-43 (5th Cir. 1961); Textile Workers Local 1386 v. American Thread Co., 291 F.2d 894 (4th Cir. 1961).

¹⁴ Kansas City Luggage Workers Local 66 v. Neevel Luggage Mfg. Co., 325 F.2d 992 (8th Cir. 1964); Local 791, IUE v. Magnavox Co., 286 F.2d 465 (6th Cir. 1961); see International Ass'n of Machinists Local 1038 v. Jeffrey Galion Mfg. Co., 350 F.2d 512 (6th Cir. 1965).

¹⁵ Glendale Mfg. Co. v. Local 520, ILGWU, 283 F.2d 936 (4th Cir. 1960), *cert. denied*, 366 U.S. 950 (1961) (award forcing employer to bargain with decertified union in violation of National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1964)); Carpenters v. Ebanisteria Quintana, 56 L.R.R.M. 2391 (D.P.R. 1964) (award requiring employer to check off dues which had been timely revoked in accordance with Labor Management Relations Act § 302(c)(4), 29 U.S.C. § 186(c)(4) (1964)). *But cf.* Sportswear Workers Local 246 v. Evans Mfg. Co., 206 F. Supp. 572 (E.D. Pa. 1962), *aff'd on other grounds*, 318 F.2d 528 (3d Cir. 1963), although the essence of the court's holding seems to be that the party seeking to upset the award had not shown that enforcement would actually require illegal acts. However, an award based on a misinterpretation of law, as opposed to one actually requiring a violation of law, may be without the scope of judicial review. Fick v. Southern Pac. Co., 338 F.2d 655, 657 (9th Cir. 1964); Newark Stereotypers' Union v. Newark Morning Ledger Co., 261 F. Supp. 832, 836 (D.N.J. 1966).

¹⁶ See pp. 139-41 & notes 19-33 *infra*.

¹⁷ See pp. 142-45 & notes 34-47 *infra*.

¹⁸ See pp. 145-47 & notes 48-60 *infra*.

A. Awards Lacking Contractual Support

In the Trilogy the Supreme Court said that a collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."¹⁹ Since the Court thereby incorporated by inference a "common law of the shop which implements and furnishes the context of the agreement,"²⁰ the arbitrator must look to the past practices of the parties as well as to the words of the contract in reaching a decision.²¹ In this light, it is difficult to apply the Court's limitation on the arbitrator's power. The party seeking to enforce the award may argue, on the basis of the Trilogy, that if anything in the words of the contract or the "common law of the shop" supports the award, then it draws its "essence" from the contract and must be enforced. The party seeking to upset the award must assert that nothing in the contract or the past practices of the parties supports it. Such an assertion invites courts to violate the policy of the Trilogy by indulging in a wholesale review of the "merits" of the case²²—namely, is the union (or management) entitled to the awarded relief under the agreement?

The dispute in *H. K. Porter Co. v. United Saw Workers*²³ involved pensions to be paid employees as the result of a relocation of the company's plant. Although the contract provided that pensions would be paid only to retiring employees who reached sixty-five with at least twenty-five years of continuous service, in actual practice pensions had often been paid to individuals with records of long service who did not comply with the age requirement. Relying upon this custom, the arbitrator awarded full pension rights to employees who had not reached age sixty-five but had served for twenty-five years. He also awarded some pension benefits to employees who had reached age sixty-five but had not amassed twenty-five years of service. The court recognized that the arbitrator may use past practice to supplement the words of the contract. But since only the first part of the award was actually

¹⁹ *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960).

²⁰ *Id.* at 580, quoting *Cox*, *supra* note 10, at 1499.

²¹ The ways in which an arbitrator may use the parties' past practices in interpreting the agreement have been classified as follows: (1) to clarify ambiguous language in the contract; (2) to implement the contract's general language; (3) to modify or amend apparently unambiguous language; or (4) to establish a separate enforceable condition of employment. Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017, 1022-40 (1961).

²² See note 6 *supra*.

²³ 333 F.2d 596 (3d Cir. 1964).

supportable on these grounds, the part based solely on age was vacated.²⁴

In *Torrington Co. v. Metal Products Workers Local 1645*,²⁵ the union demanded that management grant the employees time off with pay to vote on election day. The company had granted this benefit of its own accord for twenty years until December 1962, but announced discontinuance of the policy at that time. Although the issue was discussed by the parties during 1964 contract negotiations, the benefit was not included in the final agreement. When the company refused to grant the benefit in 1964, the union filed a grievance and the parties proceeded to arbitration. The arbitrator found for the union on the basis of the past practice of the parties.²⁶ The court refused to enforce the award, since the voting benefit was not included in the contract and the history of the parties' practice with relation to it had ended with its termination in 1962.

Although the opinions in both cases are couched in terms of the arbitrator's lack of authority under the contract to find as he did, both cases in fact run contrary to the basic ruling of the Trilogy that the courts must not review the "merits" of the case.²⁷ In each instance the actual rationale for the result seems to have been that the arbitrator clearly misapplied the evidence and came to the "wrong" conclusion.²⁸

²⁴ The court's commentary on its disposition of the arbitrator's findings is illuminating:

[I]n Part 2 of the award the Arbitrator had no ground upon which to base his interpretation of the clear and unambiguous words of the eligibility clause. Standing by itself, it gave him no room to construe it in any manner [other] than according to its plain meaning. Bereft of any practice evidencing a relaxation of the requirement of years of total service and relying only upon age, the Arbitrator was unjustified in deviating from the plain mandate of the eligibility clause, as it concerned those who fulfilled only the portion making the age of sixty-five a requirement. Indeed, such an interpretation neither goes to the essence nor to the application of the collective bargaining agreement.

Id. at 602.

²⁵ 362 F.2d 677 (2d Cir. 1966).

²⁶ The actual award was as follows:

Employees who took time off to vote on November 3, 1964 shall be paid up to a maximum of one hour and all other employees who worked during the election hours on that Election Day and who were paid this benefit on November 6, 1962 shall be paid for the same amount of time off for Election Day 1964 as they received for Election Day 1962.

The *Torrington Co.*, 45 Lab. Arb. 353, 357 (1965).

²⁷ See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960), quoted in note 6 *supra*.

²⁸ This was pointed out by a dissenting judge in *Torrington. Torrington Co. v. Metal Prods. Workers Local 1645*, 362 F.2d 677, 684 (2d Cir. 1966) (Feinberg, J., dissenting). More recently, the court in *Dallas Typographical Union v. A. H. Belo Corp.*, 372 F.2d 577, 583 (5th Cir. 1967), said of the *Torrington* result:

Couched as it is in terms of whether the bargaining agreement "authorizes the arbitrator to expand its express terms on the basis of the parties' prior practice"

In *Porter*, the management's previous conduct indicated its willingness to deviate from the letter of the eligibility clause for employees with the required length of service, but *not* for employees without such required service.²⁹ In *Torrington*, the court felt that the prevailing intent of the parties to the contract was that the benefit be excluded, since they had discussed the issue but omitted it from the contract. In short, although the result in each case seems reasonable, the courts clearly indulged in a full review of the merits.³⁰

The Supreme Court has posed an insoluble dilemma for the lower courts. If they are to give force to the statement in *Enterprise Wheel* that the "award is legitimate only so long as it draws its essence from the collective bargaining agreement,"³¹ they must undertake a de facto review of the merits of the case whenever one party claims the award itself has no basis in the contract.³² Since judicial review in certain circumstances has been endorsed by the Supreme Court, and since at least limited review is necessary to avoid subjecting the parties, against their intentions, to clearly unsupportable awards, the best approach seems to be that taken in *Porter* and *Torrington*. When the arbitrator bases his judgment on the past practices of the parties, the only method of ascertaining whether the award has its "essence" in the contract is to (1) review those practices, and (2) vacate the award if it is not supported by them. There is little doubt that an award can be vacated if it violates the language of the written agreement. Since the "common law of the shop" is a part of the contract,³³ it seems equally reasonable for a court to vacate an award which is not supported by the parties' established customs.

(emphasis added), 362 F.2d at 680, we think it has to be very carefully confined lest, under the guise of the arbitrator not having "authority" to arrive at his ill-founded conclusions of law or fact, or both, the reviewing-enforcing court takes over the arbitrator's function.

²⁹ The case itself illustrates that a court's decision whether to permit an arbitrator to avoid clear language in the contract depends upon whether the custom is found to justify the deviation.

³⁰ The *Porter* court has some claim to innocence. Although a review of the merits was undertaken, a strong argument could be made that there was *no* evidence on which the arbitrator could base that portion of his award which was ultimately reversed. The argument does not apply in *Torrington*, where the contested voting benefit had been granted for 20 years previously, albeit the company had revoked its practice and the union had failed in its efforts to reinstate it by negotiation.

³¹ *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), quoted at p. 137 *supra*.

³² Chief Judge Lumbard, writing the opinion in *Torrington*, referred to this dilemma, noting that some might say the court was undertaking an impermissible review of the "merits" of the case. 362 F.2d at 680 n.6.

³³ See p. 139 & notes 19-20 *supra*.

B. *Express Limitation on Arbitrator's Power*

When an arbitrator has violated an express limitation on his authority, the courts should refuse to enforce the award. The parties clearly have the power to exclude specific matters from arbitration;³⁴ obviously they do not expect the arbitrator to ignore such limitations or to "interpret" them out of existence. Since the arbitrator's power derives basically from the agreement between the parties, his jurisdiction is clearly limited to those matters which the parties have agreed to submit to arbitration.³⁵ Judicial intervention where the ground for upsetting the award is that the arbitrator exceeded a specific limitation on his power is more palatable than where a court asserts a general lack of contractual support for the award;³⁶ in the former case the court can avoid the appearance of reviewing the merits of the case by focusing on the words of the contract.

The proper scope of judicial intervention is not, however, clearly settled. Two leading authorities in the field have pointed out:

[Certain] types of ostensible contractual restrictions upon the jurisdiction of the arbitrator are simply different ways of structuring the labor agreement in an attempt to preclude a finding that there is a contractual commitment of the kind which must be found to exist in order to sustain the grievance. Thus analyzed, the underlying question really involves the merits and should be relegated to the arbitration process.³⁷

Furthermore, "it could be argued that the question of arbitrability is simply one of interpretation of part of the arbitration clause, and hence, like any other question of interpretation arising under the labor agreement, should be disposed of by judicial abstinence"³⁸ The

³⁴ *Apart from matters that the parties specifically exclude*, all of the questions on which the parties disagree must come within the scope of the grievance and arbitration provisions of the collective agreement.

United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581 (1960) (emphasis added).

³⁵ See *Sinclair v. Atkinson Ref. Co.*, 370 U.S. 238, 241-43 (1962).

³⁶ See pp. 139-41 & notes 19-33 *supra*.

³⁷ Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751, 793 (1965). As to whether the problem was intended for the arbitrator, the authors state:

The critical question is whether these kinds of contractual attempts to restrict the arbitrator's jurisdiction should be equated with cases where the parties by agreement have specifically excluded certain subject matters from the arbitration process or instead should be treated like those cases where the claim of non-arbitrability rests on the proposition that the labor agreement contains no express or implied substantive commitment of the kind which must be found in order to sustain the grievance.

Id. at 792-93.

³⁸ *Id.* at 789. The authors add that "in some cases the intent and scope of the exclu-

result may well depend on how specifically the limitation is worded;³⁹ the more general the restriction, the more forceful the contention that the arbitrator should be relied on to render the proper interpretation. In two discipline-discharge cases arising after the Trilogy, for example, each court vacated the arbitrator's award on the ground that he had exceeded his power. In one case the limitation was specific;⁴⁰ in the other it was ambiguous.⁴¹ That the decision in the latter evoked a lengthy dissent indicates that the question was at least a closer one than in the former.⁴²

sionary language arguably may call for the kind of expertise which, in the 1960 Trilogy cases, the Court attributed to the arbitrator." *Id.* at 790.

³⁹ See *id.* at 788-93, comparing provisions which specifically exclude from arbitration the subject matter of a particular grievance with general contractual restrictions on the arbitrator's jurisdiction. For clear authority that a general restriction will not exclude a specific matter from arbitration, see *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960), quoted in note 34 *supra*.

⁴⁰ *Truck Drivers Local 784 v. Ulry-Talbert Co.*, 330 F.2d 562 (8th Cir. 1964). The contract specified that, in cases involving discipline or discharge:

[T]he arbitration board shall not substitute its judgment for that of the management and shall only reverse the action or decision of the management if it finds that the Company's complaint against the employee is not supported by the facts, and that the management has acted arbitrarily and in bad faith or in violation of the express terms of this Agreement.

Id. at 564. An employee was discharged for falsifying his records as to work hours. After finding that the employee was indeed guilty of the offense charged, the arbitrator found that discharge was an excessive penalty and ordered the employee reinstated, despite the clear language of the agreement. Because he had exceeded the mandate given by the parties, the court vacated the arbitrator's award.

⁴¹ *Textile Workers Local 1386 v. American Thread Co.*, 291 F.2d 894 (4th Cir. 1961). This case involved substantially the same fact situation as *Ulry-Talbert*, except that the disputed clause reserved to the company:

the right of management [which] . . . includes, among other things, the right . . . to discipline or discharge employees for just cause. . . . Any action by the Company under this Section may be made the subject of collective bargaining grievance procedure, up to but not including arbitration. . . .

Id. at 897 (emphasis by the court; other emphasis by the court omitted). As in *Ulry-Talbert*, the arbitrator found the employee guilty of the offense charged (for which he had been warned twice prior to the final incident), but then ordered the employee reinstated. The arbitrator interpreted the boiler-plate language italicized above to mean that he was "not foreclosed from inquiring in this case whether just cause for discharge, rather than for a lesser disciplinary measure, existed." *Id.* at 899. The court of appeals refused enforcement of the award, saying this interpretation did "violence to the clear, plain, exact and unambiguous terms of the submission and the contract of the contending parties." *Id.*

⁴² Chief Judge Sobeloff dissented. His argument was that the clause quoted above involved the dual sanctions of discipline and discharge without defining "just cause" for either. Thus, management's right could arguably become absolute only after a determination that there was just cause to discharge, rather than merely to discipline, the employee. Since the arbitrator had interpreted the contract in this way, his judgment should not be overruled. *Id.* at 901-06 (dissenting opinion). This exemplifies the problem referred to by

The decision in *Enterprise Wheel* may have some bearing on the problem. That case involved arbitration of an employee discharge grievance after the collective bargaining agreement expired. The arbitrator rejected the contention that the expiration of the agreement limited his authority,⁴³ and awarded reinstatement of the workers with back pay. The court of appeals held that the award should not include damages for the period subsequent to the expiration of the agreement.⁴⁴ The Supreme Court reversed, concluding that the full award should be enforced. The limit imposed by the date of the contract in *Enterprise Wheel* seems analogous to express limits on the arbitrator's authority. If the case were carried to the extreme, it would leave the arbitrator free to decide the scope of his own authority, provided only that some interpretation of the contract supports his finding.

No court has adopted this reasoning. Whether an arbitrator has the power to make an award is necessarily a function of whether the dispute was arbitrable in the first place, and the courts clearly have the power to reject decisions of issues made nonarbitrable by the contract.⁴⁵ It is logical that the judiciary should have the last word in the case of an express and specific limitation, since the arbitrator is not likely to have any expertise about such a question to which a court should defer.⁴⁶ An arbitrator should not be permitted to piggyback a power to

Smith & Jones, pp. 142-43 & note 37 *supra*; though the provision appears merely to define the matters that are arbitrable, its effect is to provide a substantive definition of the rights of management.

⁴³ *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 595 (1960). In such a situation, the question again arises whether the time of the contract is a limit on the arbitrator's authority (which he may not exceed) or on the parties' substantive rights under the contract (which an arbitrator has plenary power to decide by "interpreting" the length of the period for which the contract extends). See pp. 142-43 & notes 37, 42 *supra*. The 1960 Court apparently took the latter approach.

⁴⁴ *United Steelworkers v. Enterprise Wheel & Car Corp.*, 269 F.2d 327, 331 (4th Cir. 1959), *rev'd*, 363 U.S. 593 (1960).

⁴⁵ [W]hether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.

Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 241 (1962) (emphasis added); *accord*, *John Wiley & Sons v. Livingston*, 376 U.S. 543, 547 (1964); *Retail Clerks Ass'n v. Lion Dry Goods, Inc.*, 341 F.2d 715, 720-21 (6th Cir. 1965).

⁴⁶ Whether the arbitrator is indeed possessed of all the expertise attributed to him by the 1960 Supreme Court is another question. See p. 148 & note 65 *infra*. Where the arbitrator does not twist the meaning of the clause limiting his power or ignore it altogether, but rather finds that the fact situation involved is not within that class of cases the limitation clause has excepted from the arbitration process, a court may be more likely to accept the arbitrator's decision that the contract does not preclude him from hearing the case. See *Marble Prods. Co. v. Local 155, United Stone Workers*, 335 F.2d 468 (5th Cir. 1964).

decide the scope of his own authority onto his plenary power to decide the merits.⁴⁷ The judiciary's watchdog function is therefore justified in these cases.

C. Awards Contrary to Public Policy

Even if the award does not exceed the arbitrator's authority under the contract, the court may refuse to enforce it on the ground that it contravenes public policy. It is clear that an award which requires an employer to violate a federal or state statute will not be enforced.⁴⁸ Whether an award can be vacated when it offends some less specific "public policy" is not so clear.

The rationale of the cases that have struck down arbitration awards on public policy grounds is that the public, which is not a party to arbitration proceedings, has an interest in the case that the courts may not overlook.⁴⁹ Courts have, however, enforced awards even though some public policy was violated. In *Local 453, IUE v. Otis Elevator Co.*,⁵⁰ involving the discharge of an employee following a criminal conviction for gambling on company premises, the Second Circuit asserted that:

It is no less true in suits brought under § 301 to enforce arbitration awards than in other lawsuits that the "power of the federal courts to enforce the terms of private agreements is at all times

⁴⁷ See p. 137 & notes 11-12 *supra*. Of course, the parties may explicitly give the arbitrator this power. However,

[W]here the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose.

United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 n.7 (1960).

⁴⁸ See cases cited note 15 *supra*.

⁴⁹ In one case the arbitrator had granted reinstatement of an employee discharged for gambling on company premises in violation of both a state penal statute and company rules. The court vacated the award, stating:

Arbitrators may not take unto themselves, whether or not by assent of the parties, authority to act against the public interest. . . . "[T]he laws in support of a general public policy and in enforcement of public morality cannot be set aside by arbitration."

Avco Corp. v. Preteska, 22 Conn. Supp. 475, 480, 174 A.2d 684, 687 (Super. Ct. 1961).

The same result was reached by the New York Court of Appeals in a case involving discharge of telegraph employees who refused to transmit messages to or receive messages from companies being struck by a member union. *Western Union Tel. Co. v. American Communications Ass'n*, 299 N.Y. 177, 86 N.E.2d 162 (1949). The arbitrator ordered reinstatement with back pay after finding that refusal to handle "struck traffic" was customary in the industry. The court refused to enforce the award, because the acts violated the state penal law, and enforcement would give "judicial sanction . . . to such [illegal] conduct." *Id.* at 186, 86 N.E.2d at 167.

⁵⁰ 314 F.2d 25 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963).

exercised subject to the restrictions and limitations of the public policy of the United States."⁵¹

In the particular circumstances, however, the court enforced the arbitrator's award reinstating the employee. Thus, courts retain the weapon of judicial review when public policy is outraged; but because of the competing policy of the Trilogy favoring finality of awards, they will probably use the weapon sparingly.

Cases involving the discharge of employees found to have subversive political views are analogous to those involving criminal convictions. In the leading case of *Black v. Cutter Laboratories*,⁵² the discharged employee was a member of the Communist Party and had submitted false information on his job application. The arbitration board found that the real reason for the discharge was the employee's union activity and ordered reinstatement with back pay. The Supreme Court of California refused to enforce the award, saying:

[A]n arbitration award which directs that a member of the Communist Party who is dedicated to that party's program of "sabotage, force, violence and the like" be reinstated to employment in a plant which produces antibiotics used by both the military and civilians is against public policy . . . and will not be enforced by the courts.⁵³

If *Black* were before the court today, the result might well be different. The "Red fever" of the McCarthy era has abated, and a vague anti-communist policy would have to be balanced against the Trilogy's clear policy favoring the finality of arbitration awards. Indeed, in a similar case decided after the Trilogy, one court reached a result opposite from that of *Black*.⁵⁴

Where an arbitration award contravenes a rule of law which is based on public policy, the reviewing courts have also gone both ways. In New York, for example, one court vacated an award of punitive damages for breach of contract on the ground that public policy precluded such damages.⁵⁵ The New York Court of Appeals, on the other

⁵¹ *Id.* at 29, quoting *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948).

⁵² 43 Cal. 2d 788, 278 P.2d 905 (1955), cert. dismissed, 351 U.S. 292 (1956).

⁵³ *Id.* at 798-99, 278 P.2d at 911.

⁵⁴ *WPIX, Inc. v. Broadcast Eng'rs Local 1212*, 52 L.R.R.M. 2321 (N.Y. Sup. Ct. 1962). An arbitrator had found that the employee had severed connections with the Communist Party at least 10 years before the discharge and was no longer a security risk; the court thus felt there was no "public policy" reason for refusing to enforce the award.

⁵⁵ *Publishers' Ass'n v. Newspaper Deliverers' Union*, 280 App. Div. 500, 114 N.Y.S.2d 401 (1st Dep't 1952). Another award was treated as contrary to public policy in *Western Union Tel. Co. v. American Communications Ass'n*, 299 N.Y. 177, 86 N.E.2d 162 (1949).

hand, enforced an award granting specific enforcement of an employment contract,⁵⁶ a remedy usually denied as a matter of policy.

Either result may be rationalized in terms of policy. On the one hand, the courts, as guardians of the public interest, should not permit the arbitration process to shield results which are contrary to legitimate public policy. On the other hand, courts should not ignore the policy favoring arbitration as a method of promoting industrial peace.⁵⁷ The *Black* case illustrates the problem; both the majority⁵⁸ and the dissenters⁵⁹ invoked public policy in support of their views.⁶⁰

The Trilogy's clear policy favoring finality of arbitration should be subordinated to a conflicting "public policy" only where the latter is stronger and clearer than the former. Where the arbitrator has not exceeded his authority under the contract, there is little justification for judicial intervention. Because the parties' expectations have been fulfilled, the award should not be overturned unless it flagrantly violates the public interest.

II

RETROSPECT—WHITHER THE TRILOGY?

At the core of the *Steelworkers* Trilogy is the perception that arbitration is a "substitute for industrial strife"⁶¹ and "a major factor in achieving industrial peace."⁶² Though few would challenge the proposition that industrial peace is more desirable than industrial

⁵⁶ *Staklinski v. Pyramid Elec. Co.*, 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959). Although the majority asserted that "there is no controlling public policy," Judge Burke pointed out in his dissent that the award in fact offended established principles of public policy. *Id.* at 164, 160 N.E.2d at 80, 188 N.Y.S.2d at 543. *See also* *Ruppert v. Egelhofer*, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958) (enforcing the arbitrator's grant of an injunction which the court itself would have been forbidden by statute to decree).

⁵⁷ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960). To ignore that policy would be to frustrate the presumed intent of the parties. *See* pp. 149-50 & notes 70-71 *infra*.

⁵⁸ *See* p. 146 *supra*.

⁵⁹ "[The majority decision] defeats the public policy in favor of employee organization free of employer interference and coercion . . . and the public policy in favor of the settlement of disputes by arbitration . . ." 43 Cal. 2d at 812-13, 278 P.2d at 920 (Traynor, J., dissenting).

⁶⁰ The elusiveness of the concept was noted by Chief Justice Story: Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. Quoted in *Union Cent. Life Ins. Co. v. Champlin*, 11 Okla. 184, 187-88, 65 P. 836, 837 (1901).

⁶¹ *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960).

⁶² *Id.*

strife,⁶³ some courts appear to have doubts about the assumptions underlying the Supreme Court's view of arbitration. Despite the policy of the Trilogy, several courts have reserved the right to review arbitration awards in certain circumstances.⁶⁴ That the right has been exercised in many close cases indicates that courts have used the caveat of *Enterprise Wheel* to evade the rule of the Trilogy.

Doubt has been expressed that the arbitrator is quite as sage as Supreme Court cast him. Judge Hays argues persuasively that he is not.

An arbitrator is a third party called in to determine a controversy over whether one of the parties to the collective bargaining agreement has violated that agreement. He is not a wise counsellor and statesman whom the management or the union looks to for advice on how to run their affairs or how to increase production or lessen tensions. He is merely an ad hoc judge to whom is submitted the question of whether the collective bargaining agreement has been violated. The chances are very good that, in all but a tiny percentage of arbitrations, this is the first time he has had anything to do with the plant, and that he knows nothing of the background of the dispute or of the "common law" of the industry. In fact there is a considerable possibility that this is his first arbitration case. He has no expertise in these matters and is not expected to have any⁶⁵

This view suggests that the average judge is probably as competent as the average arbitrator to assess the parties' intent in light of the common law of the shop. Indeed, Judge Hays further states:

A proportion of arbitration awards . . . are decided not on the basis of the evidence or of the contract or other proper considerations, but in a way which in the arbitrator's opinion makes it likely that he will be hired for other arbitration cases.⁶⁶

If this analysis is correct, justice requires not that the courts stay out of the arbitration process, but rather that they keep a close eye on arbitrators to ensure that they fulfill their appointed role.

⁶³ It has been argued, however, that arbitration is not a true "substitute for industrial strife," since strikes and lockouts are nearly always prohibited during the term of the contract anyway and the threat of pecuniary damages deters such activity. Rubenstein, *Some Thoughts on Labor Arbitration*, 49 MARQ. L. REV. 695, 701 (1966).

⁶⁴ See cases cited notes 11, 13 *supra*.

⁶⁵ P. HAYS, *supra* note 12, at 111. Judge (formerly Professor) Hays is a veteran of many years in the arbitration field. A related line of attack centers on the alleged tendency of many arbitrators to bypass the rules of evidence in the conduct of the hearing, which leads to the inclusion of much irrelevant evidence in the proceeding. See Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 1115, 1127-32-(1964).

⁶⁶ *Id.* at 112.

The Supreme Court assumed that the parties to an agreement expect the arbitrator to consider not only the words of the contract but also the common law of the shop and the effect of his decision upon productivity, shop morale, and tensions between labor and management.⁶⁷ The assumption may not be valid. Judge Hays has stated:

One of the difficulties with these views of the nature of arbitration and the collective agreement is that both are still matters of contract. They still are in actual fact what the parties want them to be, whatever [the Court] . . . may think they ought to be. In each of these cases, it must be remembered that one of the parties was there screaming to high Heaven that what he intended bore no resemblance whatever to the thing that [the Court] . . . has described. . . . [A]s a practical matter, arbitration and the collective agreement are what [the Court] . . . says they are if, and only if, the labor unions want them to be that way, which is certainly doubtful as a general proposition, and they can at the same time induce, or force, the employer to agree.⁶⁸

One veteran arbitrator forthrightly admits his doubt that parties want arbitrators to exercise the wide-ranging authority granted by the Trilogy: "[M]ost employers and unions . . . do not want arbitrators to function in the 'philosopher king' manner suggested by the Court's statement."⁶⁹

The Trilogy's final conclusion of law, which is based on further assumptions concerning the intent of the parties, is also questionable. The Court reasoned:

It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.⁷⁰

⁶⁷ United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960). See p. 137 & notes 9-10 *supra*.

⁶⁸ Hays, *The Supreme Court and Labor Law: October Term, 1959*, 60 COLUM. L. REV. 901, 924 (1960) (some emphasis added; other emphasis in original). The immense practical power of an arbitrator has been noted:

[L]abor arbitration may not always be a dispute settlement technique that relies solely on pre-existing standards and norms found in a collective bargaining agreement and in the common law of an enterprise. . . . This may mean that the arbitrator will give less than full attention to the terms of the agreement or the common law of an enterprise.

Wellington, *Judicial Review of the Promise to Arbitrate*, 37 N.Y.U.L. REV. 471, 482 (1962). Professor Wellington adds that "this may be what the parties expect when they choose their arbitrator. But how can a court tell on review?" *Id.* He concludes that the best policy would be for the courts to emphasize the limitation on the arbitrator's authority set out in *Enterprise Wheel. Id.* at 484.

⁶⁹ Davey, *The Supreme Court and Arbitration: The Musings of an Arbitrator*, 36 NOTRE DAME LAWYER 138, 140 (1961).

⁷⁰ United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960) (emphasis in original).

There is no way to know exactly what parties have in mind when they contract, but it is doubtful that they usually "bargain for" the arbitrator's judgment. They actually have no real choice when they agree to the arbitration clause. The alternative to arbitration may be a long and costly strike which neither party wants. The fact that collective bargaining agreements almost always contain provisions for arbitration⁷¹ indicates that parties rarely consider *not* including it. The real reason for an arbitration agreement is practical necessity, not implicit faith in the arbitrator's wisdom. Even if the contracting parties "bargain for" the arbitrator's ruling, they probably do not mean to accept *any* interpretation which he might produce. A more natural assumption is that parties who agree to arbitration do so with the expectation that the award will be based on a reasonable interpretation of the contract.⁷²

Courts of appeals that have vacated awards may agree with the Supreme Court that arbitration is a valuable tool generally. But by emphasizing the *Enterprise Wheel* limits on the arbitrator's power rather than the central Trilogy rule of judicial nonintervention, they have adhered to a realistic view of the parties' intent and have granted the just protection of meaningful review.

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⁷¹ Some 94% of all collective bargaining agreements contain labor arbitration clauses. Jay, *Arbitration and the Federal Common Law of Collective Bargaining Agreements*, 37 N.Y.U.L. REV. 448, 452 n.18 (1962).

⁷² Rubenstein, *supra* note 63, at 705. The author says that the parties who agree to arbitration do so "upon the assumption that arbitrators who render opinions under their agreement will do so not only impartially, but also with some degree of competence and in a way that can be reasonably anticipated." Judge Hays's experience, at least, indicates that the arbitrator may be neither impartial, competent, nor reasonable. See p. 148 & notes 65-66 *supra*.