

## ARTICLE

### THE *TRILOGY* AND ITS OFFSPRING REVISITED: IT'S A CONTRACT, STUPID

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Another article on judicial review of arbitration? Are there not already enough and too many? In the thirty-three years since the *Steelworkers Trilogy*,<sup>1</sup> treatises, law reviews and symposiums have restated, parsed and elaborated the emphatic ambiguities of the Supreme Court.<sup>2</sup> Each new decision of the Court has spurred new efforts to expound on the past and project the future. This subject has, for a third of a century, been one of the favorite hobby horses of law teachers, lawyers, student editors and, of course, arbitrators. Is there anything left to be said? Is it not time to put the old workhorse out to pasture, at least until the Supreme Court pronounces another impenetrable generality?

A survey of the literature leaves the depressing impression that commentators have not ridden off in all directions seeking new perspectives or vistas. They have treated the language of the *Trilogy* as holy writ and little of substance has been written that could not have been written thirty

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\* Jefferson B. Fordham Professor Emeritus, University of Pennsylvania Law School. B.S., University of Illinois, 1939; J.D., University of Illinois, 1942; J.S.D., Columbia University, 1952. This subject was chosen as a tribute to Professor Merton Bernstein's substantial contribution to the law of arbitration as well as the wisdom and integrity he brought to the practice. See, e.g., PRIVATE DISPUTE SETTLEMENT: CASES AND MATERIALS ON ARBITRATION (1968); *The Impact of the Uniform Commercial Code Upon Arbitration: Revolutionary Overthrow or Peaceful Coexistence?* 42 N.Y.U. L. REV. 8 (1967); *Nudging And Shoving All Parties to A Jurisdictional Dispute into Arbitration: The Dubious Procedure of National Steel*, 78 HARV. L. REV. 784 (1965). This Article is submitted with the confidence that although Professor Bernstein might not agree with its substance, he has the flexibility of mind to appreciate it. He is not the "stupid" referred to in the title.

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

2. For extensive collections of articles and cases, see the footnotes in four recent articles by authors who must have been exhausted by their thoroughness. Mark Berger, *Judicial Review of Arbitration Awards: Practice, Policies and Sanctions*, 10 HOFSTRA LAB. L.J. 245 (1992); Charles B. Craver, *Labor Arbitration as a Construction of Collective Bargaining*, 66 CHI.-KENT L. REV. 571 (1990); Susan A. Fitzgibbon, *The Judicial Itch*, 34 ST. LOUIS U. L.J. 485 (1990); Douglas E. Ray, *Protecting the Parties Bargain after Misco: Court Review of Arbitration Awards*, 64 IND. L.J. 1 (1988).

years ago. Subsequent Supreme Court decisions have discussed the application of the *Trilogy* to special problems—the after-life of the arbitration agreement when its host collective agreement has expired and the public policy limitations on arbitration awards. On these problems, the Court has provided less clarity than confusion. Nevertheless, commentators have sought to find new life in the repeated aphorisms of the *Trilogy* but with limited success. Much of the recent scholarship focuses on decisions in the lower courts, evaluating them in terms of the unilluminating words of the Supreme Court. The splattered results of those decisions which almost uniformly begin with ostentatious genuflections to those words bear witness to the futility of finding light where the Court casts elusive shadows.

It is brash, if not presumptuous, to assume that at this late date one can present a different perspective which will provide a more workable framework and appropriate standard for court intervention in arbitration, and it would be quixotic to assume that anyone will pay attention. But pursuing new ways of looking at problems, even if our vision is faulty, is the function and fun of scholarship, and our academic salaries free us from concern for whether our ideas are accepted in the marketplace of ideas.

My purpose here is to present a relatively simple analytical framework for describing the role of the courts in enforcing arbitration provisions in collective agreements. It is not a framework articulated in the Court's opinions, but one which underlies, perhaps subconsciously, the results. It emphasizes the contract roots of arbitration, not in Willistonian terms of worshipping the written word, but more in Corbin's way of looking to the implicit understanding of the parties and their purposes.

The first step is to better understand why the opinions in the *Trilogy* took the form they did, largely avoiding the language of contract in an admittedly contractual problem. This may free us from focusing solely on the appealing policy arguments to see the underlying contract principles. Second, we will examine the Court's role at the pre-arbitration stage when the Court must decide whether to send a case to arbitration and demonstrate how a contract perspective clarifies and simplifies the problem. Third, we will examine the Court's role at the post-arbitration stage when the Court must decide to vacate or enforce the award. Here the contract perspective provides general guidelines which may be helpful to the Court in making that decision, although it may not always produce secure answers.

I. THE *TRILOGY* LANGUAGE

Justice Douglas' opinions in the *Trilogy* were not framed in terms of contract law but in terms of the institutional function of arbitration. Indeed, the Court distanced itself from contract law. In *United Steelworkers of America v. American Manufacturing*,<sup>3</sup> Justice Douglas criticized the New York court's decision in *International Association of Machinists v. Cutler-Hammer*<sup>4</sup> as "preoccupation with ordinary contract law,"<sup>5</sup> and in *United Steelworkers of America v. Warrior & Gulf Navigation Co.* he described the collective agreement as "more than a contract; it is a generalized code . . . ."<sup>6</sup> There was, however, ambivalence. In *Warrior & Gulf*, Justice Douglas acknowledged that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit,"<sup>7</sup> but he did not build on the contract analysis by inquiring into the understanding of the parties when they made the contract to arbitrate. On the contrary, he immediately turned to congressional policy which is used to reach the oft-cited conclusion: "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."<sup>8</sup>

The presumption of arbitrability was not built on any presumed understanding of the parties but on the institutional function of arbitration and presumed competence of the arbitrator. Arbitration was characterized as a "stabilizing influence,"<sup>9</sup> a "substitute for industrial strife,"<sup>10</sup> for "[i]t, rather than a strike, is the terminal point of disagreement,"<sup>11</sup> and "process-

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3. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960).

4. *International Association of Machinists v. Cutler Hammer, Inc.*, 67 N.Y.S.2d 317, *aff'd*, 74 N.E.2d 464 (N.Y. 1947).

5. *American Manufacturing*, 363 U.S. at 567. The expression that a collective agreement is not an "ordinary contract" is a favorite aphorism of labor lawyers. However, like many aphorisms, it is not more than half true. See Clyde W. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525 (1969). The collective agreement is not a transactional contract like a horse trade. Rather, it is the paradigm of a relational contract like a franchise or a long-term lease. See generally IAN MACNEIL, *THE NEW SOCIAL CONTRACT* (1980).

6. *Warrior & Gulf*, 363 U.S. at 578.

7. *Id.* at 582.

8. *Id.* at 582-83.

9. *American Manufacturing*, 363 U.S. at 567.

10. *Warrior & Gulf*, 363 U.S. at 578.

11. *Id.* at 581.

ing of even frivolous claims may have therapeutic value . . . ."<sup>12</sup> The collective agreement is described as "an effort to erect a system of industrial self-government,"<sup>13</sup> and the written document may include "standards which require reason and judgment in their application, and [provisions which] do little more than leave problems to future consideration with an expression of hope and good faith."<sup>14</sup> Arbitration is "the means of solving the unforeseeable by molding a system of private law for all the problems which may arise . . . ."<sup>15</sup>

Arbitrators are extolled with extravagant language, which only arbitrators can unqualifiedly embrace, as competent to perform this function. In *United Steelworkers of America v. Enterprise Wheel*, Justice Douglas proclaimed: "[Arbitrators] are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or a particular industry as reflected in particular agreements."<sup>16</sup> And in *Warrior & Gulf* Justice Douglas observed:

The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective agreement permits, such factors as the effect on productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished.<sup>17</sup>

Three striking characteristics emerge from the Court's language in the *Trilogy*. First, as already noted, the decisions are not justified or explained in terms of contract principles. Instead they are explained in terms of congressional and judicial social policy based on the Court's evaluation of the arbitration process and the competence of arbitrators. Second, the extended discussion of the nature of collective agreements, the institutional function of arbitration, and the deified role of arbitrators was unnecessary to the decisions. It would have been enough to have stated, as in *American Manufacturing*, that the parties had agreed to submit all disputes to arbitration and thereby designated the arbitrator as the reader of the contract. The arbitrator should read, and that reading should be conclusive,

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12. *American Manufacturing*, 363 U.S. at 568.

13. *Warrior & Gulf*, 363 U.S. at 580.

14. *Id.* (citing Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1005 (1955)).

15. *Id.* at 581.

16. *Enterprise Wheel*, 363 U.S. at 596.

17. *Warrior & Gulf*, 363 U.S. at 582.

just as in commercial arbitration. Third, the Court repeatedly emphasized the superior competence of arbitrators and emphasized that courts should avoid becoming entangled in the merits of the dispute. In *Warrior & Gulf* the Court declared: "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."<sup>18</sup> In *American Manufacturing*, the Court concluded: "The Courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim."<sup>19</sup>

The forceful language of these opinions describing the special character of collective agreements, emphasizing the institutional function of arbitration, extolling the wisdom of arbitrators, and denigrating the competence of courts—all largely unnecessary to the decisions if a contract analysis had been used—must be read in its historical context. In the fifteen years preceding the *Trilogy*, state courts had confronted motions to compel or stay arbitration and motions to enforce or vacate awards under collective agreements. Many state courts, and particularly the New York courts,<sup>20</sup> had manifested an irresistible compulsion to entangle themselves in the merits of the dispute and displace the arbitrator. On motions to compel arbitration, courts would examine the facts and the contractual language. If they saw no merit in the grievance, they would declare that "no dispute" existed or that it was "not covered by the contract."<sup>21</sup> Because the arbitration clause applied only to disputes arising under the contract, the grievance was not within the scope of the arbitration clause and arbitration would be denied. On motions to enforce or vacate awards, if the court disagreed with the arbitrator's factual determination or contractual interpretation, it would declare that the arbitrator had exceeded his jurisdiction because the contract limited his authority to "interpret and apply the contract."<sup>22</sup> The arbitrator had no authority to misinterpret the contract or misapply the facts. All of this was done in the name of

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18. *Id.*

19. *American Manufacturing*, 363 U.S. at 568.

20. See Martin H. Malin, *Labor Arbitration Thirty Years After the Steelworkers Trilogy*, 66 CHL-KENT L. REV. 551, 552-56 (1990). For a discussion of the New York cases, see Clyde W. Summers, *Judicial Review of Arbitration or Alice through the Looking Glass*, 2 BUFF. L. REV. 1 (1952). For a discussion of the performance of the federal courts in the period between *Lincoln Mills* and the *Trilogy*, see Harry H. Wellington, *Judge Magruder and the Labor Contract*, 72 HARV. L. REV. 1268 (1959).

21. See *Cutler-Hammer*, 67 N.Y.S.2d at 318.

22. See *American Manufacturing*, 363 U.S. at 567.

upholding the arbitration agreement, but it burdened the courts with appeals, entangled them in interpreting collective agreements, and undermined the arbitration process.

When *Textile Workers Union of America v. Lincoln Mills*<sup>23</sup> was decided, with its facile assertion that the federal courts could, with "judicial inventiveness,"<sup>24</sup> fashion a body of federal substantive law, some commentators expressed fears that the federal courts would be burdened with cases. Commentators also worried that courts would develop and apply a whole labor contract code and judicial interpretation of contract provisions would establish precedents which would be applied to other collective agreements. The end result would destroy the flexibility of collective agreements and distort the bargaining process.<sup>25</sup> In Justice Frankfurter's words, the rule developed by the courts "is more likely to discombobulate than to compose."<sup>26</sup>

If the pattern of decisions which had developed in the state courts was carried over to the federal courts, all of this or worse would have followed. The emphatic language of the *Trilogy* was to make unmistakably clear to the lower federal courts that this was not to happen. They were not to follow the lead of the state courts, but were to leave to arbitrators the interpretation of collective agreements. It was not by accident that the Court specifically cited *Cutler-Hammer*, the leading New York case, and quoted its notorious rationale: "if the meaning of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration."<sup>27</sup> The Court dismissed this rationale as "preoccupation with ordinary contract law."<sup>28</sup> The language in the *Trilogy* restated and emphasized time and again that the *Cutler-Hammer* doctrine was repudiated and had no place in the federal courts. The Court reinforced this message by strongly stating the policy reasons for deferring to the arbitrator.

We can read the *Trilogy* opinions with better understanding and greater appreciation if we read them as admonitory rather than analytical. The Court was confronted with the need to send a strong message to the judges

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23. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

24. *Id.* at 457.

25. See Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

26. *Lincoln Mills*, 353 U.S. at 464 (Frankfurter, J., dissenting).

27. *American Manufacturing*, 363 U.S. at 567 (citing *Cutler-Hammer*, 67 N.Y.S.2d at 318).

28. *Id.*

of lower federal courts, which would counter any temptations they might have to meddle with the arbitration process, or any conceit that their ability to decide grievance disputes was superior to that of arbitrators. Focusing on the words of the *Trilogy* will provide little guidance beyond a sense of general direction.

The significance of this historical perspective is that we will not find the formulation of an analytic framework in the words of the Court. The Court quite understandably eschewed relating its discussion to contract principles, for the verbiage of contract had provided the rationale for *Cutler-Hammer*. However, this lack of a contractual framework coupled with the appealing description of the role of arbitration and arbitrators has obscured underlying contract principles.

## II. THE PRE-ARBITRATION CONTRACTUAL PERSPECTIVE

The starting point is to ask the question: When a motion is made to compel or stay arbitration, what is the question before the Court? The common response is: Is the dispute "arbitrable"? That, in turn, leads us to focus narrowly on the words of the arbitration clause and not look beyond to the intent and purposes of the parties. As I will develop later, the words used by the parties in the document may imperfectly or incorrectly express their intent and purpose.<sup>29</sup>

The question before the court, in simplest terms is: Should this dispute be decided by arbitration? This question, however, cannot be sensibly answered without asking: If it is not to be decided by arbitration, through what process is it to be decided? A dispute plainly exists between the parties, otherwise they would not be in court. That dispute must be decided, and the question is: Where is that dispute to be decided? For most disputes between unions and employers, there are three possible alternatives—arbitration, the courts, and economic conflict.<sup>30</sup> The court must choose. If the court decides that the dispute is not arbitrable, it implicitly decides that the dispute will be resolved by the court or by economic conflict. The question before the court is simply: What is the proper

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29. See *infra* part III.

30. Justice Douglas' quotable sentence in *Lincoln Mills*, "[p]lainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike" is simplistically misleading. The agreement to arbitrate is a bargained substitute for adjudication to keep grievance disputes out of the hands of the courts. The parties may agree to a no-strike clause without arbitration, in which case the dispute is decided by the courts. See *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

forum?<sup>31</sup>

It may be suggested that there is a fourth alternative—the employer. However, deciding that the employer is the proper forum decides the merits of the dispute, for the dispute is whether the collective agreement allows the employer to take the disputed action. The slipperiness of the word “arbitrability” is that it is frequently used to disguise the fact that, by finding that a dispute is not “arbitrable,” the merits are being decided in favor of the employer.<sup>32</sup>

The choice of forum belongs to the parties. In making their collective agreement, they must choose a forum, either implicitly or explicitly. The choice of forum is a term of the collective agreement and the contractual question for the court is: What forum have the parties chosen? To answer that question, the court must look, not just at the naked words of the arbitration clause, but at the entire agreement, and must determine the parties’ intent and understanding.

*American Manufacturing* provides a paradigm. The dispute was whether the collective agreement required the employer to reinstate an employee who had agreed in a workers’ compensation proceeding that he was twenty-five percent disabled.<sup>33</sup> The question before the court was what forum the parties had agreed should be used to resolve this dispute. A broad no-strike clause foreclosed that forum.<sup>34</sup> The standard arbitration clause demonstrated that the parties generally preferred arbitration to litigation in resolving their disputes and nothing indicated that they intended this kind of case to be an exception, preferring to have it decided by a judge rather than an arbitrator.

The same analysis is equally applicable to *Warrior & Gulf*. The dispute in that case was whether the employer had violated the collective agreement by contracting out maintenance work.<sup>35</sup> The employer’s simple verbal

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31. This approach, that arbitrability is a question of proper forum, was first suggested in my *Labor Law Decisions of the Supreme Court*, 1961 Term, Proceedings of Labor Law Section, American Bar Association (1962).

32. In *Pennsylvania Power Co. v. Local Union No. 272, IBEW*, 886 F.2d 46 (3rd Cir. 1989), the employer introduced a new job and gave it the same rate as the old job. When the union protested, the employer insisted that the decision was for management. The court stated that this was “interest” arbitration, not “rights” arbitration. Thus, it was not arbitrable because it did not involve interpretation and application of the agreement. *Id.* at 48-49. The dispute, however, was whether the contract gave this discretion to management. By holding the dispute not arbitrable, the court held that the contract gave management this discretion.

33. 363 U.S. at 566.

34. *Id.* at 567.

35. *Id.* at 575-76.



logic in refusing to go to arbitration was that the arbitration clause stated that "matters which are strictly a function of management shall not be subject to arbitration"; therefore, because subcontracting was a function of management, the dispute was not arbitrable.<sup>36</sup> If we are not bemused by the misplaced words in the arbitration clause (about which I will say more later),<sup>37</sup> we recognize that the dispute is whether the collective agreement makes subcontracting "strictly a function of management," and this requires interpretation of various provisions of the agreement. The contractual question for the court was whether the parties intended that this interpretation was to be made by the arbitrator. If the dispute is not resolved in arbitration, where will it be resolved? By incorporating a no-strike clause, the parties had rejected economic action, so the only alternatives were arbitration or litigation.

The employer's argument, taken on its face, was that the court should interpret the agreement. Would this result fit with the understanding and purpose of the parties? The broad arbitration clause affirms the parties' confidence in arbitration and a lack of confidence in the courts in resolving disputes over the interpretation and application of the collective agreement. Is it likely that the parties intended that in all those disputes which raised the question whether employer's action was "strictly a function of management," the interpretation of the collective agreement was to be made by the courts rather than by the arbitrator?

Application of the basic contract principle that looks beyond the bare words of a document to the intent and understanding of the parties, and reads the document to accomplish the purposes of the parties, makes the language of the *Trilogy* unnecessary to the results reached. It is not necessary to describe collective agreements as "a system of self-government,"<sup>38</sup> and arbitration as "molding a system of private law for all of the problems which may arise."<sup>39</sup> Nor is it necessary to extol the competence of arbitrators and overstate their functions. The question in pre-arbitration proceedings is contractual: What forum have the parties agreed should resolve the dispute?

In *American Manufacturing* and *Warrior & Gulf*, the intent and understanding of the parties is plain from the totality of the agreement. The language of the *Trilogy* reinforced the contractual result, for it

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36. *Id.* at 584.

37. *See infra* part II.C.

38. *Warrior & Gulf*, 363 U.S. at 580.

39. *Id.* at 581.

explained why the parties preferred arbitration to litigation and what functions they intended it to perform. The description of arbitration provides a richer context for determining the intent and understanding of the parties, particularly as to what forum they have chosen to decide disputes. The question, however, is still one of contract, and the contractual perspective clarifies and simplifies the problem.

#### A. *The Afterlife of Arbitration*

Three Supreme Court decisions have confronted the question whether the obligation to arbitrate survives the expiration of the collective agreement. In *Nolde Brothers Inc. v. Local 358, Bakery & Confectionery Workers Union*,<sup>40</sup> Nolde closed one of its bakeries four days after the contract expired. The union claimed that the collective agreement provision for severance pay made it an accrued right, and the terminated employees had acquired vested rights prior to termination of the agreement. The Court, in ordering arbitration relied on the institutional and policy arguments of the *Trilogy*,<sup>41</sup> but this served only to invite a dissent that those policies had no force once the plant was closed.<sup>42</sup> The Court would have stood on more solid ground if it had relied on the basic contract principle that the courts should effectuate the intent and purposes of the parties. Determination of the dispute depended on interpretation of the collective agreement, specifically whether it made severance pay an accrued vested right. The parties had manifested a clear preference that interpretation of the agreement be made by an arbitrator rather than a judge. The fact that events caused that interpretation to be made after the collective agreement expired did not effect that agreed upon preference. There was no reason to believe that the parties wanted their agreement to be interpreted by an arbitrator on the day before the contract expired and by a judge the day after.<sup>43</sup>

*John Wiley & Sons v. Livingston*,<sup>44</sup> presented a similar problem: Whether the rights claimed by the union survived the termination of Interscience's collective agreement. Furthermore, the case presented the

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40. 430 U.S. 243 (1977).

41. *Id.* at 253.

42. *Id.* at 256 (Stewart, J., dissenting).

43. *Enterprise Wheel* involved an arbitration award rendered after the contract expired, but the discharge had occurred and arbitration was pending before the contract expired. The issue was not whether the dispute was to be decided by the arbitrator, but whether, under the contract, the arbitrator could order reinstatement and back pay. The Court held that he could. 363 U.S. at 599.

44. *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

problem of whether Wiley, as successor, was bound by Interscience's obligations. The Court held that deciding whether the contract created accrued rights which survived required interpretation of the agreement, and that question, therefore, was to be decided by the arbitrator.<sup>45</sup> Whether Wiley was bound as successor did not involve interpretation of the agreement but application of general legal principles. The proper forum for that question was the courts.

Both of these cases reached results consistent with the contract analysis being advocated. The same cannot be said about the most recent case, *Litton Financial Printing Division v. NLRB*,<sup>46</sup> a five to four decision. A year after the collective agreement expired, Litton laid off a number of senior employees. The union filed a grievance, claiming that Litton had violated the seniority provisions of the expired agreement.<sup>47</sup> Litton refused to process the grievance or go to arbitration.<sup>48</sup> The NLRB found that Litton's refusal to process the grievance and "wholesale repudiation" of its obligation to arbitrate after the expiration of the agreement constituted an unfair labor practice.<sup>49</sup> The NLRB, however, refused to order arbitration because it read *Nolde* as not reaching seniority rights.<sup>50</sup>

Review of the NLRB's decision brought to the Court the question whether these claims were arbitrable. The union argued that seniority provisions create a form of earned advantage, accumulated over time, that can be understood as a special form of deferred compensation for time already worked.<sup>51</sup> Thus, the union argued that seniority rights, like rights to severance pay, survived the expiration of the agreement.

At this point, the result might seem obvious, whether one uses *Trilogy* policy or contract analysis. The union's claim was that the contractual provision should be interpreted as creating surviving rights, and the parties had agreed that the contract should be interpreted by an arbitrator, not a judge. Justice Kennedy, however, brazenly decided the merits:

[T]he layoff provision here cannot be so construed, and cannot be said to create a right that vested or accrued during the term of the Agreement, or a contractual obligation that carries over after expiration . . . .

We cannot infer an intent on the part of the contracting parties to freeze

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45. *Id.* at 558-59.

46. *Litton Financial Printing Division v. NLRB*, 111 S. Ct. 2215 (1991).

47. *Id.* at 2219.

48. *Id.*

49. *Id.*

50. *Id.* at 2220.

51. *Id.* at 2227.

any particular order of lay off or vest any contractual right as of the Agreement's expiration.<sup>52</sup>

This is *Cutler-Hammer* without even the verbal disguise of "lack of jurisdiction" or "no dispute to be arbitrated." Justice Kennedy's justification was that to apply the presumption of arbitrability "wholesale in the context of an expired bargaining agreement . . . would make limitless the contractual obligation to arbitrate."<sup>53</sup> The ghost he apparently feared was the prospect of unlimited frivolous claims raised after the contract's expiration. But frivolous claims may be raised without limit during the contract term and according to the Court may have therapeutic value. Moreover, the obligation to arbitrate is controlled by the parties and it is for them to determine whether courts or arbitrators should decide the merit of post agreement claims.

### B. *The Arbitrability of Arbitrability*

Recognizing that in pre-arbitration proceedings arbitrability is a question of proper forum leaves open the question: Who is to decide what is the proper forum? In common and confusing parlance, is arbitrability for the arbitrator or for the court? On this score, the logic of *AT&T Technologies, Inc. v. Communication Workers of America*<sup>54</sup> is less than fully satisfactory. Quoting from *Warrior & Gulf*, the Court repeated, "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."<sup>55</sup> The Court then stated that: "[it] inexorably follows . . . that the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue . . . for judicial determination."<sup>56</sup>

The difficulty with this logic is that questions of interpretation of the

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52. *Id.* at 2227. A more disguised method of deciding the merits is illustrated by *United Food & Commercial Workers v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990). Grievances involving discharge, promotions, and work by supervisors were filed after the agreement had expired and the employer had unilaterally implemented its last offer. The court said that the dispute was arbitrable only if it "arose under the contract," and to arise under the contract, it must involve "rights which have to some degree vested or accrued during the life of the agreement." *Id.* at 1024. The dispute on the merits, of course, included whether the contract created vested or accrued rights which survived the contract expiration.

53. *Litton Financial Printing*, 111 S. Ct. at 2227.

54. *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643 (1986).

55. *Id.* at 648.

56. *Id.* at 649.

agreement are to be decided by the arbitrator, and determining whether the agreement creates a duty to arbitrate a particular dispute requires an interpretation of the agreement. Reading the words of the agreement would lead to the conclusion that unless expressly excluded, disputes as to arbitrability should be decided by the arbitrator.

The contract perspective, which looks to the intent and understanding of the parties, does not necessarily lead to the same result. A dispute over who should decide a grievance is quite different from other interpretive disputes; the parties might not want to place in the hands of the arbitrator the power to decide the scope of his own authority. On the other hand, unions and employers, in practice, commonly submit the question of arbitrability, as well as the merits, to the arbitrator. This practice might point toward the conclusion that the parties intended to entrust this to the arbitrator unless they provided otherwise.

Arbitrability, however, is a question of which forum is to resolve the dispute. The answer to that question determines not only the authority of the arbitrator, but also the authority of the court. A decision by an arbitrator that a dispute is arbitrable decides not only that arbitration is the proper forum, but also that the court is not the proper forum. Courts are understandably reluctant to have arbitrators decide the scope of their judicial function and responsibility. The parties can, of course, authorize the arbitrator to decide arbitrability, but the courts require clear expression of that purpose. Applying a principle of contract construction, courts interpret silence or ambiguity in the collective agreement as signifying lack of clarity of the parties intent. Courts then resolve this uncertainty in favor of the judicial policy of protecting the court's authority.

### *C. Misplaced Words in Arbitration Provisions*

The words of arbitration provisions are often misleading because they attempt to go beyond designating the proper forum and cloak substantive terms in the guise of "arbitrability." *Warrior & Gulf* is a prime example. In that case, the arbitration clause provided: "Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration . . ."<sup>57</sup>

Read literally, these words are errant nonsense doubled. First, "issues" cannot "conflict" with a statute; only actions or decisions can conflict. It

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57. *Warrior & Gulf*, 363 U.S. at 576.

is difficult to diagnose, with nothing more, what the parties sought to accomplish by these words. There are two possibilities. One is that disputes which claim only statutory violations, rather than contract violations, should be decided by a court, not the arbitrator—a true arbitrability provision. The other is that the arbitrator should not make a decision which conflicts with any federal statute. If it is the latter meaning the parties intended to convey, then the words should have been placed in a substantive provision, not the arbitration clause.

The second half of the clause, which by its words excludes from arbitration “matters which are strictly a function of management,” is equal, if less obvious, nonsense. This clause was immediately followed by a clause providing for arbitration of “differences . . . [of the] meaning and application of the provisions of this Agreement.”<sup>58</sup> The function of a collective agreement is to define the limits of management’s freedom of action; the scope of management prerogatives is inescapably a term, either implicit or explicit, in a collective agreement. What matters are “strictly a function of management” obviously can be determined only by interpreting the agreement.

A lurking question remains to be answered: What did the parties have in mind when they used these misplaced words? Most likely the employer sought assurances that the arbitrator would not attempt to supplant management. If the agreement allocated certain decisions to management, the arbitrator was not to modify or set aside those decisions on the basis of his judgment concerning productivity, morale of the shop, or general fairness. The purpose is essentially admonitory, reminding the arbitrator that if the agreement is interpreted as making the subject a management function, then the arbitrator should not meddle. Both the district court and the court of appeals were led astray by the misshaped arbitration clause and fell into deciding the merits as a question of “arbitrability.”

*Teamster Local 315 v. Union Oil Co.* provides another example of a poorly worded arbitration provision.<sup>59</sup> The grievance article provided: “Only actions of the Company which are alleged to be violations of duties or obligations expressed in one or more of the written provisions of the Agreement shall be subject to the grievance and arbitration procedure.”<sup>60</sup> The words, read literally, are again nonsense. These words were not intended to prescribe the forums for deciding particular disputes. Their

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58. *Id.*

59. 856 F.2d 1307 (9th Cir. 1988).

60. *Id.* at 1310.

purpose was not to prescribe that disputes claiming violation of express obligations were to be resolved in arbitration and that disputes claiming violation of implied obligations were to be resolved in the courts or through economic conflict. Instead, the language was intended to provide that the Company's only obligations were those expressed in the written agreement and, therefore, the Company had no implied obligations.

In *Union Oil* the employer refused to reinstate an employee after medical leave because the Company doctor said the employee was not physically fit.<sup>61</sup> The employee's doctor disagreed. The union filed a grievance relying on the seniority clause and the employer refused to arbitrate.<sup>62</sup> The court reasoned that because the employer had kept the employee on the seniority rolls, there was no violation of the express provisions of the seniority clause.<sup>63</sup> Moreover, the court found no other language in the agreement which expressly abrogated the Company's authority to decide when an employee is physically and medically fit to return to work.<sup>64</sup> The court, without self-justification or apology, reviewed the negotiating history, interpreted the contract, and decided the merits of the dispute under the guise of determining arbitrability because the arbitration clause had gone beyond prescribing the proper forum and defined substantive rights.

Misplacing substantive terms in the arbitration clause occurs with disturbing frequency. A typical, innocent appearing example is a provision which states, "the dismissal of a probationary employee shall not be the subject matter of a grievance." This will normally cause no problem because the union will not contest such dismissals. However, what if the union claims that the dismissal is because the employee, as shop steward, has vigorously pursued grievances and that the dismissal violates the contract provision prohibiting discrimination for union activities? The employer's obvious argument is that because the dismissal cannot be the subject of a grievance, it cannot be the subject of arbitration. The verbal logic is impeccable, but there is unquestionably a dispute and if the arbitrator can not decide, shall the court decide, or shall the union strike? The plain purpose of the provision is to state in a backhanded fashion that probationary employees are not protected by the "just cause" clause and that the employer has almost unbounded discretion to dismiss. It is the function of the arbitrator to determine whether other provisions in the

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61. *Id.* at 1308.

62. *Id.*

63. *Id.* at 1311.

64. *Id.*

agreement limit that discretion.<sup>65</sup>

The contractual analysis when procedural issues are involved provides less obvious answers. For example, the agreement may provide, "No grievance may be submitted to arbitration unless it has been filed in writing and processed in the manner and within the time limit prescribed by this Agreement." If the union fails to file or appeal a grievance within the time limits, skips a step in the grievance procedure, or gives only an oral rather than a written notice of an intent to arbitrate, should the court order arbitration? The court might reason that it, not the arbitrator, should determine whether the procedural prerequisites for arbitration have been fulfilled. But there may be various reasons for waiving particular procedural requirements which are related to the merits, or when failure to meet those requirements are caused by the employer's conduct, come within past practice, or are otherwise justified. The question is whether the parties intended that these questions of waiver should be decided by an arbitrator or a judge. The dispute requires interpretation and application of the agreement, inquiry into the practices and habits of the workplace, examination of the facts surrounding the particular dispute and the parties' assumptions. These are inquiries and considerations which are the meat of arbitration, no different from those which the parties have otherwise entrusted to arbitration. Therefore, it is reasonable to conclude that the parties intended that these disputes should be decided by the arbitrator and not the court. The words of arbitrability should be read as directions to the arbitrator, not the court. The contractual perspective leads to the conclusion reached otherwise by the Supreme Court<sup>66</sup>—questions of procedural arbitrability are normally for the arbitrator.

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65. In *Morristown Daily Record v. Graphic Communications Union, Local 8N*, 832 F.2d 31 (3d Cir. 1987), the agreement provided that when there were openings the union could provide applicants. However, it also provided that the employer had the right to reject applicants and that "[s]aid rejection may be grieved, but shall not be a subject for arbitration." The union referred a substitute employee, whom the employer rejected and dismissed. The court said that if the employee was an "applicant," the dispute was not arbitrable, but if he was an "employee" then his dismissal was arbitrable. Which one he was, said the court, was to be decided by the court, by extrinsic evidence if necessary. The threshold issue in the dispute, of course, was how the collective agreement defined "applicant" and "employee" in the circumstance. The court was drawn into inappropriately interpreting the agreement and determining the merits by words of arbitrability.

66. See *supra* note 56 and accompanying text. See also *International Union of Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487 (1972).



#### D. *Other Alternative Forums*

The presence of a broad arbitration clause does not necessarily mean that arbitration is the exclusive forum for deciding all disputes arising under the collective agreement. If the no-strike clause provides that it shall not apply to "disputes concerning work standards or the establishment of rates for new jobs in the plant," this manifests an intent of the parties that these disputes need not be resolved by arbitration. If negotiations fail, they may be resolved by economic force. When the question is whether arbitration or economic force is the proper forum, the presumption of arbitrability may play a role. If the parties' intent is not clear, then the court should apply the contract principle of interpretation to resolve ambiguities in the direction of effectuating social policy, here the policy of peaceful settlement of contract grievances expressed in section 203(d) of the Labor Management Relations Act (LMRA).<sup>67</sup> The presumption of arbitrability is based on common contract principles.

The parties may designate a forum other than the arbitrator, the court, or the picket line. For example, a pension plan created by the collective agreement may create a special committee to decide questions of eligibility, thereby removing these disputes from the arbitrator. The question of arbitrability, however, remains a question of proper forum and the intention and understanding of the parties controls.

More difficult problems are presented when the dispute involves a legal issue. Clearly the parties can submit a legal issue to arbitration and be bound by the arbitrator's decision if that issue is one they can settle by agreement. The question is whether they intended to do so. For example, the union files a grievance against the employer, making no claim of contract violation, but claiming only a violation of section 8(a)(5) of the National Labor Relations Act (NLRA).<sup>68</sup> Is this "naked NLRB claim" arbitrable under an arbitration clause which by its terms encompasses "any difference between the parties"? The words would seem to say so, but what was the intent and understanding of the parties? In this inquiry, the discussion in the *Trilogy* concerning the role of arbitration and the competence of arbitrators becomes relevant, for it was in this context that the parties adopted arbitration. Resolving legal issues is not normally the purpose for which the parties choose arbitration and it is not a matter about

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67. Labor Management Relations (Taft-Hartley) Act § 203(d), 29 U.S.C. § 185(a) (1988).

68. National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1988).

which “[t]he ablest judge cannot be expected to bring the same competence to bear.”<sup>69</sup> In the absence of evidence to the contrary, the court can fairly conclude that the parties intended that legal claims should be decided by legal tribunals, here the NLRB, rather than by arbitration.<sup>70</sup>

When the dispute involves both a contract issue and a legal issue the problem is more complicated. For example, in *Communication Workers of America v. US West Direct*,<sup>71</sup> an employer refused to apply the collective agreement to a group of newly hired non-union accountants. The union claimed that they came within the definition of “employees” in the collective agreement.<sup>72</sup> The employer did not contest this, but claimed that they were not within the bargaining unit certified by the NLRB.<sup>73</sup> The court held that the contract issue was to be decided by the arbitrator. Nevertheless, the court concluded that her decision could be overridden by an NLRB determination that the accountants were not within the bargaining unit.<sup>74</sup>

Analytically, there were two issues and two forums, but the parties seemingly could not agree to have the arbitrator decide with finality the legal issue because the statutory rights of the accountants would be involved. It is not likely that the parties intended such a dispute to go to two forums sequentially, with the NLRB’s decision superseding that of the arbitrator. This would lead to the conclusion that the parties intended the NLRB and not the arbitrator to be the forum for deciding the dispute.<sup>75</sup> However, if the employer were to contest both the contract and the legal issue, then there would be an equal likelihood of sequential proceedings. Because one of the reasons that the parties prefer arbitration is to obtain a

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69. *Warrior & Gulf*, 363 U.S. at 582. See *supra* text accompanying note 18.

70. See *Graphic Arts Int’l Union Local 978 v. Haddon Craftsmen*, 796 F.2d 692 (3d Cir. 1986) (upholding arbitrator’s decision that she had no jurisdiction to decide a “naked NLRB” claim, absent a specific agreement by the parties to submit the legal issue to arbitration). The court distinguished *Ciba Geigy Pharmaceuticals v. NLRB*, 722 F.2d 1120 (3d Cir. 1983), on the grounds that the parties there had agreed to submit the legal issue to arbitration.

71. *Communication Workers of America v. US West Direct*, 847 F.2d 1475 (10th Cir. 1988).

72. *Id.* at 1477.

73. *Id.*

74. *Id.* at 1479-80.

75. The court in *Local 682, Teamsters v. Bussen Quarries, Inc.*, 849 F.2d 1123 (8th Cir. 1988), held that the question whether owner-operator truck drivers were “employees” raised a representation issue to be decided by the NLRB, not the arbitrator. *Id.* at 1125. The dissenting judge, citing *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964), argued that if the arbitrator decided that they were not “employees” within the meaning of the contract, that would end the dispute. Only if the arbitrator decided that they were “employees” would it be necessary to take the case to the NLRB. *Id.* at 1128 (Heaney, J., dissenting).

quicker resolution, going to arbitration first will further that purpose.

### *E. Closing the Strike Forum*

This framework of analysis helps us focus on the problem of *Local 174 v. Lucas Flour*.<sup>76</sup> In that case, the collective agreement expressly mandated arbitration but did not expressly prohibit a strike. The question was whether the union, though required to arbitrate, could also strike. The bare words would seem to leave the union free to strike, an interpretation that would allow it to proceed in two separate forums simultaneously. It is not likely that the parties intended such a result, for it would have undermined, if not made meaningless, the union's obligation to arbitrate. Some uncertainty as to the parties' intent existed, however, because there was no express obligation not to strike, an obligation not usually left to implication.

To resolve this uncertainty, courts can appropriately apply the principal of contract interpretation that ambiguities may be resolved in favor of the interpretation which promotes, rather than impairs, society's interests. Here again, section 203(d) of the LMRA weighs in. It states the national policy of favoring peaceful means of settling grievance disputes; therefore, the contract should be read as designating arbitration the sole forum for deciding the grievance.<sup>77</sup>

This contract analysis, however, would probably not explain the result reached by the Supreme Court in *Gateway Coal Co. v. United Mine Workers*.<sup>78</sup> Coal miners struck to protest the Company's reinstatement of two foremen who had been indicted for falsifying safety reports, thereby concealing a breakdown in the ventilation system. Long established practice in the coal mines was that in safety disputes the miners did not rely on arbitration. When the miners believed the mine was unsafe, they simply refused to work.<sup>79</sup> The miners' primary reliance was on safety

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76. 369 U.S. 95 (1962).

77. The parties may agree that they shall have a choice between alternative forums. In *Groves v. Ring Screw Works*, 111 S. Ct. 498 (1990), the agreement had neither a no-strike nor a mandatory arbitration clause as a final step in the grievance procedure. The Court held that the union had the alternative of striking or suing in court, although the grievance procedure provided that "[u]nresolved grievances shall be settled as set forth" in the no-strike clause. *Id.* at 502-03. The Court rejected the company's argument that a strike was the exclusive remedy. The Court, relying on section 203(d), refused to read the grievance clause language as requiring use of economic force. *Id.* at 513 n.10. The Court did not discuss the question whether the union could pursue both processes simultaneously.

78. 414 U.S. 368 (1974).

79. *See id.* at 389-90 n.5 (Douglas, J., dissenting).

laws and special legal procedures for investigating safety conditions by state and federal inspectors. In the face of this, the Court first invoked the *Trilogy* presumption of arbitrability to cover safety disputes, and then applied *Lucas Flour* to imply a no-strike clause.<sup>80</sup> If the Court had remembered that it was a contract it was construing, and had looked to the intention of the parties, it would have been difficult to conclude that the forum chosen by the parties in safety disputes was arbitration and not the strike with recourse to safety inspectors applying legal requirements.

### III. THE POST ARBITRATION CONTRACTUAL PERSPECTIVE

In motions to vacate or enforce arbitration awards, the function of the Court is quite different. The question is not whether arbitration is the forum agreed upon, but whether the arbitrator, in deciding the case, has stayed within the bounds intended by the parties. The court reviews the arbitrator's decision on the merits, and the question is what should be the standard of review. The contract perspective does not give easy or definite answers to this question, but it can help in defining and articulating a standard for courts to apply.

There is a threshold question whether the courts should exercise any review of an arbitrator's award, absent serious procedural defects, fraud, or corruption. The parties have agreed on arbitration as the preferred forum, agreed upon an arbitrator, and agreed that the award should be final and binding. Should that not end the matter, with the court's only function to enforce the award as it would a contract? The contract question must be: What did the parties intend? Did they intend and understand that the award is final and binding no matter how unexpected or outrageous?

There are reasons to believe that the parties do not mean all that the agreement seems to say. Although the parties select the arbitrator, they often know little about her except for the misinformation they receive by rumor, word of mouth, or from commercial agencies which purport to evaluate arbitrators largely by examining the opinions which arbitrators have submitted for publication. Do the parties intend to give a person selected from the grab bag of the American Arbitration Association or Federal Mediation and Conciliation Service panels carte blanche powers to warp the words of the agreement to fit her notions of what is wise, fair, and good for the parties, or what will increase her marketability?

Permanent arbitrators or umpires may be fully trusted, but their awards

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80. *Id.* at 377-78.

are rarely, if ever, challenged in court, and many parties will not challenge even the most egregious award of an ad hoc arbitrator because of the impact on their bargaining relations. These parties, however, never come to court. In cases in which an award is challenged in court, it is likely that when the parties agreed to arbitration, they assumed that the arbitrator would stay within some bounds, and that if he did not, there would be recourse in the courts.<sup>81</sup>

This discussion is probably academic. For more than fifty years, courts have uniformly reviewed arbitration awards and this has been endorsed without question by the Supreme Court. This is well known to unions and employers, so it is beyond question that when they agree to arbitration they understand that awards are reviewable in court. Court review is an implied term of the contract to arbitrate.

#### A. *Review of the Merits—The Spinning of Enterprise Wheel*

“The refusal of the courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.”<sup>82</sup> This was the Court’s starting position in *Enterprise Wheel*. The follow up was that in interpreting and applying the collective agreement, the arbitrator “is to bring his informed judgment to bear in order to reach a fair solution to the problem.”<sup>83</sup> The wheel then turned:

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.<sup>84</sup>

The wheel then turned again. “Arbitrators have no obligation to the court to give their reasons for an award,”<sup>85</sup> but without the arbitrator’s reasons, the court will have difficulty determining whether the arbitrator “manifests an infidelity” to the agreement. The court will have only a

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81. The possibility that when the contract ends the parties can renegotiate it to reverse an outrageous award provides the parties with limited protection. Changing a misconstrued term costs bargaining chips; misapplied wage rates can be revised, but back pay will not be recouped; discharges upheld will not be reversed; and reinstatement ordered can not be reversed.

82. *Enterprise Wheel*, 363 U.S. at 596.

83. *Id.* at 597.

84. *Id.*

85. *Id.* at 598.

clever lawyer's later inventions of reasons how the award draws "its essence from the collective bargaining agreement."

The wheel has continued to turn in subsequent Supreme Court opinions. In *W. R. Grace v. Local 759, Int'l Union of the United Rubber Workers of America*,<sup>86</sup> the Court stated: "Regardless of our view of the correctness of [the arbitrator's] contractual interpretation, the Company and the Union bargained for that interpretation."<sup>87</sup> In *United Paperworkers Int'l Union v. Misco*,<sup>88</sup> the Court first restated this principle: "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."<sup>89</sup> But in the same paragraph the Court makes one turn and then another: "The arbitrator may not ignore the plain meaning of the contract; but the parties having authorized the arbitrator to give meaning to the contract, a court should not reject an award on the grounds that the arbitrator misread the contract."<sup>90</sup>

With such contradictory guidance, it is not surprising that lower courts in reviewing arbitration awards have wandered widely. Almost uniformly, opinions open with a litany of the words of the Supreme Court and genuflections to the gospel of the *Trilogy*. However, they then find in those words justification for whatever result is reached. Three examples suffice.

### 1. *Hormel*

In *Hormel & Co. v. United Food Workers*,<sup>91</sup> the Hormel Company, which was engaged in slaughtering and meat processing, leased the slaughtering section of its plant in Austin, Minnesota to another company and bought the slaughtered animals from the lessee. The Hormel employees claimed these jobs, relying on a provision in the management rights clause which stated that the Company had the right to "subcontract work" but that "this will not be used ... in such a manner as to avoid any provisions of this Agreement."<sup>92</sup> The arbitrator ruled that leasing the slaughtering section violated the Agreement.<sup>93</sup> The court began by

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86. 461 U.S. 757 (1983).

87. *Id.* at 765.

88. 484 U.S. 29 (1987).

89. *Id.* at 37-38.

90. *Id.* at 38.

91. 879 F.2d 347 (8th Cir. 1989).

92. *Id.* at 350.

93. *Id.*

dutifully paraphrasing the language of *Misco*, stating that it was forbidden to vacate the award simply “because *we believe* that the language is plain, unambiguous and not susceptible to the particular construction given by the arbitrator. This would result in a reversal based on our perception that an arbitrator has committed serious error in his interpretation.”<sup>94</sup> It then spun the wheel and stated that courts have vacated awards:

[W]here the award’s result is one so contrary to common experience and logic that it is more likely than not that such a result was not the intent of the parties, and where (additional) facts exist that strongly indicate that the arbitrator did not premise his award on the contract, notwithstanding his words to the contrary.<sup>95</sup>

The court then found another provision in the contract which it considered relevant but which the arbitrator did not discuss, proceeded to interpret it, and on that basis vacated the award.<sup>96</sup> The court reasoned that “where an arbitrator fails to discuss a probative contract term ... there arises a strong possibility that such an award was not based on the contract.”<sup>97</sup> The court, of course, decides what is a “probative contract term.”<sup>98</sup>

## 2. Safeway

On the other side, in *Safeway Stores v. Bakery Workers*,<sup>99</sup> the contract guaranteed forty hours pay each week. The employer changed the pay period, moving it up three days and paid only for sixteen hours in the changeover week.<sup>100</sup> The arbitrator ruled that the employees must be paid forty hours each calendar week and were therefore entitled to twenty-four hours back pay.<sup>101</sup> The court upheld the award, saying: “just such a likelihood [of an unpalatable result] is the by-product of a consensually adopted contract arrangement ... the arbitrator was chosen to be the Judge. The Judge has spoken. There it ends.”<sup>102</sup>

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94. *Id.*

95. *Id.*

96. *Id.* at 351.

97. *Id.*

98. *See, e.g.,* *Clinchfield Coal Co. v. District 28, UMWA*, 720 F.2d 1365 (4th Cir. 1983).

99. 390 F.2d 79 (5th Cir. 1968).

100. *Id.* at 80-81.

101. *Id.* at 81.

102. *Id.* at 84.

### 3. *Miller Brewing*

In *Miller Brewing Co. v. Brewery Workers*,<sup>103</sup> a multi-employer contract provided that if employees were "laid off" from one brewery, they would have preference in filling vacancies in other breweries.<sup>104</sup> Schlitz closed, but Miller refused to give the Schlitz employees preference because they were not "laid off" but "terminated."<sup>105</sup> The arbitrator ruled that the clause should apply to those "permanently laid off" and the court upheld that ruling.<sup>106</sup> Judge Posner said that it was enough that the arbitrator "purported to be interpreting the language of the agreement."<sup>107</sup>

Judges have sought the magic words which would provide a touchstone for reviewing arbitration awards, but with limited success. One court has stated that the award should be upheld in those cases in which "it is possible for an honest intellect to interpret the words to the contract and reach the result the arbitrator has reached."<sup>108</sup> Another court, in more colorful terms would vacate an award only "if no judge or group of judges, could ever conceivably have made such a ruling."<sup>109</sup> These standards depend on the judges view of an "honest intellect," or their view of their fellow judges' rationality.

Academics have not had much more success in articulating a standard. For example, Professor St. Antoine would treat the arbitrator as the parties' designated "reader of the contract,"<sup>110</sup> although he would reluctantly accept the test, "actually and indisputably without foundation in reason or fact."<sup>111</sup> Professor Craver would endorse the test whether "the arbitrator is even arguably interpreting and construing the contract,"<sup>112</sup> and would except only those cases "when it can be clearly demonstrated that

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103. 739 F.2d 1159 (7th Cir. 1984).

104. *Id.* at 1161.

105. *Id.* at 1162.

106. *Id.* at 1163.

107. *Id.*

108. *See San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co.*, 407 F.2d 1327 (9th Cir. 1969).

109. *Safeway Stores*, 390 F.2d at 82.

110. Theodore St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny in Arbitration*, 30 ANN. PROC. NAT'L ACAD. ARB. 29, 37 (1979). He went on to say: "Besides assuming, in their agreement on final and binding arbitration, that the arbitrator would be untainted by fraud and corruption, the parties presumably took it for granted that he would not be insane, and that his decision would not be totally irrational." *Id.* at 38.

111. *Id.*

112. *See Craver, supra note 2*, at 593.



arbitrators have ignored unambiguous contractual provisions or have acted wholly beyond the scope of their specified authority.”<sup>113</sup> It would be superfluous to point out the unbounded adjectives and the circular or question begging terms in all these statements. None adds much to Professor Meltzer’s elusive capsulization that courts generally decline to enforce awards which “they view as lacking any rational basis in the agreement ... in short, under the *Trilogy*, arbitrators have jurisdiction to be wrong but not to be goofy.”<sup>114</sup>

The inadequacy of these formulations is not due to the inadequacy of their authors but rather the inadequacy of words to define a standard which is one of degree, definable only with adjectives. The Supreme Court’s description in the *Trilogy* of the character of collective agreements, the function of arbitration in the collective bargaining system, and the parties’ confidence in the competence of arbitrators carries a clear message that courts should give deference, but not total deference, to arbitration and arbitrators’ awards. The Court, however, does not indicate how much deference. The courts and commentators have searched for words to push that deference along the spectrum in one direction or another, but adjectives are unable to define where it should come to rest. My purpose is to try to bring general contract principles to bear to provide a more objective and useable standard to guide the courts in determining whether the arbitrator has strayed from his proper domain.

#### B. *A Contractual Standard for Review of the Merits*

If the agreement to arbitrate is read with a narrow focus on the specific words of the arbitration clause, it will provide even less guidance than the ambiguous and circular language of judges and commentators. It will give the court no sense of direction, and may lead the court astray, for as has been pointed out, the words often do not accurately state the parties’ intent.<sup>115</sup> However, if the focus looks beyond the words to the intent and purpose of the parties so as to fulfill their expectations, then the contractual perspective can provide some guidance to the court.

We should start with the question: What do the parties think they are getting when they agree to arbitrate grievances? Clearly, they intend to have their disputes decided by an arbitrator rather than by a judge.

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113. *Id.* at 594.

114. Bernard D. Meltzer, *After the Arbitration Award: The Public Policy Defense*, 40 ANN. PROC. NAT’L ACAD. OF ARB. 39, 40 (1988).

115. *See supra* part II.C.

However, the parties expect that the arbitrator will keep within limits, and if she does not the court will protect them. But what are those limits? Both parties know, or should know, that arbitration is an adventure into uncertainty. Different arbitrators will interpret provisions differently, evaluate evidence in different fashions, view facts from different perspectives, and have different understandings regarding custom or practice. When the parties select an arbitrator, they cannot predict how he will decide a particular case. If they could, they would never agree on an arbitrator, and when she was chosen there would be no need to have the case heard except for therapeutic or political purposes.

When unions and employers agree to arbitrate, both reasonably expect uncertainty. However, that expected uncertainty is not boundless. The parties expect that the arbitrator in deciding a particular case will stay within the outer boundaries which other arbitrators observe. The parties have bargained for the judgment of an arbitrator, that is the judgment of one who decides cases in the way arbitrators may be expected to decide. They have bargained for the length of a chancellor's foot, but they do not expect him to be club footed. When an arbitrator's decision is beyond the boundaries of what other arbitrators might decide, then the parties' expectations have been defeated; the decision is not within the intent and purpose of the agreement to arbitrate.

This approach to interpreting the agreement to arbitrate is essentially an application of the general principle underlying the use of custom and practice to interpret a contract. The test is not what courts consider rational, but what arbitrators consider rational. To paraphrase, the court should vacate an award only "if no arbitrator or group of arbitrators could conceivably have made such a ruling," or to use Professor Ray's more restrained formulation, "could any arbitrator have so read the contract"?<sup>116</sup> Such a ruling is not one for which the parties bargained and they should not be bound.<sup>117</sup>

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116. Professor Ray has articulated this test most clearly:

[T]he focus ought to be whether the decision is in the realm of what an arbitrator might decide...arbitration has its own set of rules and notions of the law of the shop. The parties most certainly did not bargain for the decision of a federal judge, who by training and experience is immersed in federal judicial precedent.

Ray, *supra* note 2, at 17-18. I have shamelessly borrowed from Professor Ray because his test is, at root, contractual.

117. Professor Bernstein has pointed out that this standard could lead to invalidating arbitration decisions because they were innovative, imaginative and out of the mainstream. This danger could be reduced by the arbitrator writing a carefully reasoned opinion which would persuade the court that it was sensible. Arbitrators, however, are not likely to make such novel or imaginative decisions except

The contractual standard as expressed here shifts the court's focus from what the judge considers rational or how other judges could conceivably decide, a wholly subjective inquiry, to how arbitrators could conceivably decide, a potentially objective inquiry. For example, in *Berklee College of Music v. Berklee Chapter, Massachusetts Federation of Teachers*,<sup>118</sup> the arbitrator waived the time limits for filing a discharge grievance because the contract did not state the consequences of late filing.<sup>119</sup> He determined that five days late might be considered de minimis and that no harm was done.<sup>120</sup> The court refused to vacate, giving among other reasons: "Arbitrators have read such exceptions into absolute sounding term limits in labor contracts; some times they have done so in the light of the parties' own history of practice."<sup>121</sup> This should have been enough to assure the court that the parties had obtained the arbitration for which they bargained.

The usefulness of this contractual test is best seen where it is not used. In *S.D. Warren Co. v. United Paperworkers International Local 1069*,<sup>122</sup> an employee was discharged for possession of marijuana. An undercover agent, after repeated requests, had prevailed upon a subordinate and vulnerable employee to obtain a small amount of marijuana for him.<sup>123</sup> The arbitrator ordered reinstatement subject to a substantial suspension.<sup>124</sup> The court vacated the award because an appendix to the contract listed under the heading "Causes for Discharge," the offense "possession of marijuana."<sup>125</sup> The court ruled that the arbitrator, by substituting suspension for the penalty provided in the contract, had ignored the plain language and his decision did not draw its essence from the contract.<sup>126</sup>

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where they are reasonably confident that the decisions will be accepted by parties and not challenged in court. Such decisions, when published, will provide evidence enabling others to follow in their footsteps.

118. 858 F.2d 31 (1st Cir. 1988).

119. *Id.* at 32.

120. *Id.*

121. *Id.* at 33 (citing *Peru Foundry Co.*, 73 LA 959, 960 (Sembower, 1979); *International Paper Co.*, 82 LA 306 (Williams, 1984)).

122. 815 F.2d 178 (1st Cir. 1987).

123. *Id.* at 181.

124. *Id.*

125. Facts appeared in 632 F. Supp. 463 (D. Me. 1986), and a companion case, 846 F.2d 817 (1st Cir. 1988). Fourteen offenses were listed under "Causes for Discharge." These included: smoking, refusal to comply with company rules, wilful disobedience, insubordination, neglect of duty, disorderly conduct, and dishonesty.

126. 815 F.2d at 186.

Dozens, if not hundreds, of arbitrators' decisions could have been cited to establish that other arbitrators read similarly worded discipline schedules as not automatically warranting discharge and allowing the arbitrator to reduce the penalty for less serious forms of the listed violations.

Again, in *Dobbs, Inc. v. Local No. 614, I.B.I.*,<sup>127</sup> an employee was discharged under a progressive discipline system which provided a written warning for the first offense, a layoff up to a week for the second offense, and discharge for the third offense.<sup>128</sup> The arbitrator ordered the employee reinstated because on the second offense he had received a notice but no layoff.<sup>129</sup> The court held that the arbitrator had exceeded his authority by requiring a penalty for the second offense: "No such requirement is spelled out in the collective bargaining agreement and why the union would want a provision that would axiomatically be against its own members' interest is not explained in the award."<sup>130</sup> A number of arbitration cases could be found holding that in a progressive discipline program, the penalties are mandatory for the purpose of impressing on the employee the need to reform and the jeopardy of further violations.

To measure an arbitration award against the standard of whether it is within the boundaries of what is expected from an arbitrator does not assure that all awards will be upheld. For example, in *Safeway*,<sup>131</sup> the arbitrator gave the employees a windfall of twenty-four hours pay because the employer changed the pay week. It might be difficult to demonstrate that this result fell within the boundaries of what arbitrators, for all their unpredictability, might be expected to do.

The contractual perspective, which looks to the intent and expectations of the parties when they agreed to arbitration, makes three important contributions. First, it provides an objective standard that looks to arbitral practice, what arbitrators do, in place of the subjective standard of the judge's view of what arbitrators should do. The issues in court focus on the facts of arbitral practice rather than on parsing words of the collective agreement or appeals to the hortatory language of the *Trilogy*. Second, as Professor Ray points out, it provides a large body of readily available evidence which the parties can present to the court.<sup>132</sup> Thousands of

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127. 813 F.2d 85 (6th Cir. 1987).

128. *Id.* at 86.

129. *Id.*

130. *Id.* at 87.

131. For discussion of *Safeway*, see *supra* notes 99-102 and accompanying text.

132. See Ray, *supra* note 2.

reported arbitration decisions provide relevant examples demonstrating the range of decisions in similar or analogous cases.<sup>133</sup> Treatises, journal articles, and annual proceedings of the National Academy of Arbitrators discuss the varied ways in which arbitrators deal with particular problems. Parties can use experienced arbitrators as expert witnesses to testify whether an award comes within accepted boundaries.<sup>134</sup> Third, this process of proof would educate the judges, in concrete terms, in the ways in which arbitrators interpret provisions of collective agreements, apply custom and practice of the parties, consider negotiating history, and fill the gaps left by the parties. The judges will begin to understand in the context of actual cases the discussion in the *Trilogy* of the character of collective agreements and the function of arbitration in the collective bargaining relationship.

Awards reinstating discharged employees are the ones most frequently vacated by the courts. It is in these cases that evidence of arbitral practice would be most useful, for principles and values commonly used by arbitrators in discipline cases may seem foreign to the judge's experience and practice. Imagine, in a sentencing procedure, a defense lawyer arguing that a three time loser should be given a lighter sentence because the judge had been lenient twice before in giving suspended sentences. That was the perspective of the court in *Dobbs*;<sup>135</sup> the assumptions and structured steps of progressive discipline were foreign to the judge. Had the judge been informed how arbitrators view progressive discipline, he could have recognized that the parties got what they bargained for—an award within the boundaries of their expectations.

In *HMC Management Corp. v. Carpenters District Council*,<sup>136</sup> the arbitrator ordered an employee reinstated on the grounds of equal treatment because the Company had agreed to reinstate another employee who had

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133. Arbitration decisions are published only if the parties agree and the arbitrator submits the decision to one of the publishers of such awards. The publishers then select those decisions which they consider worthy of publication. Arbitrators attempting to establish themselves are more likely to submit their decisions for publication, while some of those most highly regarded in the profession do not submit theirs. This self-selection process and its weakness have been discussed by Professor Bernstein. See "How Representative are Published Decisions," 37 ANN. PRO. NAT'L ACAD. OF ARB. 170, 192 (1984).

In spite of this incompleteness of published opinions, the ones which are published provide a reasonably representative sample of how arbitrators decide various types of cases. They at least represent what those who do publish their decisions consider acceptable to parties who may consider selecting them in the future.

134. See Ray, *supra* note 2, at 18-21.

135. For a discussion of *Dobbs*, see *supra* notes 127-30.

136. 750 F.2d 1302 (5th Cir. 1985).

engaged in the same misconduct and whose disciplinary record was the same.<sup>137</sup> The arbitrator stated that while adequate grounds to discharge both employees may have existed, the Company could not agree to rehire one and not the other.<sup>138</sup> The court vacated the award because the arbitrator's decision was not based on lack of "just cause" but on "his sense of what was improper behavior on the part of an employer. Such industrial justice is not enforceable."<sup>139</sup> The judges would never accept a defendant's argument that others were not prosecuted for the same offense; they could not conceive of industrial justice being otherwise. Had the judges been shown the multitude of cases, articles and commentaries that articulate equal treatment as a fundamental principle in industrial discipline, they would have recognized that the world of arbitration was not the world of criminal law. The judges might not have accepted the justice of the result, but they could scarcely deny that the parties got the benefits and detriments of their bargain when they put decision making in the hands of arbitrators instead of judges.

A different judicial predisposition led the Fifth Circuit to vacate an award in *Delta Queen Steamboat Co. v. District 2*.<sup>140</sup> In *Delta Queen*, a river boat captain was discharged because of a near collision. At the time of the incident, 350 passengers were aboard the *Delta Queen*.<sup>141</sup> No damage was done, but it was a close call. Although the arbitrator found the captain "grossly careless," the arbitrator ordered him reinstated without back pay partly because of his forty years of untarnished service and partly because others who had mishaps resulting in damages approaching \$1,000,000 were not discharged.<sup>142</sup>

The court read the contract as giving the arbitrator the authority only to decide if proper cause exists and leaving to management the sole responsibility to determine the penalty.<sup>143</sup> The court's opinion, emphasizing management's authority to discharge except to the extent expressly limited, carries distinct echoes of the employment-at-will doctrine. If the parties had presented the court with only a sample of the myriad of arbitration cases in which the authority of the arbitrator to modify a penalty is implied

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137. *Id.* at 1303.

138. *Id.* at 1303-04.

139. *Id.* at 1304.

140. 889 F.2d 599 (5th Cir. 1989).

141. *Id.* at 600.

142. *Id.* at 601.

143. *Id.* at 604.

without discussion, and the frequent statements by commentators that this authority is implied unless expressly excluded, the court might have opened its eyes to the world of collective agreements, where scarcely even the ghost of employment at will survives. The arbitrator's award would not have seemed aberrational but commonplace and within the range of what the parties expected when they agreed to have arbitrators decide discipline cases.

It must be emphasized that the contractual focus is on the agreement to arbitrate: What is the range of reasonable expectations of the parties from that process? The focus cannot be on the substantive terms of the collective agreement apart from the agreement to have its interpretation and application determined through arbitration. Indeed, the reasonable expectations of the parties as to the substantive terms cannot be separated from the process through which those terms are given meaning.<sup>144</sup> If the court focuses only on the substantive terms, the question will implicitly be how did the parties expect courts to decide? The proper question, however, is how did the parties expect an arbitrator to decide? The parties know that their chosen process may produce uncertain results, but they reasonably expect that the arbitrator will stay within the boundaries generally observed by other arbitrators. Objectively, the question is would other arbitrators decide the same way?

### C. Contractual Awards and Public Policy

Even though an arbitrator faithfully follows the collective agreement, a court may vacate her award because it violates public policy. The underlying principle is not in dispute. The difficult part is determining what amounts to a violation of public policy. The Supreme Court has addressed this twice with more clarity than is customary.

In *W. R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*,<sup>145</sup> the Court found no conflict between an arbitration award and a Title VII court order specifying seniority rights, even though the award and court order established different orders of seniority.<sup>146</sup> The Court pointed out that the employer could obey both by following the court

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144. The "reasonable expectations" here must not be confused with the use of that term by courts in interpreting and applying substantive terms of a contract. There, the court is inquiring into what each of the parties are led to expect by the conduct of the other in reading their agreement. Here, the inquiry is what the parties expect from an arbitrator when they give him the power of decision.

145. 461 U.S. 757 (1983).

146. *Id.* at 772.

order and by paying back pay to the employees entitled by the arbitration award who were laid off in compliance with the court order.<sup>147</sup> The Court, however, made the general pronouncement:

If the contract as interpreted by Barrett violates some explicit public policy, we are obliged to refrain from enforcing it. Such a policy must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."<sup>148</sup>

Again in *Misco*,<sup>149</sup> the Court skirted the question whether reinstating an employee who had been found in possession of marijuana was contrary to the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol."<sup>150</sup> The court of appeals had made no attempt to review existing "laws and legal precedents" to demonstrate a "well defined and dominant policy" as required by *W. R. Grace*.<sup>151</sup> In any case, no clear violation of public policy was shown by proof of traces of marijuana in the employee's car when there was no proof of use in the work place. Again, the Court made a general pronouncement, articulating the rule in traditional contract terms:

A court's refusal to enforce an arbitrator's award under a collective agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate public policy. That doctrine derives from the basic notion that no court will lend its aid to one who found a cause of action upon an immoral or illegal act. . . .<sup>152</sup>

Obviously, if an arbitration award orders a party to act in violation of the law, the court will not enforce the award. Thus, the court would vacate an award ordering reinstatement of an airline pilot whose license had been suspended for alcoholism. The obverse proposition, that if the employer could legally do unilaterally what the award orders, the award should be enforced, however, does not necessarily follow.

The common law has traditionally recognized that there are contracts which parties can make and follow without any legal sanction, but the

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147. *Id.*

148. 461 U.S. at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

149. 484 U.S. 29 (1987).

150. *Id.* at 35 (citing *Misco, Inc. v. United Paperworkers Int'l Union*, 768 F.2d 739, 743 (5th Cir. 1985)).

151. *Id.* at 43.

152. *Id.* at 42 (citing *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757, 766 (1983)).



courts will not lend their aid by enforcing those contracts.<sup>153</sup> The question in a discharge case is not whether the employer could unilaterally reinstate the employee, but whether the court will use its power to compel the employer to take the employee back. An airline might legally permit an unreformed alcoholic to continue to fly, but it would be quite another thing for a court to order the airline to put him in the cockpit.

The Supreme Court, in discussing contracts contrary to public policy, included contracts which were unenforceable though not illegal. In *W. R. Grace*, the Court cited *Hurd v. Hodge*,<sup>154</sup> a restrictive covenant case in which the Court refused to enforce a covenant which the parties at the time were legally allowed to make and voluntarily follow. In *Misco*, the Court did not speak of prohibited contracts or prohibited conduct, but stated that "a court may refuse to enforce contracts that violate public policy,"<sup>155</sup> and that "no court will lend its aid to one who founds a cause of action upon an immoral or illegal act."<sup>156</sup>

Whether the award compels conduct which is legally prohibited provides a narrow definable standard, but whether the award compels conduct which the courts should not enforce gives the courts potentially wide elbow room to vacate awards.<sup>157</sup> The Supreme Court, by its language in *W. R. Grace*, repeated and emphasized in *Misco*, attempted to define a narrow and objective standard by requiring that the policy be "well defined and dominant" and one found in "laws and legal precedents," and not based on "general consideration of public policy."<sup>158</sup>

These words have not proven fully adequate to restrain lower federal courts. For example, the Eighth Circuit Court of Appeals vacated an award reinstating, after a substantial suspension, a nuclear power plant employee who had violated a safety rule.<sup>159</sup> Because he had a cast on one leg, the employee took a short cut to the lunch room by circumventing the safety lock on a containment door.<sup>160</sup> The seriousness of this conduct is

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153. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1979).

154. 334 U.S. 24 (1948).

155. 484 U.S. at 43.

156. *Id.* at 42.

157. For a discussion of the two approaches from the standpoint of policy considerations and contract principles, see Meltzer, *supra* note 114.

158. 484 U.S. at 43 (citing *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757, 766 (1983)).

159. *Iowa Electric Light & Power Co. v. Local Union 204, I.B.E.W.*, 834 F.2d 1424 (8th Cir. 1987).

160. *Id.* at 1426.

suggested by the facts: the doors were sometimes left open by supervisors, the safety locks sometimes did not function, and no supervisor on the scene raised a question.<sup>161</sup> The court found a "well defined and dominant national policy requiring strict adherence to nuclear safety rules"<sup>162</sup> and the employee's conduct violated specific regulations.<sup>163</sup> "This strong public policy would be violated by judicial enforcement of an arbitrator's award requiring reinstatement."<sup>164</sup> Although the opinion recites the catechism of the Supreme Court's words, it scarcely follows the Court's teaching.

To upset an award on the basis of public policy, two specific elements should be required. First, the reinstatement should create a substantial threat for the future; it should not be set aside to penalize for the past. Thus, in *Delta Air Lines, Inc. v. Air Line Pilots Ass'n*,<sup>165</sup> a pilot was discharged for intoxication while flying. The arbitration panel held that he should not be discharged, but given the option of entering a rehabilitation program.<sup>166</sup> The pilot entered the program, remained abstinent for two years, and regained his license. The panel then ordered him reinstated. In vacating the reinstatement, the court asked whether "an established public policy condemn[s] the performance of employment activities in the manner engaged by the employee?"<sup>167</sup> The pilot's conduct had been condemned by removing his license and suspending him for two years. The public interest invoked by the court is not protecting the public in the future but exacting an additional penalty for past conduct.<sup>168</sup>

As the Ninth Circuit has stated, it is not enough that the employee's conduct in the past is contrary to public policy.<sup>169</sup> Public policy must be

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161. *Id.* at 1430.

162. *Id.* at 1427.

163. *Id.*

164. *Id.* Facts are taken in part from the district court's opinion.

165. 861 F.2d 665 (11th Cir. 1988).

166. *Id.* at 668.

167. *Id.* at 671.

168. For a directly contrary decision upholding the reinstatement of a pilot discharged for intoxication but who had been rehabilitated and had regained his license, see *Northwest Airlines, Inc. v. Air Line Pilots Ass'n*, 808 F.2d 76 (D.C. Cir. 1987). The court's rationale was stated in *Trilogy* type language that the public policy exception is "amongst the narrowest known to the law," and the court pointed out that the airline had a policy of allowing reformed pilots to fly. *Id.* at 83.

169. See *Stead Motors v. Automotive Machinists Lodge No. 1173*, 843 F.2d 357 (9th Cir. 1988) (reinstating mechanic who had twice failed to tighten lug bolts on wheels of cars with loss of pay for 120 days). See also *United States Postal Service v. National Ass'n of Letter Carriers*, 839 F.2d 146 (3d Cir. 1988). In that case, an employee who was upset by repeated denials of promotion fired a gun into the postmaster's empty car. The court, in upholding the arbitrator's award of reinstatement, said that

a policy which bars *reinstatement*. It is difficult to find a case for public policy in which an arbitrator has determined that the employee is subject to rehabilitation. Other courts, like the court in *Delta Airlines*, however, have refused to recognize that a substantial suspension may provide adequate assurance that the conduct will not be repeated and that the future public interest is protected.<sup>170</sup>

Second, the interest to be protected by the court is the public's interest, not the employer's private interest. The employer can protect its interest by its contract; it is not for the court to give the employer more than it obtained at the bargaining table. For example, in *United States Postal Service v. American Postal Workers*,<sup>171</sup> a postal employee discharged for embezzlement was ordered reinstated after a six month suspension.<sup>172</sup> The employee had an unblemished record and there were mitigating circumstances.<sup>173</sup> The First Circuit voided the reinstatement saying that it would have an adverse impact on employee incentives to be honest and that it would undermine public confidence in the postal service and the federal government.<sup>174</sup> At the same time, the court disclaimed any public policy against hiring an ex-convict.<sup>175</sup> The reinstatement was obviously voided to further the employer's interest in its freedom to decide whom to employ. The reinstatement was not voided to protect any public interest, for reinstatement of the employee posed no greater threat to the public than hiring an ex-convict who had embezzled from someone else.

#### *D. Remand—Giving Arbitration a Second Chance*

When a court, rightly or wrongly, invalidates an award, what then? Because the arbitrator, in the court's view, has imperfectly performed his function, the logical next step would seem to be to remand the case to the arbitrator for proper action. Strangely, this is seldom done. Indeed, it is

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even if there were a public policy against physical violence, the employee's amenability to discipline comes under the scope of the arbitrator's fact finding. *Id.* at 150.

170. *See, e.g.,* *Newsday, Inc. v. Long Island Typographical Union*, No. 915, 915 F.2d 840 (2d Cir. 1990). Employee discharged for sexual harassment was ordered reinstated because employer had failed to follow progressive discipline. He was reinstated on a "last chance" basis. The court seemed impervious to the idea that the employee would change his ways. *See also* *Iowa Electric Light & Power v. Local Union 204, I.B.E.W.*, 834 F.2d 1424 (8th Cir. 1987); *S.D. Warren Company v. Paperworkers Local 1069*, 815 F.2d 178 (1st Cir. 1987).

171. *United States Postal Service v. American Postal Workers*, 736 F.2d 822 (1st Cir. 1984).

172. *Id.* at 823.

173. *Id.*

174. *Id.* at 825.

175. *Id.*

not even seriously considered. The court's decision is final, although the parties have agreed to have their dispute resolved by an arbitrator, not by a judge. Remand seems to be overlooked as a possible, even necessary, alternative.

If an award is vacated because of bias or corruption of the arbitrator, it should be obvious that the court's decision should not be final. The case should be sent back to be decided by arbitration with another arbitrator. If an award is set aside because the arbitrator refused to consider relevant evidence,<sup>176</sup> considered polygraph evidence in violation of state law, or committed some other procedural error, the only sensible solution is to remand the case to an arbitrator to make a decision on the merits after proper procedure.

In the *Hormel* case,<sup>177</sup> the court vacated the award because the arbitrator had failed to consider a provision which the court considered relevant. Instead of remanding the case to an arbitrator to interpret the contract with this provision included, the court interpreted the contract and decided the merits itself. The parties were thereby deprived of their bargain to have the argument interpreted through arbitration.

Again, in *Grand Rapids Die Casting Co. v. Local Union No. 159, UAW*,<sup>178</sup> the arbitrator, in the court's view, rewrote the negotiated absenteeism rules because he found them "offensive" and because the suspension in the case "shocked the conscience of the arbitrator."<sup>179</sup> Assuming that this case is the epitome of an arbitrator dispensing his own brand of industrial justice, the court should not dispense its own brand of industrial justice. Instead, it should give arbitration a second chance to provide the brand of justice which the parties sought when they agreed on arbitration.

Of course, cases exist in which the basis of the court's decision leaves nothing for the arbitrator to decide. For example, a case such as *Delta Airlines*,<sup>180</sup> in which the court vacated the award of reinstatement because it was contrary to public policy, leaves nothing for the arbitrator to decide. Similarly, if the court sets aside an award on subcontracting on the basis that it is solely a function of management, or if it finds that the language of the contract is clear and unambiguous, remand to the arbitrator would

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176. See *Hoteles Condado Beach v. Union Tronquistas, Local 901*, 763 F.2d 34 (1st Cir. 1985).

177. For a discussion of *Hormel*, see *supra* part III.A.1.

178. 684 F.2d 413 (6th Cir. 1982).

179. *Id.* at 415.

180. 861 F.2d 655 (11th Cir. 1988).

be pointless.

However, remand may be more appropriate than it first appears. For example, if the court finds, as in *S.D. Warren*<sup>181</sup> and *Delta Queen*,<sup>182</sup> that the arbitrator has no authority to modify a disciplinary penalty, that would seem to end the case. However, if the arbitrator knows he cannot modify the penalty, the question is not whether the employee's conduct justified some penalty, but whether it was serious enough to justify the extreme penalty of discharge. The court should remand the case for the arbitrator to answer the proper question. Invalidating the award without remand upholds the discharge without the agreed upon arbitral review. If the arbitrator knows she cannot modify the penalty, she may view the conduct from a different perspective.

For example, in *HMC Management*,<sup>183</sup> the arbitrator in ordering reinstatement, said, "while there may have been adequate grounds for discharge of both employees," to rehire one and not the other violated the principle of equal treatment.<sup>184</sup> The court cannot know whether, apart from this principle, the arbitrator would find that the employee's conduct justified discharge. In *St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood*,<sup>185</sup> the employer made an accounting error issuing checks which underpaid a number of actors and actresses, some as much as \$1,000. When the business agent distributed the checks, he called the employees on stage to discuss this matter, thereby stopping rehearsal for ten minutes.<sup>186</sup> The employees were discharged for violating the no-strike clause.<sup>187</sup> The arbitrator characterized this as an unauthorized work stoppage and reduced the penalty to 30 days suspension. The court stated that the arbitrator had no authority to modify the penalty for violating the no-strike clause and vacated the award.<sup>188</sup> Had the arbitrator had his eye on the court, rather than on the relations of the parties, he might have concluded that this brief interruption, caused by the employer's own fault was not an "unauthorized work stoppage" within the meaning and purpose of the no-strike clause, but merely "leaving work without permission," which deserves only a substantial suspension.

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181. 815 F.2d 178 (1st Cir. 1987).

182. 889 F.2d 599 (5th Cir. 1989).

183. 750 F.2d 1302 (5th Cir. 1985).

184. *Id.* at 1304.

185. *St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood*, 715 F.2d 405 (8th Cir. 1983).

186. *Id.* at 406-07.

187. *Id.* at 407.

188. *Id.* at 409.

There is no reason why courts should not give arbitrators a second chance, the same as administrative agencies and federal district courts. The remand can be made to submit the case to a different arbitrator, reducing the subconscious desire to find ways of justifying the initial result. The parties have deliberately chosen arbitration as the preferred forum. The fact that in the court's eyes the arbitrator has mishandled the case should not deprive the parties of a decision in their preferred forum. If the court cannot resist reviewing the merits, the court, at a minimum, should allow an arbitrator to apply the contract as interpreted by the court.

#### IV. CONCLUSION

The emphatic language of the *Trilogy* served the necessary purpose of discouraging federal court judges from intervening in arbitration and disabusing them of any hubris that they knew better than arbitrators how to interpret and apply collective agreements. The language further provided a rich context for understanding the parties' intent and purpose in agreeing to have their disputes resolved by arbitration rather than by adjudication or economic force.

The Supreme Court's exhortations, however, have distracted attention from the elementary fact that the agreement to arbitrate is a contract. A contract perspective can provide a useful analytical framework and objective standards. That perspective, however, must look beyond the paper words, which are often misplaced or ill-chosen, to the intent and purposes of the parties. The words must be understood in the context of the practices of collective bargaining, the character of collective agreements, and the function of arbitration in administering and developing the collective bargaining relationship. The words must be read, not to rule the parties, but to fulfill so far as possible their expectations. The words are not to be masters but servants of the parties' purposes. The collective agreement and the agreement to arbitrate is, in these respects, no different from other relational contracts, and thus, basic contract principles are directly applicable.

At the pre-arbitration stage, the contract analysis provides clear and simple answers largely unencumbered by the *Trilogy* language. At pre-arbitration, the question is: What forum did the parties prefer for resolution of the particular dispute? The answer is seldom in doubt if one recognizes the obvious—the employer is not a forum but a party to the dispute.

In post-arbitration proceedings, the contract perspective does not always provide easy or certain answers. We should recognize that when parties

agree to arbitrate, they know that they are agreeing to uncertainty as to how an arbitrator may decide—perhaps as much or maybe even more uncertainty than when they go to court. The parties' expectation is that the arbitrator's decision will fall within the range of decisions reached by arbitrators generally. The court's function is to keep the arbitrator within the boundaries of that expectation. Those boundaries can often be found objectively by examining other arbitrators' awards and arbitration literature.

The contractual perspective in no way conflicts with the exhortations of the *Trilogy*, for the parties' purpose in agreeing to arbitration is to avoid the court, and they do not expect the court to second guess the arbitrator. The parties' expectation is only to be protected from the unexpected.

Perhaps all of this is only shouting into the wind. There is small likelihood that at this late date courts or commentators will shuck off the verbal cloaks cut from the words of the *Trilogy*. There is even less reason to hope that any form of words or analysis will cause those courts which feel compelled to meddle in arbitration to keep their hands off. However, this is written with the belief that there is a better way to define the courts' role in labor arbitration, and with the irrepressible compulsion to seek out the rudiments of that role in contract principles. After all, it is a contract we are construing.

