1973

The Ascendancy of Labor-Arbitration and the Confusion of Labor Arbitrators: A Case of Congressional Neglect

Walter L. Sales

University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Dispute Resolution and Arbitration Commons, and the Labor and Employment Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation


Available at: https://uknowledge.uky.edu/klj/vol62/iss2/9

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledges@lsv.uky.edu.
THE ASCENDENCY OF LABOR-ARBITRATION AND THE CONFUSION OF LABOR ARBITRATORS: A CASE OF CONGRESSIONAL NEGLECT

Introduction

Congressional and judicial efforts to facilitate the resolution of labor disputes have been largely responsible for the easing of tensions between employers and labor organizations. Judicial, administrative, and arbitral procedures have been formulated to encourage, and in many instances require the peaceful institutional settlement of labor disputes. Both Congress and the courts have attempted to define the respective roles of the dispute resolving bodies; and yet, these roles are neither clear nor settled.

Recently the grievance-arbitration procedure, provided for in most collective bargaining agreements, has become the primary method for resolving labor disputes. The impetus for the increased utilization of arbitration has been a series of judicial and administrative decisions rendered over a 20 year period. The effect of these decisions has been to require a potential litigant to exhaust the grievance-arbitration procedure before asserting his claim in the courts or before the National Labor Relations Board [hereinafter referred to as NLRB or the Board].

This deference to arbitration has been rationalized with three major policy explanations. First, Congress has expressed a preference for the private settlement of labor disputes through the grievance-arbitration procedure. Second, arbitration is the more efficient method for resolving labor disputes, since the Board and the courts are now overburdened with labor related litigation. Third, the arbitrator has a better knowledge of the law of the shop, which imbues him with greater competency in dealing with labor disputes.

Despite these explanations reliance upon the grievance-arbitration process encounters substantial resistance in many quarters. The purpose of this note will be to examine the cases and statutes pertaining to labor arbitration. Part I will deal with the historical background of labor-arbitration in the federal courts. Part II will be concerned with the limits and restrictions imposed upon an arbitrator’s power. A brief description of the arbitrator as a breed and as a human being, allegedly expert in the law of the shop, will ensue in Part III. Finally, it is hoped that a policy of arbitration can be formulated that will be consistent with our societal goals of economic well-being, peaceful resolution of disputes, and protection of individual rights.
I. HISTORICAL BACKGROUND

A. Development of Section 301 Actions to Enforce Collective Bargaining Agreements.

Any discussion of the role of arbitration in the resolution of labor disputes should begin with Section 301 of the Labor-Management Relations Act, as amended [hereinafter referred to as the Act or the Taft-Hartley Act]. The Supreme Court's first interpretation of Section 301 came in Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp. Petitioner-union filed suit in federal district court pursuant to Section 301 seeking enforcement of collective bargaining agreements between it and the respondent-employer. The union alleged that the company had failed to pay employees represented by the union their full salary for a certain period of time as required by the collective bargaining agreements. Mr. Justice Frankfurter, speaking for the Court, said that this was a peculiarly individual dispute between the aggrieved employees and the company, and "[n]owhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here, in which the union is suing on behalf of employees for accrued wages." The Court further held that employees are empowered to enforce individual rights in the state courts.

---

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce, as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

3 Id. at 461.
4 See Smith v. Evening News Ass'n, 371 U.S. 195 (1962) which held that an employee could maintain a suit against his employer for breach of the collective bargaining agreement between his union and the employer pursuant to Section 301 of the Act. The Court noted that the Westinghouse proscription against suits filed pursuant to Section 301 to vindicate employees' personal rights is no longer authoritative as precedent. Id. at 199.
In *Textile Workers of America v. Lincoln Mills of Alabama*, the Supreme Court withdrew from this narrow construction of Section 301. There, the petitioner-union sought enforcement of the arbitration provisions of the collective bargaining agreement. The Supreme Court reversed the Fifth Circuit's reversal of the District Court's order requiring the employer to comply with the arbitration provisions, holding that the strict procedural requirements of Section 7 of the Norris-LaGuardia Act relating to the issuance of injunctions in labor disputes need not apply to the federal district court's enforcement of arbitration provisions pursuant to Section 301. Most significantly, the Court held that Section 301 confers subject-matter jurisdiction on the federal district courts to enforce collective bargaining agreements; and that pursuant to this jurisdiction the federal courts may fashion a body of substantive common law to apply to suits arising under Section 301. In his concurring opinion Mr. Justice Burton distinguished the *Westinghouse* case by commenting that arbitration provisions are for union controversies falling within the ambit of Section 301 whereas *Westinghouse* dealt with the peculiarly individual claims of accrued back wages. This distinction, however, is attenuated since Justice Frankfurter's decision in *Westinghouse* that the applicable substantive law in suits to enforce collective bargaining agreements is the state law, was overruled by the *Lincoln Mills* holding that federal common law is the substantive law to be applied.

In *Lincoln Mills* the Supreme Court commented that Congress, through Section 8 of the Norris-LaGuardia Act, has expressed its preference for arbitration as the most desirable means for settling labor disputes. That Section "denies injunctive relief to any person who has failed to make 'every reasonable effort' to settle the dispute by negotiation, mediation or voluntary arbitration." The Court found reinforcement for this interpretation of the Norris-LaGuardia Act in Sections 301(a)-(b) of the Act. Holding that Section 301(b) "provides the procedural remedy lacking at common law" for a union to...
sue or be sued as an entity in the federal courts, the Court construed Section 301(a) as necessarily going beyond the mere grant of subject-matter jurisdiction. An analysis of the legislative history led the Court to conclude that Congress intended Section 301(a) to be the basis upon which federal courts could fashion substantive law. Vested with this power to formulate substantive law, the Court then construed Section 8 of the Norris-LaGuardia Act and the legislative history of Section 301 as requiring the courts to enforce agreements to arbitrate.

Lincoln Mills instilled fear in many that the Court would establish its own law governing employer-union relations instead of encouraging labor disputants to settle their problems by their own negotiated terms. Such a situation would seriously undermine the policy favoring freedom of contract and its corollary, industrial democracy. In 1960 the Supreme Court dispelled many of these fears in three landmark cases popularly known as the Steelworkers Trilogy. Therein, certain tests were enunciated to guide the district courts in suits to enforce arbitration pursuant to Section 301 of the Act.

In United Steelworkers of America v. American Manufacturing Co., the Supreme Court held that in actions to enforce arbitration brought pursuant to Section 301, the federal district courts are limited to deciding whether a dispute involving an alleged violation of a substantive provision of a contract in fact exists. If so, the court is bound to enforce the arbitration agreement. The majority opinion emphasized that grievances submitted to arbitration are to be judged solely on whether they describe a violation of the contract, regardless of their merit. The Supreme Court further reinforced Lincoln Mills by citing Section 203(d) of the Act as authority for the congressional preference for arbitration.

In United Steelworkers of America v. Warrior & Gulf Navigation Co., the Supreme Court added substance to American Manufacturing by establishing a guideline that doubts regarding the ap-

---

14 Id. at 455.
18 Id. at 568.
19 Id.
20 29 U.S.C. § 173(d) (1970) provides in part: Final Adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.
21 363 U.S. at 566.
22 363 U.S. 574 (1960).
plication of the contract to a particular dispute are to be "resolved in favor of coverage." Arbitration must be compelled unless the dispute was expressly excluded from those disputes which are covered by the arbitration clause.

Finally, in United Steelworkers of America v. Enterprise Wheel & Car Corp. the Supreme Court limited the power of the federal district courts to review an arbitral award to determining whether the arbitrator's decision was based upon the contract. The court cannot reverse the award merely because it disagrees with the arbitrator's interpretation of the contract. Furthermore, the court cannot refuse to enforce an ambiguous award merely because the ambiguity "permits the inference that the arbitrator may have exceeded his authority."

The Steelworkers Trilogy reaffirmed the policy favoring private settlement of labor disputes. By severely restricting the courts' power to review arbitral awards and by narrowly limiting those cases where a court could refuse to enforce arbitration, the Supreme Court upheld the policy that the collective agreement establishes "a system of industrial self-government." Industrial democracy has been preserved and the fears that judicial intrusion into labor disputes would erode the private nature of the labor contract have been dispelled.

Following the Steelworkers Trilogy the Supreme Court decided a number of cases which further illuminate the expansive nature of the arbitration policy. In Teamsters Local 174 v. Lucas Flour Co. the Supreme Court faced an appeal from the Washington Supreme Court which had held that an employer could recover damages from a union where the union called a strike over a dispute contractually required to be arbitrated. Even absent an express no-strike clause, arbitration was the proper method for settling the dispute. The Court noted that the agreement to arbitrate was the only remedy available to a disputant under this contract, and unilateral action, such as a strike

23 Id. at 582-83.
24 Id. at 584-85.
26 Id. at 598.
27 Id.
28 383 U.S. at 590.
30 369 U.S. 95 (1962).
32 It had been assumed in Lincoln Mills and in the Steelworkers Trilogy that an agreement by the employer to arbitrate was the quid pro quo for an agreement by the union not to strike during the life of a collective bargaining agreement. Without an express no-strike clause some felt that an agreement to arbitrate was an unenforceable executory agreement. Here, however, this theory is dispelled.
or lockout, was precluded by the arbitration provision.\textsuperscript{33} To further the policy of arbitration as a substitute for economic warfare, the Supreme Court held that an agreement to arbitrate a dispute provides the sole method for resolution of that dispute. Therefore, economic warfare is waived by the parties when they have agreed to arbitrate, and an employer can recover damages for breach of that agreement.\textsuperscript{34}

In \textit{Sinclair Refining Co. v. Atkinson}\textsuperscript{35} the employer sought, \textit{inter alia}, to enjoin the union from striking where the contract contained a no-strike clause and an agreement to arbitrate all disputes arising under the collective bargaining agreement. The Supreme Court found that the strike violated the no-strike clause of the collective bargaining agreement; however, the Court decided that it lacked jurisdiction to enjoin the strike because Section 4 of the Norris-LaGuardia Act prohibited federal courts from issuing injunctions in labor disputes.\textsuperscript{36} According to the Court, the Norris-LaGuardia proscription against enjoining strikes and peaceful picketing had not been narrowed by the subsequent enactment of Section 301 of the Taft-Hartley Act.\textsuperscript{37} They reasoned that if Congress had intended to repeal Norris-LaGuardia, it would have done so expressly, and any attempt to restrict Norris-LaGuardia by judicial construction of Section 301 of the Taft-Hartley Act would therefore contravene the intent of Congress.\textsuperscript{38}

In \textit{Drake Bakeries v. Local 50, Bakery Workers}\textsuperscript{39} the employer sued the union for damages for encouraging a one-day strike in contravention of the no-strike clause and the arbitration provisions of the collective bargaining agreement. The union moved to stay the proceedings pending arbitration of the dispute. The Supreme Court ruled that a stay was proper and that the collective bargaining agreement required the employer to arbitrate his claim for damages.\textsuperscript{40} Since the union denied it encouraged the strike, the employer was not justified in seeking judicial rather than arbitral relief.\textsuperscript{41}

\textsuperscript{33} 369 U.S. at 104-05.
\textsuperscript{34} Id. at 106.
\textsuperscript{35} 370 U.S. 195 (1962).
\textsuperscript{36} Id. at 203.
\textsuperscript{37} Id. at 203-05.
\textsuperscript{38} Id. at 206-10.
\textsuperscript{39} 370 U.S. 254 (1962).
\textsuperscript{40} Id. at 267. \textit{See also} Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) where an employer sued the union for damages pursuant to Section 301 of the Act. The Supreme Court held that the employer's claim for damages need not be submitted to arbitration because the arbitration clause of the collective bargaining agreement was limited solely to submission of grievances by the employee or the union. No contractual provision conferred upon the employer the right to submit grievances. \textit{Id.} at 243.
\textsuperscript{41} 370 U.S. at 266.
The result of these cases was to extend the coverage of Section 301 of Taft-Hartley to employer grievances and employer suits to compel arbitration. Curiously, however, the Supreme Court did not face at this point the contradiction that is created by its varying interpretations of Norris-LaGuardia. In *Lincoln Mills* the Court justified its grant of equitable relief by applying Section 7 of Norris-LaGuardia which expresses a preference for arbitration. In *Sinclair Refining Co.* however, the Court construed Section 4 of Norris-LaGuardia as denying the federal courts jurisdiction to enjoin strikes even where strikes were prohibited by a no-strike clause and an agreement to arbitrate in a collective bargaining agreement. Clearly, a policy of arbitration is not advanced when a party may continue its strike or lock-out. Although a remedy at law may exist for damages, there is no remedy for the present violation of the contract. Consider the dilemma of a small employer forced out of business because of a prolonged strike in contravention of a no-strike clause who is subsequently unable to collect damages from the union because it is judgment proof.

The Supreme Court resolved this difficulty in *Boys Markets, Inc. v. Retail Clerks Union, Local 770* by expressly overruling that part of *Sinclair Refining Co.* which held that Section 4 of Norris-LaGuardia prohibits federal courts from enjoining strikes by labor organizations or employees in contravention of a no-strike clause where there is an agreement to arbitrate. The Court noted that by denying an employer injunctive relief in cases of this type, the federal policy favoring arbitration would be undermined. The Supreme Court justified this new construction of Section 4 of Norris-LaGuardia by reasoning that Section 4 was responsive to a situation where the federal courts

\[\ldots\] were regarded as allies of management in its attempt to prevent the organization and strengthening of labor unions; and in this struggle the injunction became a potent weapon that was wielded against the activities of labor groups. \ldots\] Congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes.\[43\]

Pursuant to this change in congressional policy the Supreme Court in *Boys Markets* held that Section 4 of Norris-LaGuardia is inapplicable in suits to enjoin strikes and enforce arbitration where the collective bargaining agreement contains a no-strike clause and an arbitration provision.


\[43\] 398 U.S. at 250-51.
B. Employee's Suits Under Section 301 and the Duty of Fair Representation.

The preceding discussion has focused on the rights of the employer and the union vis-a-vis each other. During the past decade, however, the rights of employees vis-a-vis employers and unions have been the source of considerable litigation under Section 301. The effect of these cases on the arbitral process has been significant, not only in the volume of cases arbitrated but also in terms of arbitral strategy.

The duty of an exclusive bargaining agent is to fully and fairly represent the interests of all the employees impartially "subject always to complete good faith and honesty of purpose in the exercise of its discretion."\textsuperscript{44} In Humphrey v. Moore\textsuperscript{45} the Supreme Court was faced with a suit filed by a group of employees against its bargaining agent, Teamsters Local 89, for breach of its duty of fair representation. The union was the bargaining agent for employees of two companies which performed similar services for the Ford Motor Company in Louisville, Kentucky. Ford informed the two companies, E. & L. Transport Co. and Dealers Transport Co., that it could not continue to do business with both of them. Thereafter, E. & L. and Dealers agreed that Dealers would continue to perform its services for Ford. Pursuant to this agreement the union and the companies convened a joint employer-employee committee to deal with the relative seniority rights of the employees of the two companies. It was decided that the seniority lists of the two companies would be dovetailed, which caused some of Dealers' employees to be placed on lay-off status. The affected Dealer's employees brought suit in state court to enjoin implementation of the agreement. Their suit was dismissed, but the Kentucky Court of Appeals reversed the lower court and ordered that a permanent injunction be issued.\textsuperscript{46} The Supreme Court reversed. While noting that the committee was convened and empowered to dovetail the seniority lists pursuant to the collective bargaining agreement, the Court held that the union acted in good faith and did not breach its duty of fair representation.\textsuperscript{47} The Court quoted from its decision in Ford Motor Co. v. Huffman.\textsuperscript{48}

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who

\textsuperscript{44} Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).
\textsuperscript{45} 375 U.S. 335 (1964).
\textsuperscript{46} Moore v. Teamsters Local 89, 356 S.W.2d 241 (Ky. 1962).
\textsuperscript{47} 375 U.S. at 350-51.
\textsuperscript{48} Id. at 349.
are represented is hardly to be expected. A wide range of reason-
ableness must be allowed a statutory bargaining representative in
serving the unit it represents, subject always to complete good
faith and honesty of purpose in the exercise of its discretion.49

The doctrine enunciated in Humphrey v. Moore was expanded in
Republic Steel Corp. v. Maddox.50 Maddox, a discharged employee,
sued Republic Steel in state court to recover severance pay provided
for in the collective bargaining agreement. The agreement also pro-
vided for mandatory arbitration of all disputes arising over the
interpretation and application of the contract. Judgment for Maddox
was affirmed by the Supreme Court of Alabama on the grounds that
state law did not require him to exhaust his contractual grievance
procedures.51 The Supreme Court reversed finding the specific
grievance was “not so different in kind as to justify an exception”
to the federal rule requiring exhaustion of contractual remedies before
suit may be brought.52 The Court based its holding on three policies,
as expressed by Mr. Justice Harlan:

Union interest in prosecuting employee grievances is clear. Such
activity complements the union’s status as exclusive bargaining
representative by permitting it to participate actively in the con-
tinuing administration of the contract. . . . Employer interests, for
their part, are served by limiting the choice of remedies to ag-
grieved employees. And it cannot be said, in the normal situation,
that contract grievance procedures are inadequate to protect the
interests of an aggrieved employee until the employee has at-
ttempted to implement the procedures and found them so.53

Republic Steel parallels the Second Circuit’s decision in Black
 Clawson Company, Inc. v. IAM, Lodge 355, District 137, holding that
an individual employee cannot prosecute a grievance on his own
absent the contractual proviso expressly allowing such action.54 The
Court recognized that the right to arbitrate is not a right “incident
to the employer-employee relationship, but one which is incident to
the relationship between employer and union.”55

Republic Steel, Black Clawson, and Smith v. Evening News As-
 sociation56 clearly vest the right to arbitrate an employee grievance
with the employee’s exclusive bargaining representative. The only

---

49 345 U.S. at 338.
51 158 So.2d 492 (Ala. 1963).
52 379 U.S. at 654.
53 Id. at 653.
54 313 F.2d 179 (2d Cir. 1962).
55 Id. at 184 citing Black-Clawson Co. v. International Ass’n of Machinists,
exception arises where the collective bargaining agreement expressly provides that an employee may sue before exhausting his contractual remedies or may personally implement the contract grievance procedures. Analytically, the union, as exclusive bargaining representative, possesses the right to bargain with the employer on behalf of the employee. Since collective bargaining is a continuing process, this right does not cease upon the successful negotiation of a collective bargaining agreement, but continues throughout the life of the agreement.

To ensure the protection of the employees' rights from negligent or arbitrary union decisions not to arbitrate a grievance, the Supreme Court held in *Vaca v. Sipes* that a union member could sue his union and recover damages for the failure of the union to fairly represent him. The Court also established the standard by which the courts could determine whether a union has breached its duty of fair representation. The Court recognized that

the individual employee has no absolute right to have his grievance arbitrated under the collective bargaining agreement at issue, and that a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious. . . .

The employee must prove "arbitrary or bad faith conduct on the part of the union in processing his grievance."  

---

57 386 U.S. 171 (1967).
58 Id. at 195.
59 Id. at 193. See also Bsharah v. Eltra Corp., 394 F.2d 502 (6th Cir. 1968) where the Court of Appeals sustained the district court's dismissal of a suit against the union for breach of the duty of fair representation, because the plaintiff failed to pursue her intra-union remedies.

See Feller, supra note 15, at 813-14 where David Feller argues that the Sixth Circuit's holding "is plainly erroneous. It imposes a bar based on a right rising out of union membership to a suit in which membership is irrelevant and which is based solely on employee status. . . ."


No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding . . . ; Provided, that any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officers thereof. . . .

This statute imposes a duty upon the union member to exhaust his intra-union remedies before suing the union, which is not surprising. The duty of fair representation is akin to a fiduciary duty. Our jurisprudence historically has required that before a beneficiary may sue the trustee he must allow the trustee the opportunity to cure the defect. A stockholder must seek a remedy through the board of directors before he may file a derivative suit against those directors (Continued on next page)
The crux of the decision, however, does not lie in the test enunciated above. Rather, the Court's holding that employee claims for breach of the duty of fair representation are not pre-empted by the NLRB and may be litigated in the courts presents a difficult problem for union officials. If the union decides not to arbitrate a particular grievance, it exposes itself to potential liability. Even if no liability is found, the expense of defending the suit is extremely high. Since the cost of arbitration would probably be substantially less, the union is well advised to arbitrate even though it believes the claim lacks merit. This indirectly deprives the union of discretion as to whether it should arbitrate a particular grievance. Moreover, the union, as bargaining agent for a large group of employees, is restricted in its ability to bargain away the rights of a single employee when such action would inure to the benefit of the group as a whole. Clearly, the overriding emphasis for the union in the negotiation and administration of a labor contract is the interest of the entire group with due regard for individual rights. The holding in Vaca shifts the balance toward the protection of individual rights and away from the interests of the consummate group.

To assure the efficacy of labor-arbitration, the courts have established a system of law to administer the respective rights of employers, unions, and employees whenever one of them wishes to invoke the contract grievance procedures. To provide stability and predictability to the arbitral process, the courts recognize only two parties as competent to invoke the contract grievance procedures—unions and employers. Concomitantly, the courts have expanded the doctrine of the union's duty of fair representation to protect employees from arbitrary union refusal to prosecute employee grievances.

(Footnote continued from preceding page)

or on behalf of the corporation. Analytically, the stockholder-corporation relationship is the same as the employee-union relationship. Hence, exhaustion of intra-union remedies is not an unrealistic requirement.

60 386 U.S. at 182-83.

61 Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 606-11 (1956). See also Feller, supra note 15, at 806 where he argues that the parties to a collective bargaining agreement intend to give the union the power to bargain away individuals' rights if by so doing, the group will benefit or analogously, by not so doing, the effect on the other employees will be adverse.

62 Again, it must be emphasized that this system of laws fulfills the prophecy by many that judicial intrusion into the labor-arbitration field usurps the powers of the parties to a labor agreement to work out their own solutions. See text accompanying notes 15-26 supra.

Though seemingly restricting the courts' role in the arbitral process in the Steelworkers Trilogy, the Supreme Court, in fact, laid the groundwork for further judicial intrusion in the field. The culmination of these decisions in Boys Markets v. Retail Clerks Union led to a vast narrowing of the Norris-LaGuardia Act. The effect of Norris-LaGuardia is virtually restricted to those periods of time between the expiration of the labor contract and its subsequent renewal.
C. National Labor Relations Board Deferral to Arbitration.

In order to complete this historical overview of labor arbitration, it is necessary to consider the NLRB’s relationship to the arbitral process. The Board derives its power from the Labor-Management Relations Act. Briefly, its function is to protect the rights of employers, employees and unions created under the Act. The Board can seek injunctions, issue cease and desist orders, reinstate employees, and order payments of back wages; however, since the Board is not vested with any power to enforce its orders, it must seek enforcement through the circuit courts of appeal.

Any discussion of the relationship of the NLRB to the arbitral process must begin with the Board’s seminal decision in Collyer Insulated Wire63 [hereinafter cited as Collyer]. The union filed unfair labor practice charges alleging that the employer violated Sections 8(a)(1)64 and 8(a)(5)65 of the Act by unilaterally changing certain wage rates and working conditions. The Trial Examiner (now the Administrative Law Judge) found two violations of Section 8(a)(5). However, the NLRB in a three to two decision held that this dispute arose entirely from the contract and required the parties to utilize the contract grievance procedure to settle their dispute.66 Although the power of the Board to defer to an arbitral award had been well-established,67 never before had the Board deferred to arbitration before one of the parties had invoked the contract grievance procedure.

For its justification of this radical innovation the Board relied upon the series of cases beginning with Lincoln Mills and concluding with Boys Markets.68 Having found a congressional and judicial preference for arbitration as the desired forum for resolving labor disputes, the NLRB reasoned that if a dispute is arguably covered by both the collective bargaining agreement and the Act, then the grievance arbitration procedure is the preferred method for resolution of the dispute.

64 29 U.S.C. § 158(a)(1) (1970) provides that it shall be an unfair labor practice for an employer to interfere with the rights of the employees to bargain collectively.
65 29 U.S.C. § 158(a)(5) (1970) provides that it shall be an unfair labor practice for an employer to refuse to bargain collectively with representatives of the employees.
66 The Board relied upon its decision in Joseph Schlitz Brewing Co., 175 N.L.R.B. 141, 70 L.R.R.M. 1472 (1969) where the Board deferred to an arbitrator’s award on the issue of whether or not the employer could unilaterally change the rest period operations. This activity arguably could be the subject of 8(a)(1) and 8(a)(5) charges.
Support for Collyer and its policy preference for arbitration has come from many sources. The supporting arguments, however, recognize other reasons for deferring to arbitration, foremost among which is the greater competency of the arbitrator to decide cases involving the "law of the shop." Authority for this viewpoint can be found in the oft-quoted language of Mr. Justice Douglas:

The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity or a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs.

The Board retained jurisdiction in Collyer to ensure that the arbitration hearing and result would satisfy the standards set forth in Spielberg Manufacturing Co. By so doing, the Board can assure that all parties will receive a fair and impartial hearing and that no party will be prejudiced by an incompetent or unknowledgeable arbitrator. The Board further restricted the extent to which it would defer to arbitration by requiring evidence that the unilateral action taken by the employer was not designed to undermine the union, but was based upon "substantial claims for contractual privilege".

---

71 112 N.L.R.B. 1080, 1082, 36 L.R.R.M. 1152, 1153 (1955). The Board will defer to an arbitral award where it appears that:
1. The proceedings were fair and regular;
2. All parties agreed to be bound;
3. The decision of the arbitrator is not clearly repugnant to the purposes and policy of the Act.
72 Joseph Schlitz Brewing Co., 175 N.L.R.B. 141, 142, 70 L.R.R.M. 1472, 1474-75 (1969). See also Menard, The National Labor Relations Board—No Longer a Threat to the Arbitral Process, 23 Lab. L.J. 140, 151 (1972) which applauds the Collyer rule but cautions that deferral should not result where it appears that the employer conduct complained of "forms an integral part of a pattern of overall anti-union activity" and where it appears that the issue raised is specifically excluded from arbitration.
Cf. Urban N. Patman, Inc., 197 N.L.R.B. No. 150, 80 L.R.R.M. 1481 (June 30, 1972) where the Board remanded to arbitration a wage and hour dispute despite a contractual provision excluding same from arbitration.
Since *Collyer* the Board has further explained its standards for deferral. In *Malrite of Wisconsin, Inc.* an employer refused to abide by an arbitrator's award, thereby provoking the union to file a charge with the Board alleging violation of Section 8(a)(5) of the Act. The Board dismissed the complaint issued by the Regional Director on the grounds that the courts, and not the NLRB, are the proper forum for seeking enforcement of arbitral awards. The Board explained that the "Spielberg standards" apply to the entire arbitral process, including judicial enforcement of the award. Thus, only after the union had sought judicial enforcement could it come to the Board for review.

In *National Radio Co., Inc.* the NLRB deferred to arbitration on several charges, including the suspension and subsequent discharge of the union president. Though expanding *Collyer* to include alleged Section 8(a)(3) violations, the Board concluded that the contractual provision requiring "just cause" for any discharge would force the arbitrator to consider the possibility of discrimination and anti-union bias. Again, the Board retained jurisdiction pursuant to *Spielberg* to assure fundamental fairness in the proceedings and a decision not wholly "repugnant to the purposes and policy of the Act."

In *Teamsters Local* an employer filed charges with the Board alleging that the union violated Section 8(b)(3) of the Act when it directed its members, truck drivers for the employer, to cease making cash collections on all deliveries or pick-ups. The employer alleged that this was a unilateral change in the terms and conditions of employment.

---

76 See Raytheon Co., 140 N.L.R.B. 888, 52 L.R.R.M. 1129 (1963) where the Board first ruled that an arbitral award upholding the discharge of two employees is not determinative of an unfair labor practice charge alleging that those two employees were discriminatorily discharged for protected union activity.
77 In *Kansas Meat Packers*, 198 N.L.R.B. No. 2, 80 L.R.R.M. 1743 (July 31, 1972) the Board refused to defer to arbitration in a discharge case where evidence was adduced that the business agent for the Union requested the discharge of the employee. Upon these facts the Board felt that [it] would be repugnant to the purpose of the Act to defer to arbitration in this case as to do so would relegate the Charging Parties to an arbitral process authored, administered, and invoked entirely by parties hostile to their interests. 198 N.L.R.B. No. 2 at 5, 80 L.R.R.M. at 1746.
78 198 N.L.R.B. No. 4, 80 L.R.R.M. 1727 (July 31, 1972).
79 29 U.S.C. § 158(b)(3) (1970) provides that it shall be an unfair labor practice for a labor organization to refuse to bargain with an employer.
of employment as set out in the collective bargaining agreement. The employer further charged the union with violating Section 8(b)(1) (A) of the Act by threatening drivers with disciplinary action, including fines and loss of union membership, if they continued making cash collections. The NLRB deferred to arbitration because if the union action was a change in the terms and conditions of employment as defined in the collective bargaining agreement, then the arbitrator could decide this issue and award an appropriate remedy. Applying the Collyer rationale, the Board concluded that arbitral interpretation and application of the contract to this dispute would also decide the unfair labor practice issue.

In Mailer's Union the Board again deferred to arbitration a complaint filed by an employer alleging that the union violated Section 8(b)(1)(B) of the Act when the union fined one of its members, a foreman for the employer, twenty-five dollars for performing an act within the scope of his supervisory function. The employer argued that this union discipline resulted in a restraint on the employer's right to select its representatives for purposes of collective bargaining and the adjustment of grievances. The Board concluded that arbitral determination of the scope of the foreman's supervisory duties, as defined in the collective bargaining agreement, would be a sufficient adjudication of the unfair labor practice issue, thereby warranting Board deferral to arbitration.

The Teamsters Local 70 and Mailer's Union cases represent the first time the Board deferred to arbitration for adjudication of employer instituted unfair labor practice charges. Assuming arguendo, the efficacy of the deferral policy, then requiring the employer to submit to the arbitral process, as the Board has required the unions to do in 8(a)(1), 8(a)(3) and 8(a)(5) charges, is only fair and reasonable.

Taking its cue from the Supreme Court decisions in The Steelworkers Trilogy, Lincoln Mills, and Boys Markets, the Board has deferred deciding unfair labor practice charges until the contract grievance procedures have been exhausted. Member Fanning, in his dissent in Collyer, however, objected to the application of those cases to cases where unfair labor practice charges have been filed.

---

80 29 U.S.C. § 158(b)(1)(A) (1970) provides that it shall be an unfair labor practice for a labor organization "to restrain or coerce employees in the exercise of their rights to bargain collectively."


82 29 U.S.C. § 158(b)(1)(B) provides that it shall be an unfair labor practice for a labor organization "to restrain or coerce an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances."
He notes that those cases dealt with the courts' relationship to arbitration whereas the Board's relationship with the arbitral process is an entirely different matter. In any event, the Collyer rule seems to be well entrenched with the Board. Since the Board's decision to assert jurisdiction over a particular case is at least partially discretionary, the basic principle of discretionary deference to arbitration would probably withstand appeals to the judiciary. The policy to force parties to a labor contract to settle their disputes according to their own agreed upon methods has received such wide acceptance by the judiciary that overruling the Collyer principle by the courts appears quite remote.

D. Section 502 Limits on Arbitrable Issues.

Section 502 of the Act provides in part:

Nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

Supervisory personnel for the Knight-Morley Corporation discharged several employees for walking off their jobs without permission. The union filed charges with the Board which ultimately ordered that the employees be reinstated. When the employer refused to abide by the Board's decision, the Board sought enforcement of its order in the Sixth Circuit Court of Appeals. Basing its decision on Section 502 of the Act, the Sixth Circuit determined that the employees had walked off their jobs under a good faith belief that abnormally dangerous working conditions existed at their plant.

---

83 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1942-43 (Aug. 20, 1971). See Atleson, Disciplinary Discharges, Arbitration and N.L.R.B. Deference, 20 Buffalo L. Rev. 355, 357 (1971) which agrees with Member Fanning that a policy of non-deference would neither undermine nor interfere with arbitration since the focus of the Board is statutory, not contractual. See also Lodge 143, IAM v. United Aircraft Corp., 337 F.2d 5 (2d Cir. 1964) where the court held that despite the execution of an arbitration submission agreement allowing for final and binding arbitration to determine the rights of striking employees, the union, nevertheless, could file and maintain unfair labor practice charges with the Board in contravention of the agreement. The court said, This public interest in preventing unfair labor practices can not be entirely foreclosed by a purely private arrangement, no matter how attractive the arrangement may appear to the individual participants. Id. at 9.

Cf. NLRB v. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, 391 U.S. 418 (1967) where the Court commented: A healthy interplay of the forces governed and protected by the Act means that there should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances. . . . [w]e agree that the overriding public interest makes unimpeded access to the Board the only healthy alternative. . . . Id. at 424.

The court then held that the employer discharged the employees for protected union activity and ordered the enforcement of the Board's order.

In *Gateway Coal Co. v. UMW* the Supreme Court balanced the § 502 protection against the arbitration mandate of the *Steelworkers Trilogy*. A partial blockage of an intake airway into the employer's mine shaft reduced the airflow into the mine, increasing the danger of accumulated dust, flammable gases and possible explosion. The blockage was not detected because of faulty readings recorded in a log book by the employer's foremen. The Union voted not to work so long as the negligent foremen were responsible for safety. In a suit under § 301 the district court compelled arbitration and ordered the foremen suspended pending resolution. On appeal, the Third Circuit reversed saying:

Considerations of economic peace that favor arbitration of ordinary disputes have little weight here. Men are not wont to submit matters of life or death to arbitration and no enlightened society encourages, much less requires them to do so... The arbitrator is not staking his life on his impartial decision. It should not be the policy of the law to force the employees to stake theirs on his judgment.

The Supreme Court reversed, holding that no specific inclusion was necessary to make safety disputes arbitrable where broad arbitration clauses exist. Section 502 operates to protect safety strikes from *Boys Market* injunctions when employees have a good faith belief that abnormally dangerous working conditions exist. Nevertheless, this dispute was arbitrable because of the broad coverage of the grievance-arbitration clause.

Clearly, the Supreme Court has reasserted its support for the policy of arbitration found in the *Steelworkers Trilogy*. A resulting difficulty is the effect that *Gateway* will have on the Board's deferral policy. As illustrated by *Knight-Morley* and other decisions, the Board his-

---

84 466 F.2d 1157, 1160 (3rd Cir. 1972).
85 94 S. Ct. at 636.
86 The Court indicated that a *Boys Market* injunction may not issue if it is adduced that an abnormal hazard in fact exists. Hence, as to the issuance of an injunction, a good faith belief requires also that the hazard exists in fact; but, § 502 protection may be required even if no hazard exists in fact if the safety strikers have good faith belief in abnormally dangerous working conditions. In this situation § 502 would protect the strikers from discharge.
87 See also Machaby v. NLRB, 377 F.2d 50 (1st Cir. 1967); Marble Products Co. v. Storeworkers Local 155, 335 F.2d 468 (5th Cir. 1964); Philadelphia Marine Trade Ass'n v. NLRB, 330 F.2d 492 (3rd Cir. 1964).
torically has protected safety strikers from discharge by their employers. Now, it appears that since the safety disputes are arbitrable the Board may decide also that employee discharges as a result of safety strikes may also be arbitrable. The problems here are complicated. Though the issuance of a Boys Market injunction depends upon a safety hazard in fact not existing, § 502 may operate to protect safety strikers from discharge so long as their belief is in good faith.

E. Summary of Historical Background.

Section 301 of the Act provides the impetus for judicial and administrative recognition of the arbitral process as the primary method for settling labor disputes. Reading that section for the first time, one could hardly predict that it would spawn an entire new body of law which expresses a preference for arbitration in the settlement of labor disputes and provides standards by which arbitral awards are judged and methods for enforcing them. Safeguards have been established to protect the rights of employees who, peculiarly, are not parties to a labor contract. This trend toward arbitration has seeped in to the Board procedures for administration of unfair labor practice charges, and yet, not an approving, dissenting or explanatory word has been provided by Congress since the passage of Section 301 in 1947.

II. The Power of the Arbitrator

A. Limitations on the Arbitrator's Power to Consider Public Laws.

The arbitrator must render the mutual intent of the parties whether or not he approves of that intent. He must ascertain that intent from the record made by the parties themselves, as presented at the arbitration hearing. The arbitrator must be bound by the agreement and may not reform it by adding to or subtracting from its written provisions.91

This conception of the proper role of the arbitrator is held by many of the more traditional commentators in the labor-arbitration field. It requires that the arbitrator look no further than the contract between the parties to resolve disputes. Whether there has been a breach of a contractual duty and which remedy the arbitrator may impose are questions determinable solely by reference to the collective bargaining agreement. This perception of the role of the arbitrator would require the arbitrator to ignore the law and decide the case according to the contract,92 and only the courts could determine

---

whether the contract contravenes some higher authority or law. Dean Shulman supported this view when, speaking of arbitrators, he commented:

"He is rather a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not."\(^9\)

In *Eaton Manufacturing Co.*\(^{94}\) the arbitrator tacitly approved the above characterization of his role when he held that it was beyond his contractual authority and jurisdiction to effectuate the Equal Employment Opportunity Law in contravention of the collective bargaining agreement. The inconsistency of this view with the *Collyer* rationale is obvious. If an arbitrator is restricted to the conditions and terms of the contract, he is powerless to consider public law, but *Collyer* requires that any arbitral award which is reviewed by the Board not be "repugnant to the purposes and policy of the Act." Analytically, the only explanation is that the arbitrator should render his decision in conformity with his contractual restrictions independently of the public law. If public law is violated by the contract and award, then the judiciary or the Board could vacate or disregard the award. At any rate, the arbitrator performs his function by properly interpreting the contract and restricting himself to that contract. At that point the judiciary and the NLRB could apply the public law and declare the contract, or any part thereof, illegal.

Consider *Steel & Iron Association v. Shopmen's Local 547*\(^{95}\) where the Third Circuit declared that it was against public policy to uphold an arbitral award enjoining the employer from appealing to the Pay Board the wage rates it had contracted for with the union. The court cited a Ninth Circuit decision, *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Limited*,\(^{96}\) as authority for the proposition that arbitral awards may be vacated when clearly violative of a higher law. In neither case do the courts say that an arbitrator must consider public law; rather, they hold an arbitral award will not be enforced if repugnant to public law. This characterization of the issues by the Third and Ninth Circuits seems to support the traditionalists' insistence upon arbitral consideration of

---


\(^{93}\) Shulman, *supra* note 29 at 1016.

\(^{94}\) 66-3 ARB ¶ 9089 (1966).

\(^{95}\) *21 Wage & Hour Cas.* 46 (3d Cir. 1973).

\(^{96}\) *293 F.2d* 796 (9th Cir. 1973).
the collective bargaining agreement, alone, and letting the courts and the Board decide public law application. Since one of the reasons for the preference for arbitration is that it is speedier, it is imperative that the arbitrator be empowered to resolve all issues pertaining to the collective bargaining agreement, including legality of the agreement and the power to interpret the agreement so as not to violate public laws. Otherwise, the arbitral process would be encumbered with an arbitral hearing and subsequent Board or judicial application of public laws.

In opposition to Meltzer's orthodox view, liberals maintain that arbitrators have a responsibility to consider statutes that affect the interpretation or application of a term in the collective bargaining agreement. This theory is interwoven with the NLRB's decision in Collyer. For deferral to be effective an arbitrator necessarily must probe for statutory violations. If the arbitrator fails to consider the statutes, the Board would be obligated to review the arbitral decisions in a great number of cases. In this situation arbitration would simply add an unnecessary step to the decision-making process.

Equally as compelling as the Collyer rationale for Howlett's conception of the proper role of the arbitrator is the Sixth Circuit's decision in Dewey v. Reynolds Metals Co. There, a grievant processed his claim through the arbitral process resulting in an adverse award. Subsequently, he sued in federal district court alleging that his discharge violated Title VII of the Civil Rights Act of 1964. The Sixth Circuit reversed the judgment for the plaintiff and commented:

Where the grievances are based on an alleged civil rights violation, and the parties consent to arbitration ... the arbitrator has a right to finally determine them.

... [W]e find [no] national policy for ousting arbitrators of jurisdiction to finally determine grievances initiated by employees, based on alleged violation of their civil rights.

---

98 29 U.S.C. § 160(b) (1973) provides for a six month statute of limitations on all unfair labor practice charges. If a party relying upon Collyer and its progeny, were to seek arbitration of a dispute arguably covered by the Act, he could jeopardize his position by not also filing unfair labor practice charges. For example, an arbitrator could decide that the controversy is not arbitrable, but rather should properly be before the NLRB. If no unfair labor practice charges have been filed, the case may be barred after the arbitral determination that it is an unfair labor practice.
99 429 F.2d 324 (6th Cir. 1970).
101 429 F.2d at 332. See generally Goss, The Labor Arbitrator's Role: Tradition, (Continued on next page)
Considering the importance of civil rights in this country, national policy compels not only due process, but also correctness of decisions in civil rights cases. *Ergo*, arbitrators entrusted with civil rights cases should be empowered to consider the Civil Rights Act.

To further complicate matters, consider *Hutchings v. United States Industries, Inc.* where the Fifth Circuit held that the doctrine of election of remedies applies in Title VII cases "only to the extent that a plaintiff is not entitled to duplicate relief in the public and private forums which would result in an unjust enrichment or windfall to him." The court reasoned that rights and remedies in the labor-arbitration process are different from "those involved in judicial proceedings under Title VII," and, echoing the sentiments of the traditionalists, concluded:

\[
\text{[t]he arbitrator's role ... is to carry out the aims of the agreement that he has been commissioned to interpret and apply. ... [t]he arbitrator ... may consider himself constrained to apply the contract and not give types of remedies available under Title VII. ...}^{105}
\]

Hence, the plaintiff was allowed to maintain his suit alleging violation of the Civil Rights Act even though he had already received an adverse award in an arbitration concerning the same issue.

The basis of the controversy concerning the power of an arbitrator to consider public law is the lack of any definitive judicial or legislative statement of policy. Reacting to judicial uncertainty and legislative inaction, arbitrators have been unable to formulate their own policy regarding the consideration of statutes in the arbitral process despite the trend for replacing the courts with arbitration as the prime method for resolving labor disputes.\(^{106}\)

B. Contractual Limitations Upon An Arbitrator.

Typically, labor contracts afford arbitrators broad remedial powers, *e.g.*, reinstatement and back pay for wrongfully discharged employees, modification of punitive action taken by a company against an employee, and ordering an employer to discontinue a harsh work rule regarding broad areas such as overtime, seniority, job classifica-
tion and job bidding. However, frequently labor contracts restrict arbitral remedial powers, and it is necessary to point out some of these problems in order to understand arbitral power. In *Magnavox Co. v. International Union of Electrical, Radio & Machine Workers* the court vacated an arbitrator's award because the arbitrator exceeded his contractual limitations in determining whether the grievant reasonably believed that a health hazard existed. The collective bargaining agreement restricted the arbitrator to a determination of whether a serious health hazard *in fact* existed. Only after such a determination could the grievant rely upon the health hazard as a defense to a discharge for refusal to obey orders.

In *Textile Workers Union v. American Thread Co.* the court vacated an arbitrator's finding that there was just cause for the company to suspend but not discharge the grievant. The court interpreted the collective bargaining agreement as restricting the arbitrator's power to a determination of only whether just cause for discharge existed, not just cause for any other disciplinary action. However, the Fourth Circuit overruled this decision in *Lynchburg Foundry Co. v. Steelworkers Local 2556*, holding that arbitral determination of the propriety of a particular punishment for employee misconduct is "routinely grist for the arbitral mill."

*Olin Corp. v. Electrical Workers Local 369* provides an example of the extensive power of an arbitrator. The grievant was discharged for starting a fight with another employee; the other employee, however, was only suspended. The arbitrator held that the grievant should have been given the same punishment as the other employee, *i.e.*, suspension, and ordered the grievant reinstated with full back pay from the time the suspension would have terminated, which amounted to nearly five thousand dollars. In the interim between the order of reinstatement and the time the suspension should have ended, the grievant earned over five thousand dollars at another job. The Sixth Circuit rejected the employer's argument that as a matter of law the

---

108 Though not presented with a § 502 issue, the Sixth Circuit still seems to contradict its holding in NLRB v. Knight Morley Corp., 251 F.2d 753 (6th Cir. 1957). See text accompanying notes 86-91 supra. In *Knight-Morley* the court held that employees were entitled to walk off their jobs if they had a good faith belief that they were working under abnormally dangerous conditions. Good faith belief necessarily implies that abnormally dangerous conditions do not in fact have to exist. Only the good faith belief must be clear.
109 291 F.2d 894 (4th Cir. 1961).
112 471 F.2d 468 (6th Cir. 1972).
grievant's interim earnings should be set off against his lost wages.\textsuperscript{113} The court looked to the collective bargaining agreement and found that it provided for certain setoffs in case of back pay awards but that these setoffs did not include interim wage earnings. The court concluded that general contract law requiring mitigation was not applicable, thereby allowing the arbitrator to award full back pay without setting off interim earnings.\textsuperscript{114} The court remanded the case to the arbitrator to determine whether interim earnings should be set off, and the arbitrator decided that the grievant was entitled to full back pay. As illustrated by this case, an arbitrator's power to determine the "law of the shop" and award remedies for violation of that law is expansive. Though in the idyllic sense the arbitrator derives his power from the collective bargaining agreement, the law spawned by Section 301 of the Act and the courts has given some measure of independence to the arbitrator without which his influence on the dispute-resolution process would be greatly reduced. Very narrow limits within which arbitral awards are reviewable by the courts and the NLRB has conferred upon the arbitrator weighty responsibility to be fair, decisive, and impartial to all parties to the collective bargaining agreement.

Unfortunately, the arbitrator's perception of his own role is confused.\textsuperscript{115} Caught between the traditional confines of the contract and the increasing legislation which confers and withdraws rights to employees, arbitrators have not fully recognized their ever more significant place in the labor arena. An insight to some of the reasons for this situation may be found in the arbitrator himself. What kind of a man becomes a labor arbitrator? Who owns the arbitrator's "marker," and what effect does this have on the decisions he renders?

III. \textit{Max It Please The Arbitrator, What Makes You Tick?}

To understand the nature of the arbitrator it is necessary to understand where he derives his power and, most importantly, what influences his decisions. Obviously, since he is not required by law,\textsuperscript{116} an arbitrator derives his power in essence from the collective bargaining agreement. His powers are negotiated by the employer and the union just as are wage rates, working hours and day to day rights and duties of employers and employees. The labor contract can

\begin{footnotes}
\item[113] Id. at 471.
\item[114] Id. at 471-72.
\item[115] Goss, supra note 101, at 231.
\item[116] Although in many labor disputes arbitrators are required by law, in the private sector they are not. Generally, those areas where arbitration is required are public employment and the railroad and airline industries. See Railway Labor Act, 45 U.S.C. § 153(f) (1970) where arbitration is required for all minor disputes between employers and employees covered by this Act.
\end{footnotes}
limit arbitral discretion or expand it to the point where it is nearly limitless. Hence, the arbitrator’s power to judge discretionary decisions of employers and employees and to afford a wide range of remedies for abuses of discretion depends entirely upon what the parties negotiated and agreed to in the collective bargaining agreement. As Dean Shulman so aptly put it:

A proper conception of the arbitrator’s function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather a system of self-government created by and confined to the parties.\(^{117}\)

Though Congress and the courts have encouraged employers and unions to utilize the arbitrator, problems have arisen over his dependence on the parties to a labor contract. The arbitrator is not imposed upon the parties, rather he is chosen by them. Typically, a labor contract will provide that an arbitrator will be chosen from a panel named in the contract or provided by a third party.\(^ {118}\) From this panel the parties generally by process of elimination will choose one man to serve as the arbitrator for a particular dispute. In a few situations the collective bargaining agreement has named a permanent arbitrator for all disputes that may arise during the life of the contract. Of course, upon the expiration of the contract the parties may negotiate the arbitrator out.

In this state of dependence the arbitrator cannot be wholly oblivious to the desires of the parties, no matter how irrational they may be. To maintain credibility with both parties, the arbitrator must necessarily make compromises. For the arbitrator to hold for one party in several arbitrations would certainly assure his elimination by the other in future disputes. Archibald Cox has commented that, “[a]mong lawyers and judges there is also a widespread belief that arbitrators make expedient compromises instead of rational decisions.”\(^ {119}\)

The arbitrator’s impartiality suffers by being closely tied to the contracting parties. The opportunity to compromise issues is most noticeable when one arbitrator must decide several grievances at the same hearing which generally arises when a back-log of similar cases has built up. This provides the arbitrator with the opportunity to

\(^{117}\) Shulman, supra note 29, at 1016.

\(^{118}\) There are many organizations which provide panels of arbitrators from which one is chosen by the company and the union for a particular dispute, e.g., the Federal Mediation and Conciliation Service and the American Arbitration Association. In addition, most major cities have their own arbitration services.

offend no one by splitting his decisions. Of course, often the cases are not all one way or the other, but it is not unusual for an attorney to complain that he won the wrong case or lost his sure winner. It must be mentioned, however, that the accumulation of grievances to submit to an arbitrator at one hearing is not accidental. First, it does save money. Secondly, by providing an arbitrator with the opportunity to throw a few bones to each side, union business agents and company personnel directors can always show enough “winners” to placate those people to whom they are responsible. Hence, union and employer complaints about arbitral compromise are not always justified.

Contributing to the arbitrator’s dependency state is the method by which he is chosen. Typically, a panel of prospective arbitrators is presented to the parties. From this panel the parties alternatively strike names from the list until only one is left who serves as the arbitrator for the particular dispute. A fortiori, rarely is either party completely satisfied with the chosen arbitrator.

Consideration of the reasons parties eliminate prospective arbitrators is necessary for a complete understanding of the compromise arbitrators are forced to make.

It is a well known fact that there are commercial organizations which make it their business to issue ratings on arbitrators and prospective arbitrators. The standards of judgment used by these organizations and, therefore, the standards of those who avail themselves of the services of such organizations, are primarily in terms of “pro” or “anti” union bias. Thus, when choosing arbitrators, unions and employers frequently are more impressed by the reputed bias of an arbitrator than by his rationality. Obviously, this results in the selection of an arbitrator known more for his expedient compromises than for his resolute strong decisions. Rather than a strong arbitrator, the disputants often choose the least offensive.

Apologists for this method of choosing arbitrators contend that there is nothing wrong with arbitrators seeking compromise solutions. Indeed, compromise and conciliation are the essence of collective bargaining. From the first negotiating session until the parties sign the contract, compromises have been made, and nothing is wrong with compromising after the agreement has been effectuated. Often, the apologists submit, disputes occur because one party over-reacted to the other’s extreme position in a discipline or harsh work rule case and neither is wholly right or wrong. The sensitive and perceptive arbitrator will seek a compromise that will compensate each party for the abuses of the other.

Prior to the Lincoln Mills decision in 1957, most labor specialists acknowledged the compromising and conciliatory role of the arbitrator as being the most appropriate one. That was an era, however, when violence was not uncommon in labor disputes, and when the strict law of the collective agreement and knowledge of the "law of the shop" supplied all an arbitrator needed to make a wise, judicious decision. Since that time, however, industrial stability has been achieved by an ever increasing body of law developed by Congress and the courts.

Since the federal government's entry into the labor-arbitration field, the scope of the arbitrator's power has increased enormously. Paralleling his growth in power has been a growth in the responsibility of the arbitrator to become expert in numerous areas of the law. Application of statutory requirements to contractual labor disputes repeatedly precludes compromise and demands precise application of statutes and court decisions to factual situations and contract language. In areas as potentially volatile as civil rights (including race, sex, and age discrimination), compromise may result in a denial of constitutionally protected rights and lead to greater disorder than existed prior to the arbitral decision.

Yet, arbitrators often have little or no legal background, much less a sufficient knowledge of the many applicable statutes. Indeed, many readily admit to a lack of essential knowledge of many statutes affecting the employer-employee relationship.121 This group includes lawyers, as well as non-lawyers. To further complicate matters many arbitration hearings never involve lawyers, for often the union's business agent and the employer's personnel director will argue their cases before an arbitrator, who is also not a lawyer. Hence, frequently the statutory issues are never raised, and an employee whose conduct may be contractually prohibited but statutorily protected is disciplined. Ensuring conformance to the law and protection of individual civil rights requires an arbitral expertise and independence that is not readily available in the labor arbitrator market today.

121 See Note, Authority and Obligation of a Labor Arbitrator to Modify or Eliminate a Provision of a Collective Bargaining Agreement Because in his Opinion it Violates Federal Law, 32 Orno St. L.J. 395, 398 n.16 (1971) where the author sent out a questionnaire to a group of arbitrators asking that they rate themselves on their knowledge of the public labor laws. The results follow:

The following is the actual question presented to the members of the Academy and its results:

Assuming you were authorized to do so, how would you feel about interpreting the provisions of a collective-agreement in accordance with the following statutes. (1) Would feel competent and expert; (2) Would feel competent; (3) Would rather avoid; (4) No opinion.

(Continued on next page)
**CONCLUSION**

From a few short sentences in section 301(a) & (b) of the Act, a sprawling labor arbitration bureaucracy has developed. Where once the parties to a collective agreement were left to their own devices to resolve their disputes, there now exists a complex and sophisticated body of law to decide these issues. Labor disputes and labor legislation affect everyone in this country. The primary target for those groups beginning to demand rights once denied is the labor market. Success in this area can virtually eliminate the residual effects of years of past oppression.

Twenty years ago the identification of the opposing interests in labor disputes as a duality, union and management, was valid. Today these disputes involve four separate competing interests: the union, the employer, the employee, and the public. The mutuality of interests that once characterized the union-employee relationship no longer

<table>
<thead>
<tr>
<th>Act/Statute</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Labor Relations Act</td>
<td>48%</td>
<td>34%</td>
<td>16%</td>
<td>2%</td>
</tr>
<tr>
<td>Labor Management Relations Act</td>
<td>48%</td>
<td>34%</td>
<td>16%</td>
<td>2%</td>
</tr>
<tr>
<td>Railway Labor Act</td>
<td>24%</td>
<td>41%</td>
<td>32%</td>
<td>3%</td>
</tr>
<tr>
<td>Federal Antitrust Statutes</td>
<td>12%</td>
<td>24%</td>
<td>57%</td>
<td>7%</td>
</tr>
<tr>
<td>Norris-La Guardia</td>
<td>31%</td>
<td>87%</td>
<td>29%</td>
<td>3%</td>
</tr>
<tr>
<td>Labor Management Reporting and Disc.</td>
<td>29%</td>
<td>43%</td>
<td>26%</td>
<td>2%</td>
</tr>
<tr>
<td>Welfare and Pension Plans</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Civil Rights Act of 1964, Title VII</td>
<td>18%</td>
<td>47%</td>
<td>31%</td>
<td>4%</td>
</tr>
<tr>
<td>Fair Labor Standards Act</td>
<td>25%</td>
<td>45%</td>
<td>26%</td>
<td>4%</td>
</tr>
<tr>
<td>Executive Order No. 10988 Employee-</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Management Cooperation in the Federal Service</td>
<td>31%</td>
<td>44%</td>
<td>19%</td>
<td>6%</td>
</tr>
</tbody>
</table>

The following were the results of those respondents who indicated that they were also lawyers (Note: these results were also included in the total results set out above):

<table>
<thead>
<tr>
<th>Act/Statute</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Labor Relations Act</td>
<td>65%</td>
<td>25%</td>
<td>7%</td>
<td>3%</td>
</tr>
<tr>
<td>Labor Management Relations Act</td>
<td>65%</td>
<td>25%</td>
<td>7%</td>
<td>3%</td>
</tr>
<tr>
<td>Railway Labor Act</td>
<td>34%</td>
<td>50%</td>
<td>13%</td>
<td>3%</td>
</tr>
<tr>
<td>Federal Antitrust Statutes</td>
<td>16%</td>
<td>80%</td>
<td>42%</td>
<td>12%</td>
</tr>
<tr>
<td>Norris-La Guardia</td>
<td>43%</td>
<td>43%</td>
<td>9%</td>
<td>5%</td>
</tr>
<tr>
<td>Labor Management Reporting and Disc.</td>
<td>39%</td>
<td>44%</td>
<td>12%</td>
<td>5%</td>
</tr>
<tr>
<td>Welfare and Pension Plans</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Civil Rights Act of 1964, Title VII</td>
<td>23%</td>
<td>53%</td>
<td>16%</td>
<td>8%</td>
</tr>
<tr>
<td>Fair Labor Standards Act</td>
<td>37%</td>
<td>39%</td>
<td>16%</td>
<td>8%</td>
</tr>
<tr>
<td>Executive Order No. 10988 Employee-</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Management Cooperation in the Federal Service</td>
<td>39%</td>
<td>44%</td>
<td>9%</td>
<td>8%</td>
</tr>
</tbody>
</table>

122 Currently there are several multi-volume sets reporting decisions of arbitration cases. Moreover, the innumerable organizations which provide arbitrators immeasurably contribute to the arbitral bureaucracy.

123 With the advent of wage controls this becomes especially true. Daily, the newspapers report wage disputes and the effects of wage increases on the rest of our economy.
exists. To assume that unions and management will always protect the interest of the employees and the public is pure legal schizophrenia. To assume that arbitrators, wholly dependent upon unions and employers, will render wise, knowledgeable decisions reflecting consideration of all interests is utter naiveté.

To properly order the relationships of all four parties in labor disputes, Congress must enact a new labor-arbitration policy which considers and protects the interests of all four parties. Industrial democracy is still the desired objective inasmuch as it reflects the macrocosm of our culture,\textsuperscript{124} and we should continue to encourage labor disputants to settle their disputes according to their own agreed upon procedures. However, a new policy should more clearly recognize the public interest in the settlement of labor disputes and in the results of those settlements.

Our policy should recognize the often dichotomous relationship of the union and the individual employee. The union has an interest in group protection, often to the detriment of a single employee's interest. Due regard should be afforded this interest by providing a speedy and less expensive forum for resolving employee claims of breach of the duty of fair representation by the union.

A policy favoring arbitration should be restated with an objective to release the arbitrator from his dependency upon union and management. If unions and management provide for arbitration of disputes, they should be required to go to a single source of arbitrators such as the National Labor Relations Board. The Board could have lists of approved and qualified arbitrators, from which one could be selected by the regional director to serve as the arbitrator for a particular dispute.

By requiring arbitrators to be knowledgeable on all relevant statutes and court decisions, the Board could then assure greater protection of rights vested by statute and the Constitution. This method of choosing arbitrators would assure a greater measure of protection for the interests of all four affected parties by releasing the arbitrator from his dependency status and by requiring him to know and apply public law. This policy would not disrupt existing policy; rather, it would complement it. The NLRB's policy of deferring to arbitration would be enhanced by clearly requiring the arbitrators to apply public law. The preference for arbitration expressed in Section 301 would not only be more credible, but would have its own method for implementation.

\textit{Walter L. Sales}

\textsuperscript{124} See Shulman, \textit{supra} note 29, at 1016.