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## Labor Law - Arbitration - Restriction of Judicial Intervention Into the Arbitration Process

James J. White  
*University of Michigan Law School*

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LABOR LAW — ARBITRATION — RESTRICTION OF JUDICIAL INTERVENTION INTO THE ARBITRATION PROCESS — Respondent company laid off a number of employees as a result of its decision to contract out maintenance work formerly done in the company shop. After the grievance procedure failed to resolve petitioner union's claim that this violated the contract provision against lockouts, and the company refused the union's request for arbitra-

tion, the union sought specific performance of the promise to arbitrate contained in the collective bargaining contract. In dismissing the plea, the district court found that contracting out work was solely a function of management and therefore not arbitrable because the contract specifically excluded from arbitration "matters which are strictly a function of management."<sup>1</sup> The Court of Appeals for the Fifth Circuit affirmed on the same ground.<sup>2</sup> On certiorari to the United States Supreme Court, *held*, reversed, one Justice dissenting.<sup>3</sup> An order to arbitrate should not be denied unless it may be said with positive assurance that the arbitration clause can not be interpreted to cover the asserted dispute. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

In 1957 the Supreme Court in *Textile Workers Union v. Lincoln Mills*<sup>4</sup> interpreted section 301 of the Taft-Hartley Act<sup>5</sup> in a manner which gave federal courts a right to form a federal substantive labor law. Since this time the federal courts have heard a number of suits seeking specific performance of the contract agreement to arbitrate. These cases draw into question the jurisdiction of the arbitrator over the alleged grievance and require the court to determine whether the defendant promised to arbitrate the particular grievance.<sup>6</sup> The general rule in the lower federal courts has been that the further question, which party is right on the merits of the grievance, is for the arbitrator, and not the court, to decide.<sup>7</sup> However, in denying arbitration of grievances because they were found to be frivolous on the merits or in deciding the question of the arbitrator's jurisdiction where the same contract interpretation will resolve both this question and the question on the merits, the court may in effect deny arbitration upon its own conclusion concerning the merits of the grievance.<sup>8</sup> Similar intervention may occur in a court's review of arbitration awards to determine whether the arbitrator has exceeded his jurisdiction in making the award.<sup>9</sup> On the other hand, the legal writers have almost uniformly

<sup>1</sup> *United Steelworkers v. Warrior & Gulf Navigation Co.*, 168 F. Supp. 702, 705 (S.D. Ala. 1958).

<sup>2</sup> *United Steelworkers v. Warrior & Gulf Navigation Co.*, 269 F.2d 633 (5th Cir. 1959).

<sup>3</sup> In dissent Justice Whittaker argued that the Court could not order arbitration where the parties did not manifest by plain language an intent to arbitrate the particular grievance. He also found a practical construction of the contract by the parties that contracting out was strictly a management function. Justices Brennan, Harlan, and Frankfurter, concurring, indicate that the federal courts could inquire more deeply into the circumstances and refuse arbitration upon a less conclusive showing by the defendant where the presence of a restrictive arbitration clause and specific exclusions from arbitration display the parties' "interest in confining" the arbitrator.

<sup>4</sup> 353 U.S. 448 (1957).

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

<sup>6</sup> Principal case at 582.

<sup>7</sup> See, e.g., *New Bedford Defense Products v. Local 1113, UAW-CIO*, 258 F.2d 522 (1st Cir. 1958). See also Cox, *Current Problems in the Law of Grievance Arbitration*, 30 *Rocky Mt. L. Rev.* 247, 258 (1958).

<sup>8</sup> See, e.g., *Local 149, Am. Fed'n Technical Eng'rs v. General Electric Co.*, 250 F.2d 922 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958).

<sup>9</sup> See *Enterprise Wheel & Car Corp. v. United Steelworkers*, 269 F.2d 327 (4th Cir. 1959).

asserted the uniqueness of the collective bargaining contract and the ineptitude of the ordinary judge in dealing with it.<sup>10</sup> Because it is designed to cover a myriad of occurrences and is written to be understood by the union rank and file, the contract is but a skeleton which can best be interpreted by one who is familiar with industrial practice.<sup>11</sup> In harmony with these ideas the Court in the principal case and its two companion cases, *United Steelworkers v. American Mfg. Co.*<sup>12</sup> and *United Steelworkers v. Enterprise Wheel & Car Corp.*,<sup>13</sup> has restricted the opportunity for judicial intervention into the merits of the grievance or the propriety of the arbitrator's award while deciding the question of the arbitrator's jurisdiction.<sup>14</sup>

In *American Mfg. Co.*<sup>15</sup> the Court held that arbitration cannot be denied merely because a court thinks the grievance itself has no reasonable basis. Unfounded grievances, which are occasionally brought by the union either for tactical purposes or to satisfy the demands of rank and file members,<sup>16</sup> may now reach arbitration in increased numbers. However, there seems to be little inducement to bring additional baseless grievances. Since by hypothesis such claims would be unfounded, the union could expect only unfavorable decisions. The only harassment value then would lie in the time and money spent by the employer in his defense; but similar costs would also be incurred by the union.<sup>17</sup>

In the principal case and in *Enterprise* it appears that the rules promulgated to restrict judicial intervention are of an evidential nature. Prior to the principal case, the plaintiff seeking specific performance of a promise to arbitrate had to prove by a preponderance of the evidence that defendant had promised to arbitrate the particular grievance.<sup>18</sup> However, according

<sup>10</sup> A leading example is Summers, *Judicial Review of Labor Arbitration*, 2 BUFFALO L. REV. 1 (1952).

<sup>11</sup> For a recent expression of such views, see Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959).

<sup>12</sup> 363 U.S. 564 (1960).

<sup>13</sup> 363 U.S. 593 (1960).

<sup>14</sup> For two instances in which the impact of the three cases has been felt, see *Maryland Tel. Union v. Chesapeake & Potomac Tel. Co. of Md.*, 187 F. Supp. 101 (D. Md. 1960); *Local 725, Int'l Union of Operating Eng'rs v. Standard Oil Co. of Ind.*, 186 F. Supp. 895 (D.N.D. 1960).

<sup>15</sup> 363 U.S. 564 (1960). The union sought arbitration of an employee's right to return to a job which required him to lift heavy objects. He had been released after an accident and settlement of his workmen's compensation claim in which his doctor alleged he had sustained a permanent, 25% disability of the spine. The court of appeals found the grievance was encompassed by the arbitration clause but denied arbitration because the grievance was "frivolous." *United Steelworkers v. American Mfg. Co.*, 264 F.2d 624 (6th Cir. 1959).

<sup>16</sup> Unions occasionally bring "political" grievances; see DAVEY, *CONTEMPORARY COLLECTIVE BARGAINING* 316 (1951).

<sup>17</sup> It appears that the parties normally pay their own expenses but occasionally the loser pays all. Kruger, *Arbitration and Its Uses in 36 Firms in Wisconsin*, 6 LAB. L.J. 165, 172 (1955).

<sup>18</sup> See WIGMORE, *EVIDENCE* §§ 2485, 2537 (3d ed. 1940); BLUME, *AMERICAN CIVIL PROCEDURE* § 2-03 (1955). However, at least one court of appeals appears to have created a burden similar to that in the principal case. *Local 1912, IAM v. United States Potash Co.*, 270 F.2d 496 (10th Cir. 1959), *cert. denied*, 363 U.S. 845 (1960), 58 MICH. L. REV. 935 (1960).

to the principal case, a federal court must now have "positive assurance" shown by the "most forceful evidence"<sup>19</sup> that the promise to arbitrate can not be interpreted to encompass the particular grievance before it can deny arbitration. While the decision does not affect the burden of proof in the usual case in which the question of his own jurisdiction is also submitted to the arbitrator,<sup>20</sup> it may be argued that the courts, in the cases submitted to them, will force defendant into arbitration without finding that he in fact agreed to arbitrate the particular grievance.<sup>21</sup> However, simply because the party seeking arbitration has a lighter burden of proof, it should not be said that the courts will now not decide the question of agreement.<sup>22</sup> Rather, the procedural requirements for establishing any claim can properly vary with policy considerations.<sup>23</sup> Here the policy in favor of settlement of labor disputes by arbitration supports the lesser burden on the plaintiff seeking to prove that the defendant promised to arbitrate the particular grievance.<sup>24</sup> Future federal court interpretations of agreements to arbitrate may well come closer to the parties' intent than those former decisions which displayed the full effect of judicial hostility to arbitration.<sup>25</sup>

In the *Enterprise* case the arbitrator reinstated several workers after the collective bargaining contract had expired and in spite of the fact that there was then no contractual bar to their discharge. The company resisted the union's action to enforce the arbitrator's award on the ground that the arbitrator had exceeded his jurisdiction in making the award. Because of an ambiguity in the opinion accompanying the award it could have reasonably been inferred either that the arbitrator properly based his award upon his construction of the contract or that he improperly founded the result solely upon his interpretation of enacted legislation. By inferring that the arbitrator acted within his authority when his opinion was ambiguous on that point, the Court holds in effect that the party urging the vacation of the award has the burden of proving the arbitrator's excess. Because of this burden and the language in the case indicating that the arbitrator need not give reasons for his award, it might be argued that the arbitrator, behind

<sup>19</sup> Principal case at 582-85.

<sup>20</sup> Although some arbitrators deny that a "burden of proof" rests on either party in arbitration, most arbitrators apply burdens similar to those in court. Upon whom the burden rests depends greatly upon the circumstances of the grievance, but generally it is said to rest upon the party seeking to prove the affirmative. See Gorske, *Burden of Proof in Grievance Arbitration*, 43 MARQ. L. REV. 135 (1959).

<sup>21</sup> See Note, 58 MICH. L. REV. 935 (1960), where this fear is expressed about a similar case.

<sup>22</sup> If there is "most forceful evidence of a purpose to exclude the claim from arbitration," the court may deny arbitration, even in the absence of an express contractual denial. Principal case at 585.

<sup>23</sup> McCormick indicates several factors which may govern the placing and weight of the burden of proof. McCORMICK, EVIDENCE §§ 309, 318 (1954).

<sup>24</sup> Congress has expressed approval of labor arbitration. 61 Stat. 152, 154 (1947), 29 U.S.C. §§ 171 (c), 173 (d) (1958).

<sup>25</sup> See Judge Frank's discussion of the history and nature of this hostility in *Kulkundis Shipping Co. S/A v. Amtorg Trading Corp.*, 126 F.2d 978, 982 (2d Cir. 1942).

the shield of an ambiguous opinion, can now make awards in excess of his jurisdiction without fear of judicial review.<sup>26</sup> However, a similar, though perhaps lighter, burden has long rested on the party seeking to vacate a commercial arbitration award without evident adverse effect upon the process.<sup>27</sup> Moreover, the diligence with which the federal courts enforce these restrictions upon judicial intervention may well vary with the abuses of the arbitration process. Also, judicial review may prove unnecessary in this area to avoid excesses because of the parties' internal controls upon the arbitration process. Neither party will accept an arbitrator who in his previous decisions has proved untrustworthy.<sup>28</sup> Finally, the Court has indicated that the arbitrator's actions may be limited by specific contractual provisions.<sup>29</sup> Although the union will generally desire the widest discretion in the arbitrator, the risk of a complete management rejection of arbitration may compel union agreement to clearly-defined limits on the arbitrator's jurisdiction.<sup>30</sup>

In addition to its impact upon the arbitration process, the *Warrior & Gulf* case appears to make serious inroads upon the idea that management has certain exclusive prerogatives. The Court's statement that where the contract contains a no-strike clause "everything that management does is subject to the agreement"<sup>31</sup> and its suggestion that restrictions upon management rights can properly be implied from the contract seem to jeopardize the traditional management view that it retains rights unless express restrictions in the contract provide to the contrary.<sup>32</sup> However, since only the question of the arbitrability of a contracting-out grievance was con-

<sup>26</sup> For the standard grounds for judicial review and an indication of the common law confusion here, see Jones, *Judicial Review of Arbitral Awards*, 31 So. CAL. L. REV. 1 (1957).

<sup>27</sup> See *American Almond Prods. Co. v. Consolidated Pecan Sales Co.*, 144 F.2d 448 (2d Cir. 1944); *Jacob v. Pacific Export Lumber Co.*, 136 Ore. 622, 297 Pac. 848 (1931).

<sup>28</sup> It seems likely that the parties give close study to the previous awards indexed according to arbitrator in the Labor Arbitration Reports. This power of choice may be less helpful to small unions and companies who may be limited by cost alone to inferior arbitrators.

<sup>29</sup> When the "arbitrator's words manifest an infidelity to this obligation" to draw the "essence" of the award from the "collective bargaining agreement," the courts can properly refuse enforcement of the award. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). It seems that Professor Hays gives an unduly restrictive meaning to this language in his suggestion that now a court may not overturn an award which contradicts an express term of the contract if only the arbitrator says that the award is based upon his interpretation of the contract. Hays, *Supreme Court and Labor Law October Term 1959*, 60 COLUM. L. REV. 901, 929 (1960).

<sup>30</sup> If one party has a very strong bargaining position, he could attempt to prevent the application of the evidential rules of *Warrior* or *Enterprise* by a contract stipulation that normal standards of proof should apply. It is conceivable that in this situation the courts would find the policy in support of arbitration strong enough to override such a stipulation although the result would probably be couched in terms of the parties' inability to control court procedure by contract.

<sup>31</sup> Principal case at 583.

<sup>32</sup> For the competing views on the present status of these prerogatives, see Phelps, *Management's Reserved Rights: An Industry View* and Goldberg, *Management's Reserved Rights: A Labor View*, both in *MANAGEMENT RIGHTS & THE ARBITRATION PROCESS*, at 102 and 118 (1956).

sidered by the Court, it seems unlikely that the restrictive definition here placed upon "management functions" will be extended to other situations, for the policy favoring arbitration of grievances does not also require that labor be given additional substantive rights once the actual arbitration has begun.<sup>33</sup>

*James J. White*

<sup>33</sup> Cf. principal case at 583-84.