Michigan Law Review

Volume 65 | Issue 8

1967

Labor Law-Arbitration and Award-Judicial Review of Labor Arbitration Awards Which Rely on the Practices of the Parties

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Labor and Employment Law Commons, Legal Remedies Commons, and the Supreme Court of the United States Commons

Recommended Citation
Michigan Law Review, *Labor Law-Arbitration and Award-Judicial Review of Labor Arbitration Awards Which Rely on the Practices of the Parties*, 65 MICH. L. REV. 1647 (1967).
Available at: https://repository.law.umich.edu/mlr/vol65/iss8/7

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

LABOR LAW—ARBITRATION AND AWARD—Judicial Review of Labor Arbitration Awards Which Rely on the Practices of the Parties

Modern collective bargaining agreements typically provide for private arbitration as the means of resolving disputes between employees and management over the interpretation and application of the agreement. In the event the arbitrator's decision is challenged in court by the adversely-affected party, the question of how much judicial deference should be given to the private ruling becomes of some importance. The Supreme Court has set out guidelines which purport to define the proper role of courts in such disputes—that role being for the most part one of judicial deference to arbitrator's decisions. Nevertheless, the appropriate scope of judicial review remains unclear.[1] This lack of clarity is especially manifest in the uncertainty that lower courts have displayed in attempting to apply the guidelines to cases in which the arbitration award is based upon the past practices of the parties rather than upon the express terms of the collective bargaining agreement.[2] Some courts, in dealing with such cases, have overstepped the guidelines, perhaps out of a fear that they provide insufficient means for judicial control over the exercise of discretion by arbitrators.[3] This note will suggest a framework for analysis of the judicial role in "past practices" cases and will propose a modification of the guidelines which might reconcile the lower courts' reluctance to allow arbitrators unbridled discretion with the reluctance of the Supreme Court to sanction judicial interference in the arbitrators' sphere of competence and authority.

In 1957 the United States Supreme Court held, in *Textile Workers v. Lincoln Mills*,[4] that section 301(a) of the Labor Management Relations Act[5] gives the federal courts jurisdiction to entertain suits to enforce arbitration provisions in collective bargaining

1. See Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751 (1965).

2. Because the multifarious nature of the relationship governed by a collective bargaining agreement makes impossible the reduction of every aspect of the contractual relationship to express terms, reliance on past practices has been of particular importance in this area. See Comment, *The Doctrine of Past Practice in Labor Arbitration*, 38 U. COLO. L. REV. 229 (1966). See also Aaron, *The Uses of the Past in Arbitration*, 1955 NAT'L ACADEMY OF ARBITRATORS PROCEEDINGS 1; McLaughlin, *Custom and Past Practice in Labor Arbitration*, 18 ARB. J. 205 (1963); Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017 (1961); see note 27 *infra* and cases cited therein.

3. See the discussion of Torrington Co. v. Metal Prods. Workers, 362 F.2d 677 (2d Cir. 1966), and H. K. Porter Co. v. United Saw Workers, 333 F.2d 596 (3d Cir. 1964), in text accompanying notes 20-41 and 42-50 *infra*.

4. 353 U.S. 448 (1957).

5. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

agreements,[6] and encouraged the lower courts to develop a body of federal common law, based on the "policy of our national labor laws," to govern their role in such suits.[7] Three years later, however, in response to a concern that the courts were thereby infringing upon the arbitrators' authority as the interpreters of collective bargaining agreements,[8] the Supreme Court decided the *Steelworkers* trilogy,[9] three landmark decisions which have been viewed as having "dispelled the specter of judicial intrusion into the arbitration process created by the Court's earlier decision in . . . *Lincoln Mills*."[10] In brief, the trilogy requires the courts to abstain from passing on the *merits* of the bargaining agreement dispute; specifically, the arbitrator's construction of the agreement is not reviewable for errors of either fact or law.[11]

After the trilogy, the courts were still left with a residuum of power to review. Courts exercising this power have seldom precisely articulated the grounds upon which their review is justified. Never-

6. 353 U.S. at 456.

7. See Bickel & Wellington, *Legislative Purpose and the Judicial Process—The Lincoln Mills Case*, 71 HARV. L. REV. 1147 (1957); Bunn, *Lincoln Mills and the Jurisdiction To Enforce Collective Bargaining Agreements*, 43 VA. L. REV. 1247 (1957); Feinsinger, *Enforcement of Labor Agreements—A New Era in Collective Bargaining*, 43 VA. L. REV. 1261 (1957); Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635 (1959).

8. See, *e.g.*, Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247 (1958); Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1483 (1959); see Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519 (1960).

Many of the lower courts assumed that in determining the arbitrability of a dispute they were to construe the terms of the contract itself in order to determine whether it could reasonably support the contentions of the party seeking to compel arbitration. This approach was formulated in the case of International Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317, *aff'd* 297 N.Y. 519, 74 N.E.2d 464 (1947), and came to be known as the *Cutler-Hammer* view. See Comment, *The Emergent Federal Common Law of Labor Contracts: A Survey of the Law Under Section 301*, 28 U. CHI. L. REV. 707, 731-32 (1961); 10 SYRACUSE L. REV. 278 (1959). An example of this judicial assumption can be found in Portland Web Pressman's Union v. Oregonian Publishing Co., 286 F.2d 4 (9th Cir. 1960).

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

The two landmark commentaries on the trilogy are Hays, *The Supreme Court and Labor Law October Term 1959*, 60 COLUM. L. REV. 901, 919-35 (1960), and Meltzer, *The Supreme Court, Arbitrability and Collective Bargaining*, 28 U. CHI. L. REV. 464 (1961). See generally Aaron, *Arbitration in the Federal Courts: Aftermath of the Trilogy*, 9 U.C.L.A.L. REV. 360 (1962); Davey, *The Supreme Court and Arbitration: The Musings of an Arbitrator*, 36 NOTRE DAME LAW. 138 (1960); Snyder, *What Has the Supreme Court Done to Arbitration?*, 12 LAB. L.J. 93 (1961); *Symposium, Arbitration and the Courts*, 58 NW. U.L. REV. 466, 494-520, 532-44 (1963).

10. Aaron, *supra* note 9.

11. 363 U.S. 593, at 596, 598-99 (1960); 363 U.S. 574, at 585 (1960); 363 U.S. 564, at 567-68 (1960). Of course, the principle that courts may not review the award of an arbitrator for error of either fact or law is one to which the courts have been paying lip service for many years. Burchell v. Marsh, 58 U.S. (17 How.) 344 (1854); Georgia & F. Ry. v. Brotherhood of Locomotive Engrs., 217 Fed. 755 (5th Cir. 1914).

theless, for the sake of analysis, the grounds permitted by the trilogy for reviewing an arbitration proceeding may be grouped into three categories.[12] The first two categories derive from the Court's statement that "the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made."[13] From this language, it is evident that the courts have the authority to determine whether the grievance is arbitrable, that is, within the arbitrator's subject-matter jurisdiction under the contract [category (1)][14] and whether, even if the con-

12. Commentators differ as to the appropriate breakdown of the possible grounds for challenging court enforcement of an arbitration award. Leaving aside matters not relevant here, Meltzer lists only two subdivisions (Meltzer, *supra* note 9, at 464 n.5), whereas Smith & Jones list eight (Smith & Jones, *supra* note 1, at 780-81 "claims" 1-7 & 12). Neither of these analyses, however, purports to include only those grounds that would be *upheld* under the trilogy. See Cornfield, *Developing Standards for Determining Arbitrability of Labor Disputes by Federal Courts,* 14 LAB. L.J. 564 (1963); Schmertz, *When and Where Issue of Arbitrability Can Be Raised,* P-H LAB. ARB. SERV., Report Bull. No. 3, July 19, 1962.

13. 363 U.S. 574, at 582 (1960).

14. Additional support for this category is found in the following language from the trilogy: "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree . . . come within the scope of the grievance and arbitration provisions of the collective agreement." 363 U.S. 574, at 581 (1960).

Category (1) has been correctly limited to those cases in which the agreement makes it clear that the type of grievance at issue was not intended to be appealable to the arbitrator. Thus it has been stated that:

> [U]nder the broad and comprehensive standard labor arbitration clause every grievance is arbitrable, unless the provisions of the collective bargaining agreement concerning grievances and arbitration contain some clear and unambiguous clause of exclusion, or there is some other term of the agreement that indicates beyond peradventure of doubt that a grievance concerning a particular matter is not intended to be covered by the grievance and arbitration procedure . . . .

Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 298 F.2d 644, 645-46 (2d Cir. 1962); *accord,* Taft Broadcasting Co. v. Radio Broadcast Technicians, 298 F.2d 707 (5th Cir. 1962); Radio Corp. of America v. Association of Professional Eng'r. Personnel, 291 F.2d 105 (3d Cir. 1961); Lodge 912, Int'l Ass'n of Machinists v. General Elec. Co., 236 F. Supp. 123 (S.D. Ohio 1964). An example of an appropriate utilization of this category is to be found in Communications Workers v. Telephone Co., 327 F.2d 94 (2d Cir. 1964), in which the court refused to order arbitration of a grievance concerning a temporary promotion where the contract clause covering promotions stipulated that grievances arising out of issues covered by that clause would not be subject to arbitration.

Even as to this category, however, the path to be followed by the lower courts has not been clearly delineated. For example, assuming that parties can exclude a particular subject from arbitration by a collateral agreement to that effect as well as by a provision in the principal contract, the question has arisen as to whether evidence concerning the alleged exclusion—*e.g.,* negotiations leading to the purported agreement—should be admissible in determining the issue of abritrability. Some courts have held that such evidence is admissible, *e.g.,* Local 787, Int'l Union of Elec. Workers v. Collins Radio Co., 317 F.2d 214 (5th Cir. 1963); others have excluded similar evidence, *e.g.,* International Union of Elec. Workers v. Westinghouse Elec. Corp., 228 F. Supp. 922 (S.D.N.Y. 1964), 63 MICH. L. REV. 1274 (1965); and still others appear to have decided the issue without actually having confronted it, *e.g.,* Flintkote Co. v. Textile Workers, 243 F. Supp. 205 (D.N.J. 1965). See generally Smith, *The Question of "Arbitrability"—Roles of Arbitrator, the Court, and the Parties,* 16 Sw. L.J. 1 (1962).

troversy is arbitrable, the arbitrator exceeded specific contractual limits on his authority in making his decision [category (2)].[15] The third category [category (3)] is derived from a passage which has been relied upon by nearly every lower court that has declined to enforce an award, perhaps because it is the only language in the trilogy with a ring to it that runs counter to the general emphasis upon the arbitrator's autonomy:

> 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

15. One student commentator has suggested that "arbitrability" in the category (1) sense of jurisdiction—not the problem of authority to render a given award—was the only question at issue in the trilogy. Note, *Admissibility of Parol Evidence in Judicial Determinations of Arbitrability,* 63 MICH. L. REV. 1274, 1274 n.5 (1965). This suggestion, however, is clearly incorrect, as one of the trilogy cases, United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), itself involved the challenge of an award solely on the ground that as to a portion of the remedy the arbitrator had exceeded his contractual authority.

The rationale of the decisions under category (1) (see note 14 *supra*) would indicate that a refusal to enforce an award under this category should be based only upon a clear and unambiguous expression in the contract of an intention to prohibit the arbitrator from exercising the specific power in question. An example of an appropriate application of this category is provided by Truck Drivers v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964). The contract in that case stated that, as to grievances arising out of the provision concerning discharges, "the arbitration board shall not substitute its judgment for that of the management and shall only reverse the action . . . of the management if it finds that the Company's complaint against the employee is not supported by the facts . . . ." The arbitrator found that the discharged employee had, in fact, falsified his time card in violation of the rules, but, feeling that discharge was too severe a penalty, he nevertheless ordered reinstatement. The court vacated the award on the ground that the arbitrator had exceeded the express limitation on his powers as set forth in the contract. Consistent with that decision is Local 2130, Int'l Bhd. of Elec. Workers v. Bally Case & Cooler, Inc., 232 F. Supp. 394 (E.D. Pa. 1964). Under a contract allowing discharge for "just cause" (and making no explicit mention of a discretionary authority in the arbitrator to substitute suspension in instances where discharge was deemed unwarranted) the arbitrator awarded reinstatement to three employees with varying degrees of back pay based on his view of the degree of seriousness of their respective offenses. The court upheld the award on the ground that the contract "did not specifically deny" to the arbitrator either the power to consider whether there was just cause for suspension rather than discharge or the authority to determine the amount of back pay to be awarded in a particular instance. A contrary result was reached in Textile Workers v. American Thread Co., 291 F.2d 894 (4th Cir. 1961), where an award of reinstatement without back pay was vacated on the ground that the alleged rule violation did not constitute "just cause" for discharge, as opposed to suspension. Although there was no express limitation on the arbitrator's powers of the type found in *Ulry-Talbert, supra,* the court read such a limitation into the management's "inherent right" to discipline and the meaning of "just cause." See Note, *The Scope of Judicial Review in Arbitration Proceedings,* 13 W. RES. L. REV. 596, 598-99 (1962), where the *Amercan Thread* decision is declared to be "in conflict with [the] recent trilogy of Supreme Court cases which are the landmarks for the treatment of labor arbitration by the federal courts." A similar view of *American Thread* is expressed by Christensen, Book Review, 19 STAN. L. REV. 671, 686 (1967).

arbitrator's words *manifest an infidelity* to this obligation, courts have no choice but to refuse enforcement of the award.[16]

Under this last category of judicial authority, a court may review and set aside an award when the arbitrator, by basing his award on some source wholly extraneous to the agreement between the parties, has violated his obligation to interpret and apply the contract.[17] These three specific exceptions to the general rule of judicial noninterference, then, must constitute the bases for a court's proper refusal to enforce an arbitrator's award, including, of course, a refusal to enforce an award based on the past practices of the parties.

Category (1) is only concerned with the arbitrator's subject-matter jurisdiction to entertain the dispute,[18] not the factors he may or may not rely upon in reaching his decision; therefore, it may not properly be used by courts as a basis for deciding that an arbitrator's award should be set aside because it was based on past practices.[19]

16. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). (Emphasis added.)

17. It is a thesis of the present Note that the Supreme Court intended this category of jurisdiction to be far narrower than the scope attributed to it by the lower courts. One case comes close enough to the meaning of this category to warrant mention here. In Local 791, Int'l Union of Elec. Workers v. Magnavox Co., 286 F.2d 465 (6th Cir. 1961), the union claimed that a company-initiated assembly line speed-up constituted a violation of the collective bargaining contract. After dismissing the grievance on the ground that the union had failed to carry its burden of showing that the speed-up constituted an "unfair" change under the contract, the arbitrator went on to order the parties to negotiate concerning the implementation of appropriate engineering studies regarding assembly line speed. Where the grievance itself has been dismissed, it is a close question whether such an order is an instance of an arbitrator "dispensing his own brand of industrial justice" or a legitimate incident of his function in settling the contract dispute. It is therefore of interest to note that in vacating this award the court relied on language in the contract which expressly limited the arbitrator's powers, *i.e.*, the court treated it as a category (2), rather than category (3), case.

18. See discussion in Christensen, *supra* note 15, at 678-93.

19. Clearly, category (1) is inappropriate in past practices cases, and no court has chosen to reply on such a basis for its jurisdiction. The courts have also held that arbitrability is not to be denied on the ground that there is no provision in the contract on which an award for the grievant could be based. See Livingston v. John Wiley & Sons, 313 F.2d 52 (2d Cir. 1963), *aff'd*, 376 U.S. 543 (1964); International Union of Elec. Workers v. General Elec. Co., 332 F.2d 485 (2d Cir. 1964); Minute Maid Co. v. Citrus Workers, 331 F.2d 280 (5th Cir. 1964) (per curiam); Lodge 12, Int'l Ass'n of Machinists v. Cameron Iron Works, Inc., 292 F.2d 112 (5th Cir. 1961); United Saw Workers v. H. K. Porter Co., 190 F. Supp. 407 (E.D. Pa. 1960). Arbitrability is not to be denied on the ground that limitations on the arbitrator's authority prohibit him from reaching a result in favor of the grievant, *e.g.*, Carey v. General Elec. Co., 315 F.2d 499 (2d Cir. 1963), *cert. denied*, 377 U.S. 908 (1964); Livingston v. John Wiley & Sons, *supra*; International Ass'n of Machinists v. Hayes Corp., 296 F.2d 238 (5th Cir. 1961). *Compare* Camden Indus. Co. v. Carpenters Union, 353 F.2d 178 (1st Cir. 1965), *with* Trailways of New England, Inc. v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees, 353 F.2d 180 (1st Cir. 1965). *Cf.* Greater Kansas City Laborers v. Builders Ass'n, 217 F. Supp. 1 (W.D. Mo. 1963). See also cases cited in Smith & Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties*, 52 VA. L. REV. 831, 859 n.79 (1966).

In International Union of Elec. Workers v. General Elec. Co., *supra*, the Court

Category (2) gives courts the power to deny enforcement of an award as improperly based upon past practices if, but only if, the contract contains a provision which prohibits the arbitrator from looking beyond the express terms of the contract.[20] However, in a recent decision of the Court of Appeals for the Second Circuit the court apparently relied upon category (2) grounds in refusing to enforce an arbitrator's award based on past practices even though there was no finding of a contractual requirement that the arbitrator adhere to the written provisions of the contract. In *Torrington Co. v. Metal Prods. Workers*,[21] the company, during the term of the old contract, announced, over the objection of the union, its intention to discontinue a long-standing practice of giving its employees paid time-off to vote on election days. The company reiterated its position during the negotiations for a new contract, but failed to deal with this issue when it submitted a formal proposal to extend the old contract with specified amendments. The new contract which emerged from the negotiations contained no paid voting time provision. When the company later refused to grant paid voting time, the union filed a grievance which ultimately went to arbitration. The arbitrator ruled in favor of the union, holding as follows: (a) this long-standing benefit, though unilaterally extended, had become an implied contractual obligation which the company could discontinue only by negotiation with the union; (b) the company was the first to withdraw the issue from the negotiations for the new contract, since its offer to continue the old contract with specified amendments did not include termination of the benefit; and (c) the final bargain did not include an agreement, tacit or express, to discontinue the implied benefit, and thus it remained part of the collective bargaining agreement between the parties.[22]

In opposing enforcement of this award in court, the company argued that a statement in the contract providing that the arbitrator "shall have no power to add to . . . the provisions of this agreement"[23] was an express limitation on the arbitrator's powers which

of Appeals for the Second Circuit, which also decided the *Torrington* case, affirmed an order compelling arbitration despite the company's argument that because the union had tried and failed during the contract negotiations to include a provision that would have covered the dispute at issue, the grievance was not one concering the "interpretation or application of a provision of the contract" within the meaning of the arbitration clause. It is of interest that Chief Judge Lombard, the author of the opinion in *Torrington*, dissented on that occasion. See discussion in Smith & Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitration, and Parties*, 52 VA. L. REV. 831, 850-54, 858-60 (1966); Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751, 784 (1965).

20. See note 15 *supra*.

21. 362 F.2d 677 (2d Cir. 1966).

22. *In re* the Torrington Co., 45 Lab. Arb. 353, 355-56 (1965).

23. The arbitration provision is set forth in 362 F.2d at 678 n.2, and provides in part that: "The arbitrator shall be bound by . . . the terms of this agreement and

he violated in making his award.[24] Whether this contention raises a proper category (2) issue depends initially upon whether this "boiler plate" contractual language[25] should be viewed as prohibiting the arbitrator from adding to the *written* provisions of the contract obligations implied from the past practices of the parties, or whether it simply forbids him from adding obligations not already expressed in the contract or implied from the practices of the parties.[26] Arbitrators have frequently ruled that this sort of contract language does not prohibit the implication of obligations from past practices,[27] and the *Torrington* court did not hold otherwise.[28] Instead, the court seems to have held that the past practices of the parties did not in fact support the arbitrator's finding that the obligation to grant paid voting time should be implied; thus, it ruled that the arbitra-

---

he shall have no power to add to, delete from, or modify, in any way any of the provisions of this agreement . . . ."

24. Brief for Appellee, pp. 6, 8, & 11.

25. See cases discussed in note 27 *infra.*

26. See Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1011 (1955). The *Torrington* decision has been criticized on the ground that the bargaining history surrounding the wording of the arbitration clause in the new contract, as opposed to that in the former contract, indicates that the parties did not intend to limit the source of contractual obligations to the *written* provisions of the agreement. Christensen, *supra* note 15, at 690-93.

In Lodge 12, Int'l Ass'n of Machinists v. Cameron Iron Works, Inc., 292 F.2d 112 (5th Cir. 1961), the company argued that the grievance was not arbitrable because it was not covered by any provision of the written contract, and the limitation denying the arbitrator authority to "supplement the terms of [the] agreement" precluded him from finding for the grievant. On the question of the arbitrator's authority to expand the express terms of the agreement in light of such a limitation, the court said:

> So far as the term "supplement" is concerned it can not be read literally to rule out the right of arbitrators—just as would a court—to find substantive rights, obligations and duties which are implied though not expressed. The alternative to this would make the agreement to arbitrate superfluous, for the sole inquiry would then be: is it expressed in the contract?

292 F.2d at 118. See also Wilson H. Lee Co. v. New Haven Printing Pressmen, 248 F. Supp. 289 (D. Conn. 1965).

27. In International Harvester Co., 20 Lab. Arb. 276 (1953), the contract included the standard limitation prohibiting the arbitrator from "adding to" the agreement, and did not contain any provision for the retention of unmentioned past benefits. In concluding that the company could not unilaterally discontinue the long standing practice of granting paid wash-up time, Arbitrator Wirtz noted "There is . . . a fast growing body of private arbitration precedent which denies any broad managerial right, in the absence of express reservation, to change important practices during the contract term." *Id.* at 279-80. (The arbitrator also relied on his conclusion that unilateral termination of the benefit would be an unfair labor practice under the decisions of the NLRB.) Likewise, in Pennsylvania Forge Co., 34 Lab. Arb. 732 (1960) (Christmas bonus), there was neither an add-to provision nor mention of a retention-of-benefits provision in the arbitrator's opinion. See Anaconda Aluminum Co., 45 Lab. Arb. 277 (1965); Stepan Chem. Co., 45 Lab. Arb. 34 (1965); Lutheran Medical Center, 44 Lab. Arb. 107 (1964); Tonawanda Publishing Co., 43 Lab. Arb. 892 (1964); Keystone Lighting Corp., 43 Lab. Arb. 145 (1964).

28. The opinion states that the trilogy language on which category (3) is based (quoted in text accompanying note 16 *supra*) makes an arbitrator's authority to expand the express terms of the contract on the basis of the parties' prior practices

tor "added to" the terms of the agreement. This ruling, of course, could only be made after a review of the arbitrator's finding of fact, contrary to the policy set forth in the trilogy. The court found the facts and the law as follows:[29] (1) the company's original announcement did terminate effectually the paid voting time benefit,[30] since the narrow arbitration clause of the contract then in force[31] indicated that the power to discontinue unilaterally such a practice had not been excepted from the usual prerogatives of management;[32] (2) the court refused to accept the arbitrator's finding that the company withdrew this demand from the bargaining table,[33] apparently accepting instead the lower court's finding that "throughout the negotiations, the plaintiff employer persistently reiterated its position not to grant this benefit;"[34] and (3) the court rejected the arbitrator's position that the company had an affirmative burden to secure an agreement to discontinue the benefit,[35] and instead suggested that once the question of the termination of a long standing benefit has been raised in negotiations, the benefit should be

subject to judicial review, but the precise nature and scope of this review is left unclear, 362 F.2d at 680. However, nowhere in the opinion does the court state that there was no such authority under the contract at issue.

29. The following order is not necessarily that in which these points appear in the opinion. Rather, the presentation here is an attempt to reconstruct the grounds of the decision desultorily set forth in the court's opinion.

30. 362 F.2d at 681. This conclusion is, of course, a direct reversal of that reached by the arbitrator on this point. See text accompanying note 22 *supra*.

31. The relevant section of the arbitration clause then in force is set forth in 362 F.2d at 681 n.7. It includes the following statement: "The Company's decisions . . . will not be overruled by any arbitrator unless the arbitrator can find that the Company misinterpreted or violated the express terms of the agreement."

32. *But cf.* Harmon v. Martin Bros. Container & Timber Prods., 227 F. Supp. 9 (D. Ore. 1964), in which the court, interpreting a collective bargaining agreement that contained *no* arbitration provision, found that the company could not unilaterally abrogate the practice of paid traveling time to and from work—a practice not mentioned in the contract.

33. 362 F.2d at 681.

34. Torrington Co. v. Metal Prods. Workers, 60 L.R.R.M. 2262, 2264 (D. Conn. 1965).

35. The court actually assumed that the arbitrator had placed the burden "of securing an express contract provision in the [new] contract on the company." 362 F.2d at 682. Apparently, this interpretation of the basis for the award is drawn from the arbitrator's statements that the company was obligated to continue the implied contractual benefit "until such time as it negotiated a change in the matter" (45 Lab. Arb. at 355) and that "the final bargain between the parties did not include an agreement to discontinue the practice." *Id.* at 356. The court's interpretation of this language, however, is unmistakenly erroneous, for it is clear that, in the arbitrator's opinion, an agreement during the negotiations to discontinue the benefit would have been sufficient. He regarded the issue as being "whether that obligation [to grant paid voting time] was bargained off the table in the negotiations which resulted in the current labor agreement" (*id.* at 355), and subsequently reached a negative conclusion on this question. The court goes on to imply that, contrary to the arbitrator's view, the burden is on the *union* to secure an express provision retaining the paid voting benefit because "labor contracts generally state affirmatively what conditions the parties agree to, more specifically, what restraints the parties will place on management's freedom of action." 362 F.2d at 681. *But see* Comment, *Arbitration and Award—Interpretation of Arbitration Clauses in Collective Bargaining Agreements*, 36 N.Y.U.L.

deemed conclusively terminated if the new contract does not expressly provide for its continuation.[36] Thus, the court appears to have denied enforcement of the arbitration award on the ground that it was based on an obligation which the arbitrator implied by applying an erroneous rule of law[37] to erroneous conclusions of fact.[38]

There is no doubt, therefore, that the *Torrington* court engaged in a review of the merits of the arbitrator's award. It is not easy to follow the court's rationale in this apparent circumvention of the trilogy's hands-off policy. In addition to purporting to enforce a specific contractual limitation on the arbitrator's authority—an apparent category (2) approach—it also blends into its reasoning the language of category (3), quoting the "manifest infidelity" passage of the trilogy,[39] and further noting that the arbitrator's award "should not be accepted where the reviewing Court can clearly perceive that he has derived that authority from sources outside the collective bargaining agreement at issue."[40] Thus, the court's conclusion seems to be that when an arbitrator has *erroneously* found that a particular obligation is part of an agreement, he has both "added to," and failed to base his award upon, the agreement.[41]

REV. 233 (1961), where it is asserted that the trilogy rejected the theretofore prevailing view that management retains all rights not expressly contracted away.

36. The court states:

> While it may be appropriate to resolve a question never raised during negotiations on the basis of prior practice . . . it is quite another thing to assume that the contract confers a specific benefit when that benefit was discussed during negotiations but omitted from the contract.

362 F.2d at 681. This position has also been advanced by Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017, 1040-41 (1961), to which one student commentator has replied:

> Some authorities say that if unilateral objection to a past practice is made at contract negotiations, the practice should no longer be a binding condition of employment. . . . This argument, however, has not been generally accepted by arbitrators. It has many faults. It would allow one party to destroy almost all past practices without negotiation or agreement of any kind. . . . The essential feature of bargaining for a new contract is that gains to one side are substantially balanced by new provisions favoring the other. The same should be true for bargaining over past practices.

Comment, *The Doctrine of Past Practice in Labor Arbitration*, 38 U. COLO. L. REV. 229, 246 (1966).

37. *I.e.*, the rules concerning abrogation of a benefit that has become an implied contractual right as a result of long-standing practice.

38. *I.e.*, the powers of management under the former contract and the question of what was bargained off the table by whom during negotiations over the new contract.

39. See text accompanying note 16 *supra*.

40. 362 F.2d at 680.

41. The following statement of the Supreme Court in *Enterprise* is especially pertinent to the court of appeals' disposition of *Torrington:*

> Respondent's major argument seems to be that applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not so provide, and that therefore the arbitrator's decision was not based upon the contract. The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract.

363 U.S. at 598-99.

This conclusion is no more justified by the language of category (3) than it is by that of category (2).[42] The trilogy clearly indicates that the agreement upon which an arbitrator's award must be based may include much more than the integrated contract;[43] the language of category (3) that the award draw its essence from the agreement is properly utilized as a basis for review only when the award clearly purports to be founded on something other than the arbitrator's (*not the court's*) interpretation of the parties' agreement.[44]

However, the position of the court in *Torrington* does find support in the 1964 case of *H. K. Porter Co. v. United Saw Workers*[45] in which the Court of Appeals for the Third Circuit also apparently assumed that an award is not "drawn from" the agreement within the meaning of category (3) if it is based upon an implied or modified term which the arbitrator has *erroneously* deduced from the parties' practices. In *Porter* two classes of employees whose jobs were being terminated by the closing of a plant and who did not come within the express terms of the pension eligibility clause of the collective bargaining contract demanded pension benefits. The contract limited benefits to parties who had both completed twenty-five years of continuous service and had reached a designated age. However, the arbitrator found that the management pension board which administered the pension plan had on occasion deviated from the express terms of the eligibility clauses.[46] He therefore concluded that the board had been guided by the "spirit" of the eligibility clause rather than its exact wording, and that he, too, was free to give it such a broad interpretation. He awarded full pensions to the class of employees who had completed twenty-five years or more of total service, whether or not they met the age requirement, and prorata pension benefits to those who had reached the required age but had less than twenty-five years of service. The court upheld the award to the first mentioned class, but refused to enforce the prorata award to the latter class. It reasoned that, while the arbitrator had authority to deviate from the express terms of the eligibility provision when justified by the parties' practices, the practices as shown could not reasonably justify the conclusion reached by the

42. See discussion of category (2) in note 15 *supra*.

43. See, *e.g.*, 363 U.S. at 581-82 (1960).

44. See the Supreme Court's remarks concerning the arbitrator's opinion in *Enterprise* which arguably purported to base the award on the requirements of the positive law rather than on the agreement. 363 U.S. at 597-98 (1960).

45. 333 F.2d 596 (3d Cir. 1964).

46. The arbitrator found cases in which the pension board had awarded: (1) pensions in cases where there was less than the expressly required twenty-five years of continuous employment but over thirty years of total service; (2) pensions where the recipient was under the expressly required age but had thirty years or more of employment; (3) an increment to pension-eligible employees whose jobs had been terminated by the closing of a division until the recipients reached the age of eligibility for social security benefits.

arbitrator as to the second class of employees.[47] The basis for the court's power to vacate this part of the award was stated to be the requirement that an award derive its essence from the agreement between the parties.[48] Thus, under the aegis of category (3), the court struck down part of the arbitrator's award because it did not correspond to the court's view of a proper interpretation of the parties' practices.[49]

The common misapprehension of the *Porter* and *Torrington* courts was their apparent assumption that the language on which category (3) is based[50] authorized them to review at least the reasonableness of the conclusion that the arbitrator had drawn from the parties' practices.[51] This assumption, and the overstepping of the Supreme Court's limits on the scope of judicial review which it entails, may have stemmed from the belief that the Supreme Court could not have intended the scope of review under category (3) to be as limited as the language in the trilogy seems to indicate, as well as from the fear that such a limited role for the courts provides insufficient control over the arbitrator. Such a fear is not irrational. The language of category (3), properly read, permits vacation of an award for failure to draw its essence from the agreement *only* when the arbitrator's *language* clearly shows that the award was based on something other than the arbitrator's interpretation of the parties' agreement.[52] Since, as the Supreme Court noted in the trilogy, arbitrators are under no legal obligation to submit opinions,[53] an arbitrator could always avoid a judicial finding of "manifest infidelity" simply by not submitting an opinion. This fear seems to be

47. 333 F.2d at 602.

48. *Ibid.*

49. *But see* Christensen, *supra* note 15, at 693, where it is suggested that *Porter*, unlike either *Torrington* or *American Thread* (discussed in note 14 *supra*), represents adherence to the proper limitations upon judicial interference with the merits of an award established by category (3). The author postulates that since there was no support for the award of pro-rata pensions to workers with less than twenty-five years of service in either the express terms of the contract or the management pension board's practices, that that aspect of the award must have been based on the arbitrator's "own brand of industrial justice" rather than on the terms of the contract.

Compare H. K. Porter Co. v. United Saw Workers, 333 F.2d 596 (3d Cir. 1964), *with* Local 7-644, Oil Workers v. Mobil Oil Co., 350 F.2d 708 (7th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966).

50. Although the *Torrington* case has been treated herein as a category (2) case, the language of the opinion in that case does not recognize the distinction between categories (2) and (3), and, in fact, cites the trilogy language upon which category (3) is based as authority for its power to refuse enforcement of the award at issue. 362 F.2d at 680 n.5.

51. For example, in *Porter* the court stated: "[A]bsent any provision either explicitly or implicitly authorizing the arbitrator's ruling in Part 2 of his award, *or any prior practice which reasonably could so interpret it,* [sic] he lacked a basis for his conclusion." 333 F.2d at 602. (Emphasis added.)

52. See text accompanying note 45 *supra.*

53. 363 U.S. 593, 598 (1960).

especially prevalent in past practice cases, perhaps because of the greater potential for abuse in these cases which results from the fact that the arbitrator does not even purport to rely on the written agreement.

The legitimacy of the judicial concern, however, does not minimize the subversive effect of the *Porter-Torrington* rationale on the non-intervention policy of the trilogy. There is, of course, room for the argument that the trilogy has drawn the line against intervention too tightly. Indeed, the trilogy offers little safeguard against capricious arbitration. In *Porter*, for example, even if the arbitrator had clearly subverted the parties' agreement by "liberally interpreting" the pension eligibility clause to authorize pro-rata pension benefits for every employee whose job was terminated,[54] the trilogy rule of non-intervention, if applied, would have prevented the court from refusing to enforce the award. Moreover, current dissatisfaction with the arbitration system and questioning of the premises upon which the trilogy was based have resulted in increasing pressure on the courts to allow some degree of judicial review on the merits of arbitration awards.[55] Nevertheless, the Supreme Court has clearly indicated its view that the dangers arising from strict limitations on judicial review of awards are outweighed by a number of considerations: the desirability of having the controversy settled in the manner, and by the personnel, chosen by the parties;[56] the arbitrator's expertise in interpreting collective bargaining agreements, and his familiarity with the conditions of the plant or industry involved;[57] and the fear, borne out by experience, that courts in the business of interpreting collective bargaining agreements are likely to make bad law.[58] These advantages would be threatened by any standard of review which would give the courts a foothold for substituting their own view on the merits in a contract dispute for that of the arbitrator. Nor would limiting review to the question of whether the award could reasonably have been based on the agreement provide a sufficient safeguard against this type of judicial in-

---

54. In *Porter* the arbitrator had refused at the outset to award severance pay on the ground that to do so would constitute an unauthorized addition to the agreement. 333 F.2d at 599.

55. See HAYS, LABOR ARBITRATION, A DISSENTING VIEW 80 (1966); Rubenstein, *Some Thoughts on Labor Arbitration*, 49 MARQ. L. REV. 695 (1966); Smith & Jones, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 1115 (1964); Straus, *Labor Arbitration and Its Critics*, 20 ARB. J. 197 (1965).

56. 363 U.S. at 582 (1960).

57. *Ibid*; 363 U.S. at 596 (1960).

58. See Wellington, *Judicial Review of the Promise To Arbitrate*, 37 N.Y.U.L. REV. 471, 475 (1962). See also Mayer, *Judicial "Bulls" in the Delicate China Shop of Labor Arbitration*, 2 LAB. L.J. 502 (1951); Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 BUFFALO L. REV. 1 (1952). Compare Herzog, *Judicial Review of Arbitration Proceedings—A Present Need*, 5 DE PAUL L. REV. 14 (1955).

trusion. *Porter* and *Torrington* themselves indicate that an award which could not "reasonably" have been based upon the agreement will inevitably be one which differs too greatly from that which the court would itself have rendered had it been in the arbitrator's shoes.

Assuming that the Supreme Court intends to adhere to the doctrine prohibiting review of labor arbitration awards on the merits,[59] the kind of veiled transgression of this principle which occurred in *Torrington* and *Porter* might be discouraged if the Supreme Court adopted a rule which permitted the lower courts to condition enforcement of an award on an affirmative showing that it was based on the arbitrator's interpretation of the agreement between the parties—a rule which would in practice necessitate written opinions by arbitrators. Operating under such a rule, the courts could then adopt the approach of a recent district court decision[60] in which the court was presented with an award based in part on the practices between the parties. While not reviewing the merits of the controversy, the district judge was able to determine that the arbitrator had carried "out with fidelity his obligation to interpret and apply the contract"[61] from the fact that his written opinion supported the award with a discussion of the relevant contractual provisions and prior practices and his interpretation thereof.[62] By modifying its guidelines to permit the lower courts to adopt this approach, the Supreme Court could more clearly direct their focus to the *process* by which the arbitrator reached his result rather than to the *merits* of the result itself.

---

59. It is, perhaps, an open question whether the present Court would adhere in all respects to the holding of the trilogy. Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751 (1965), apparently takes the position that recent decisions indicate that the Court has undergone no basic changes in its views. They do not discuss, however, the following dictum of Mr. Justice Harlan speaking for the majority in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964):

> It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as nonarbitrable because it can be seen in advance that no award to the Union could receive judicial sanction.

376 U.S. at 555. Although the holding, affirming an order to arbitrate, is certainly consistent with the trilogy, this particular language is indeed reminiscent of the *Cutler-Hammer* approach expressly disapproved by the Court in the trilogy. See discussion in note 7 *supra*. See also Rubenstein, *Some Thoughts on Labor Arbitration*, 49 MARQ. L. REV. 695, 713 n.54 (1960).

60. Local 77, Am. Fed'n of Musicians v. Philadelphia Orchestra Ass'n, 252 F. Supp. 787 (E.D. Pa. 1966).

61. *Id.* at 791.

62. The language in *Philadelphia Orchestra* may be interpreted as standing for a somewhat different proposition as well, that in cases in which the arbitrator has relied on the parties' practices, the courts may inquire whether the decision to go beyond the express terms and look to the parties' practices was arbitrary or capricious. 252 F. Supp. at 792. *Compare* Local 77, Am. Fed'n of Musicians v. Philadelphia Orchestra Ass'n, 252 F. Supp. 787 (E.D. Pa. 1966), *with* Marble Prods. Co. v. Local 155, United Stone Workers, 335 F.2d 468 (5th Cir. 1964).

There is no apparent limitation on the authority of the Supreme Court to require arbitrators to render written opinions.[63] Although the Court noted in the trilogy that arbitrators presently "have no obligation to the court to give their reasons for an award,"[64] the advantages of such a requirement were specifically emphasized: "a well-reasoned opinion [by the arbitrator] tends to engender confidence in the integrity of the process."[65] Moreover, the arguments that such a requirement would be unduly burdensome, and that it would lead to the rigidity of stare decisis in a field which requires flexibility, are both unpersuasive. A brief memorandum of decision setting forth the grievance, the relevant contractual provisions, the relevant past practices of the parties, and the interpretation of those provisions or practices deemed to support the result would certainly suffice. To the extent that the proposed rule would force the arbitrator to articulate his reasoning in each case rather than allow him to "shoot from the hip," it would appear to be more beneficial than harmful. Nor does the fact that prior decisions are available for reference mean that an arbitrator must adhere to precedent which he is not disposed to follow. Indeed, the availability of opinions which an arbitrator may wish to follow when he finds their reasoning persuasive might upgrade, rather than rigidify, arbitration decisions. Thus, although the suggested modification of the trilogy guidelines would probably not be sufficient to stem entirely the increasing pressure for major revision of those guidelines, it seems to be a practicable step toward reconciling the desire to minimize judicial intervention with the fear of capricious arbitration, and toward eliminating the type of judicial usurpation found in *Torrington* and *Porter.*

63. See Wellington, *supra* note 58, at 479 ("it is not clear why a court could not insist that an arbitrator produce an unambiguous and reasoned opinion").

64. 363 U.S. 593, 598 (1960).

65. *Ibid.*