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KEEPING MINERS OUT OF WORK: THE COST OF JUDICIAL REVISION OF ARBITRATION AWARDS

RICHARD L. TRUMKA*

Recent legal attempts by coal operators signatory to the National Bituminous Coal Wage Agreement of 1981 to evade arbitration awards they dislike raise the identical dangers to arbitration asserted by coal operators during the unauthorized coal field work stoppages of the seventies. Federal courts were quick to respond to the threat to autonomous industrial dispute resolution identified by the coal operators as arising from "wildcats" through issuance and enforcement of injunctive orders under *Boys Markets, Inc. v. Retail Clerk Local 770*.¹ However, at least some federal courts appear to abet the current imminent danger to arbitration—the employers' legal quest to avoid an unfavorable award.

Whether framed offensively as an action under section 301(a)² of the Labor Management Relations Act to vacate an award, or as a defense to an action by the union to enforce one, the employers' objective is to invite the federal trial court to review the arbitration award on the merits. Once entangled in substantive review, the court has defeated the adjudicative mechanism chosen by the parties, including the employer. As surely as the unauthorized striker of the seventies was alleged to have resorted to strike pressure to avoid the arbitration process in particular cases, so will the employer of the eighties resort to courts to evade adverse arbitration results.³ The inevitable result of both attempts to end run the arbitrator is the same, although the method differs. Industrial peace flowing from autonomous dispute resolution suffers.

The failure of some federal courts to decisively foreclose substantive retrial of arbitration cases has occurred with disturbing frequency in one area of dispute under the 1981 National Bituminous Coal Wage Agreement, namely its prohibition against the leasing or licensing out of coal operations when employees are laid-off.⁴ Although this provision, like many contractual provisions expressly designed to limit managerial choice in favor of employment opportunity, may be subject to varying interpretations, federal courts in the coal fields have displayed reluctance to enforce the interpretation bargained for by the parties—that of their chosen arbitrator. The inability of some federal courts to swiftly enforce the arbitrator's "tilt" toward job opportunity, and away from entrepreneurial choice at the expense of jobs, regret-

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¹ 398 U.S. 235 (1970).

² 29 U.S.C. § 185 (1976).

³ Data provided by the Bituminous Coal Operators Association (BCOA) to the United Mine Workers of America discloses a marked decline in wildcats since 1978. See also Note, *Prospective Boys Market's Injunctions*, 90 HARV. L. REV. 790, 795 (1977).

⁴ NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1981, Art. IA, Sec. (h).

tably, implicates fundamental questions of fairness. If the arbitrator is only supreme in routine discipline cases, but subject to expansive de novo review in areas where he or she interprets language to restrict transfer of work out of a bargaining unit, what is the ultimate value of the arbitration process and collective bargaining which results in such job protective clauses? And if such contractual provisions are unenforceable, or enforceable only after exhaustive litigation, why should workers abandon their inherent right to self-help in favor of arbitration?

Indeed, the interesting question emerges as to whether self-help by frustrated workers in the wake of judicial nullification of an arbitration award they have won is enjoined under *Boys Markets*.⁵ The Norris-LaGuardia Act⁶ expresses the fundamental federal policy against judicial intervention in labor disputes. There is, consequently, "no general federal anti-strike policy . . ."⁷ The sole office of an injunction issued under the narrow *Boys Markets* exception to the withdrawal of jurisdiction from the federal courts effected by Norris-LaGuardia is to prevent, pending arbitration, displacement of the arbitral process by self-help.⁸ Thus, the argument can be made that self-help remedies become permissible once the arbitral remedy has itself been displaced. The *Boys Markets* Court itself emphasized that the injunctive remedy it authorized should not outstrip, in time or scope, the need to vindicate the arbitration process.⁹ Once the award has been vacated, there can hardly be any basis for an injunction to vindicate that process.¹⁰

Three cases currently being litigated by my Union, the United Mine Workers of America, illustrate graphically what happens when the "autonomous rule of law" established by the parties' agreement to arbitrate is unraveled by courts.¹¹ In each of the three cases, the employer challenged an arbitrator's interpretation that the collective bargaining agreement prohibited the lease or licensing out of coal mining operations to contract miners while employees of the employer were laid-off. None of the cases involved any questions as to the arbitrator's impartiality, want of jurisdiction, or of conflict between the award and statutory law.¹² In short, the employer's ob-

⁵ 398 U.S. 235 (1970).

⁶ 29 U.S.C. §§ 101-15 (1976).

⁷ *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 225 (1962) (Brennan, J., dissenting).

⁸ 398 U.S. at 252-54.

⁹ 398 U.S. at 254.

¹⁰ Similar questions arise with respect to availability of damages in the case of a strike over a vacated award, where there is no express no-strike clause in the collective agreement, but only one implied as a corollary of the arbitration clause. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.*, 369 U.S. 95 (1962); *see also United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 ("[A]rbitration is the substitute for industrial strife.") and *Boys Markets*, 398 U.S. at 239 n.3.

¹¹ Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1007 (1955).

¹² The *Steelworkers Trilogy* established labor arbitration and protected the ensuing award

jection in each case goes only to the interpretation of the agreement announced by the arbitrator, and not to any fundamental defect in the award.

The first two cases, *Clinchfield I* and *Clinchfield II*, began as grievances under Article IA(h) of the 1981 National Bituminous Coal Wage Agreement, contesting the employer's practice of leasing or licensing out coal operations while laying off its employees.¹³ The underlying facts of both *Clinchfield* cases command attention. In May 1982, a time of pervasive coal industry unemployment, the employer laid-off approximately 35% of its existing work force by closing down six of its mines and cutting back employment at two other mines. At the same time, the employer utilized other mining companies to exploit its coal lands.¹⁴ The Union challenged this practice in several grievances, and prevailed before mutually selected arbitrators in *Clinchfield I* and *Clinchfield II*. In both *Clinchfield I* and *Clinchfield II*, the employer succeeded in its attempt to judicially evade adverse awards.¹⁵ The judicial opinions generated in *Clinchfield I* and *Clinchfield II* disclose the substitution of judicial interpretation for that of the arbitrator. This result flies in the face of the *Steelworkers Trilogy* where the Supreme Court protected labor arbitration awards from expansive judicial review.

Article IA(h) of the Wage Agreement provides:

The Employers agree that they will not lease, sublease, or license out any coal lands, coal producing, or coal preparation facilities, where the purpose thereof is to avoid the application of this Agreement or any section, paragraph, or clause thereof.

Licensing out of coal mining operations on coal lands owned or held under lease or sublease by any signatory operator hereto shall not be permitted unless the licensing out does not cause or result in the lay-off of Employees of the Employer.¹⁶

by strictly limiting judicial review. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Yet, it appears that, once rendered, a commercial arbitration award is more protected in practice than a labor arbitration award. Under common law, many state statutes, and the Federal Arbitration Act, 9 U.S.C. § 10(a)-(d) (1982), vacatur is available only on very narrow grounds. See ELKOURI & ELKOURI, *HOW ARBITRATION WORKS*, (3d ed.) 36-41; 5 AM. JUR. 2D. *Arbitration and Awards* § 167 (1962), and cases cited therein. For example, an award must be "completely irrational" for vacatur in *New York Rochester City School District v. Teachers' Ass'n.*, 41 N.Y.2d 578, 582, 362 N.E.2d 977, 980, 394 N.Y.S.2d 179, 182 (1977). Such specific grounds may be less susceptible to judicial manipulation than the "essence" test of the *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

¹³ *Clinchfield I*, *Clinchfield Coal Co. v. District 28, United Mine Workers of America*, 720 F.2d 1365 (4th Cir. 1983), was decided on November 3, 1983, adverse to the Union. The district court's opinion is reported at 556 F. Supp. 522 (W.D. Va. 1983). *Clinchfield II*, *Clinchfield Coal Co. v. District 28, United Mine Workers of America*, 567 F. Supp. 1431 (W.D. Va. 1983), *appeal pending*, No. 83-1758 (4th Cir. filed on Aug. 17, 1983), is as yet undecided by the Fourth Circuit.

¹⁴ *Clinchfield II*, Joint Appendix at 242-43, 280.

¹⁵ *Clinchfield I*, *Clinchfield II*, *supra* note 13.

¹⁶ NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1981, Art. IA, Sec. (h).

In *Clinchfield I*, the employer argued, first, that it had not engaged in a licensing out of coal mining *operations*, but rather a leasing of coal lands, and accordingly could not be deemed to have violated the second paragraph of Article IA(h).¹⁷ In light of the Union's stipulation before the arbitrator that only the second paragraph of Article IA(h) was involved, the employer argued that the grievance should be denied.¹⁸ Second, the employer urged that there was no causal relationship between its practices, whether they be characterized as leasing or licensing out, and the massive lay-off of its employees.¹⁹

The arbitrator, after a careful review of the common law distinctions between a lease and a license, concluded: "The 'contract' between Clinchfield and the contract operators . . . seems to be much closer to a license than a lease of real property."²⁰ Thus, the second paragraph of Article IA(h) was properly invoked. As to the causal relationship between the license and the lay-offs, the arbitrator held that the Wage Agreement imposed upon the employer a burden of negating causality where licensing out occurred in the context of lay-offs. For this proposition, the arbitrator relied upon the *Restatement (Second) of Contracts*, 2d § 227:

In resolving doubts as to whether an event has made a condition of an obligor's duty and as to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk.²¹

Analyzing whether the employer could rebut the presumption that the lay-offs occurred as a result of the licensing out, the arbitrator made what in retrospect appears to have been a fatal remark, one which apparently irritated the trial court, and subsequently the appeals court. The arbitrator examined the company's proffered economic rationale for closing its mines, but concluded that: "[A]rguments based on need for profit are irrelevant."²²

By that phraseology, the arbitrator of course meant no more than the commonplace that considerations of profitability cannot override a contractual commitment of the employer to protect jobs. Obviously, any job protective provision of a collective bargaining agreement would have little content if considerations of profit were supreme. The arbitrator's language is not the

¹⁷ See *Clinchfield I*, 556 F. Supp. at 529-30.

¹⁸ See *id.* at 530-31.

¹⁹ *Clinchfield II*, Joint Appendix at 248-50.

²⁰ *Id.* at 251.

²¹ *Id.* at 254.

²² *Id.* at 255. Obviously, any contract violation can be justified on grounds of profitability. But Article IA, Section (h) expressly prohibits leasing or licensing out "to avoid the application of . . . [the] Agreement . . ." Where work is contracted out to avoid union wage and benefit scales, profit may be the motive but can never justify the contract breach.

announcement of the overthrow of the capitalist system, but rather a shorthand for the reasoning elaborated by an eminent arbitrator, Saul Wallen, in a case where the employer had transferred work out of the collective bargaining unit:

Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job security may be considered its soul. Those eligible to share in the degree of job security the contract affords are those to whom the contract applies

The transfer of work customarily performed by the employees in the bargaining unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore on one of the contract's basic purposes.²³

Concluding that the licensing out provision of Article IA(h) applied and that the employer had not rebutted, by its economic evidence, the causal connection between the licensing out and the lay-offs, the arbitrator directed the employer to reinstate its laid-off employees.

The federal trial court decided that the arbitrator in *Clinchfield I* should be overturned on three grounds. First, the district court found that the arbitrator had neither discussed nor decided the issue of whether "coal mining operations" or "coal lands" were licensed. The district court reasoned that those terms had specific legal connotations to the parties, and that the parties "were aware of the literal distinction between naked coal lands and coal mining operations . . ." ²⁴ Second, the federal trial court sharply criticized the arbitrator for disregarding the arguments of the company that considerations of profitability alone dictated its closure and curtailment of mining operations.²⁵ Finally, the federal district court disagreed with the arbitrator's allocation of the burden of proof respecting the relationship between the employer practices and the lay-offs.²⁶

On appeal to the Fourth Circuit, the trial court was sustained on its first two grounds for vacating the award:

Where, as here, the arbitrator fails to discuss critical contract terminology, which terminology might reasonably require an opposite result, the award cannot be considered to draw essence from the contract.²⁷

[The] Arbitrator . . . should have considered the evidence that . . . [the mine] was closed because it was an inefficient and an expensive mine from which coal no longer could profitably be mined given the depressed prices.²⁸

²³ New Britain Machine Co., 8 Lab. Arb. 720, 722 (1947) (Wallen, Arb.).

²⁴ *Clinchfield I*, 556 F. Supp. 522, 529.

²⁵ *Id.* at 529-30.

²⁶ *Id.* at 531.

²⁷ *Clinchfield I*, 720 F.2d 1365, 1369.

²⁸ *Id.* at 1370.

In sustaining the trial court in its reversal of the arbitrator for disregarding economic evidence, the Fourth Circuit devoted much attention to the arbitrator's determination that arguments of profitability could not justify the lay-offs. Upon the predicate of a textual analysis at odds with that of the arbitrator, the Fourth Circuit concluded that:

Clinchfield may lay-off employees for economic reasons, that is, the *cause* of the lay-offs may be a decline in demand. If the proximate cause of the lay-offs . . . was . . . demand decline, then [paragraph two] was not violated even though Clinchfield at that time was licensing out coal lands.²⁹

Thus, the *Clinchfield I* court itself interpreted the contract, clearly "second-guess[ing]" the arbitrator.³⁰ The *Steelworkers Trilogy* enjoins against such supplanting of the "bargained for" interpretation of the arbitrator.³¹

The panel that decided *Clinchfield I* was itself divided as to where the arbitrator had erred, evidencing the closeness of the questions of contract interpretation involved. Three appeals judges could not agree, and produced two distinct conclusions as to the defects in the award. Judge Sprouse concurred in the trial court's and panel majority's result, but premised his opinion on the failure of the arbitrator to establish "some evidence that lay-offs flowed from or were proximately caused by the licensing agreements."³²

Clinchfield II involved the same basic facts as *Clinchfield I*, but was decided by a different arbitrator. That arbitrator sustained the Union's grievance and the company brought the case to the same trial judge who had decided *Clinchfield I*. The trial court expressly found that the *Clinchfield II* arbitrator had "avoided some of the obvious errors which were made in the . . . [*Clinchfield I*] Arbitration Award."³³ The trial court concluded that the arbitrator had not impermissibly imposed the burden of proof upon the employer to negative causality, that the arbitrator had developed and discussed the historical distinctions between the licensing out of coal operations, and coal lands, and had not ruled out economic considerations in construing the labor agreement.³⁴ After concluding that the *Clinchfield II* arbitration award did not share the interpretative defects of the *Clinchfield I* award, the district court staked out an entirely novel and perplexing theory of why that second award should not be sustained. The trial court concluded that, because the *Clinchfield II* award differed from other arbitration awards involving the same facts, it was the duty of the trial court to determine which of the awards was correct:

²⁹ *Id.* at 1369-70.

³⁰ *W. R. Grace & Co. v. Local 759, Int'l Union of the United Rubber, Cork, Linoleum and Plastic Workers*, 103 S. Ct. 2177, 2183 (1983).

³¹ *Id.*

³² *Clinchfield I*, 720 F.2d at 1371 (Sprouse, J., concurring).

³³ *Clinchfield II*, Joint Appendix at 66.

³⁴ *Id.*

When the identical factual situation is submitted to two arbitrators for consideration, and the arbitrators reach opposite conclusions, it becomes obvious that one arbitrator's opinion is not in accordance with the essence of the contract. This being so, it is mandatory that it be determined which of the arbitrator's opinions is in accordance with the essence of the contract.³⁵

By its own admission, then, the trial court constituted itself as an arbitral appellate body to reconcile conflicts between arbitration awards. The revisionist tendencies of the trial court modestly expressed in *Clinchfield I* became overt in *Clinchfield II*. The record in *Clinchfield II* clearly discloses that the parties to the 1981 National Bituminous Coal Wage Agreement had abolished the Arbitration Review Board, an appellate panel established under prior agreements to resolve conflicts between arbitral decisions.³⁶ In abolishing certiorari-type review to an arbitral review body, the parties expressly agreed that each arbitration opinion would be final, binding, and nonprecedential. The only possible conclusion from these undisputed facts is that the parties considered and accepted the prospect of conflicting awards. For whatever reason, the parties, in free collective bargaining, decided that conflicting awards were preferable to arbitral review. From my own involvement in my Union's collective bargaining, I know that the Union and the companies chose speed and finality over a protracted appellate process and consistency.³⁷

In *Clinchfield II*, the district court intruded into the very workings of the arbitral system established by the parties, and attempted to restructure that system in line with its view of the need to harmonize conflicting arbitral awards. The district court in *Clinchfield II* asserted that there was no place for the parties to turn except the courts when faced with conflicting awards. I respectfully submit that there is a forum to resolve such conflicts, and that is collective bargaining.

The actions of the trial court in the *Clinchfield* cases, and of the Fourth Circuit in affirming *Clinchfield I*, amount to review on the merits of arbitration decisions with which courts disagree, in contravention of the *Steelworkers Trilogy*, most recently affirmed in *W. R. Grace & Co. v. Local 759*.³⁸ There, Justice Blackmun held:

Under well established standards for the review of labor arbitration awards, a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be a better one. *Steelworkers v. Enterprise Wheelcar Corp.*, 363 U.S. 593, 596 . . . (1960). When the parties include an arbitration clause in their collective bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator.

³⁵ *Id.* at 69.

³⁶ *Id.* at 215-18.

³⁷ See, e.g., *Proceedings, 48th Consecutive Constitutional Convention, UMW*, 175-80 (1979).

³⁸ 103 S. Ct. 2177.

...

Regardless of what our view might be of the correctness of . . . [the arbitrator's] contractual interpretation, the Company and the Union bargained for that interpretation. A federal court may not second-guess it.³⁹

While the trial court and appellate opinions display a rote deference to the admonitions of the *Steelworkers Trilogy* that courts not second guess the interpretations of arbitrators, in reality these two judicial exercises involve no more than a disagreement with the arbitrator's interpretation. I do not question the sincerity or the technical expertise with which the judges proceeded to address the factual and contractual issues before them. However, the judicial decisions in both cases are no more compelled by the facts or the contract language than the arbitrators' opinions. In both cases, the arbitrators interpreted and applied contract language to facts. In the last analysis, the federal courts disagreed with the interpretation of the arbitrators. They should not, however, have displaced the opinion of the parties' chosen contract reader.

While *Clinchfield I* and *Clinchfield II* involve judicial reinterpretation and restructuring of the contract, *Kris-Beth, Inc. v. District 17, United Mine Workers of America*⁴⁰ demonstrates the prospects for unbargained-for delay inherent in the judicial review of arbitration decisions. Kris-Beth and Elm Coal Company, intervenors, are subcontract miners for Union Carbide Corporation at its coal operations in Sanderson, West Virginia. The Union presented a grievance against Union Carbide in June 1982, on behalf of some 160 laid-off employees of Union Carbide, asserting that the jobs of the grievants had been lost because Union Carbide had subcontracted out its mining operations to Kris-Beth and Elm, in violation of Article IA(h) of the Wage Agreement. An arbitrator, the Dean of the Law School of the University of Louisville, Kentucky, Harold G. Wren, on December 17, 1982, sustained the grievances in an extensive and analytical opinion. Specifically, the arbitrator concluded, on the basis of the record before him, that Union Carbide had entered into agreements with independent contractors such as Kris-Beth and Elm to operate undeveloped coal lands in order to avoid the burdens of the seniority system at Carbide's own mines.⁴¹

When Carbide suspended its contracts with Kris-Beth, in compliance with Dean Wren's award, Kris-Beth rushed to federal court to vacate that award. On May 27, 1983, the district court directed a stay of the arbitration award and Kris-Beth's section 301 proceeding until the Fourth Circuit had ruled in the *Clinchfield I* case. The Union has unsuccessfully appealed this stay of the award.

³⁹ *Id.* at 2182-83.

⁴⁰ No. 83-2071 (S.D. W.Va. May 27, 1983) (Order to Stay Arbitration Award), *appeal dismissed*, No. 83-1531 (4th Cir. Dec. 20, 1983).

⁴¹ *Clinchfield II*, Joint Appendix at 311.

Apart from the propriety of allowing *Kris-Beth* and *Elm* to convert their commercial agreements with Union Carbide into agreements cognizable under section 301(a), the trial court's stay can only be interpreted as an expression of a presumption against arbitrable awards. The arbitration award at issue should survive the most probing judicial review. Yet, merely because of the filing of an action by a party extraneous to the collective bargaining agreement, the arbitration award rendered by Dean Wren has been denied enforcement for over one year.

Clinchfield I, *Clinchfield II*, and *Kris-Beth* demonstrate the perils inherent in judicial intervention in the collective bargaining and grievance resolution process. All three cases bring to mind the attitude aptly summarized by Sir Winston Churchill in 1911, when he said: "It is not good for trade unions that they should be brought in contact with the courts, and it is not good for the courts."⁴²

Congress and many courts have recognized that arbitration is central to the collective bargaining process and, hence, to industrial peace. Congress has definitively endorsed the internal resolution of industrial disputes. Section 203(d) of the Labor Management Relations Act, 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."⁴³

This federal policy is mirrored in Article XXVII of the National Bituminous Coal Wage Agreement of 1981, which declares the contractual adjustment procedure to be exclusive:

The United Mine Workers of America and the Employers agree and affirm that, except as provided herein, they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Disputes" Article of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract and by collective bargaining *without recourse to the courts*. (emphasis added.)

Thus, when signatory companies seek to vacate arbitration decisions on most grounds, they not only contravene federal labor policy, but also their solemn contractual commitment to abide by the arbitration process of the agreement.

In the *Steelworkers Trilogy*, the Supreme Court legitimized arbitration, and consequently restricted courts to a very narrow scope of review of arbi-

⁴² MILNE-BAILEY, TRADE UNION DOCUMENTS 380 (1929).

⁴³ 29 U.S.C. § 173(d) (1976).

tral awards. In *United Steelworkers v. Warrior & Gulf Navigation*,⁴⁴ Justice Douglas defined the limited area of judicial review:

To be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, 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.⁴⁵

As noted, that restrictive standard of review was recently affirmed by the Supreme Court in *W. R. Grace v. Local 459*.⁴⁶ The results in the cases discussed here simply cannot be squared with national labor policy. Courts need to be reminded:

[t]he arbitrator is the parties' officially designated 'reader' of the contract. He (or she) is their joint *alter ego* for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement. Thus, a 'misinterpretation' or 'gross mistake' by the arbitrator becomes a contradiction in terms. In the absence of fraud or an overreaching of authority on the part of the arbitrator, he is speaking for the parties, and his award *is* their contract.⁴⁷

At a time when federal and state courts are unable to handle the load of civil litigation and when many commentators are promoting private dispute resolution systems, it makes absolutely no sense to destroy the finality of the major private consensual dispute resolution process in the United States, the arbitration process.⁴⁸ When unemployed workers seek to vindicate their contractual rights to jobs in times of pervasive unemployment, it is little short of a mockery to ensnare them in the procedural and substantive morass of judicial review. As of this writing, Union Carbide employees entitled to work, according to a well reasoned and factually sound arbitral opinion, sit unemployed. The union has been compelled to devote considerable legal resources in its attempts to bring the *Kris-Beth* court to the well of decision. There could be no more graphic example of how free-wheeling judicial review destroys the credibility of arbitration, and ultimately of the collective bargaining process. The policy goal of industrial peace is hardly served by such widespread disillusion with contractual mechanisms.

I do not, of course, advocate the abolition of judicial review of arbitration

⁴⁴ 363 U.S. 574.

⁴⁵ *Id.* at 582.

⁴⁶ 103 S. Ct. 2177.

⁴⁷ St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977).

⁴⁸ S. REP. NO. 117, 95th Cong. 2d Sess. 8-10, reprinted in 1978 U.S. CODE CONG. & AD. NEWS, 3569, 3570-73, 3578-82; See generally, Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, n.2 (1975); Hufstедler, *The Future of Civil Litigation*, 1980 UTAH L. REV. 753.

awards, as it is through courts that such awards are enforced under section 301. Nor do I propose that awards which exceed interpretation and application of the collective bargaining agreement, that do not draw their essence from the collective bargaining agreement, be enforced.⁴⁹ Rather, I suggest that federal courts look to state and federal law governing commercial arbitration to give content to the determination of whether an award draws its essence from an agreement. Under common law, an arbitrator's errors of law or fact are unreviewable.⁵⁰ Under the Federal Arbitration Act⁵¹ arbitration awards are immune from review except for fraud, bias, lack of due process or want of jurisdiction. It is anomalous that labor arbitration should have less immunity than commercial arbitration, given the public's stake in industrial peace.

In order to give content to their review of labor arbitration awards, courts should look to the generally accepted standards for review of commercial arbitration awards. Litigants seeking to evade an award should be looked upon with disfavor and their legal challenge limited to specific and narrow grounds, as suggested by the Federal Arbitration Act.⁵² Frivolous claims of such litigants should be deterred by award of attorneys' fees to the adverse party, and where backpay is involved, by bonding requirements which test the sincerity of the litigant.⁵³ Only by such unequivocal measures will the finality of arbitration be restored.

Harry Shulman, the first arbitrator under the GM-UAW agreements, and Dean of the Yale Law School, wrote in 1955 about his arbitration experiences:

The arbitration is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work, and thus preserving private enterprise in a free government. When it works fairly well, it does not need the sanction of the law of contracts or the law of arbitration. It is only when the system breaks down completely that the courts' aid in these respects is invoked. But the courts cannot, by occasional sporadic decision, restore the parties' continuing relationship; and their intervention in such cases may seriously affect the ongoing systems of self-government.⁵⁴

The courts should not destroy the system of autonomous dispute resolution and free enterprise mandated by Congress and established by the parties in

⁴⁹ *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

⁵⁰ ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* (3d ed.) 36-41.

⁵¹ 9 U.S.C. § 10 (1982).

⁵² *Id.*

⁵³ *See, e.g., Washington Hosp. Center v. Service Employees Int'l. Union, Local 722*, No. 83-0700 (D.D.C. Sept. 30, 1983).

⁵⁴ Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955).

collective bargaining. Rather, they should view those who seek to vacate arbitration awards with suspicion as the forum shoppers they are. If courts continue to intrude in the arbitration process by excessive review, that process, as Dean Shulman predicted, will surely lose credibility. Management, labor unions, employees, and the public alike will all be the victims.