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Timothy J. Heinsz

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Timothy J. Heinsz*

For all of its flaws, the institution of labor arbitration has remained the core mechanism for settling disagreements between employers and unions over the interpretation and application of collective bargaining agreements.[1] In this time of increasing demand for means of alternative dispute resolution outside of the judicial arena,[2] practitioners in the area of labor relations law have already developed sophisticated techniques of arbitration, mediation,

* Manley O. Hudson Professor of Law, University of Missouri-Columbia. A.B. 1969, St. Louis University; J.D. 1972, Cornell Law School. This article is based on a paper presented to the Third Annual Multi-State Labor and Employment Law Seminar in Dallas, Texas.

1. It has been estimated that ninety-five percent of collective bargaining agreements contain arbitration clauses. *See* W. GOULD, A PRIMER ON AMERICAN LABOR LAW 136 (2d ed. 1986).

2. *See, e.g.*, E. JOHNSON, V. KANTOR & E. SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES (1977); Burger, *Using Arbitration to Achieve Justice*, 40 ARB. J. 3 (1985); Bush, *Dispute Resolution Alternatives and Achieving the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893.

med-arb, negotiation and numerous other processes of conflict settlement.[3] Labor arbitration and these other skills have had a developed history which predates the current wave of extra-judicial means of dispute resolution.[4]

In view of the practical necessities of an on-going relationship, the representatives of companies and labor organizations concluded very early that they could not rely on the courts to settle every grievance alleging a breach of contract and still manage to resolve their daily disputes without a serious disruption of production needs and industrial harmony. The delay and cost of using the judicial system would simply exact too heavy a price. Moreover, in most instances the parties would have no need of the intricate procedural devices for fact finding associated with the litigation process or, if necessary, they could tailor their own fact-producing investigative procedures. Labor and management practitioners also realized that they could better rely on a group of expert adjudicators who would be acceptable to both parties and who would be knowledgeable in the ways of the shop to determine those disputes which the parties themselves could not resolve. In other words, the parties could develop their own system of industrial justice and make it more adaptable to the needs of their special relationship. It is a tribute to the ingenuity of labor-management representatives that the techniques which they developed and refined have served as a model to others in the burgeoning field of alternative dispute resolution.[5]

In this time of growing emphasis on the use of private means to solve socio-economic differences between parties in such a wide spectrum of legal fields, it is almost paradoxical that perhaps never before has the labor arbitration system come under such intense judicial scrutiny. Courts have not hesitated to ignore arbitral awards in areas dealing with issues such as employment discrimination, constitutional protections, or statutory rights.[6] Fur-

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3. *See* J. DUNLOP, DISPUTE RESOLUTION: NEGOTIATION AND CONSENSUS BUILDING (1984); 6 E. TEPLE & R. MOBERLY, LABOR RELATIONS AND SOCIAL PROBLEMS 117-20 (1979); *Summary Jury Trials Touted*, 73 A.B.A. J. 27 (1987).

4. M. BERNSTEIN, PRIVATE DISPUTE SETTLEMENT 315 (1968); F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 2-4 (4th ed. 1985); R. FLEMING, THE LABOR ARBITRATION PROCESS 1-30 (1965); Nolan & Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373 (1983); Nolan & Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557 (1983).

5. Smith, *Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government*, 1984 MO. J. OF DISP. RES. 9, 11.

6. *See, e.g.*, Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984) (Multi-employer Pension Plan Amendment Act of 1980); McDonald v. City of West Branch, 466 U.S. 284 (1984) (Section 1983 claim); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981), *cert. denied*, 471 U.S. 1054 (1985) (Fair Labor Standards Act); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), *cert. denied*, 423 U.S. 1058 (1976) (Title VII of the Civil Rights Act of 1964); Professional Adm'rs Ltd. v. Kopper-Glo Fuel, Inc., 819 F.2d 639 (6th Cir. 1987) (National Labor Relations Act); Anderson v. Alpha Portland Indus., 752 F.2d 1293 (8th Cir. 1985), *cert. denied*, 471 U.S. 1102 (1985) (Employee Retirement Income Security Act); EEOC v. County of Calumet, 686 F.2d 1249 (7th Cir. 1982) (Age Discrimination in Employment Act); Marshall v. N.L. Indus., 618 F.2d 1220 (7th Cir. 1980) (Occu-

ther, courts have increasingly denied enforcement to the decisions of labor arbitrators where judges have determined that arbitrators have employed what courts considered "faulty judgment"[7] or have made conclusions against the grain of judicial "common sense."[8] In certain respects it is neither surprising nor improper that courts have expanded the reviewability of arbitral decision-making. Indeed this phenomenon was predicted almost a decade ago by Professor David Feller in his provocative and excellent exposition to the National Academy of Arbitrators, "The Coming End of Arbitration's Golden Age."[9] As the public law rights of employees, as individuals, have dramatically increased in the past twenty years, and as the issues in the workplace have become more complicated due to developing technologies and a greater awareness of the impact of change itself on the human value of labor,[10] the decisions of labor arbitrators have likewise become more complex and far reaching in impact.[11] It is not surprising that neither the parties nor the labor

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pational Safety and Health Act); Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied sub nom.* Kentucky Carbon Corp. v. Interior Bd. of Mine Operations Appeals, 420 U.S. 938 (1975) (Federal Coal Mine Health and Safety Act); Steck v. Smith Barney, Harris Upham & Co., 661 F. Supp. 543 (D.N.J. 1987) (Age Discrimination in Employment Act); Kidder v. Eastern Air Lines, Inc., 469 F. Supp. 1060 (S.D. Fla. 1978) (Veteran's Reemployment Rights Act); McMiller v. Bird & Son, Inc., 376 F. Supp. 1086 (W.D. La. 1974) (Civil Rights Act of 1866).

7. Hoteles Condado Beach v. Union De Tronquistas, 588 F. Supp. 679, 685 (D.P.R. 1984), *aff'd*, 763 F.2d 34 (1st Cir. 1985); *see infra* text accompanying notes 42-50.

8. Amalgamated Meat Cutters Local 540 v. Great Western Food Co., 712 F.2d 122, 125 (5th Cir.), *reh'g denied,* 717 F.2d 1399 (5th Cir. 1983); *see infra* text accompanying notes 97-106.

9. Feller, *The Coming End of Arbitration's Golden Age*, in Proc. of the 29th Ann. Meeting, Nat'l Academy of Arbitrators, ARBITRATION-1976, at 97.

10. Many local union officials have recognized this change wrought by advancing technology. Rather than resisting such change, these union leaders favor a response of contract language which will give labor organizations an influence over the nature and impact of technology. Weikle & Wheeler, *Unions and Technological Change: Attitudes of Local Union Leaders*, in Proc. of the 36th Ann. Meeting, Industrial Relations Research Ass'n Series — 1983, at 100, 104. Such contract provisions would undoubtedly come within the jurisdiction of the grievance-arbitration provisions of the collective agreement.

11. *See, e.g.*, Allegheny Ludlum Steel Corp., 80 Lab. Arb. (BNA) 937 (1983) (McDermott, Arb.) (elimination of jobs in steel plant due to introduction of new roll-setting equipment); Dravo Corp., 79 Lab. Arb. (BNA) 427 (1982) (Sherman, Arb.) (effect of time keeping computerization on job of time keepers); Bethlehem Steel Corp., 77 Lab. Arb. (BNA) 372 (1981) (Seward, Arb.) (consolidation of positions after introduction of new equipment allows one employee to monitor operations at two pumping stations); Bell Tel. Co. of Pennsylvania, 75 Lab. Arb. (BNA) 750 (1980) (Garrett, Arb.) (effect on bargaining unit jobs of introduction of new self-contained electronic switching system); CBS, Inc., 74 Lab. Arb. (BNA) 1209 (1980) (Turkus, Arb.) (increased use of portable television cameras results in layoffs of camerapersons); Bon Secours Hosp., Inc., 73 Lab. Arb. (BNA) 751 (1979) (Matthews, Arb.) (assignment of social coding work to non-unit employees following installation of

arbitrator can expect the validity and finality of an arbitrator's decision to be determined simply by placing the arbitration award against the yardstick of the collective bargaining agreement to see if it somehow measures the "essence" of the company-union contract.[12] If ever there was a time when an arbitrator could render a decision on a matter without consideration of close judicial oversight, it has now passed.[13]

This is not to say that the labor arbitration system has become simply a lower tribunal subject to the full appellate process of review by the courts. Notions of judicial economy and deference to the expressed, contractual intent of the parties alone would dictate against such a result. It is still true that the overwhelming majority of labor arbitration awards are upheld with only cursory inspection by courts under the standards of *Enterprise Wheel*.[14]

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new coding system that increased the efficiency of the operation); Leavenworth Times, 71 Lab. Arb. (BNA) 396 (1978) (Bothwell, Arb.) (effect on bargaining unit employees of newspaper employer's conversion from hot metal process to cold metal process).

12. The Supreme Court, in United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960), initiated the "essence of the contract" standard. *See infra* text accompanying notes 16-21.

13. One commentator has persuasively argued that the Supreme Court abandoned any meaningful discussion of the standard of judicial review after its decision in *Enterprise Wheel*. He has noted:

> In the absence of adequate guidance, the lower courts have had difficulty in formulating and applying standards to determine whether an arbitrator has respected the limits of the authority granted him by the collective bargaining agreement. Similarly, courts have used inconsistent standards in defining those instances when an arbitrator's decision, even though made under proper authority, should not be considered for all purposes final. The Supreme Court's reluctance to return to the subject in the face of demonstrated need has contributed to the wavering and uncertain path of judicial review of arbitration awards.

Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 267-68 (1980). Accordingly, Professor Kaden contends that courts, to a great extent, have always scrutinized arbitral awards more than they should. *Id.* at 297-98.

14. *Enterprise Wheel*, 363 U.S. 593; Textile Processors Employees Int'l Union Local 108 v. Morgan Systems, Inc., 794 F.2d 678 (8th Cir. 1986); New Meiji Market v. United Food & Commercial Workers Local 905, 789 F.2d 1334 (9th Cir. 1986); Local 863 Int'l Bhd. of Teamsters v. Jersey Coast Egg Producers, Inc., 773 F.2d 530 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1468 (1986); Chicago Web Printing Pressmen's Union, No. 7 v. Chicago Newspaper Publishers' Ass'n, 772 F.2d 384 (7th Cir. 1985); Ethyl Corp. v. United Steelworkers, 768 F.2d 180 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1184 (1986); Island Creek Coal Sales Co. v. City of Gainesville, 729 F.2d 1046 (6th Cir. 1984), *cert. denied*, 106 S. Ct. 346 (1985); TTL Distrib., Inc. v. Local 99, Office Employees Union, 729 F.2d 1444 (2d Cir. 1983); *see, e.g.*, Local 59, Int'l Bhd. of Elec. Workers v. Green Corp., 725 F.2d 264 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984); Taunton Mun. Light Plant Comm. v. Paul L. Geiringer & Assocs., 725 F.2d 664 (1st Cir. 1983); Office & Professional Employees Int'l Union Local 2 v. Washington Metro. Area Transit Auth., 724 F.2d 133 (D.C. Cir. 1983); Ottley v. Sheepshead Nursing Home, 688 F.2d 883 (2d Cir. 1982); McClatchy Newspapers v. Central Valley Typographical Union No. 46, 686 F.2d 731 (9th Cir.), *cert. denied*, 459 U.S. 1071 (1982); GSX Corp. of Missouri v. Teamsters Local 610, 658 F. Supp. 124 (E.D. Mo. 1987); Teamsters Local 957 v. R.W.F. Distributing Co., 574 F. Supp. 703 (S.D. Ohio 1983).

However, in an increasing number of cases, particularly those involving issues of external law or public policy, the bases for attacking the finality of labor arbitrators' decisions have become broader and the judicial scrutiny more intense.[15] Nor is it likely that this state of affairs will soon abate. The issues of public policy and individual legal rights are becoming ever more intertwined with the employment relationship as expressed in collective bargaining agreements. A corresponding augmentation of judicial review is inevitable. Although this is not the age of inquisition as to the examination of arbitral awards, it might be characterized as the age of judicial inquiry.

This Article first will trace and consider developments in the *Enterprise Wheel* standard as applied to basic contractual disputes. Next the focus will be on the cases that have applied emerging rules of review to arbitral decisions

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F. Supp. 124 (E.D. Mo. 1987); Teamsters Local 957 v. R.W.F. Distributing Co., 574 F. Supp. 703 (S.D. Ohio 1983).

15. *See infra* text accompanying notes 56-200; Professional Adm'rs Ltd. v. Kopper-Glo Fuel, Inc., 819 F.2d 639 (6th Cir. 1987); S.D. Warren Co. v. United Paperworkers Local 1069, 815 F.2d 178 (1st Cir. 1987); Dobbs, Inc. v. Teamsters Local 614, 813 F.2d 85 (6th Cir. 1987); Hughes Aircraft Co. v. Electrical & Space Technicians Local 1553, 809 F.2d 1442 (9th Cir. 1987); Trailways Lines, Inc. v. Joint Trailways Council, 807 F.2d 1416 (8th Cir. 1986), *reh'g denied*, 817 F.2d 1333 (8th Cir. 1987) (en banc); Pinkerton's N.Y. Racing Sec. Serv., Inc. v. Local 32E, Service Employees Int'l Union, 805 F.2d 470 (2d Cir. 1986); Newark Morning Ledger Co. v. Newark Typographical Union Local 103, 797 F.2d 162 (3d Cir. 1986); United Auto Workers v. Keystone Consol. Indus., 793 F.2d 810 (7th Cir.), *cert. denied*, 107 S. Ct. 403 (1986); Cement Divs., Nat'l Gypsum Co. v. United Steelworkers, Local 135 793 F.2d 759 (6th Cir. 1986); Avis Rent-A-Car Sys. v. Garage Employees Union Local 272, 791 F.2d 22 (2d Cir. 1986); United Food & Commercial Workers Union Local 1119 v. United Markets, Inc., 784 F.2d 1413 (9th Cir. 1986); Champion Int'l Corp. v. United Paperworkers Int'l Union, 779 F.2d 328 (6th Cir. 1985); Misco, Inc. v. United Paperworkers Int'l Union, 768 F.2d 739 (5th Cir. 1985), *cert. granted*, 107 S. Ct. 871 (1987); Johnston Boiler Co. v. Local Lodge No. 983, Int'l Bhd. of Boiler Makers, 753 F.2d 40 (6th Cir. 1985); HMC Management Corp. 759 F.2d 489 (1985) (en banc); Bakers Union Factory No. 326 v. ITT Continental Baking Co., 749 F.2d 350 (6th Cir. 1984); Carpenters Local 1478 v. Stevens, 743 F.2d 1271 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985); United States Postal Serv. v. American Postal Workers Union, 736 F.2d 822 (1st Cir. 1984); Amalgamated Meatcutters Local 540 v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983); Broadway Cab Coop. v. Teamsters Local 281, 710 F.2d 1379 (9th Cir. 1983); Local No. P-1236, Amalgamated Meatcutters v. Jones Dairy Farm, 680 F.2d 1142 (7th Cir. 1982); Perma-Line Corp. v. Sign Pictoral & Display Union Local 230, 639 F.2d 890 (2d Cir. 1981); District No. 72, Int'l Ass'n of Machinists v. Teter Tool &Die, Inc., 630 F. Supp. 732 (N.D. Ind. 1986); PECA v. A.A. Electric, 583 F. Supp. 472 (D. Haw. 1984); International Bhd. of Elec. Workers Local 323 v. Coral Elec. Corp., 576 F. Supp. 1128 (S.D. Fla. 1983); Wilmington Typographical Union No. 123 v. News-Journal Co., 513 F. Supp. 987 (D. Del. 1981); Pacific Crown Distribs. v. Teamsters Local 70, 183 Cal. App. 3d 1138, 228 Cal. Rptr. 645 (1986); Port Huron Area School Dist. v. Port Huron Educ. Ass'n, 426 Mich. 143, 393 N.W.2d 811 (1986); *see also Survival of Labor Arbitrators*, 125 Lab. Rel. Rep. (BNA) News and Background Information 100, 101 (1987).

implicating public law rights. Finally the Article will evaluate *Enterprise Wheel* in relation to cases involving the volatile and expanding employment at will doctrine.

I. THE "ESSENCE" STANDARD

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[16]

This basic guideline for review set down by Justice Douglas in *United Steelworkers v. Enterprise Wheel and Car Corp.*,[17] has been an antinomy which has continued to intrigue and confound judges, practitioners and scholars. The rubric is well known and oft-cited from the *Steelworkers Trilogy*.[18] When an arbitration clause encompasses a dispute, it is the decision of the arbitrator, not that of a court, for which management and labor have bargained.[19] The parties have expressed an intent to use the labor arbitrator's special expertise to effectuate a resolution of the disagreement. In *Enterprise Wheel* the Court recognized that an arbitrator may look to "many sources" in reaching a conclusion.[20] Moreover a reviewing court should not weigh the merits of the dispute or overrule an arbitrator simply because the judicial interpretation of the collective bargaining agreement differs from that of the labor arbiter. This preference for the parties' own dispute resolution mechanism has been underscored in repeated judicial opinions and by congressional mandate.[21]

Of course, the paradox has always been that the "essence" of the contract which is in dispute invariably is unclear — oftentimes intentionally so.

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

17. *Enterprise Wheel*, 363 U.S. 593.

18. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); *Enterprise Wheel*, 363 U.S. 593; *see also* AT&T Technologies, Inc. v. Communication Workers, 475 U.S. 643 (1986).

19. *Enterprise Wheel*, 363 U.S. at 597.

20. *Id.*

21. *See, e.g.*, 29 U.S.C. § 173(d) (1982): "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." *See also* Nolde Bros. v. Local 358, Bakery Workers, 430 U.S. 243 (1977); Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Laborers' Int'l Union of North America Local 309 v. W.W. Bennett Constr. Co., 686 F.2d 1267 (7th Cir. 1982); Johns-Mansville Sales Corp. v. International Ass'n of Machinists, Local Lodge 1609, 621 F.2d 756 (5th Cir. 1980).

Thus in deciphering an answer to a grievance, as to the meaning of the parties' labor agreement, the arbitrator often concludes what the contract would be, could be, or should be in a myriad of factual circumstances. This, however, is the slipknot, since to a degree such a decision will require the arbitrator to bring to bear his own notions or "brand of industrial justice."[22] When this occurs, the opportunity presents itself for a reviewing court to declare that, rather than following the "essence" of the contract, the arbitrator has inappropriately applied the wrong "brand of industrial justice," i.e., the arbiter's own conclusions of what the contract was intended to mean.[23]

This vagueness, and to an extent contradiction, is at the same time the strength as well as the vulnerability of the *Enterprise Wheel* standard. On the one hand the court is encouraged to take a *laissez faire* approach and, in the words of one commentator, allow the arbitrator to be the official "contract reader."[24] On the other hand, the decision presents a means whereby a court can utilize its own brand of industrial equity by permitting a judge to determine that an arbitrator has skewed the meaning of a contract in a way never expected by the company or the union or to consider the decision as an outrage to judicial propriety.

Certainly there are exceptions to the doctrine of finality of labor arbitration awards that are well defined and accepted: (1) where there are procedural irregularities, or there is bias or improper conduct by the arbitrator;[25] (2) where the arbitrator goes beyond the specific limitations placed by the parties on the arbiter's jurisdiction;[26] (3) where an arbitrator commits a mis-

22. *See* Jones, *"His own Brand of Industrial Justice": The Stalking Horse of Judicial Review of Labor Arbitration*, 30 UCLA L. REV. 881, 884-85 (1983):

> The court [in the *Steelworkers Trilogy*] seemed to recoil from the implications of its construct of arbitral independence in creating the "essence" test, a paradox in that it conceptually joins issues which are functionally incompatible. The Court said that judges must not allow arbitrators to stray beyond the parameters of the essence of collective agreements. But it also said that the parties' chosen arbitrators are more aware than are judges of the parties' intents and needs that constitute that "essence." Thus, as written, the "essence" test is simply unworkable.

Id.

23. *See* Jones, *supra* note 22.

24. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 MICH. L. REV. 1137, 1138 (1977).

25. 9 U.S.C. § 10(b) (1982); Morelite Constr. Corp. v. New York Dist. Council Carpenters Benefit Funds, 748 F.2d 79 (2d Cir. 1984); Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc., 607 F.2d 649, 653 (5th Cir. 1979); International Bhd. of Elec. Workers v. Coral Elec. Corp., 104 F.R.D. 88 (S.D. Fla. 1985); Teamsters Local 506 v. E.D. Clapp Corp., 551 F. Supp. 570 (N.D.N.Y. 1982), *aff'd*, 742 F.2d 1441 (2d Cir. 1983).

26. Coast Trading Co. v. Pacific Molasses Co., 681 F.2d 1195, 1198 (9th Cir. 1982); Buzz Oates Enters. v. Sacramento Area Carpenters, 534 F. Supp. 481 (N.D. Cal. 1982); Western Elec. Co. v. Communications Workers, 450 F. Supp. 876, 881 (E.D.N.Y.) *aff'd*, 591 F.2d 1333 (2d Cir. 1978).

take as to specific contract language or as to facts central to a decision[27] or (4) where a violation of the duty of fair representation by a union taints an award rendered by a labor arbitrator.[28] However, as courts begin to expand beyond these exceptions into areas of more second — "essence" — guessing, the danger likewise increases of giving more encouragement to the disgruntled party, i.e., the loser, to remove the decision-making process from the arbitral forum into the litigation arena. The troublesome area in this regard has been with those cases which rely too heavily on what a court considers to be beyond the anticipation of the parties or what one might refer to as the "expectability" doctrine. The problem is as old as the 1966 case of *Torrington Company v. Metal Products Workers Union Local 1645*.[29] There the arbitrator could find no written contractual provisions regarding the disputed issue of whether the employer was required to permit employees paid time off to vote on election days. The arbitrator held for the union and based his decision on a twenty-year past practice which the employer had unilaterally discontinued. The court concluded that an arbitrator's authority is "an appropriate question for judicial review."[30] The court held that "the arbitrator's decision that he has authority 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."[31] This decision was roundly criticized as improper under *Enterprise Wheel*, and as an example of a court simply disagreeing with an arbitrator's judgment rather than a determination that the arbitrator had exceeded his contractual authority.[32] After all, if an arbitrator cannot look to individual or industry

27. St. Louis Theatrical Co. v. St. Louis Theatrical Bhd. Local 6, 715 F.2d 405 (8th Cir. 1983); United Elec., Radio & Mach. Workers, Local 1139 v. Litton Sys., 704 F.2d 393 (8th Cir. 1983); Brotherhood of R.R. Trainmen v. Central of Georgia Ry. Co., 415 F.2d 403 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970); Sears, Roebuck & Co. v. Automotive Union Local 618, 570 F. Supp. 650 (E.D. Mo. 1983); Ziegler Coal Co. v. District 12, United Mine Workers, 484 F. Supp. 445 (C.D. Ill. 1980).

28. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); *see* 2 C. MORRIS, THE DEVELOPING LABOR LAW 1328-37 (2d ed. 1983); *see also* Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964), *reh'g denied*, 376 U.S. 935 (1964).

29. 362 F.2d 677 (2d Cir. 1966). For another early case similarly limiting an arbitrator's authority, see Textile Workers Union v. American Thread Co., 291 F.2d 894 (4th Cir. 1961) (arbitrator exceeded his authority by distinguishing between greater and lesser penalties in determining that employee's misconduct warranted discipline but not discharge).

30. *Torrington*, 362 F.2d at 680.

31. *Id.*

32. *See, e.g.*, Aaron, *Judicial Intervention in Labor Arbitration*, 20 STAN. L. REV. 41 (1967); Jones, *The Name of the Game is Decision — Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration*, 46 TEX. L. REV. 865 (1968); Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, 34 U. CHI. L. REV. 545 (1967).

custom as a legitimate source in determining the parties' expectations to an issue in fashioning an award, where can one go?[33]

However, *Torrington* cannot be dismissed simply as an outdated judicial aberration. A more recent converse is *Clinchfield Coal Company v. District 28, United Mine Workers*.[34] There the company and union had an agreement as follows:

> Licensing out of coal mining operations on coal lands owned or held under lease or sublease by any signatory party hereto shall not be permitted unless the licensing out does not cause or result in the layoff of Employees of the Employer.[35]

It was undisputed that the company had licensed certain coal mines to many independent contractors for a number of years. When the employer shut down one of its own mines, the union grieved and the arbitrator found that the licensing had caused layoffs in violation of the collective bargaining provision. The Fourth Circuit overturned the arbitrator's award as not drawing its essence from the contract and thus going beyond the parties' expectations. The court concluded that economic conditions had caused the mine closing and not the prior licensing of other coal mining operations.[36] The appellate court affirmed the conclusion of the district court that by ignoring the economic evidence of the company and three prior arbitral awards in the industry to the contrary (each involving different companies and different locals, although the same contractual language), the arbitrator "disregarded the 'common law of the . . . industry' which 'is an integral part of the contract,' and thereby strayed from the essence of the Agreement."[37]

Thus, contrary to the *Torrington* situation where the arbitrator had relied solely on past practice without specific contractual support, the arbitrator's

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33. Many authorities are of the opinion that past practice and customs can be as binding as the written provisions of a labor contract. As one commentator has noted:

> Past practice may serve to clarify, implement, and even amend contract language. But these are not its only functions. Sometimes an established practice is regarded as a distinct and binding condition of employment, one which cannot be changed without the mutual consent of the parties. Its binding quality may arise either from a contract provision which specifically requires the continuance of existing practices or, absent such a provision, from the theory that long-standing practices which have been accepted by the parties become an integral part of the agreement with just as much force as any of its written provisions.

Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017, 1030 (1961); *see also* CNPA v. Pressmen's Union No. 7, 821 F.2d 390 (7th Cir. 1987); F. ELKOURI & E. ELKOURI, *supra* note 4, at 437-56; C. UPDEGRAFF, ARBITRATION AND LABOR RELATIONS 301-03 (3d ed. 1970).

34. 720 F.2d 1365 (4th Cir. 1983).

35. *Id.* at 1367.

36. *Id.* at 1369-70.

37. *Id.* at 1369 (citation omitted).

failure in *Clinchfield* to look at industrial practice and confining himself to the interpretation of the language of the contract was an improper "brand of industrial justice." Indeed the court was so convinced as to the incorrectness of the arbitrator's conclusion that a year later it reversed a second arbitral decision, which was to the same effect as the first award and which involved the same parties but concerned the shutdown of a different mine.[38] But to whom had the parties entrusted that determination of the meaning of the contract language and the effect to be given to industrial practice? If the Supreme Court decision in *W. R. Grace & Co.*[39] teaches anything, it should be that one arbitrator is not bound by the decision of another.[40] Moreover, after the last award, the industry custom was seemingly at a 3-2 posture since, although at least three arbitrators took the companies' position,[41] two have now upheld the union's view. One can question just how common the law of that industry or operation is. In *Clinchfield*, like *Torrington*, the reviewing court primarily disagreed with the type of arbitral interpretation which, while perhaps debatable, was grounded in contractual essence. Once again the court seems to be defeating the purpose of the *Enterprise Wheel* standard while purporting to follow it.

Another area of increasing judicial intervention is where the "rogue arbitrator" strikes. This occurs when the losing party can convince a judge that no one with common sense could have reached such a conclusion as that made by a particular arbitrator and that such an unanticipated result

38. Clinchfield Coal Co. v. District 28, United Mine Workers, 736 F.2d 998 (4th Cir. 1984). The court again relied on the "'common law' of the industry as expressed in past arbitral decisions" that layoffs due to economic conditions were exempt from leasing out contract provisions. *Id.* at 999. Thus when the arbitrator made a finding that the contract had been violated, even though the decision to close the mine was due to economic losses, the court felt the decision clearly did not draw its essence from the contract. *Id.*

39. W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers, 461 U.S. 757 (1983); *see infra* text accompanying notes 76-82.

40. This view that one arbitrator's decision is not binding in the sense of concepts of stare decisis is the prevailing view among arbitrators and authorities in the field. Consolidation Coal Co., 84 Lab. Arb. (BNA) 1037 (1985) (Duda, Arb.); Associated Grocers of Alabama, Inc., 83 Lab. Arb. (BNA) 261 (1984) (Odom, Arb.); Arch of Illinois, Inc., 82 Lab. Arb. (BNA) 625 (1984) (Hewitt, Arb.); Hospital Linen Serv. Facility, 80 Lab. Arb. (BNA) 549 (1983) (Talarico, Arb.); North Am. Rayon Corp., 78 Lab. Arb. (BNA) 880 (1982) (Whyte, ARb.); Champion Parts Rebuilders, Inc., 73 Lab. Arb. (BNA) 905 (1979) (Carson, Arb.); Detroit Edison Co., 73 Lab. Arb. (BNA) 565 (1979) (Lipson, Arb.); Dresser Indus., 72 Lab. Arb. (BNA) 138 (1979) (Layborn, Arb.); *see also* F. ELKOURI & E. ELKOURI, *supra* note 4, at 414-36; O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 570-79 (2d ed. 1983).

41. In *Clinchfield I*, the court pointed to three arbitration decisions supporting the notion that layoffs for economic reasons might not run afoul of the leasing prohibition. Clinchfield Coal Co. v. District 28, United Mine Workers, 720 F.2d 1365, 1369 (4th Cir. 1983).

should be given no legal effect. A good example is *Hoteles Condado Beach v. Union De Tronquistas*.[42] There the company discharged an employee, a male lifeguard, for allegedly engaging in immoral conduct in front of a female guest. At the hearing the arbitrator granted the union's request to exclude the husband of the female guest from the hearing room while she testified. The wife then refused to give testimony. At that point the company submitted a judgment and transcript in a criminal case concerning the same incident. The arbitrator conditionally accepted the transcript at the hearing but later ruled in his decision that he had decided not to consider it, since it gave him no opportunity to view the credibility or demeanor of the witness.[43] The arbitrator sustained the grievance and overturned the discharge.

The federal district court concluded that the arbitrator's decision was beyond the mutual expectations of the parties and was fundamentally unfair. According to the court the employee violated a disciplinary rule which required his discharge for immoral conduct. In so ruling the district judge noted:

> The arbitrator's rationale is challenged here because the conduct of the employee is a per se violation of his employment contract without need of any identification of rules or regulations. The subsequent reversal of the discharged employee's [criminal] conviction would not have had any effect on the arbitration hearing. The burden of proof required at the arbitration hearing is the preponderance of evidence standard, as opposed to the higher burden of proof of guilt beyond a reasonable doubt in a criminal proceeding.[44]

In regard to the fundamental unfairness of the proceeding, the court stated that, although arbitration is concededly a private affair, the exclusion of the husband from the hearing room was "short-sighted and misconceived."[45] The court then held that it was error for the arbitrator to fail to give weight to the transcript, since the company had relied on it as its sole evidence and such a sworn document would be admissible under Federal Rules of Evidence 803 and 804.[46] The court considered the exclusion of the transcript to be "faulty judgment" by the arbitrator.[47]

While one might question the merits of the decision of the arbitrator in this case, the finding of the district court is even more disturbing in regard to its effect on the doctrine of the finality of labor arbitration awards. There is a fair degree of arbitral authority for the proposition that employee discharges for offenses involving moral turpitude should require clear and con-

42. 588 F. Supp. 679 (D.P.R. 1984), *aff'd*, 763 F.2d 34 (1st Cir. 1985).
43. *Id.* at 682, 684-85.
44. *Id.* at 687.
45. *Id.* at 684.
46. FED. R. EVID. 803(8), 804(b)(1).
47. 588 F. Supp. at 685.

vincing evidence or even evidence beyond a reasonable doubt.[48] Moreover, it is hard to find that the parties had never contemplated the possibility of a penalty less than discharge for an offense involving immoral conduct when the company's disciplinary rules for just such an infraction specifically stated the penalties as follows: "first offense — suspension or dismissal; second offense — dismissal."[49] Finally requiring arbitrators to apply the federal rules of evidence or judicial notions as to sequestration of witnesses is imposing a burden of formality and procedure that parties attempt to avoid by agreeing to an arbitration clause.[50] Certainly the court and not the arbitrator decided this case on its notions of the parties' expectations of contractual justice.

Cases like *Clinchfield Coal Co.* and *Hoteles Condado Beach*, while not the rule, are by no means unique examples.[51] As exceptions to the doctrine

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48. Many arbitrators subscribe to the theory outlined by arbitrator Adolph Koven in Atlas Freight Lines, 39 Lab. Arb. (BNA) 352 (1962), a case involving the discharge of an employee for theft:

> But in cases involving moral turpitude and where the charges are in their nature criminal, a much higher degree of proof is required. Since the instant case involves a charge of theft and thus involves moral turpitude with the loss of job, loss of seniority and other contractual rights, and possible loss of reputation at stake, in accordance with overwhelming authority, the degree of proof required is proof beyond a reasonable doubt.

Id. at 358 (citations omitted); *see also* Regional Transp. Dist., 80 Lab. Arb. (BNA) 1225, 1234 (1983) (Eaton, Arb.) (clear and convincing evidence); Progressive Transp., 80 Lab. Arb. (BNA) 546, 547 (1983) (Wilmoth, Arb.) (beyond a reasonable doubt); Southern Bell Tel. & Tel., 75 Lab. Arb. (BNA) 409, 412 (1980) (Seibel, Arb.) (clear and convincing evidence); Hughes Air Corp., 73 Lab. Arb. (BNA) 148, 156 (1979) (Barsamian, Arb.) (clear and convincing evidence); Eastern Assoc. Coal Co., 66 Lab. Arb. (BNA) 1063, 1064 (1976) (Lubow, Arb.) (evidence beyond a reasonable doubt); Dockside Mach. & Boilerworks, Inc., 55 Lab. Arb. (BNA) 1221, 1226 (1970) (Block, Arb.) (beyond a reasonable doubt); F. ELKOURI & E. ELKOURI, *supra* note 4, at 661-63; M. HILL, JR. & A. SINICROPI, EVIDENCE IN ARBITRATION 10-13 (1980); Aaron, *Some Procedural Problems in Arbitration*, 10 VAND. L. REV. 733, 740-42 (1957).

49. 588 F. Supp. at 686. The court found that the arbitrator made an incorrect assumption that these disciplinary rules concerning immoral conduct applied only to casino employees rather than all employees of the hotel. *Id.* However, even if the arbitrator had applied these rules, which were a part of the collective bargaining agreement, a possible penalty for the violation was suspension rather than discharge.

50. American Postal Workers v. United States Postal Serv., 789 F.2d 1, 6 (D.C. Cir. 1986); Shearson Hayden Stone, Inc. v. Liang, 653 F.2d 310, 313 (7th Cir. 1981); Fairchild & Co. v. Richmond, Fredericksburg & Potomac R.R., 516 F. Supp. 1305, 1315 (D.D.C. 1981); F. ELKOURI & E. ELKOURI, *supra* note 4, at 296-98; M. SCHEINMAN, EVIDENCE & PROOF IN ARBITRATION 15 (1977).

51. Dobbs, Inc. v. Local No. 614, Int'l Bhd. of Teamsters, 813 F.2d 85 (6th Cir. 1987) (arbitrator failed to properly recognize and confirm employer's right to discipline and enforce working rules in reinstating employee who had been discharged for habitual tardiness); Trailways Lines, Inc. v. Trailways, Inc. Joint Council, 807 F.2d 1416 (8th Cir. 1986) (arbitrator acted improperly in overturning bus company's "no-beards" policy for garage employees when he copied a substantial portion of

of finality of arbitral awards expand, particularly in the area of cases involving public policy,[52] a corresponding increase in the number of cases has occurred where courts simply seemed concerned with the discretionary authority of arbitrators in contractual interpretation situations. If a judge does not like the "brand of justice," he can simply find a lack of "essence" on the basis of the expectability doctrine. The flaw in this approach is that what the parties have anticipated in negotiations, and indeed have agreed upon in a collective bargaining contract, is that the labor arbitrator rather than a court will determine their expectations as to the numerous unforeseen situations and disputes which arise, when such are not clear from the language of the agreement.[53] Even more fundamentally, such an approach fails to

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his analysis from one of his prior, completely different cases and did not give effect to the intent of the parties as evidenced in the contract); Clinchfield Coal Co. v. District 28, United Mine Workers, 736 F.2d 998 (4th Cir. 1984) (failure to give effect to past practice regarding licensing of independent contractors); Clinchfield Coal Co. v. District 28, United Mine Workers, 720 F.2d 1365 (4th Cir. 1983) (again failure to give effect to past practice in regard to licensing of independent contractors of coal mines); United Elec., Radio & Mach. Workers Local 1139 v. Litton Sys., 704 F.2d 393 (8th Cir. 1983) (failure to give effect to mandatory contractual requirement concerning inventory and vacation during plant shutdown); Pacific Motor Trucking Co. v. Automotive Machinists Union, 702 F.2d 176 (9th Cir. 1983) (employer demotion of long-standing employee upheld despite arbitrator's decision); Devine v. White, 697 F.2d 421 (D.C. Cir. 1983) (judicial review by director of personnel of arbitration awards); Lackawanna Leather Co. v. United Food & Commercial Workers Dist. Union No. 271, 692 F.2d 536 (8th Cir. 1982) (overturning arbitrator's decision regarding the discharge of an employee after three written notices involving different infractions, but all for poor performance within one year), *vacated*, 706 F.2d 228 (8th Cir. 1983); Hoteles Condado Beach v. Union De Tronquistas, 588 F. Supp. 679 (D.P.R. 1984), *aff'd*, 763 F.2d 34 (1st Cir. 1985) (reinstatement of employee discharged for engaging in sexual misconduct overturned); Sears, Roebuck & Co. v. Automotive Union Local No. 618, 570 F. Supp. 650 (E.D. Mo. 1983) (overturning arbitration board decision reinstating employee who had continued rude and discourteous service despite agreement to the contrary); Buzz Oates Enters. v. Sacramento Area Dist. Council of Carpenters, 534 F. Supp. 481 (N.D. Cal. 1982) (overturning arbitrator's award deciding factual questions without holding hearings or without deciding legal questions as parties had agreed); Aeronautical Machinists Lodge 709 v. Lockheed-Georgia Co., 521 F. Supp. 1327 (N.D. Ga. 1981) (arbitrator failed to consider contractual provision concerning right of union business representative to access company premises), *cert. denied*, 459 U.S. 1205 (1983); Port Huron Area School Dist. v. Port Huron Educ. Ass'n, 426 Mich. 143, 393 N.W.2d 811 (1986) (arbitrator, on his own initiative, improperly interpreted the preamble of the collective bargaining agreement as prohibiting the use of sex as a qualification in determining lay-off rights).

52. *See* cases cited *supra* note 15.

53. As the Supreme Court noted in United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960):

> Arbitration is the means of solving the unforseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and

recognize that arbitration is not just a substitute for litigation but is the alternative means for companies and unions to resolve their disputes without applying economic weapons.[54] As such, the arbitration process is its own system of collective governance.[55] The more often courts encroach on the finality of awards through use of the expectability doctrine in applying the *Enterprise Wheel* "essence" standard, the more the system itself deteriorates as parties simply look at an arbitrator's decision as one more step in the litigation process.

II. EXTERNAL LAW: *Enterprise Plus*

The debate among arbitrators and others has been ongoing as to whether and to what extent a labor arbitrator should apply external law when ren-

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desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Id. at 581. *See also* Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

54. This point that "the agreement to arbitrate grievances disputes is the *quid pro quo* for an agreement not to strike" has been the underpinning of the arbitral system since Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957). *See also* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). The Supreme Court has linked these two concepts to the extent that, if the parties include a comprehensive arbitration clause in their collective agreement, the courts will imply a no-strike obligation. Gateway Coal Co. v. United Mineworkers, 414 U.S. 368 (1974); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). The effect of the arbitral system then is quite different than litigation. It is to resolve the parties' differences by methods which will avoid industrial disruption but still maintain the tenets of the underlying, continuing relationship in a manner compatible with their written agreement. Abrams, *The Integrity of the Arbitral Process*, 76 MICH. L. REV. 231, 232 (1977); Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 533-34 (1969); *see generally* Meltzer, *supra* note 32.

55. This point was aptly stated by Professor Feller:

> The collective bargaining agreement is not a contract insofar as it establishes the rights of employers and employees, but is, rather, a set of rules governing their relationship. Rules that are integral with and cannot be separated from the machinery that the parties have established to resolve disputes as to their meaning. Consider, for example, the provision in the automobile agreements setting forth the principles governing the setting of production standards. That provision is substantively different, *and intended to be so*, from a provision in the same agreement governing seniority or specifying that discharge shall be only for just cause. The difference is that disputes as to the latter provisions are subject to arbitration, while the disputes as to the former are intended to be solved only by the use, or non-use, of the strike. But *in neither case* are the rules intended to be seen as contractual, that is, adjudicable by the courts.

Feller, *supra* note 9, at 101 (emphasis in original); *see also* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958); Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

dering a decision under the terms of a collective bargaining agreement. The positions of different scholars have spanned the spectrum of opinions. Some have argued, with great persuasiveness, that the designated role of the labor arbitrator is only to interpret what the terms of the collective bargaining agreement mean without regard to external law.[56] In this analysis courts are only to decide whether the contractual provision, as interpreted by the arbitrator, violates statutes or public policy. The contrary position, advanced by other scholars with equally convincing arguments, is that arbitrators must always consider external law, since parties to a collective bargaining agreement either expressly or impliedly obligate themselves to conform to public law.[57] This Article will not consider this thorny issue. Rather, the premise here is that in many instances arbitrators do utilize considerations of external law when reaching decisions on the meaning and interpretation of a labor contract and that the decisions of labor arbitrators often affect public law rights.[58] The issue then becomes how courts should review such awards.

This situation has become increasingly more common as Congress and state legislatures have passed a plethora of statutes extending various rights to individual employees. Thus the National Labor Relations Act,[59] the Fair Labor Standards Act,[60] the Equal Pay Act,[61] Title VII of the Civil Rights

56. Meltzer, *supra* note 32; Meltzer, *The Role of Law in Arbitration: Rejoinders*, in Proc. of the 21st Ann. Meeting, Nat'l Academy of Arbitrators, at 58 (1968); St. Antonine, *supra* note 24.

57. Howlett, *The Arbitrator, The NLRB, and The Courts*, in Proc. of the 20th Ann. Meeting, Nat'l Academy of Arbitrators, at 67, 83 (1967); *see also* Feller, *supra* note 9; Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969); Platt, *The Relations Between Arbitration and Title VII of the Civil Rights Act of 1964*, 3 GA. L. REV. 398 (1969); Sovern, *When Should Arbitrators Follow Federal Law?*, in Proc. of the 23rd Ann. Meeting, Nat'l Academy of Arbitrators, at 29 (1970).

58. *See, e.g.*, Lucky Stores, 88 Lab. Arb. (BNA) 841 (1987) (Gentile, Arb.) (religious discrimination); Alabama By-Products Corp., 79 Lab. Arb. (BNA) 1320 (1982) (Clarke, Arb.) (religious discrimination under Title VII); United Technologies Corp., 80 Lab. Arb. (BNA) 92 (1982) (Bloch, Arb.) (Rehabilitation Act of 1973); Bay Area Rapid Transit Dist., 79 Lab. Arb. (BNA) 1171 (1982) (Koven, Arb.) (Rehabilitation Act of 1973); Social Security Administration, 79 Lab. Arb. (BNA) 449 (1982) (Mittelman, Arb.) (religious discrimination under Title VII); Flint Bd. of Educ., 77 Lab. Arb. (BNA) 244 (1981) (Daniel, Arb.) (requirements of affirmative action program); Mare Island Naval Shipyard, 76 Lab. Arb. (BNA) 462 (1981) (Aller, Arb.) (Occupational Safety and Health Act); Reynolds Metal Co., 74 Lab. Arb. (BNA) 1121 (1980) (Welch, Arb.) (Age Discrimination and Employment Act); Hurley Hospital, 71 Lab. Arb. (BNA) 1013 (1978) (Roumell, Arb.) (religious discrimination); National Broadcasting Co., 81 Lab. Arb. (BNA) 762 (1978) (Gentile, Arb.) (racial discrimination).

59. 29 U.S.C. §§ 151-169 (1982).

60. 29 U.S.C. §§ 201-219 (1982).

61. 29 U.S.C. § 206(d) (1982).

Act of 1964,[62] the Age Discrimination in Employment Act,[63] the Employee Retirement Income Security Act,[64] the Occupational Safety and Health Act,[65] and other federal laws directly affect the employment relationship and can impact significantly on collective rights under a labor contract. The accommodation of such individual statutory rights with obligations and duties under a collective agreement has caused notable tension. Moreover, collective bargaining interests and arbitral decisions often involve public policy rights which, while not aimed directly at employment, can involve management decisions regarding employees. For instance, a decision to discharge an employee who has reported illegal activity by an employer or other employees to a state authority may fall within the parameters of a company's right to discharge for just cause under a labor agreement, and yet be contrary to the policy of a state statute encouraging the communication of such information by any persons.[66]

In these instances where external law interacts with collective bargaining agreements, courts' review of arbitral decisions has not been limited simply to applying the "essence" standard to see if there is a link between the award of the labor arbitrator and the terms or meaning of the contract. Since the labor agreement may not even address the public law rights, or indeed may run counter to them, courts are applying a more exacting standard of review, which will be referred to in this Article as *Enterprise Plus*.

The roots of this more encompassing principle of review of arbitral cases involving public law issues can be traced back to *Enterprise Wheel* itself. In that opinion Justice Douglas noted that an arbitrator could look to many sources, including legal criteria, to determine a contractual dispute.[67] However, he concluded that if the arbitrator's decision was based "solely upon the arbitrator's view of the requirement of the enactment of legislation," as opposed to interpreting the collective agreement, then the arbitrator "exceeded the scope of the submission" and the award would not be enforced.[68] It should be a somewhat rare occurrence where an arbitrator would totally disregard the plain terms of a labor contract and utilize only external law guidelines.[69] However, the Court in *Enterprise Wheel* underscored that the

62. 42 U.S.C. § 2000(e) (1982).
63. 29 U.S.C. §§ 621-634 (1982).
64. 29 U.S.C. §§ 1001-1461 (1982).
65. 29 U.S.C. §§ 651-678 (1982).
66. Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985); *see also* Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981).
67. Justice Douglas noted that in interpreting a contract an arbitrator could "look for guidance from many sources," and more specifically might refer "to 'the law' for help in determining the sense of the agreement." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597-98 (1960).
68. *Id.* at 597.
69. *See infra* text accompanying notes 92-94.

primary focus of the arbitrator's attention was interpreting the parties' agreement rather than making pronouncements as to the meaning of statutory rights.

The more limited basis of an arbitrator's authority in a contractual dispute involving public law issues was crystallized in *Alexander v. Gardner-Denver Company*.[70] There the Court drew a sharp distinction between contractually based rights under a just cause discharge clause and statutory rights under Title VII.[71] The Court again clearly stated that an arbitrator could not make a decision contrary to the labor agreement simply on the basis of an arbitral interpretation of statutory rights.[72] Since the anti-discrimination obligations were based on public law independent of the labor contract, and since the arbitral procedures in regard to the competence of arbitrators (especially non-attorneys) to handle public law considerations and the ability of the arbitral process to develop facts without discovery, rules of evidence or other judicial fact-finding measures were considered inferior, the Court refused to give binding effect to an arbitrator's decision which included the public law issue.[73]

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70. 415 U.S. 36 (1974).

71. The Court noted that there was no inconsistency between an employee pursuing remedies under a collective bargaining agreement and Title VII:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

Id. at 49-50.

72. The Court stated:

> The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties. . . . If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be enforced.

Id. at 53 (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

73. *Id.* at 56-60. Although some commentators felt that the decision in *Alexander v. Gardner-Denver* would result in the demise of the arbitration process because employees would have alternate means of redress and employers might exclude arbitration clauses from labor agreements, such does not seem the case. *See, e.g.*, Siber, *The Gardner-Denver Decision: Does It Put Arbitration in a Bind?*, 25 LAB. L.J. 708 (1974). Rather, arbitration of employment discrimination claims seems often to lead to a resolution of the underlying dispute. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1083-87 (2d ed. 1983); Edwards, *Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives*, 27 LAB. L.J. 265 (1976).

However, in a footnote the Court held that the judicial body which was entrusted with determining the public law issue had deference-granting discretion where: (1) the legal issue was covered by the labor agreement, (2) the question involving external law was fully and fairly presented to the arbitrator, and (3) the arbitrator had the ability to handle and actually considered the public law matter.[74] This same policy and rationale has been applied by the Supreme Court subsequently in regard to other employment-related statutes.[75]

Any doubts as to whether a court reviewing an arbitral decision could utilize the concept of public policy were dispelled by *W.R. Grace and Company v. Local Union 759, International Union of Rubber Workers.*[76] The employer in the case faced a lay-off situation and had decided to follow the provisions of a conciliation agreement between it and the Equal Employment Opportunity Commission (which a district court had found to be binding) rather than the terms of a seniority clause in its collective bargaining agreement with the union. As a result, more senior males were laid off instead of junior female employees, and the male employees filed a number of grievances.[77] In deciding one of the grievances which arose concerning the lay-

74. 415 U.S. at 60 n.21. There has been some confusion in the lower courts in regard to the standards for deferral outlined in note 21. Some courts have accorded "great weight" to arbitral awards involving discrimination claims. Dripps v. United Parcel Serv., 381 F. Supp. 421 (W.D. Pa. 1974), *aff'd*, 515 F.2d 506 (3d Cir. 1985); *see also* Barnes v. St. Catherine's Hosp., 563 F.2d 324 (7th Cir. 1977). Other courts have given little or no weight to an arbitral decision. For instance, in Alexander v. Gardner-Denver Co., 519 F.2d 503 (10th Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976), the court of appeals, on remand, affirmed the trial court's decision granting judgment for the employer. The only mention made of the arbitration award was in the factual rescitation that "[t]he arbitrator did not consider whether racial discrimination was involved in the discharge." 519 F.2d at 505; *see also* Corbin v. Pan Am. World Airways, Inc., 432 F. Supp. 939 (N.D. Cal. 1977); Kornbulh v. Sterns & Foster Co., 73 F.R.D. 307 (S.D. Ohio 1976). The "devolution principle" discussed *infra* would require a court to give the arbitrator's decision deference if certain clear standards are met. *See infra* text accompanying notes 146-200.

75. McDonald v. City of West Branch, Michigan, 466 U.S. 284 (1984) (42 U.S.C. § 1983); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) (Fair Labor Standards Act); *see also supra* note 5 and accompanying text.

76. 461 U.S. 757 (1983).

77. The company had agreed to conciliate with the Equal Employment Opportunity Commission (EEOC), but the union had refused. In December of 1974, the company and the EEOC signed a conciliation agreement that if layoffs occurred, the company would keep a given percentage of female employees. The company had previously filed suit to prevent the union from arbitrating any conflicting rights under the collective bargaining agreement and for a judicial determination that the conciliation agreement would supersede the labor contract. In November of 1975, the federal district court upheld the conciliation agreement. Both before and after this decision, the company laid off male employees not by seniority, but according to the conciliation agreement. In January of 1978, the Fifth Circuit reversed the decision of the

off, the arbitrator refused to follow the decision on the same issue by a prior arbitrator which had upheld the conciliation agreement over the labor contract.[78] Rather the second arbitrator looked only to the terms of the collective bargaining agreement to find that the company violated the seniority provisions.[79] In reviewing the arbitral award, the Supreme Court applied not only the *Enterprise Wheel* "essence" standard but also held that a collective bargaining agreement, like any contract, could not be "contrary to public policy."[80] The determination as to the applicability of public policy was for a reviewing court to decide in making a ruling whether to enforce or to vacate an arbitrator's award that allegedly violated statutory or constitutional rights. The Court did not hold that such a standard of review was limitless. Rather the Court concluded that the public policy had to be "explicit," "well defined and dominant," and must be "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."[81] In the facts of the case, the Court found that the arbitrator's award had not violated any such notions of public policy in his interpretation of the labor contract; however, it left no uncertainty as to the use of public policy as a gauge to determine the propriety of an arbiter's decision.[82]

This explicit incorporation of a public policy standard by *W.R. Grace & Co.* into the otherwise limited contractual review under *Enterprise Wheel* has caused a good deal of disarray within the federal circuits in subsequent cases.[83] Despite the restrictive language in the *W.R. Grace & Co.* opinion,

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federal district court and upheld the union's counterclaim to require arbitration of the collective bargaining grievances. Although the company reinstated the laid off male employees, these employees' grievances concerning back pay remained intact. 461 U.S. at 759-63.

78. The first grievance to reach arbitration concerning the back pay issue was that of a male employee who had been demoted while the federal district court order modifying the seniority provisions was in effect. In August of 1978, the arbitrator, Anthony J. Sabella, denied the grievance on the ground that it would be inequitable to penalize the company for conduct that complied with the order of the district court. Another grievance involving three other employees, two laid off before and one laid off after the entry of the district court order was brought before arbitrator Gerald A. Barrett. Arbitrator Barrett refused to follow the award of arbitrator Sabella and upheld the employees' grievance for back pay, since he determined there was a violation of the collective bargaining agreement and the labor contract contained no defense of good faith for the company. 461 U.S. at 762-64.

79. *Id.*

80. *Id.* at 766.

81. *Id.* (citation omitted).

82. For a critical review of *W.R. Grace*, as court approval of one arbitrator, in effect, voiding the decision of another arbitrator, see Christensen, *W.R. Grace & Co.: An Epilogue to the Trilogy?*, in Proc. of the 37th Ann. Meeting, Nat'l Academy of Arbitrators, ARBITRATION 1984: ABSENTEEISM, RECENT LAW, PANELS, AND PUBLISHED DECISIONS, at 21.

83. A number of courts have broadly interpreted a public policy exception to

the concept of public policy based on external law presents a rather large offensive opening for challenges to arbitral awards by disgruntled losers.

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vacate awards of arbitrators. Professional Adm'rs Ltd. v. Kopper-Glo Fuel, Inc., 819 F.2d 639 (6th Cir. 1987) (arbitration award permitting trustees of pension funds to unilaterally increase contribution rates was contrary to public policy of the National Labor Relations Act requiring collective bargaining over wages and benefits); S.D. Warren Co. v. United Paperworkers Local 1069, 815 F.2d 178 (1st Cir. 1987) (arbitrator's reinstatement of employee discharged for using and distributing drugs on company property violated public policy); Local One, Amalgamated Lithographers v. Stearns & Beale, Inc., 812 F.2d 763 (2d Cir. 1987) (arbitration committee's decision to bind a non-signatory employer that was not a "single employer" with a company that was a party to a collective bargaining agreement was against public policy); United Auto Workers v. Keystone Consol. Indus., 793 F.2d 810 (7th Cir.), *cert. denied*, 107 S. Ct. 403 (1986) (arbitrator's award vacated for failure to consider public policy behind the enactment of ERISA requiring annual funding of pension agreement); Misco, Inc. v. United Paperworkers Int'l Union, 768 F.2d 739 (5th Cir. 1985), *cert. granted*, 107 S. Ct. 871 (1987) (reinstatement of employee apprehended on company premises in a car containing marijuana smoke and in whose car marijuana had been found was contrary to public policy against operation of dangerous machinery by persons under the influence of drugs or alcohol); United States Postal Serv. v. American Postal Workers Union, 736 F.2d 822 (1st Cir. 1984) (reinstatement of employee who had been convicted of embezzling postal funds violates public policy and is unenforceable); Amalgamated Meat Cutters Local 540 v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983) (vacating arbitrator's award reinstating employee who violated the public policy against truck drivers drinking and driving); American Postal Workers Union v. United States Postal Serv., 682 F.2d 1280 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983) (denial of enforcement of arbitrator's award reinstating postal service employee who had participated in a strike against the postal service in violation of law); Local No. P-1236, Amalgamated Meat Cutters v. Jones Dairy Farm, 680 F.2d 1142 (7th Cir. 1982) (arbitrator's award upholding company rule prohibiting employees from access to USDA meat inspectors violated public policy).

On the other hand, a number of courts have given a more limited interpretation to the public policy exception. *E.g.*, United States Postal Serv. v. National Ass'n of Letter Carriers, 810 F.2d 1239 (D.C. Cir. 1987) (arbitration award reinstating letter carrier who was discharged after arrest for unlawful delay of mail was no basis to apply public policy exception to the finality of arbitral awards); Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. filed*, March 26, 1987 (arbitration award reinstating pilot who had been discharged for flying while under the influence of alcohol did not violate public policy for airline safety); Bevles Co. v. Teamsters Local 986, 791 F.2d 1391 (9th Cir. 1986) (arbitration awards reinstating employees who had been terminated because they were undocumented aliens did not violate clearly defined public policy); E.I. DuPont & Co. v. Grasselli Employees Indep. Ass'n, 790 F.2d 611 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 186 (1986) (arbitrator's award reinstating worker who had assaulted fellow employee does not violate public policy of providing a safe working environment); American Postal Workers Union v. United States Postal Serv., 789 F.2d 1 (D.C. Cir. 1986) (arbitrator's decision to reinstate employee who had not been given a *Miranda*-type warning before confessing to alleged dishonesty in handling postal transactions was not against public policy).

Such attacks on the validity of arbitral awards have definitely increased.[84] In such cases the reviewing court must measure the award not only against the norm of the collective agreement but also against notions of public law — the *Enterprise Plus* standard.

There are basically three instances where external law and the *Enterprise Plus* standard become involved in the arbitral process: (1) an arbitrator, *sua sponte*, utilizes public law as a basis for an award; (2) the arbitrator renders a decision on a contractual issue which one of the parties claims conflicts with some legal rights; or (3) the parties, as part of their submission agreement, request the arbitrator to decide a contractual issue based on public policy principles. Each of these situations will be considered separately.

In many cases, in order to resolve a contractual dispute, an arbitrator will turn to legal guidelines based on statutes or judicial opinions to aid in the decision-making process, even though the parties have not specifically incorporated the public law as a part of their issue. For example, an arbitrator may be presented with an issue as to whether the unilateral discontinuation of a benefit by an employer violates the collective bargaining agreement between the company and union. The employer may claim that such action is permissible under a management rights clause and the union may contend that the action violates the union recognition clause, a specific economic provision in the contract, or past practice.[85] The standard of review of the

84. See *supra* note 83; *Survival of Labor Arbitrators*, 125 Lab. Rel. Rep. (BNA) News and Background Information 100 (1987).

85. *See, e.g.*, Texas Utils. Generating Co., 85-1 Arb. (CCH) ¶ 8066 (1984) (Heinsz, Arb.) (company improperly discontinued annual purchase of tickets to an amusement park or a musical summer theater event during the term of a labor contract, since such had been a binding past practice and a result of contract negotiations); Everlock Charlotte, 81-1 Arb. (CCH) ¶ 8034 (1980) (Butler, Arb.) (removal of all chairs from manufacturing department was proper by company in order to improve production and meet competition, despite the Union's claim of a binding past practice that chairs be allowed in the department); Redford Township, 80-2 Arb. (CCH) ¶ 8596 (1980) (Coyle, Arb.) (township's action in unilaterally establishing a winter and summer vacation for its firefighters was improper where the determination of vacations had been historically left to officers of the bargaining unit); Beecher, Peck & Lewis, 74 Lab. Arb. (BNA) 489 (1980) (Lipson, Arb.) (employer did not have right under the management rights clause or any other clause of the collective bargaining agreement to unilaterally obtain a new insurance carrier for health and welfare benefit plan, since contract provision concerning insurance benefits included the selection of the carrier); Hooker Chemicals, 74 Lab. Arb. (BNA) 96 (1980) (Gootnick, Arb.) (employer failed to comply with its contractual obligation not to amend or modify retirement program without first notifying and consulting with the Union when it failed to notify the Union before modifying pension reduction factors); State of Alaska, 79-2 Arb. (CCH) ¶ 8590 (1979) (Hauck, Arb.) (state employer had no right under management rights clause and violated the collective bargaining agreement, including the Union recognition clause, when it unilaterally implemented a rent increase affecting state-controlled employee housing without first obtaining the ap-

arbitrator's decision could differ significantly depending upon which of the following he or she might hold:

(1) "I find for the aggrieved employees on the basis of my interpretation of the provisions of the contract."

(2) "I find for the aggrieved employees on the basis of my interpretation of the provisions of the contract read in light of Section 7 of the NLRA."

(3) "I find for the aggrieved employees on the basis of my interpretation of Section 7 of the NLRA."[86]

In the first instance a court should consider the legitimacy of the award only under the *Enterprise Wheel* essence standard since the arbitrator has made a strict contractual determination.[87] Thus so long as there is the necessary link between the award and the collective bargaining agreement, a court should go no further into a review of the merits of the decision. As to the second finding, the arbitrator has used statutory law as a source in determining what the intent of the parties was on this issue when they entered into the labor contract. Clearly this is a proper point of reference, since an arbitrator can assume that the parties to the agreement knew the affect of the NLRA and foresaw its application in the interpretation of the specific contractual provisions.[88] Indeed, courts have approved the utilization of public law as a basis of contractual interpretation even where arbitrators have

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proval of its employees); Continental Forest Indus., Plant No. 536, 79-2 Arb. (CCH) ¶ 8540 (1979) (Williams, Arb.) (employer allowed to unilaterally eliminate the use of manlifts at its paper mills under the management rights clause allowing company to determine the means of production and its responsibility to remedy dangerous conditions at the plant in response to a fatal accident on the manlift at another mill).

86. *See* W. OBERER, K. HANSLOWE, J. ANDERSON & T. HEINSZ, LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY 648 (3d ed. 1986).

87. Indeed, in *Enterprise Wheel*, the Court noted that "[a]rbitrators have no obligation to the court to give their reasons for an award." 363 U.S. at 598. Thus such a terse award would be proper under the *Trilogy* standards.

88. Using legal principles as a source of interpretation was specifically approved by the Supreme Court in *Enterprise Wheel*. 363 U.S. at 597-98. As one commentator has stated:

> Unless the parties specifically limit the powers of the arbitrator in deciding various aspects of the issues submitted to him, it is often presumed that they intend to make him the final judge on any questions which arise in the disposition of the issue, including not only questions of fact but also questions of contract interpretation, rules of interpretation, and questions, if any, with respect to substantive law.

F. ELKOURI & E. ELKOURI, *supra* note 4, at 366; *see also* O. FAIRWEATHER, *supra* note 40, at 447-58; Mittenthal, *The Role of Law in Arbitration*, in Proc. of the 21st Ann. Meeting, Nat'l Academy of Arbitrators, DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION, at 49 (1968).

been erroneous in the legal conclusions drawn.[89] It is generally the reasoning of the overturned judicial opinion or amended statute which has persuaded the decision making process of the arbitrator. If the decision is grounded primarily in the contract, even though the rationale of public law principles were considered by the labor arbitrator, then a court should make no further inquiry into the merits. For the most part, the adequacy of the arbitrator's conclusion or the legitimacy of the reasoning for the award become irrelevant. In other words, a reviewing court once again should apply the essence standard.

In the third instance, the arbitrator has disregarded the collective bargaining agreement and relied solely upon public law. Under *Enterprise Wheel* and *Alexander v. Gardner-Denver Co.*, the arbitrator has put the award at risk.[90] The arbitrator was not requested to tell the parties how the National Labor Relations Board would decide the outcome, but how the contract requires the parties to act. In this situation, regardless of whether the arbitrator is right or wrong in the statement of external law, the decision quite likely is improper.

An example is *Wilmington Typographical Union No. 123 v. News-Journal Company*.[91] There the parties had a collective bargaining agreement which allowed the employer to require involuntary retirement of employees once they reached a certain age. According to the labor contract, prior to January 1, 1979, the mandatory retirement age of employees was to be 65 years, and

89. Courts reason that the national labor policy favoring arbitration dictates that as long as an arbitration award represents a reasonable interpretation of the contract, it should be enforced notwithstanding legal errors short of a manifest disregard of the law. As explained by Judge Harry Edwards in American Postal Workers Union v. United States Postal Serv., 789 F.2d 1 (D.C. Cir. 1986):

> [T]he parties may not seek relief from the courts for an alleged mistake of law by the arbitrator. They have agreed to be bound by the arbitrator's interpretation without regard to whether a judge would reach the same result if the matter were heard in court. The parties' remedy in such cases is the same remedy they possess whenever they are not satisfied with the arbitrator's performance of his or her job: negotiate a modification of the contract or hire a new arbitrator.

Id. at 6-7; *see also* Jones Dairy Farm v. Local No. P-1236, United Food & Commercial Workers Int'l Union, 760 F.2d 173, 176-77 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 136 (1985); American Federation of Tel. & Radio Artists v. Storer Broadcasting Co., 745 F.2d 392, 398 (6th Cir. 1984); Local Union 59, Int'l Bhd. of Elec. Workers v. Green Corp., 725 F.2d 264, 268-69 (5th Cir.), *cert. denied*, 469 U.S. 833 (1984); George Day Constr. Co. v. United Bhd. of Carpenters Local 354, 722 F.2d 1471, 1477 (9th Cir. 1984); Sobel v. Hertz Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972).

90. *See supra* text accompanying notes 67-75.

91. 513 F. Supp. 987 (D. Del. 1981); *see also* United States Steel & Carnegie Pension Fund v. McSkimming, 759 F.2d 269 (3d Cir. 1985) (court overturns arbitrator as exceeding his authority by basing opinion on interpretation of ERISA rather than the pension plan agreement).

thereafter 70 years. On December 31, 1978, the company terminated the grievant who had just reached age 65. The arbitrator concluded that, although the language of the agreement would justify the forced retirement, this clause was contrary to the terms of the Age Discrimination in Employment Act and ordered the grievant reinstated.[92] The court vacated the decision since the arbitrator had based his determination solely on statutory law and in violation of the collective agreement. In such a case it was not only that the arbitrator had used statutory law as the sole justification for his decision, but also that he had disregarded the contrary, applicable contract provisions.[93]

If an arbitrator steps out of the designated role of contract interpreter and into the position of public law advocate and, in so doing, disregards the labor contract, courts must void the award under the *Enterprise Plus* standard. The parties understood and submitted to the arbitrator an issue of contractual interpretation. To receive a "non-ordered" package of public policy interpretations is contrary to their primary, underlying expectations when they negotiated and agreed to an arbitration clause to resolve contract disputes. In such a case the court must return the "damaged goods" to the arbitrator.

The second situation of the *Enterprise Plus* standard is where the decision of the arbitrator allegedly conflicts with public policy. This occurs in a case where the parties may not have stipulated that the arbitrator should decide the matter on external law grounds or the arbitrator may not have even considered such law. However, once the arbiter issues the decision, then one party challenges the award as contrary to public policy.

Not surprisingly, in light of *W.R. Grace* such objections have become more commonplace.[94] The danger, of course, is that notions of public policy are often in the eye of the beholder. The public weal can be a broad and amorphous concept. The Court recognized this in *W.R. Grace* and limited the exception to instances of "well defined" public policy which could be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interest."[95] Yet such limits can be hard to apply in concrete cases. Legislatures and courts speak often and broadly. It is not too difficult for an enterprising attorney to find a specific statutory or judicial violation in an arbitral decision.

The perils of such a standard are demonstrated in cases such as *Amalgamated Meatcutters Local Union No. 540 v. Great Western Food Com-*

92. 513 F. Supp. at 988.
93. *Id.* at 989-90.
94. *See supra* note 15.
95. W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber Workers, 461 U.S. 757, 766 (1983) (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)); *see also supra* text accompanying notes 76-84.

pany.[96] There the arbitrator reinstated an employee who had been discharged for overturning his eighteen wheel truck rig. The arbitrator found that the company had not met the burden of proving that the accident was caused by other than a faulty steering mechanism as alleged by the grievant. However, the arbitrator denied back pay since the employee admitted that he had taken a drink at a rest stop shortly before the accident.[97] The Fifth Circuit vacated the award of reinstatement under the *W.R. Grace* public policy exception. The court found that the arbitrator's decision violated "the public policy of preventing people from drinking and driving [as] embodied in the caselaw, the applicable regulations, statutory law, and pure common sense."[98] More specifically, the court pointed to a Federal Motor Carriers Safety Regulation which prohibited persons from consuming alcohol within four hours of operating a motor vehicle.[99] One cannot quarrel that there is a definite public policy against drinking and driving—indeed laws specifically prohibit persons from driving greater than 65 miles per hour on public highways,[100] from driving on the wrong side of the road,[101] from driving without utilizing the highest degree of care,[102] from using marijuana,[103] from working in certain areas without safety glasses,[104] from stealing,[105] and from engaging in a host of other specific actions. However, simply finding a violation of a well defined and definite public policy should not be sufficient to set aside an arbitrator's decision in a termination case such as *Great Western Food*. If it were, then once a court finds the external law infraction, the discharge must stand regardless of arbitral notions as to causation and just cause.[106]

A better example of the use of the public policy exception is *Local No. P-1236, Amalgamated Meatcutters v. Jones Dairy Farm*.[107] There an arbi-

96. 712 F.2d 122 (5th Cir. 1983).
97. *Id.* at 123-24.
98. *Id.* at 125.
99. 49 C.F.R. § 392.5 (1986).
100. 23 U.S.C. § 154 (1982).
101. *See, e.g.*, MICH. COMP. LAWS ANN. § 257.634 (West Supp. 1987); TENN. CODE ANN. § 55-8-115 (1980); 75 PA. CONS. STAT. ANN. § 3301 (Purdon 1977); TEX. REV. CIV. STAT. ANN. art. 6701(d) § 52 (Vernon 1977).
102. *See, e.g.*, CAL. VEH. CODE §§ 21950, 23103, 40000.15 (West 1985); ILL. ANN. STAT. ch. 95 1/2, paras. 7-101, 11-503 (Smith-Hurd 1977); MO. ANN. STAT. § 304.010 (Vernon Supp. 1987); N.Y. VEH. & TRAF. LAW §§ 1101, 1146, 1190 (McKinney 1986).
103. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11357 (West Supp. 1987); ILL. ANN. STAT. ch. 56 1/2, para. 1402 (Smith-Hurd Supp. 1987); MINN. STAT. ANN. § 152.09 (West Supp. 1987); N.J. STAT. ANN. § 24:21-20 (West Supp. 1987).
104. 29 C.F.R. § 1926.102 (1986).
105. *See, e.g.*, IND. CODE ANN. § 35-43-4-2 (Burns Supp. 1987); LA. REV. STAT. ANN. § 14:67 (West 1986); MASS. GEN. LAWS ANN. ch. 266, § 30 (West Supp. 1986); OHIO REV. CODE ANN. § 2913.02 (Page 1987).
106. *See infra* text accompanying notes 113-25.
107. 680 F.2d 1142 (7th Cir. 1982).

trator had upheld a company rule prohibiting employees in a meat processing plant from dealing directly with inspectors from the U.S. Department of Agriculture concerning unsanitary conditions. The Seventh Circuit vacated the decision as violative of public policy embodied in the Meat Inspection Act that persons be allowed to report unsanitary acts.[108] Here, unlike the *Great Western Food* case, there was a causal connection between the underlying contractual finding, i.e., an employee could not report an unsanitary condition, and the public policy embodied in a statute requiring such reports.[109] The contrary finding of the arbitrator was a direct impingement upon the individuals' statutory right and, as such, was properly set aside on the grounds of public policy.

A somewhat similar situation arose in *American Postal Workers Union v. United States Postal Service.*[110] An arbitrator found that a postal worker had participated in an illegal strike, but ordered reinstatement without backpay due to mitigating circumstances.[111] The Ninth Circuit held that the award of reinstatement was directly contrary to a federal statute prohibiting the employment of a federal employee who "participates in a strike . . . against the Government of the United States."[112] The court determined that such a remedy would require the employer to commit an illegal act. In such an instance the court stated that the congressional mandate must supersede the arbitrator's ruling.[113] Public policy certainly dictates that no contract can be valid which mandates unlawful action by a party.[114]

However, if not carefully considered, the concept of public policy can be used as a means to review awards in a fashion beyond that contemplated in *Enterprise Wheel* and *W.R. Grace.* An example of such mischief is *Misco,*

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108. 21 U.S.C. §§ 602, 608 (1982).

109. As the court stated:

> The public policy involved here dictates that: (1) it is essential that the health and welfare of consumers be protected by assuring that meat and meat food products are unadulterated; (2) meat and meat food products be inspected to prevent traffic in diseased and unwholesome meats; (3) standards of sanitation be enforced throughout the plant; and (4) USDA inspectors and the Company be encouraged to join forces to maintain such standards of sanitation.

680 F.2d at 1145.

110. 682 F.2d 1280 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983).

111. The arbitrator mitigated the penalty of discharge because the grievant acted "under erroneous assumptions" about the legality of the strike and "subsequently abandoned the strike." In addition, the arbitrator stated that "the penalty of discharge is too severe in view of Grievant's potential for becoming a valuable Postal Service employee, and particularly in view of the destructive effect that sustaining the discharge would in all likelihood have upon his prospects for future employment." 682 F.2d at 1284.

112. 5 U.S.C. § 7311 (1982).

113. 682 F.2d at 1285.

114. *Id.* at 1286.

Inc. v. United Paperworkers International Union.[115] In that case the Fifth Circuit affirmed the denial of an arbitrator's award reinstating an employee who operated what the court considered "an unusually dangerous machine,"[116] and whom the company had discharged for allegedly violating its rules against possession or use of narcotics or controlled substances on plant premises.[117] The arbitrator determined that the grievant was alone in the back seat of another person's automobile after two co-workers had left the car. There was a lit marijuana cigarette in the front-seat ash tray when the grievant was apprehended. The arbitrator found no evidence that the employee had smoked the marijuana cigarette. Further, the arbitrator refused to allow the company to place into evidence testimony that in the grievant's automobile there was a plastic scale case containing a non-usable trace of marijuana since the company was unaware of this fact at the time of the employee's discharge until shortly before the arbitration hearing. The arbitrator concluded that the termination was without just cause, as required by the contract.[118]

The majority overturned the arbitral finding excluding the evidence regarding the residue of marijuana.[119] The judges concluded that, even though there was only an unusable trace of marijuana in the grievant's automobile, this demonstrated possession of the controlled substance in violation of the company rule.[120] This holding overlooks the commonly accepted view of

115. 768 F.2d 739 (5th Cir. 1985), *cert. granted*, 107 S. Ct. 871 (1987); *see also* Oil Workers Local 4-228 v. Union Oil Co. of California, 818 F.2d 437 (5th Cir. 1987). In *Union Oil Co.*, the Fifth Circuit upheld an arbitrator's decision sustaining the discharge of one employee for the use and sale of drugs off company premises and not on company time while upholding a second arbitrator's decision reinstating an employee who had also used and sold drugs off company premises and not on company time. The court agreed with the reasoning of the second arbitrator that the probability of the second employee using or selling drugs in the future was too low to merit discharge and did not violate any public policy since that employee would not present the safety risk as was present in the *Misco* case. The court, however, did remand the reinstatement decision concerning the second employee to the arbitrator for a determination whether subsequent, post-award drug use by the employee rendered enforcement of the initial award of reinstatement as against public policy.

116. 768 F.2d at 740.

117. *Id.* at 741.

118. *Id.* at 740-41.

119. The court chided the arbitrator for "an opinion perhaps most kindly described as whimsical." 768 F.2d at 740. The court also noted that the arbitrator was not a lawyer. *Id.* at 741 n.2. The court went on to determine that "[i]t is true that the company did not know of the [police] officer's discovery [of the unusable trace of marijuana in the grievant's car] until shortly before arbitration began, but the real issue in this case is not when the company learned of the incident, but whether reinstatement is appropriate at this point." *Id.* at 742.

120. The court found that the rule prohibiting narcotics or controlled substances on the plant premises "draws no distinction between 'residue' and 'usable quantities,' nor need it do so." *Id.*

arbitrators that "[w]here a discharge occurs, its propriety must be determined from an analysis of the cause for the discharge, and evidence of misconduct discovered after the discharge cannot be presented to justify the discharge action."[121]

The majority then determined that the award also violated a public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol."[122] To reach such a conclusion the court had to make a number of factual determinations, none of which had been found by the arbitrator: that the grievant had in fact smoked marijuana;[123] that the grievant had utilized the drug to the point where he was under its influence; and that the grievant then proceeded to perform his work duties in such a condition. Such a misguided factual interpretation of the evidence substitutes the judgment of judges for that of the arbitrator, whom the parties had chosen to resolve the dispute.

There is a more fundamental flaw with a case such as *Misco* than simply a judicial, rather than arbitral, determination of facts. In this case the arbitrator's award of reinstatement of the employee did not infringe on the legal rights of the employer nor did it require the employer to commit an illegal act. Nevertheless, by injecting a general notion of public policy, even though founded upon specific statutory authority, as a basis to set aside an arbitral award, the court makes suspect many decisions of labor arbitrators.

This is particularly true in discharge cases, where public policy considerations often intertwine with notions of just cause. These contract provisions protecting employees from unwarranted termination from their jobs and livelihood require more than a finding that the fired worker committed the misconduct—even activity implicating such public policy issues as use or

121. O. FAIRWEATHER, *supra* note 40, at 303-04; *see, e.g.*, General Elec. Co., 74 Lab. Arb. (BNA) 125, 128 (1979) (Clark, Arb.); Price Bros., 61 Lab. Arb. (BNA) 587, 589 (1973) (Howlett, Arb.); *see also* E. ELKOURI & F. ELKOURI, *supra* note 4, at 675-76.

122. 768 F.2d at 743.

123. The court did not directly dispute the arbitrator's finding that the lit marijuana cigarette was in the front seat ashtray, while the grievant was sitting in the backseat of the car, but the court stated:

> We note in passing that, although lacking personal experience in such matters, we had thought it common knowledge that the narcotic effect of marijuana can be obtained by simply sitting in a small enclosure where smoke from it is present. It is not clear from the record whether or not the car windows were closed, but — given that the incident occurred on an evening in late January — it is a reasonable inference that they were.

768 F.2d at 741. This approach not only includes factual findings not made by the arbitrator, but also overlooks contrary evidence that passive inhalation can cause one to be under the influence of drugs. BUREAU OF NATIONAL AFFAIRS, SPECIAL REPORT — DRUG TESTING 29-30 (1986); Perez-Rayes, Guiseppi, Mason & Davis, *Passive Inhalation of Marijuana Smoke and Urinary Excretion of Cannabinoids*, 34 CLINICAL PHARMACOLOGY AND THERAPEUTICS No. 1, at 36 (1983).

possession of drugs or alcohol,[124] safety violations,[125] theft,[126] assault and fighting,[127] threats,[128] falsifying records,[129] engaging in illegal strikes,[130] and

124. Day & Zimmerman, Inc., 88 Lab. Arb. (BNA) 1001 (1987) (Heinsz, Arb.) (improper discharge despite positive results after random, mandatory drug test); Durian Co., 85 Lab. Arb. (BNA) 1127 (1985) (Coyne, Arb.) (improper discharge for intoxication due to lack of evidence); Freeman United Coal Co., 82 Lab. Arb. (BNA) 861 (1984) (Roberts, Arb.) (proper discharge of grader operator in extreme state of intoxication who injured himself and damaged equipment in on-the-job accident); Hussman Refrigerator Co., 82 Lab. Arb. (BNA) 558 (1984) (Mikrut, Arb.) (discharge upheld of employee for possession of plastic bag of marijuana in his car parked on company property); Mallinckrodt, Inc., 80 Lab. Arb. (BNA) 1261 (1983) (improper discharge of employees who shared marijuana cigarette while on break); Refining Co., 79 Lab. Arb. (BNA) 196 (1982) (Saracino, Arb.) (improper discharge of employee for bringing beer on company premises and allegedly reporting to work under the influence of alcohol); Burns Int'l Security Serv., Inc., 78 Lab. Arb. (BNA) 1104 (1982) (Traynor, Arb.) (proper discharge of guard at nuclear plant for having marijuana seeds in his locker); Renaissance Center Partnership, 76 Lab. Arb. (BNA) 379 (1981) (Daniel, Arb.) (discharge of security officer who smoked marijuana with co-worker while on duty upheld); Hiram Walker & Sons, Inc., 75 Lab. Arb. (BNA) 899 (1980) (Belshaw, Arb.) (proper discharge of employee found to be under the influence of alcohol); Hooker Chem. Co., 74 Lab. Arb. (BNA) 1032 (1980) (Grant, Arb.) (discharge of employee for possession and use of marijuana in plant sustained); St. Joe Minerals Corp., 73 Lab. Arb. (BNA) 1193 (1979) (McDermott, Arb.) (proper discharge of employee for absenteeism due to alcoholism).

125. Alumax Mill Prods., Inc., 79 Lab. Arb. (BNA) 539 (1982) (Anderson, Arb.) (discharge of employee sustained who improperly left trainee in charge while employee took coffee break when molten aluminum spilled on floor); Kroger Co., 75 Lab. Arb. (BNA) 290 (1980) (Berns, Arb.) (proper discharge of meat cutter who ignited apron of co-worker while using knife to trim meat); Chayes-Virginian, Inc., 71 Lab. Arb. (BNA) 993 (1978) (Davis, Arb.) (discharge too severe for employee's failure to wear safety glasses as required).

126. Carnation Co., 84 Lab. Arb. (BNA) 80 (1985) (Wright, Arb.) (improper discharge of union steward for theft of fourteen legal pads he had obtained from supply room with intent of using them for company-union conferences); Fisher Foods, Inc., 82 Lab. Arb. (BNA) 505 (1984) (Abrams, Arb.) (discharge too severe a penalty for produce manager making unauthorized long distance calls on employer's phones); Food Giant, Inc., 79 Lab. Arb. (BNA) 833 (1982) (Dallas, Arb.) (discharge upheld of employee who put tomato in his pocket that had fallen from cart); Portsmouth Naval Shipyard, 76 Lab. Arb. (BNA) 373 (1981) (Hoban, Arb.) (proper discharge of employee who took a bag containing government items); Clark Oil & Refining Corp., 73 Lab. Arb. (BNA) 702 (1979) (Franke, Arb.) (discharge upheld of employee for theft of company tools which police had seized from employee's automobile).

127. Marco Mfg. Co., 84 Lab. Arb. (BNA) 134 (1985) (Richman, Arb.) (discharge of employee for fighting with fellow employee and making no attempt to evade confrontation upheld); Apex Int'l Alloys, Inc., 82 Lab. Arb. (BNA) 747 (1984) (Wright, Arb.) (discharge of employee who struck another employee when provoked improper); Harris Trucking Co., 80 Lab. Arb. (BNA) 352 (1983) (Sabo, Arb.) (discharge of employee for fighting improper since employee had been struck by subcontractor's employee and had been subjected to verbal harassment and assault for a year); Marquette Inn, 79 Lab. Arb. (BNA) 1259 (1982) (Flagler, Arb.) (discharge of larger employee who assaulted smaller employee proper); Gerber Prods. Co., 77

the like. For the discharge to stand, the cause must also be just.[131] Arbitrators,

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Lab. Arb. (BNA) 1217 (1981) (Hays, Arb.) (discharge of employee for fighting with co-workers proper despite contention that co-worker threw jar lids at and pushed dolly towards employee); Union Camp Corp., 71 Lab. Arb. (BNA) 866 (1979) (Duff, Arb.) (discharge of employee who punched union committeeman upheld).

128. Solar Turbines, Inc., 85 Lab. Arb. (BNA) 293 (1985) (Kaufman, Arb.) (discharge of employee for allegedly threatening fellow employee improper); Marquette Inn, 79 Lab. Arb. (BNA) 1259 (1982) (Flagler, Arb.) (discharge of doorman for assault on co-worker which was instigated by "fighting words" upheld); St. Regis Paper Co., 74 Lab. Arb. (BNA) 1281 (1980) (Kaufman, Arb.) (discharge of employee who threatened to rape a co-worker proper); Pioneer Transit Mix Co., 72 Lab. Arb. (BNA) 206 (1979) (Darrow, Arb.) (discharge of union steward who threatened a truck driver upheld).

129. Morton Thiokol, Inc., 85 Lab. Arb. (BNA) 834 (1985) (Williams, Arb.) (discharge upheld for employee who failed to state on employment application that previous employer had fired him for problems with supervisors); Golden Eagle Distribs., Inc., 85 Lab. Arb. (BNA) 279 (1985) (D'Spain, Arb.) (discharge of employee for allegedly falsifying time card overturned); Owens-Illinois, 83 Lab. Arb. (BNA) 1265 (1984) (Cantor, Arb.) (discharge of employee for failing to include information concerning back injury on employment application found proper); Plough, Inc., 80 Lab. Arb. (BNA) 1005 (1983) (Flannagan, Arb.) (discharge of employee for allegedly falsifying company records improper); United States Steel Corp., 74 Lab. Arb. (BNA) 354 (1980) (Simpkins, Arb.) (discharge of employee who cited divine inspiration for falsifying employment application so as not to reveal that he had been under psychiatric care upheld); Gardner-Denver Co., 71 Lab. Arb. (BNA) 1126 (1978) (Dunn, Arb.) (discharge of employee for falsifying employment application by omitting information concerning felony conviction held proper).

130. Fraser Shipyards, Inc., 78 Lab. Arb. (BNA) 129 (1982) (Greco, Arb.) (discharge improper for employees who engaged in wildcat strike); Berc Bldg. Maintenance Co., 76 Lab. Arb. (BNA) 487 (1981) (Pritzker, Arb.) (discharge of employee for refusing to work and encouraging another employee to strike in protest against late delivery of paychecks in violation of no-strike clause proper); Traverse City Iron Works, 67 Lab. Arb. (BNA) 21 (1980) (Heinsz, Arb.) (discharge of employee for cursing and threatening supervisor and for carrying picket sign that said "UAW on Strike for Equity" that resulted in work stoppage upheld); Superior Switchboard & Devices Divs., 75 Lab. Arb. (BNA) 1107 (1980) (Seinsheimer, Arb.) (discharge penalty too severe for employees who actively led strike in violation of no-strike clause, since supervisory employees did nothing to discourage strike); City of Tampa, Florida, 75 Lab. Arb. (BNA) 836 (1980) (Nachring, Arb.) (city employer improperly selected sanitation worker for discharge for allegedly participating in or instigating illegal work stoppage); Price Bros., 74 Lab. Arb. (BNA) 748 (1980) (Laybourne, Arb.) (discharge of employee who participated in wildcat strike to greater degree than other strikers upheld); Quanex, Mac Steel Div., 73 Lab. Arb. (BNA) 9 (1979) (McDonald, Arb.) (discharge of employee who was one of primary agitators and leaders of illegal walkout proper); Clinton Corn Processing Co., 71 Lab. Arb. (BNA) 555 (1978) (Madden, Arb.) (employer properly discharged union executive board members, employees, and probationary workers who participated in illegal work stoppage resulting from employer's refusal to reinstate employee who was discharged for theft of company property).

131. The concept of "just cause" for discipline and discharge of employees is one of the most important principles in labor-management relations. Indeed, some

like judges who must determine the sentence for or the probation of convicted felons, must consider the terms of the punishment for the offense and whether mitigation is in order.[132] Before the final penalty is assessed, the arbitrator

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arbitrators have implied just cause limitations in collective bargaining agreements even where there was no explicit provision. F. ELKOURI & E. ELKOURI, *supra* note 4, at 652. A survey has shown that more than 90% of the major collective bargaining agreements contain a "just cause" or a "cause" provision in regard to discipline and discharge. 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) § 40:1 (1983).

Although the notion of requiring just cause for discipline is well accepted in the labor relations field, few collective bargaining agreements define the term any further. Gene McKelvey, a noted arbitrator and authority in the field, has commented on the concept as follows:

> What is just cause? Unlike other substantive areas of contract construction involving the interpretation and application of contract language to such matters as seniority, wage rates, hours, and overtime and fringe benefit entitlement, the determination of just cause involves a value judgment on the part of the arbitrator. [One should consider] Lawrence Stessin's definition of just cause: "What a reasonable person, mindful of the habits and customs of industrial life and standards of justice and fair dealing, would decide." (Stessin 1973). Such a decision, Stessin elaborates, involves the use of common sense and a knowledge of industrial standards governing employee deportment as well as of the common understanding governing the relationship of the particular parties.
>
> It should be obvious that these standards of common sense, reasonableness, and fair dealing are slippery and elusive, wholly lacking in objectivity and concreteness. . . . [H]owever, once just cause clauses were adopted, arbitrators began to develop certain principles and criteria to apply to just cause cases, thereby creating a body of common law that served to reduce some of the elements of unpredictability and surprise that might otherwise have made the process of arbitral review unacceptable to both parties.
>
> Although collective bargaining agreements, the past practice of the parties, and the particular facts of disciplinary incidents vary from case to case, arbitrators in general analyze each case in terms of the following considerations: (1) Was the alleged misconduct proved to the complete satisfaction of the arbitrator? (2) If so, was it of such a nature as to warrant disciplinary action? (3) If the misconduct is proved, was it the result of provocation or other extenuating circumstances that might mitigate the guilt of the grievant? (4) Is there evidence that discrimination motivated the disciplinary action? (5) Was the misconduct of such a nature that it affected the employer-employee relationship. . . ? (6) Did the employer adhere to principles of corrective or progressive discipline?

MCKELVEY, *Discipline and Discharge*, ARBITRATION IN PRACTICE 89-91 (1984); *see also* Abrams & Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594.

132. *See, e.g.*, Morgan Adhesives Co., 87 Lab. Arb. (BNA) 1039 (1986) (Abrams, Arb.) (employee reinstated whose absenteeism was due to alcohol problem, which employee acknowledged and for which he sought treatment); Signal Delivery Serv., Inc., 86 Lab. Arb. (BNA) 75 (1985) (Weis, Arb.) (reinstatement without back pay of truck driver who was involved in two accidents due to intoxication because of

must evaluate factors such as the employee's work record, i.e., is the person a first-time or chronic offender;[133] with what degree of intent or culpability the employee acted;[134] whether the rules have been equally enforced against all employees;[135] and whether the rehabilitation of the worker is a realistic

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unblemished 22 year work record); Shell Oil Co., 83 Lab. Arb. (BNA) 787 (1984) (Allen, Arb.) (six day suspension for absenteeism improper where employee previously had received a written warning notice and then maintained a good absence record for eight months); *see also* F. ELKOURI & E. ELKOURI, *supra* note 4, at 670-88; Abrams & Nolan, *supra* note 131, at 608-09, 611-12, 621-22.

133. Southwestern Bell Tel. Co., 85 Lab. Arb. (BNA) 567 (1985) (Penfield, Arb.) (suspension of employee for refusing callout upheld, even though on a date he was sick, since he had failed to tell his supervisor that he was sick and he had received numerous warnings about refusals to accept callouts); Shell Oil Co., 83 Lab. Arb. (BNA) 787 (1984) (Allen, Arb.) (improper penalty of six day suspension for excessive absenteeism where employee had maintained a good record for eight months after written warning); Van Dyne-Crotty Co., 81 Lab. Arb. (BNA) 1209 (1983) (Murphy, Arb.) (discharge of employee for tardiness upheld when he had another employee punch his card to avoid being late since employee had received four written warning notices within 12-month period); Dahlstrom Mfg. Co., 78 Lab. Arb. (BNA) 302 (1982) (Gootnick, Arb.) (discharge of employee for drinking on the job upheld, since employee was given "last chance" return to work from earlier termination due to alcohol problems); Rohr Indus., 76 Lab. Arb. (BNA) 273 (1980) (Weiss, Arb.) (proper discharge of employee for distributing newspaper of socialist workers' party in the work area after warning that such distribution violated plant rules); Bethlehem Steel Co., 72 Lab. Arb. (BNA) 1036 (1979) (Aronin, Arb.) (improper suspension of employee for absenteeism since two prior warnings in employee's file were not related to absenteeism).

134. Porter Equip. Co., 85 Lab. Arb. (BNA) 1082 (1985) (Lieberman, Arb.) (improper suspension of employee for failure to follow instructions, since employee was a Vietnamese who did not speak or understand English very well); Potlatch Corp., 82 Lab. Arb. (BNA) 445 (1984) (Kapsch, Arb.) (discharge upheld of employee who fraudulently attempted to obtain reimbursement for hunting boots which he claimed were safety boots); Whitehall-Coplay School Dist., 76 Lab. Arb. (BNA) 325 (1981) (Quinn, Arb.) (proper suspension and written reprimand to teacher who recklessly risked students' safety by requiring them to finish an examination during a bomb threat); *see also* Sunshine Mining Co. v. United Steelworkers Local 5089, 823 F.2d 1289 (9th Cir. 1987) (arbitrator's interpretation of contractual clause that required just cause for discharge to encompass a mental fault element was proper).

135. Georgia Pac. Corp., 81 Lab. Arb. (BNA) 179 (1983) (Szollosi, Arb.) (discharge of employee who left plant allegedly due to illness was proper even though other employees left plant for same reason); W.R. Case & Sons Cutlery Co., 80 Lab. Arb. (BNA) 902 (1983) (Hewitt, Arb.) (employer improperly suspended and demoted employee for poor performance when no other employees had been disciplined for poor quality work performance); Litton Microwave Cooking Prods., 75 Lab. Arb. (BNA) 724 (1980) (O'Connell, Arb.) (employer discriminated against militant union adherent who participated in strike when it refused to reimburse employee for damage to truck parked on company lot after returning from strike, when non-striking employees and others were reimbursed for damage to their vehicles during strike); Anderson Elec. Connectors, 75 Lab. Arb. (BNA) 214 (1980) (Hardin, Arb.) (rule prohibiting foundry employees who are continuously exposed to traces of airborne

possibility.[136] In other words, before sustaining a discharge, even for actions involving a violation of explicit external law, an arbitrator is duty-bound under a just cause clause to consider all of the pertinent facts and circumstances. Courts under the guise of public policy should not usurp this critical arbitral function.

When the interpretation of a labor agreement implicitly or even explicitly involves considerations of external law, it should be done by the arbitrator. It is the arbitrator's decision that the parties have negotiated for and intended when they agreed that their contractual disputes would be resolved by final and binding arbitration rather than economic weapons or court actions. Where a company and a union agree to allow an arbitrator to determine whether a discharge is for just cause and the appropriateness of the remedy, the arbitrator, and not a court, should decide the weight to be given to public policy considerations. As noted by Judge Harry Edwards, a former labor arbitrator and member of the National Academy of Arbitrators,[137] in a case

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lead from eating and drinking in foundry while permitting others to eat or drink while passing through foundry, upheld); Mobil Oil Corp., 75 Lab. Arb. (BNA) 143 (1980) (Herman, Arb.) (penalty of 20-day suspension too severe for black employee who was charged with violating company rules, where customary discipline for similar infractions varied from written reprimands to 3-5 day suspensions); Price Bros., 74 Lab. Arb. (BNA) 748 (1980) (Laybourne, Arb.) (discharge of employee who participated in wildcat strike to greater degree than other employees upheld).

136. Day & Zimmerman, Inc., 88 Lab. Arb. (BNA) 1001 (1987) (Heinsz, Arb.) (improper discharge despite positive results after random drug test when employer failed to abide by mandatory drug abuse counselling program); Cleveland Elec. Illuminating Co., 88 Lab. Arb. (BNA) 781 (1987) (Morgan, Arb.) (discharge too severe for employee with excessive tardiness and absenteeism due to use of drugs and alcohol, since employee had rejected intoxicants and had sought professional help in rehabilitation efforts); Ohio River Co., 83 Lab. Arb. (BNA) 211 (1984) (Hewitt, Arb.) (discharge of deck hand who fell overboard due to intoxication found improper where employee admitted alcohol problem and had joined Alcoholics Anonymous); Bemis Co., 81 Lab. Arb. (BNA) 733 (1983) (Wright, Arb.) (proper discharge of employee for absenteeism that employee claimed was due to alcohol, since employer had previously reinstated employee after completing company-sponsored rehabilitation program); Indianapolis Rubber Co., 79 Lab. Arb. (BNA) 529 (1982) (Gibson, Arb.) (discharge overturned of employee who had accumulated sufficient points under absentee program for discharge, but all infractions were due to alcoholism and the employer had never given the employee a chance to enroll in company-paid alcohol rehabilitation program); Continental Airlines, Inc., 75 Lab. Arb. (BNA) 896 (1980) (Ross, Arb.) (proper discharge of employee found sleeping on the job after he refused to enter rehabilitation program for drugs and alcohol); St. Joe Minerals Corp., 73 Lab. Arb. (BNA) 1193 (1979) (McDermott, Arb.) (discharge for excessive absenteeism overturned of employee who was known to have alcohol problems at the time of discharge but was not offered treatment opportunity by the company).

137. *See* Edwards, *Advantages of Arbitration Over Litigation: Reflections of a Judge*, in Proc. of 35th Ann. Meeting, Nat'l Academy of Arbitrators, ARBITRATION 1982-CONDUCT OF HEARING, at 16. The National Academy of Arbitrators is a professional organization of labor arbitrators who have been selected for membership on

involving just such an issue of a court reviewing an arbitrator's reversal of an employer's decision to terminate an employee despite a challenge that such violated external law:

> When construction of the contract implicitly or directly requires an application of 'external law,' *i.e.*, statutory or decisional law, the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it. Since the arbitrator is the 'contract reader,' his interpretation of the law becomes part of the contract and thereby part of the private law governing the relationship between the parties to the contract.[138]

Only if the award directly infringes upon the positive law rights of the parties, as in *Jones Dairy Farm*, or has the effect of mandating illegal conduct, as in *American Postal Workers Union*, should courts overturn the award as a violation of public policy. If not so limited, courts, as in *Great Western Food* or *Misco*, will use the *Enterprise Plus* doctrine of public policy to usurp the arbitral process in order to correct what they perceive as mistaken arbitral awards.[139] As one commentator noted:

> To the famous statement, "Public policy is an unruly horse and dangerous to ride," Professor Corbin gave the unanswerable reply, "However unruly the horse may be, it is not possible for the courts to refuse to ride." We may criticize the courts for their horsemanship, but not for riding the horse on which contract principles placed them.[140]

W.R. Grace requires courts to scrutinize arbitral opinions with public policy in mind. However, a mere finding that an arbitral award implicates some specific statutory or judicial rule should be an insufficient basis for overturning the decision. Otherwise the exception will be too broad and the finality of arbitral decisions undermined. It is this finality, in addition to the relative speed and flexibility of arbitration, that has caused parties to forgo other means of dispute resolution such as strikes, lock-outs, or court litigation.[141] This essential strength of the arbitration system will be significantly diluted if the losing party knows that it has a good chance of having an arbitral award overturned by invoking the talisman of public policy.

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the basis of substantial and current experience as an arbiter of labor-management disputes. *See* F. ELKOURI & E. ELKOURI, *supra* note 3, at 20-21.

138. American Postal Workers Union v. United States Postal Serv., 789 F.2d 1, 6 (D.C. Cir. 1986).

139. *See supra* note 83.

140. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 557 (1969).

141. Since its earliest rulings, the Supreme Court has emphasized that the arbitration system is the "quid pro quo" for the no-strike/no lockout promises in the collective agreement. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); Boys Mkts., Inc. v. Retail Clerks Union, 398 U.S. 235 (1970); Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974).

The Supreme Court in *W.R. Grace* not only concluded that the public policy must be "explicit" and "well defined," but it must also be "dominant."[142] In addition to finding some contrary law which may be on point, a reviewing court should consider both causation and degree of infringement upon the public policy before setting aside an arbitral award. Only in instances where an order of an arbitrator causes a party to violate an explicit external law or where an arbitral award directly impinges upon the public law rights of a person should a court utilize the public policy exception of the *Enterprise Plus* standard.

The final circumstance of the *Enterprise Plus* doctrine under consideration here is where the parties by joint agreement confer upon the arbitrator the authority to apply external law to their contractual dispute.[143] In such a situation the employer and the union specifically request an interpretation of their contract in light of public law. Here the arbitrator cannot avoid utilizing public policy since the contractual issue has become encompassed in the question of external law. Indeed, to refuse to consider outside statutes or case law would be error since the arbitrator's authority is drawn from and circumscribed by the agreement of the parties.[144]

In this third instance, a court should apply a different standard of review to an arbitral award than when an arbitrator applies external law on his own or where the award is alleged to conflict with public policy. Here the parties by agreement have made a choice of laws as to how a contract issue will be determined. This often occurs in commercial agreements.[145] However, in this circumstance, rather than the law of New York or Texas or California, the parties have requested application of the law of the arbitral system in light of the pertinent external law considerations.[146] In such an instance, which will be referred to as "devolution," courts should give much deference to the arbitral award if certain safeguards and conditions are met. This standard of review would be more akin to that under *Enterprise Wheel* rather than *Enterprise Plus*.

First, the issue under the collective bargaining agreement must interrelate clearly with the public law question. The arbiter cannot sit simply to decide

142. W.R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers, 461 U.S. 757, 766 (1983).

143. The most common situation where such occurs is in regard to the "deferral" doctrine under the National Labor Relations Act. In Collyer Insulated Wire, 192 N.L.R.B. 837 (1971), the NLRB held that it would defer the decision in an unfair labor practice case to the parties' arbitration mechanism where the parties agreed to resort to arbitration and the meaning of the contract was at the center of the dispute before the Board. *Id.* at 842; *see* R. GORMAN, LABOR LAW 751-61 (1976); *see also* George Banta Co., 74 Lab. Arb. (BNA) 388 (1980) (Goldberg, Arb.); Michigan Consol. Gas Co., 58 Lab. Arb. (BNA) 1058 (1972) (Shister, Arb.).

144. *See supra* text accompanying notes 16-21.

145. RESTATEMENT (SECOND) OF CONFLICTS §§ 186-188 (1971).

146. *See* Feller, *supra* note 9, at 106-07.

public law disputes between the parties. For instance, a company and a union could not expect an arbitrator to make a unit determinations under section 9 of the NLRA[147] or to decide whether a manufacturing process violated standards promulgated by the Environmental Protection Agency,[148] if such issues had no relationship to their collective bargaining agreement.

Secondly the parties must inform the arbitrator at the outset of the arbitral proceeding that he or she is to consider the contractual dispute in light of external law. It would be inappropriate for the devolution principle to apply where an arbitrator is unaware of the public law issue. For instance, assume the parties submit to the arbitrator, under the just cause provision of their contract, the validity of a company's discharge of an employee, who is also a union steward, for allegedly engaging in a fight.[149] If the company and the union do not inform the arbitrator or submit as an issue that, regardless of the fight, there is a question as to whether the grievant was terminated because of anti-union animus, one should not say that the arbitrator has decided this public law issue in determining whether the discharge was for just cause.[150]

Thirdly the arbitral forum must be compatible with a full and fair presentation of the external law issue. Some legal questions simply require the fact finding processes of the litigation system.[151] In those instances parties cannot simply contract away judicial determination, particularly where individual rights are involved.[152] Suppose a grievant alleges an improper denial of a promotion under the terms of a provision in a labor agreement which allows the company to make promotions solely on the basis of qualifications. If the grievant claims racial discrimination in the application of the company rule by proving on the basis of statistical data the disproportionate impact of the neutral rule on minorities,[153] the lack of adequate discovery tools in

147. Section 9(b) of the NLRA provides that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . ." 29 U.S.C. § 159(b) (1982); *see, e.g.*, Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964).

148. 42 U.S.C. §§ 4321-4370 (1982).

149. *See, e.g.*, Iowa Dep't of Gen. Servs., 79 Lab. Arb. (BNA) 852 (1982) (Mikrut, Arb.); Nickles Bakery, Inc., 73 Lab. Arb. (BNA) 801 (1979) (Letson, Arb.); Furr's, Inc., 72 Lab. Arb. (BNA) 960 (1979) (Leeper, Arb.).

150. *See, e.g.*, Nevins v. NLRB, 796 F.2d 14 (2d Cir. 1986).

151. Traditionally discovery procedures have been limited in arbitration cases. One of the strengths of arbitration is its relative speed and informality. As a result, courts and arbitrators have hesitated to incorporate the full panoply of discovery procedures as exist in civil lawsuits. O. FAIRWEATHER, *supra* note 40, at 133-34.

152. *See supra* note 71.

153. In the landmark case of Griggs v. Duke Power Co., 401 U.S. 424, 431, (1971), the Supreme Court found that objective employment selection devices, such

arbitration may be too great a barrier for devolution to occur.[154] On the other hand, simply because certain statutory rights present difficult and complex issues to an arbitrator should not *ipso facto* require complete judicial disregard of the parties' selected method of resolution.

It is not the general nature of the issue but its precise characteristics that should determine the propriety of the arbitral process and the extent of judicial review. For example, in cases where an employee claims that a discharge was because of sex discrimination, a complaint filed with the Occupational Safety and Health Commission, or the filing of a workers' compensation claim, individual statutory rights as well as contractual matters would certainly be involved. However, arbitrators routinely decide such issues of causation in discipline cases.[155] If the claim concerns the exact basis for the company's action and whether disparate treatment occurred, an arbitrator's decision should not be dismissed by a court since the arbitral process is sufficient to develop the underlying factual claims.[156]

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as tests, which are "fair in form, but discriminatory in operation" had an adverse impact on minorities and were violative of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-1 to -17. This disproportionate impact method of analysis has been applied to numerous other employment criteria. *See* B. SCHLEI & P. GROSSMAN, *supra* note 73, at 80-205.

154. As the Supreme Court stated in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), in determining that a federal court in a Title VII case was not bound by a prior arbitration award:

> Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, testimony under oath, are often severely limited or unavailable.

Id. at 57-58; *see also supra* note 74.

155. *See, e.g.*, Customs Serv., 80 Lab. Arb. (BNA) 777 (1983) (Allen, Arb.) (denial of female employee's shift request claimed to be on basis of sex discrimination); United Technologies Corp., 80 Lab. Arb. (BNA) 92 (1982) (Bloch, Arb.) (application of non-discrimination clause in contract with regard to handicapped employee); Bay Area Rapid Transit Dist., 79 Lab. Arb. (BNA) 1171 (1982) (Koven, Arb.) (application of handicap anti-discrimination laws in regard to allegations of employer discrimination against employees who were unable to perform full scope of duties under job descriptions); Flint Bd. of Educ., 77 Lab. Arb. (BNA) 244 (1981) (Daniel, Arb.) (employer not required to follow strict seniority when filling apprenticeship program with female and minority applicants); Max Factor & Co., 73 Lab. Arb. (BNA) 742 (1979) (Jones, Arb.) (decision regarding female employees' claims that affirmative action plan violated contractual seniority provisions); American Stevedoring Corp., 72 Lab. Arb. (BNA) 559 (1979) (Ables, Arb.) (arbitrator rejected claims that employees were discharged because of race and sex discrimination); County of Santa Clara, 71 Lab. Arb. (BNA) 290 (1978) (Koven, Arb.) (decision regarding allegations of sex discrimination in reclassification of female employees); Page Dairy Co., 42 Lab. Arb. (BNA) 1051 (1964) (Kiroff, Arb.) (allegation that employee was discharged after filing several workers' compensation claims).

156. Such issues as motive, causation, and credibility can be adequately raised

In determining the deference to be given the arbitral process in public policy cases, courts have also alluded to the competence of arbitrators, particularly those who are not attorneys.[157] This issue is probably less troublesome in actual practice. Despite the accolades of arbitral omniscience by Justice Douglas in the *Trilogy* as to industrial relations in the shop,[158] arbitrators often are presented with issues outside of their individual expertise. Routinely labor arbitrators must decide matters requiring an understanding of the intricacies of an operation[159] or the rapidly developing technology of an industry[160] of which he or she had no knowledge prior to arriving at the hearing. The parties in their own self interest either will choose an expert on the matter involved[161] or will educate the arbiter as to the complexities of the situation. Not surprisingly, the same process occurs when a case involves a matter of public law. If resolution requires the special analytical competence

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and resolved through the grievance-arbitration procedures. *See* Heinsz, *An Arbitrator's Authority to Subpoena: A Power in Need of Clarification*, in Proc. of the 38th Ann. Meeting, Nat'l Academy of Arbitrators, ARBITRATION 1985, LAW AND PRACTICE at 201 (1986).

157. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 n.18 (1974); Misco, Inc. v. United Paperworkers Int'l Union, 768 F.2d 739, 741 n.2 (5th Cir. 1985), *cert. granted*, 107 S. Ct. 871 (1987).

158. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-83 (1960).

159. *See, e.g.*, Glenmore Distilleries Co., 80 Lab. Arb. (BNA) 1043 (1983) (bourbon whiskey distillery); Peoria Water Co., 80 Lab. Arb. (BNA) 478 (1983) (Fitzsimmons, Arb.) (electronic leak detection); Bell Tel. Co., 75 Lab. Arb. (BNA) 750 (1980) (Garrett, Arb.) (self contained electronic switching system); Printing Indus. of Metro. Washington, D.C., Inc., 71 Lab. Arb. (BNA) 838 (1978) (Ables, Arb.) (Heidelberg five color, offset, perfecting printing press); Leavenworth Times, 71 Lab. Arb. (BNA) 396 (1978) (Bothwell, Arb.) (publishing company converted from hot-metal to cold-metal type setting process); Kansas City Power & Light Co., 71 Lab. Arb. (BNA) 381 (1978) (Elkouri, Arb.) (computer programming and system design); Continental Oil Co., 71 Lab. Arb. (BNA) 185 (1978) (Towers, Arb.) (company introduced new large reactors permitting merger of vinyl dryers department and large reactors department).

160. *See supra* notes 10-11.

161. There are a variety of methods for selecting arbitrators. Often arbitrators are chosen by mutual agreement between the parties. In other instances, parties will designate agencies such as the American Arbitration Association or the Federal Mediation & Conciliation Service to provide lists of names of arbitrators to hear disputes. Sometimes parties agree on a single individual to serve as a permanent umpire to handle all arbitration disputes or a permanent panel of arbitrators from whom they will select an individual to hear a particular matter. In other instances parties select arbitrators on an ad-hoc basis as disputes arise. *See* F. ELKOURI & E. ELKOURI, *supra* note 4, at 118-37; O. FAIRWEATHER, *supra* note 40, at 79-96; C. UPDEGRAFF, ARBITRATION AND LABOR RELATIONS 102-07 (3d ed. 1970). Further, there are numerous services that list the qualifications of arbitrators. Thus, the parties are able to choose an individual who can settle the type of dispute which they have encountered. Indeed, evidence indicates that this selection of judges by the parties leads to a greater acceptability of decisions. Edwards, *supra* note 137, at 25.

of an attorney, there are many lawyer-arbitrators from which parties can choose.[162] As to the non-attorney arbitrator, the parties can fully inform him or her as to the underlying legal principles upon which the case should turn.

Another qualm often expressed with the arbitral process, particularly when individual rights are concerned, is the aspect of union control of the employee's grievance.[163] However, once the case proceeds to the arbitration stage, by definition the matter will be considered by a neutral outsider. That arbitrator has a duty to insure a full and fair hearing,[164] and the nature of the process tends to require both company and union representatives to advocate their cause fully. Moreover, the duty of fair representation acts as a curb upon perfunctory presentation of a case and the tainting of an arbitrator's decision due to inadequate advocacy by a union.[165]

Thus, where the basis of the grievance claim involving public law can be fully and fairly developed in the arbitral forum, devolution would be proper. Further, since under this concept the parties must jointly submit the external law issue to the labor arbitrator,[166] the presumption should be in favor of the parties' choice of forum and decision-making process.[167]

Finally, for the devolution principle to apply, it must be shown that the arbitrator considered the public policy issue and applied what might be described as "a" correct legal standard.[168] In delegating to an arbitrator the external law question which intertwines itself with the contractual issue, a company and union assume that the arbitrator will employ accepted legal principles. This, of course, is somewhat of an overstatement since the law

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162. C. UPDEGRAFF, *supra* note 161, at 108.

163. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 n.19 (1974).

164. The code of professional ethics for labor arbitrators promulgated by the National Academy of Arbitrators, the American Arbitration Association and the Federal Mediation and Conciliation Service specifically provides: "An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument." CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATION OF LABOR-MANAGEMENT DISPUTES Canon 5(A)(1), at 19 (1974). Moreover, the failure of an arbitrator to allow a party to introduce material evidence at a hearing or an arbitrator acting in a partial manner are grounds to set aside an award. 9 U.S.C. § 10(c) (1982).

165. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567-68 (1976); Local 249, Int'l Bhd. of Teamsters v. Western Pennsylvania Motor Carriers Ass'n, 574 F.2d 783, 786 n.5 (3d Cir.), *cert. denied*, 439 U.S. 828 (1978); Harrison v. Chrysler Corp., 558 F.2d 1273, 1276-77 (7th Cir. 1977), *rev'd on other grounds*, Rupe v. Spector Freight Systems, 679 F.2d 685, 690 (7th Cir. 1982); Hart v. National Homes Corp., 668 F.2d 791, 793 (5th Cir. 1982).

166. *See supra* text accompanying notes 149-50.

167. Moreover, in situations where the employee files the grievance which initiates the arbitration procedure, the worker too should be presumed to have chosen the contractual dispute resolution procedures. *See* Peoples v. Pennsylvania Power & Light Co., 638 F. Supp. 402 (M.D. Pa. 1985).

168. *See infra* text accompanying notes 171-86.

on a particular matter might be uncertain, the parties might dispute which legal standard is applicable, or the case may involve contested, mixed questions of law and facts. In such circumstances, the parties by jointly bringing the issue before the arbitrator have also, in essence, conferred upon the arbitrator the choice of which legal standard should be utilized. So long as there is some support for this choice, and absent a manifest disregard of the law, the arbitrator's decision should bind the parties.

Where the factors of devolution occur, a reviewing court should not reject an arbitrator's award simply because a statutory public policy is also involved. On the other hand, in a devolution situation a company and union cannot expect only the limited "essence of the contract" review standard. Their inclusion of the external law issue in the arbitral process means that there is also a matter of public interest in the case which can transcend the parties' private contract matter.[169] However, since there has been not only a choice of forums but also, in a sense, a "choice of laws" or a "choice of legal interpreters," the court should limit its review to determining whether the four principles of devolution exist.[170] If so, the court should set aside the award only when there is a clearly erroneous application of the external law.

A good example of the operation of the devolution principle, as here espoused, is in two cases from the Ninth Circuit, *Broadway Cab Cooperative, Inc. v. Teamsters Local Union No. 281*,[171] and *Teamsters Local No. 162 v. Mitchell Brothers Truck Lines*,[172] both of which involved similar external law issues, applied the principle of devolution, but reached different results as to the finality of an arbitrator's award. In both cases the companies and unions had submitted to arbitration the issue of whether individuals, in *Broadway Cab*, cab drivers and in *Mitchell Brothers*, truck drivers, were employees or independent contractors for purposes of union security agreements[173] and, if the individuals were not employees, whether the appli-

169. *See supra* note 75.

170. The principles of the devolution doctrine espoused here are: (1) the issue being arbitrated under the collective bargaining agreement must interrelate with the public law question, (2) the parties agreed to submit the contract issue in light of the external law to the arbitrator; (3) arbitration must provide a full and fair forum for the external law issue and (4) the arbitrator must consider the public policy issue and apply a correct legal standard. *See supra* text accompanying notes 147-69.

171. 710 F.2d 1379 (9th Cir. 1983).

172. 682 F.2d 763 (9th Cir. 1982).

173. Union security agreements are contractual arrangements between employers and unions which require employees to become members of or to pay financial support to a union for representation and collective bargaining services. R. GORMAN, *supra* note 143, at 639-76. The National Labor Relations Act specifically allows such arrangements to require employees to become members of a union within thirty days of hire. 29 U.S.C. § 158(a)(3) (1982); *see also* Chicago Teachers Union Local 1 v. Hudson, 475 U.S. 292 (1986); Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435 (1984); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); NLRB v. General Motors

cation of the contract would require the companies to cease using the individuals' services in violation of Section 8(e) of the NLRA.[174]

In these cases the external law was clearly interrelated with the contractual questions. Further, the parties expressly submitted the issues to the arbitrators to decide the contractual matters in light of external law considerations. Although both issues were complex legally as well as factually, the arbitration process was sufficient to produce the necessary evidence for a fair decision. Thus, the first three factors of the devolution theory were present.

In both cases the arbitrators held that the individuals were employees and, thus, there was no section 8(e) violation. The employers sought to vacate both awards. In *Mitchell Brothers* the company argued that the arbitrator had used an outmoded legal standard for the critical decision of whether the truck drivers were employees or independent contractors. The court quite properly looked at the legal standard and concluded that the arbitrator was required by Supreme Court precedent to use a common law agency test.[175] The arbitrator in his opinion stated that he had relied on the case of *NLRB v. Hearst Publication*,[176] which the court noted was "a case whose standard for determining employee status was overruled by amendment of the Wagner Act and by the case of *NLRB v. United Insurance Co.*"[177] The court further noted that the appropriate principle was the common law agency test for determining employee or independent contractor status as illustrated in the Restatement (Second) of Agency section 220.[178] Nevertheless, the court upheld

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Corp., 373 U.S. 734 (1963). Thus, individuals who are considered employees would be required to maintain membership or pay dues in accordance with a union security agreement; whereas, independent contractors would not be covered by such an agreement.

174. Section 8(e) of the National Labor Relations Act, in pertinent part, provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .

29 U.S.C. § 158(e) (1982). This provision proscribes so-called "hot-cargo" agreements causing an employer to enter into an agreement to engage in a secondary boycott. W. OBERER, K. HANSLOWE, J. ANDERSEN & T. HEINSZ, *supra* note 86, at 393; *see* NLRB v. Enterprise Ass'n of Steam & Gen. Pipefitters, 429 U.S. 507 (1977); National Woodwork Mfr. Ass'n v. NLRB, 386 U.S. 612 (1967).

175. Local 162, Int'l Bhd. of Teamsters v. Mitchell Bros. Truck Lines, 682 F.2d 763, 766 (9th Cir. 1982).

176. 322 U.S. 111 (1944).

177. 682 F.2d at 766 (citing NLRB v. United Ins. Co., 390 U.S. 254 (1968)).

178. RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

the arbitrator's award because "[t]he Arbitrator did, *in fact*, use the 'common-law agency test' in arriving at his decision."[179] Even though the arbitrator cited an improper case and did not specifically state that he was using *United Insurance Company* or the Restatement, the arbitrator based his decision upon the degree of control which the company exercised over the employees and analyzed a number of other factors to determine whether sufficient control existed.[180] This, the court found, was in essence the same way the common law agency test would be applied. Once the court concluded that the legal standard was a permissible one, it declined to review how the arbitrator applied the standard since that would be the equivalent of a review of the merits. The parties had delegated this decision to the arbitrator.

In *Broadway Cab* the court reversed the arbitrator's decision on essentially the same issue. Again the court reviewed the legal standard which the arbitrator had applied in the case. The arbitrator found that, since the company had referred to the cab drivers as "employees" in the parties' agreement, the estoppel doctrine prevented the employer from asserting an independent contractor status.[181] The court concluded that estoppel was an impermissible method of deciding cases involving section 8(e) issues. The reason for this was not because arbitrators cannot use the estoppel theory,[182] but rather because the Supreme Court in *Kaiser Steel Corp. v. Mullins*,[183] noted that an adjudicator must consider an employer's section 8(e) defense and cannot rely upon rules of estoppel.[184] According to the court, the particular legal standard chosen by this arbitrator was improper in light of the Supreme Court's specific mandate to determine the merits of a section 8(e) defense in such a situation. The court quite properly distinguished *Mitchell Brothers* as follows:

> Thus, in *Mitchell Brothers* we deferred to the arbitrator's resolution of the employee/independent contractor issue, a legal decision based on factual determinations, but engaged in an independent review of whether the legal standard applied by the arbitrator was contrary to Supreme Court precedent.[185]

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179. 682 F.2d at 766 (emphasis in original).

180. *Id.*

181. Broadway Cab Coop. v. Local 281, Int'l Bhd. of Teamsters, 710 F.2d 1379, 1381-82 (9th Cir. 1983).

182. *See, e.g.*, Monarch Mach. Tool Co., 74 Lab. Arb. (BNA) 854, 856 (Gibson, Arb.); Theodore Mayer & Bros., 62 Lab. Arb. (BNA) 540, 542 (1974) (MacIntosh, Arb.); Holland Die Casting & Plating Co., 58 Lab. Arb. (BNA) 173, 176 (1972) (Howlett, Arb.); Continental Distilling Sales Co., 52 Lab. Arb. (BNA) 1138, 1141 (1969) (Sembower, Arb.); *see also* F. ELKOURI & E. ELKOURI, *supra* note 4, at 399-401.

183. 455 U.S. 72 (1982).

184. 710 F.2d at 1383-84.

185. *Id.* at 1383.

Since the case directly involved a matter of public policy, the court was correct under the devolution principle in determining the propriety of the legal standard used by the arbitrator. But, whereas in *Mitchell Brothers* the arbitrator had used a proper legal principle, in *Broadway Cab* the arbiter had not. Thus, the latter decision could not stand.

The devolution doctrine will require a high level of sophistication and diligence by all involved in the process — management and union representatives, arbitrators, and judges. The legal issues, such as hot cargo clauses,[186] are often intricate and complex. The required presentation of applicable statutory and caselaw principles in arbitration cases involving public policy issues will undoubtedly increase the time and cost of such awards. Moreover, once the arbitration decision is reached, there must be a careful balancing of conflicting interests, particularly by reviewing courts, to insure that the legal standard is not an impermissible one and that the other factors for devolution are present, but without the court substituting its judgment on the merits of the award.

This principle of devolution may have an increasing import, particularly in cases involving deferral under the NLRA.[187] Due to *United Technologies Corporation*,[188] more cases involving individual statutory rights under sections 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2)[189] should be deferred by the NLRB to the arbitration process under the *Collyer* doctrine.[190] For instance, in an

186. *See supra* note 174.

187. *See supra* note 143; *see also* Morris, *NLRB Deferral to the Arbitration Process: The Arbitrator's Awesome Responsibility*, in Proc. of the 37th Ann. Meeting, Nat'l Academy of Arbitrators, ARBITRATION-1984, at 51-76.

188. 268 N.L.R.B. 557 (1984).

189. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in exercising their right to form labor organizations, bargain collectively or engage in concerted activities. Section 8(b)(1)(A) similarly makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of such rights. Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate against employees in order to encourage or discourage membership in a union. Section 8(b)(2) makes it an unfair labor practice for a union to cause an employer to commit such discrimination or for a union to discriminate on such a basis. 29 U.S.C. §§ 158(a)(1), (a)(3), (b)(1)(A), (b)(2) (1982).

190. The Board's policy on deferring unfair labor practice charges other than those under section 8(a)(5), which was the limit of Collyer Insulated Wire, 192 N.L.R.B. 837 (1971) (*see supra* note 143) has at best been a wavering one. In 1972 the Board expanded the *Collyer* deferral policy to cover charges under sections 8(a)(1) and (3)(8)(a) in a 3-2 decision. National Radio Co., 198 N.L.R.B. 527 (1972). In General Am. Transp. Corp., 228 N.L.R.B. 808 (1977), the Board again by 3-2 vote, deflated the doctrine so as to encompass only section 8(a)(5). Chairman Murphy provided the swing vote and noted the distinction between disputes essentially between the contracting parties, i.e., the company and the union, under sections 8(a)(5) and 8(b)(3) and those involving individual rights of employees under sections 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2). *Id.* at 810. In United Technologies Corp., 269 N.L.R.B.

unfair labor practice charge where a union steward claims that he was discharged for his union activities rather than for engaging in a fight, the NLRB now would defer to the arbitration process. Once the arbitrator made his or her decision, the Board would determine the propriety of the resolution of the statutory claim under *Olin Corporation*.[191] In that case the Board held that it would defer to an arbitrator's decision even though the arbitrator did not specifically rule on the unfair labor practice issue (1) if the contractual issue was parallel to the unfair labor practice issue and the parties generally presented the arbitrator with the facts underlying the unfair labor charge; (2) that any differences between the contractual issue and the unfair labor practice issue would go to the "clearly repugnant" standard, (3) as to the "clearly repugnant" standard, the arbitrator's decision need not be totally consistent with Board policy; and (4) that the Board would follow the arbitrator's decision unless the general counsel could prove that it was "palpably wrong."[192]

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557 (1984), by a 3-1 margin (there was one vacancy at the time), the Board returned to the *National Radio* view that the deferral doctrine should include cases alleging violations of individual rights under sections 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2).

191. 268 N.L.R.B. 573 (1984).

192. 268 N.L.R.B. at 574. In *Olin Corp.*, the Board departed from its prior review standards for arbitration decisions outlined in Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). In *Spielberg*, the Board had found that it would defer to the award of an arbitrator if: (1) the proceedings were fair and regular; (2) all of the parties agreed to be bound by the decision; and (3) the decision was not "repugnant to the purposes and policies of the Act." 112 N.L.R.B. at 1082. Later, the Board also required that the unfair labor practice issue before the Board had to be both presented to and considered by the arbitrator. Suburban Motor Freight, Inc., 247 N.L.R.B. 146 (1980). Under the Board's present view, as set forth in *Olin Corp.*, the specific unfair labor practice issue need be neither presented to nor considered by the arbitrator so long as there is factual parallelism between the contractual issue and the unfair labor practice issue. Further, under the *Olin* decision, the Board has determined that there will be deferral unless the arbitration award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act. The Board will "not require an arbitrator's award to be totally consistent with Board precedent." 268 N.L.R.B. at 574, 576. For example, in Reichhold Chem., 275 N.L.R.B. 1414, 120 L.R.R.M. (BNA) 1037 (1985), the union contended that the employer had improperly removed bargaining unit work in violation of the contract and of the National Labor Relations Act when it converted three union employees to supervisors. The Board held that deferral was required even though the arbitrator refused to consider the unfair labor practice issue because the contract and statutory issues were factually parallel. *See also* Ohio Edison Co., 274 N.L.R.B. 874, 118 L.R.R.M. (BNA) 1429 (1985); Martin Readi-Mix, Inc., 274 N.L.R.B. 559, 118 L.R.R.M. (BNA) 1425 (1985); United States Postal Serv., 275 N.L.R.B. 430, 119 L.L.R.M. (BNA) 1153 (1985). This new *Olin* doctrine of arbitral review by the N.L.R.B. has caused controversy. A number of courts have refused to accept Board rulings where an arbitrator did not rule on the unfair labor practice issue or reached a conclusion contrary to that under the NLRA. Darr v. NLRB, 801 F.2d 1404 (D.C. Cir. 1986); Nevins v. NLRB, 796 F.2d 14 (2d Cir. 1986); Taylor v. NLRB, 786 F.2d

Under *Olin Corporation* it is conceivable that, if the arbitrator was presented with evidence of the individual's status as a union steward and the factual issues concerning the alleged fight, the Board would uphold the arbitrator's decision to discharge the person even if there had been no specific claim at the arbitration proceeding that the discharge was motivated by union activity and even though the arbitrator had made no specific ruling on this issue.[193]

Rather than appealing this case to the NLRB for review under *Olin Corporation*, the losing party might also seek judicial review under section 301.[194] Such a situation would be entirely compatible with the deferral doctrine. There should be no notions of preemption or exclusive NLRB consideration[195] as to the arbitral decision that involves the statutory unfair labor practice issue, since, as *W.R. Grace* makes clear, it is the courts which are charged with insuring that arbitral decisions do not violate public policy.[196] Indeed, under the devolution principle a court should use a more exacting standard of review than the factors developed by the NLRB in *Olin Corporation*. At the outset, in order to determine whether devolution was proper, the court would have to consider whether the parties actually submitted the statutory issue and whether it was specifically considered by the arbitrator.[197] Even if such submission and consideration occurred, the court, as occurred in *Mitchell Brothers* and *Broadway Cab*, would decide whether the arbiter utilized a proper legal standard to determine causation and pretext claims under NLRA principles.[198] If there was not adequate consideration of

1516 (11th Cir. 1986); Garcia v. NLRB, 785 F.2d 807 (9th Cir. 1986). *But see* Lewis v. NLRB, 779 F.2d 12 (6th Cir. 1985). For further discussion of the Board's new deferral policy, see Mack & Bernstein, *NLRB Deferral to the Arbitration Process: The Arbitrator's Demanding Role*, 40 ARB. J. Sept. 1985, at 33, and Morris, *supra note* 187.

193. *See, e.g.*, Anderson Sand & Gravel, 277 N.L.R.B. 127, 121 L.R.R.M. (BNA) 1069 (1985), where a joint union-employer arbitration committee upheld the discharge of two employees who allegedly engaged in a wildcat strike. The Board deferred emphasizing that the contractual issue of whether the employees violated the no-strike clause was factually parallel to the unfair labor practice issue of whether the employees' statutory right to strike had been waived by the no-strike clause, even though the issue of waiver was not presented to the arbitration panel. *See also* Sachs Elec. Co., 278 N.L.R.B. 121, 121 L.R.R.M. (BNA) 1269 (1986) (deferral to arbitration committee decision upholding discharge of alleged union steward).

194. 29 U.S.C. § 187 (1982).

195. *See* Vaca v. Sipes, 386 U.S. 171 (1967); Local Joint Executive Bd. of Las Vegas Culinary Workers Local 226 v. Royal Center, Inc., 796 F.2d 1159 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 881 (1987); Associated Gen. Contractors v. Operating Eng'rs Local 701, 529 F.2d 1395 (9th Cir.), *cert. denied*, 429 U.S. 822 (1976); *see also* 2 Morris, *supra* note 28, at 1543-45.

196. W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber Workers, 461 U.S. 757, 766 (1983).

197. *See supra* text accompanying notes 147-50.

198. *See supra* text accompanying note 168.

the statutory issue or if the arbitrator applied an improper legal standard, the arbitral decision would violate the statutory public policy principles outlined in the NLRA and the court should vacate the decision.[199]

In these cases involving external law the arbitrator comes closer to an adjudicator who decides public law rights, than to a contract reader who makes decisions that substitute for industrial strife. If an arbitrator errs by misinterpreting private contract rights, the company or union can correct such in subsequent negotiations.[200] However, a clearly erroneous misapplication of individual statutory rights would be without redress unless there was a type of review as espoused under the devolution principle.

III. Wrongful Discharge Causes of Action

Another subject which labor law attorneys must consider today in regard to the finality of arbitration awards are lawsuits involving the employment at will doctrine.[201] Courts in at least twenty-nine jurisdictions have recognized some exception to the American common law principle that an employee is terminable at will.[202] These actions for wrongful discharge are perhaps the

199. *See supra* text accompanying notes 171-76.

200. As noted by Judge Edwards in American Postal Workers v. United States Postal Serv., 789 F.2d 1 (D.C. Cir. 1986), where an arbitrator makes a mistake in regard to contract interpretation "[t]he parties' remedy in such cases is the same remedy they possess whenever they are not satisfied with the arbitrator's performance of his or her job: negotiate a modification of the contract or hire a new arbitrator." *Id.* at 7.

201. Under the common law doctrine in the United States, employers, in the absence of specific contractual provisions to the contrary, were free to terminate employees for good reason, bad reason or no reason. Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Blumrosen, *Worker's Rights Against Employers and Unions: Justice Francis — A Judge for Our Season*, 24 Rutgers L. Rev. 480, 481 (1970); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481, 484-91.

202. Heinsz, *The Assault on the Employment at Will Doctrine: Management Considerations*, 48 Mo. L. Rev. 855, 857-58 n.14 (1983) (collecting cases from twenty-six states). Subsequent additions to the list are Arizona: Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984) (en banc); Hawaii: Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625 (1982); Kentucky: Firestone Textile Co. Div., Firestone Tire & Rubber Co. v. Meadows, 666 S.W.2d 730 (Ky. 1983); Brown v. Physicians Mut. Ins. Co., 679 S.W.2d 836 (Ky. Ct. App. 1984); New Mexico: Vigil v. Arzola, 101 N.M. 687, 687 P.2d 1038 (1984); North Dakota: Wadeson v. American Family Mut. Ins. Co., 343 N.W.2d 367 (N.D. 1984); *see also* McCone v. New England Tel. & Tel. Co., 393 Mass. 231, 471 N.E.2d 47 (1984); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985); Galante v. Sandez, 196 N.J. Super. 568, 483 A.2d 829 (1984), *appeal dismissed*, 103 N.J. 492, 511 A.2d 665 (1986); Holien v. Sears, Roebuck & Co., 298 Or. 76, 689 P.2d 1292 (1984); Annotation, *Modern Status of Rule That Employer May Discharge At-Will Employee For Any Reason*, 12 A.L.R.4th 544 (1982).

fastest growing causes of action in the field of labor relations today.[203] In limiting the employment at will doctrine, courts have utilized essentially three theories: (1) that the termination violates an express or implied contract term between the employer and the employee;[204] (2) that the discharge violates an implied obligation of good faith between the employer and employee;[205] or (3) that the termination violates public policy.[206]

Lawyers representing employers or unions have given little consideration to these wrongful discharge actions where there is a collective bargaining agreement between the parties limiting discharges to just cause and providing for arbitration of any such dispute. Indeed one of the reasons for the emergence of the wrongful discharge action was the lack of remedies for employees who were not covered under collective bargaining agreements.[207] When an employee's termination is arbitrated under a just cause provision, the parties might expect some federal court review under *Enterprise Wheel* but not much consideration has been given to possible state court action.

This notion has been seriously shaken by cases such as *Garibaldi v. Lucky Food Stores, Inc.*[208] In that case an arbitrator had upheld an em-

203. For instance, Professor William Gould noted that it has been estimated that at least one wrongful discharge action is filed every day in the California state courts. Gould, *Reflections on Wrongful Discharge Litigation and Legislation*, in Proc. of the 37th Ann. Meeting, Nat'l Academy of Arbitrators, ARBITRATION-1984, at 33.

204. *See, e.g.*, Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); Pugh v. See's Candies, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Touissant v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980).

205. *See, e.g.*, Cancellier v. Federated Dep't Stores, Inc., 672 F.2d 1312 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

206. *See, e.g.*, Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Petermann v. Local 396, Int'l Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959). For a description of these three theories of recovery (contract, implied obligation of good faith, and tort), see Heinsz, *supra* note 202, at 865-77.

207. Although over 90% of employees who are covered by collective bargaining agreements are protected by "just cause" discharge clauses, it has been estimated that between one and two-thirds of the workforce are under the employment at will doctrine. *See* 2 COLLECTIVE BARGAINING, NEGOTIATIONS & CONTRACTS (BNA) § 40:1 (1983); Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8 (1979). As one court has stated in denying a cause of action for wrongful discharge to a unionized employee: "An employee covered by a collective bargaining agreement . . . precluding discharge except for proper cause and providing a grievance procedure which includes binding arbitration is adequately protected contractually from retaliatory discharge." Cox v. United Technologies, Essex Group, Inc., 240 Kan. 95, ___ , 727 P.2d 456, 459 (1986); *see also* Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511 (7th Cir. 1985); Phillips v. Babcock & Wilcox, 349 Pa. Super. 351, 503 A.2d 36 (1986), *appeal denied*, 513 Pa. 641, 521 A.2d 933 (1987).

208. 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985); *see*

ployee's discharge under a labor agreement as being for cause. The employee then filed a wrongful termination suit, alleging that he had been fired because he had notified the local health department when his employer had instructed him to deliver spoiled milk and that this violated state public policy.[209] The court found no preemption under the NLRA since the claim was based on an overriding state interest arising from the enforcement of a public policy and had little impact on the regulation of the employer-employee contractual relationship.[210] The court also held that the arbitrator's decision was not a bar to the wrongful discharge action, since the lawsuit involved the protection of a statutory right to report to public health officials, which right was separate and distinct from any protections that the labor contract might afford the employee.[211]

Kinyon & Rohlik, *"Deflouring" Lucas through Labored Characterizations: Tort Actions of Unionized Employees*, 30 ST. LOUIS U.L.J. 1 (1985); Taldone, *Federal Preemption of Wrongful Discharge Claims of Union Employees*, 12 EMPLOYEE REL. L.J. 33 (1986); Zimmerman & Howard-Martin, *The National Labor Relations Act and Employment-at-Will: The Federal Preemption Doctrine Revisited*, 37 LAB. L.J. 223 (1986); Comment, *Unsuccessful Employee Arbitrants Bring Wrongful Discharge Claims in State Court: The Accommodation of Public and Private Adjudication*, 35 BUFFALO L. REV. 295 (1986).

209. 726 F.2d at 1368.

210. *Id.* at 1371-73

211. *Id.* at 1375-76. The Ninth Circuit has been most active in regard to the issue of the preemption of unionized employees' state wrongful discharge actions, particularly in light of *Lueck v. Allis-Chalmers. See infra* text accompanying notes 219-20. In Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984), the court determined that a union employee's state court wrongful discharge action based upon alleged complaints about safety violations under the Federal Mine Safety and Health Administration Act was preempted under section 301 of the NLRA, since these complaints concerned only federal law and did not involve a strong state interest. Similarly, the court found preemption in Truex v. Garrett Freightlines, Inc., 784 F.2d 1347 (9th Cir. 1985), where employees had alleged an action of intentional infliction of emotional distress because their employer had issued unjustified warning letters, conducted excessive supervision, altered work assignments and sought to terminate the employees. The court found that these claims in essence involved the administration of discipline under the collective bargaining agreement, which procedure should control. In Evangelista v. Inlandboatmen's Union of Pac., 777 F.2d 1390 (9th Cir. 1985), the court applied the preemption doctrine to an employee's claim based upon an alleged state public policy to protect citizens from job harassment. Again the court found that resolution of the claim depended upon the interpretation of the collective bargaining agreement, rather than an independent state public policy as was involved in *Garibaldi*. In DeSoto v. Yellow Freight Sys., 820 F.2d 1434 (9th Cir. 1987), a union employee attempted to assert a state wrongful discharge action that he had been terminated for refusing to drive a trailer with expired registration papers. The employee was unaware that a grace period existed during which he did not have to display the trailer's registration sticker. The court found that the action was preempted by the contractual grievance procedure since the employee was in fact not acting in defense of a public policy of the state of California, but rather was incorrectly asserting his own interpretation of the law. In such a case the grievance procedure

Although this preemption issue is far from decided,[212] a number of courts have followed the *Garibaldi* rationale and have concluded that the existence of a grievance-arbitration provision does not affect the ability of an employee to bring an action for wrongful discharge.[213] For instance, in *Midgett v.*

should apply. However, in Tellez v. Pacific Gas & Elec. Co., 817 F.2d 536 (9th Cir. 1987), the court found that employee state law claims of defamation and intentional infliction of emotional distress based on an employer's distribution of a letter accusing the employee of purchasing cocaine were not preempted by section 301. The court determined that the collective bargaining agreement was vague in regard to disciplinary formalities, did not regulate suspension letters, and did not govern allegedly defamatory conduct. Thus, the court determined that examining the labor agreement would not resolve the employee's claim and that such claim under state law was not preempted.

212. Several courts have applied the preemption doctrine to employee state wrongful discharge tort claims based upon alleged violations of public policy. Lingle v. Norge Div. of Magic Chef, Nos. 85-2971, 86-1763, slip op. at 20 (7th Cir. June 23, 1987) (en banc) (state wrongful discharge action by employees who alleged that they were discharged for invoking, or threatening to invoke, state workers' compensation laws); DeSoto v. Yellow Freight Sys., 820 F.2d 1434 (9th Cir. 1987) (alleged violation of public policy for refusing to drive a trailer with expired registration papers, although employee unaware that a grace period existed during which the registration sticker need not be displayed); Evangelista v. Inlandboatmen's Union of Pac., 777 F.2d 1390 (9th Cir. 1985) (public policy asserted of protecting persons from job harassment); Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511 (7th Cir. 1985) (state retaliatory discharge action based on Indiana's Workers' Compensation Laws); Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984) (state wrongful discharge action based upon federal mine safety law); Mann v. Georgia-Pacific Corp., 651 F. Supp. 580 (E.D. Ark. 1986) (state law tort claim alleging intentional infliction of emotional distress); Nelson v. Owens-Corning Fiberglass Corp., 648 F. Supp. 44 (D. Mont. 1986) (state tort claim of wrongful termination preempted by federal law and bad faith discharge on the basis of gender not preempted); Snow v. Bechtel Constr., Inc., 647 F. Supp. 1514 (C.D. Cal. 1986) (wrongful discharge action based upon reporting alleged flagrant safety violations at a nuclear power plant); Peoples v. Pennsylvania Power & Light Co., 638 F. Supp. 402 (M.D. Pa. 1985) (wrongful termination suit alleging intentional infliction of emotional distress and tortious interference with contractual relations under state law); Cox v. United Technologies, Essex Group, 240 Kan. 95, 727 P.2d 456 (1986) (tort action for retaliation for filing a workers' compensation claim); Brinkman v. State, 729 P.2d 1301 (Mont. 1986) (state action for termination based upon workers' compensation statute).

213. Tellez v. Pacific Gas & Elec. Co., 817 F.2d 536 (9th Cir. 1987) (state law claims of defamation and intentional and negligent infliction of emotional distress due to employer letter accusing employee of purchasing cocaine); Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp., 814 F.2d 102 (2d Cir. 1987) (state wrongful termination action based upon filing workers' compensation claim); Herring v. Prince Macaroni, Inc., 799 F.2d 120 (3d Cir. 1986) (state action for discharge based upon filing workers' compensation claim); Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1986) (state retaliatory discharge action based upon filing workers' compensation claim); Tuttle v. Bloomfield Hills School Dist., 156 Mich. App. 527, 402 N.W.2d 54 (1986) (employee state action based upon state "whistleblowers" statute); MGM Grand Hotel-Reno, Inc. v. Insley, 728 P.2d 821 (Nev. 1986) (state retaliatory discharge suit based upon employee's right to receive industrial insurance benefits under state statute).

Sackett-Chicago, Inc.,[214] the Illinois Supreme Court allowed an employee to pursue a claim of wrongful discharge based upon an allegation that he had been fired for filing a workers' compensation claim. The court found that the plaintiff was not barred from the action for his failure to pursue a grievance under the collective bargaining contract. The court held that the labor agreement could only protect purely private rights, whereas the tort action would vindicate public policies and allow a remedy of punitive damages.[215]

One impact of these decisions is again to lessen the finality of arbitral awards. More significantly, courts in cases such as *Garibaldi* and *Midgett* have given no deference or consideration to the arbitral process. Rather, the courts have simply borrowed from the notions of *Alexander v. Gardner-Denver* regarding the distinction between statutory and contractual rights.[216] However, one must look closer at the basis of the wrongful discharge action. If the lawsuit alleging improper termination is based on the theory of a violation of an express or implied contractual provision or the implied obligation of good faith dealing, then the collective bargaining procedures should preempt. Here the heart of the contractual wrongful discharge action is the regulation of the employer-employee relationship. Such a case is simply duplicative of the rights and remedies provided in the labor contract.[217] The only significant difference would be that the matter in the wrongful discharge action would be interpreted in accordance with state law. It is just such a situation that the preemption doctrine was meant to avoid.[218]

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214. 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 106 S. Ct. 278 (1985).

215. *Id.* at 149-52, 473 N.E.2d at 1283-85; *see also* Gonzalez v. Presstress Eng'g Corp., 115 Ill. 2d 1, 503 N.E.2d 308 (1986); Byrd v. Aetna Casualty & Sur. Co., 152 Ill. App. 3d 292, 504 N.E.2d 216 (1987).

216. *See supra* text accompanying notes 70-75.

217. In such a case the employee is only attempting to substitute the judgment of a state judge or jury for that of an arbitrator as to whether contract rights covered by the labor agreement have been violated. This, the courts have not allowed. Lingle v. Norge Div. of Magic Chef, Nos. 85-2971, 86-1763, slip op. at 20 (7th Cir. June 23, 1987) (en banc); Truex v. Garrett Freightlines, Inc., 784 F.2d 1347 (9th Cir. 1985); Evangelista v. Inlandboatmen's Union of Pac., 777 F.2d 1390 (9th Cir. 1985); Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984); Bartley v. University Asphalt Co., 111 Ill. 2d 318, 489 N.E.2d 1367 (1986); MGM Grand Hotel-Reno, Inc. v. Insley, 728 P.2d 821 (Nev. 1986). Nor have the courts permitted employees to avoid the preemption doctrine by pleading a cause in tort which in reality is contractual in nature and duplicative of the collective bargaining agreement. Johnson v. Hussmann Corp., 805 F.2d 795 (8th Cir. 1986); Oglesby v. RCA Corp., 752 F.2d 272 (7th Cir. 1985).

218. Since San Diego Bld. Trades Council v. Garmon, 359 U.S. 236 (1959), the foundation of the preemption doctrine has been that state jurisdiction must yield where there is an actual or potential conflict with national labor policy so that there will be a uniform approach in regard to labor law and the interpretation of collective

This was the approach of the Supreme Court in *Allis-Chalmers Corp. v. Lueck*.[219] There a unionized employee had filed a state law tort action claiming that an employer had engaged in bad faith delay in processing a disability claim under the collective bargaining agreement. The court determined that the state suit was preempted by section 301 and the arbitration process outlined in the collective bargaining agreement. The court concluded that the test of whether preemption should apply to a state tort action was:

> [W]hether the [tort claim] confers non-negotiable state law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract.[220]

The court concluded that the state court would be required to interpret the terms of the collective bargaining agreement to determine whether the employee had a valid tort cause of action for willful breach of contract. Such an action would in essence bypass the arbitrator and undermine the principle that it is the arbitrator and not a state court which has the responsibility to interpret labor contracts.

Although *Lueck* did not deal directly with a wrongful discharge action, its principles should apply in such cases, especially those based on theories of contract breach. For in such instances by definition the "claim is inextricably intertwined with consideration of the terms of the labor contract" which prohibit discharge without just cause.

A wrongful discharge action based upon tort theories involves different considerations. Here the basis of the action is a violation of public policy usually expressed in state statutes or judicial opinions.[221] However, again such public policy notions are not totally distinct from rights under a collective bargaining agreement. Indeed, the just cause provision in a labor contract should prohibit the discharge of an employee who files a workers' compensation claim, gives a report to a state or federal agency adverse to

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bargaining agreements. *See also* International Bhd. of Elec. Workers v. Hechler, 107 S. Ct. 2161, 2164-66 (1987); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 218-19 (1985); Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962); R. GORMAN, *supra* note 143, at 766-70.

219. 471 U.S. 202 (1984). The Court reiterated its holding in International Bhd. of Elec. Workers v. Hechler, 107 S. Ct. 2161, 2163 (1987), where it found that an employee's state tort claim that a union had breached its duty to provide a member with a safe workplace depended substantially upon the interpretation of a collective bargaining contract and was therefore preempted by section 301. *Cf.* Atchison, Topeka & Santa Fe Ry. v. Buell, 107 S. Ct. 1410 (1987) (grievance procedure under the Railway Labor Act and parties' collective bargaining agreement does not preempt a railroad employee's right to sue his employer for damages under the Federal Employers' Liability Act for allegedly condoning harassment by coworkers that led to an emotional breakdown).

220. 471 U.S. at 213.

221. *See supra* note 206.

the employer, or engages in other legally protected activity.[222] Thus the issues involved in wrongful discharge litigation, where an employee is also covered by a collective bargaining agreement, will normally be interrelated with the labor contract. Under the principles of *Lueck* the arbitration process should prevail.[223]

However, even if a court considered a tort wrongful discharge action to be based upon "non-negotiable state law rights . . . independent of any right established by contract," the approach of cases such as *Garibaldi* or *Midgett* is still flawed. The primary difficulty is that these courts overlook what the Supreme Court noted in *Alexander v. Gardner-Denver*—that an arbitral decision on a statutory rights issue was entitled to weight by a court if certain prerequisites were met.[224] Certainly the public policy interests are just as significant in cases involving the rights of individuals under statutes such as Title VII, the NLRA, or other federal legislation as they are in instances of rights protected by principles of public policy found in state law. Thus even where the preemption doctrine does not apply to prohibit a state action by an employee, despite the applicability of an arbitration procedure, the processes of resolution required in the collective bargaining agreement do not become irrelevant. Where an employee has pursued a contractual remedy to arbitration, the state court should consider the arbitrator's award under the

222. American Meat Packing Co., 79 Lab. Arb. (BNA) 1327 (1982) (Malinowski, Arb.) (discharge improper where employee filed claim for on-the-job injury which employer did not prove was fraudulent); Thunderbird Inn, 77 Lab. Arb. (BNA) 849 (1981) (Armstrong, Arb.) (employee improperly discharged for protected union activity); City of Indianapolis, 76 Lab. Arb. (BNA) 1054 (1981) (Hollander, Arb.) (discharge overturned for employee who filed workers' compensation claim which employer alleged was invalid); Contractors Steel, 76 Lab. Arb. (BNA) 327 (1981) (Ellmann, Arb.) (discharge too severe for employee who exercised right to bring lawsuit against union and employer); Hygrade Food Prods. Corp., 73 Lab. Arb. (BNA) 755 (1979) (Chiesa, Arb.) (improper discharge for employee who filed and recovered unemployment compensation); Messenger Corp., 72 Lab. Arb. (BNA) 865 (1979) (Brooks, Arb.) (discharge of union president for distributing union cards was improper disparate treatment constituting unfair labor practice); Carborundom Co., 72 Lab. Arb. (BNA) 118 (1979) (Altrock, Arb.) (suspension of union officials for engaging in protected activity of filing grievances overturned).

223. *See, e.g.*, Lingle v. Norge Div. of Magic Chef, Nos. 85-2971, 86-1763, slip op. at 20 (7th Cir. June 23, 1987) (en banc); Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511 (7th Cir. 1985); Mann v. Georgia-Pacific Corp., 651 F. Supp. 580 (E.D. Ark. 1986); Nelson v. Owens-Corning Fiberglass Corp., 648 F. Supp. 44 (D. Mont. 1986); Cox v. United Technologies, Essex Group, Inc., 240 Kan. 95, 727 P.2d 456 (1986); Brinkman v. State, 729 P.2d 1301 (Mont. 1986).

224. *See supra* notes 70-75 and accompanying text; *cf.* Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) (court refused to defer to an arbitration award against an employee who subsequently filed a wrongful discharge action for alleged retaliatory termination in violation of state workers' compensation statute, but conceded that some aspects of the dispute, such as the employee's fitness to work, could be resolved through arbitration).

devolution principles outlined previously.[225] Thus if there is an interrelationship between the public policy rights and the contract issues, if the parties inform and jointly submit the public policy issue to the arbitrator in determining the contractual dispute, if the forum of arbitration is adequate to handle the issue, and if the arbitrator considers the issue and applies a proper legal standard, deference should be given to the arbiter's award in a subsequent wrongful discharge action.

One difficulty with the devolution principle in an employment at will situation might be the arbitrator's determination of the proper legal standard, due to the possible uncertainty as to the contours of public policy. However, most state courts that have accepted the wrongful discharge tort have required that the public policy be well defined either in statutory proscriptions, constitutional rights or judicial decisions.[226] An arbitrator should have no more difficulty applying a proper legal standard in a case alleging a violation of state public policy than in one alleging the violation of the hot cargo provisions outlined in section 8(e) of the NLRA.[227] Moreover it would be for the reviewing court to determine whether the arbitrator had utilized an impermissible legal standard in reaching his or her decision.[228]

Whether there has in fact been a violation of the well defined public policy in a wrongful discharge tort suit is a question for the trier of fact. This issue involves notions of credibility, causation, and mitigation which are the grist of the decision-making mill of an arbitrator.[229] That arbitration would be an adequate forum for such a resolution is underscored by a number of legislative proposals regarding employment at will cases which advocate arbitration as a dispute resolution mechanism. For example, the California State Bar Ad Hoc Committee on Termination at Will and Wrongful Discharge has suggested to the California legislature forms of arbitration as an alternative to such lawsuits.[230]

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225. *See supra* text accompanying notes 134-59.

226. *See* Heinsz, *supra* note 202, at 873-75.

227. *See supra* notes 171-86 and accompanying text.

228. *See supra* text accompanying notes 168, 171-86.

229. *See, e.g.*, Creasey Co., 77 Lab. Arb. (BNA) 998 (1981) (Edelman, Arb.) (causation); Covington Furniture Mfg. Corp., 75 Lab. Arb. (BNA) 455, 458-59 (1980) (Holley, Arb.) (credibility); Frito-Lay, Inc., 75 Lab. Arb. (BNA) 293 (1980) (Brown, Arb.) (credibility and causation); Markle Mfg. Co., 73 Lab. Arb. (BNA) 1292, 1299 (Williams, Arb.) (mitigation); National Serv. Indus., 73 Lab. Arb. (BNA) 538 (1979) (Amis, Arb.) (causation); Ogden Air Logistics Center., 72 Lab. Arb. (BNA) 445, 457-58 (1979) (Richardson, Arb.) (causation); Orlando Transit Co., 71 Lab. Arb. (BNA) 897, 900-03 (1978) (Serot, Arb.) (mitigation); *see also* F. ELKOURI & E. ELKOURI, *supra* note 4, at 650-88.

230. Gould, *supra* note 203, at 32-51. For a similar approach in regard to legislation proposed in the state of Michigan requiring arbitration of certain wrongful discharge claims, see Heinsz, *supra* note 202, at 863-64. One commentator has proposed a statute in California to provide for "no-cause" discharge, i.e., allow an

A key difficulty with the use of the arbitral forum in wrongful discharge situations is one of remedy. Critics note that in tort actions successful plaintiffs can recover punitive and compensatory damages, whereas the arbitral process does not allow for such.[231] This is not totally accurate since arbitrators in certain circumstances have allowed punitive-type sanctions to successful parties.[232] Although it is true punitive or compensatory damages are normally inappropriate in the arbitral forum,[233] perhaps arbitrators should be allowed to give more consideration to this remedy in discharge situations involving public policy violations.

Even if courts held that such a rule allowing punitive relief would be improper in arbitral proceedings due to their contractual nature, other considerations would still come into play. The lessening of the possibility of punitive damages might be a tradeoff that employees, who are covered by a collective bargaining agreement, would be required to make in return for the relative speed and lower costs of utilizing the arbitral system. Some authorities have noted that the cost alone of wrongful discharge litigation often makes the alternative of litigation inaccessible to a substantial portion of the work force.[234] Another possible solution would be to allow the successful grievant who has proved a violation of public policy in an arbitration case to pursue additional remedies in a state proceeding.[235] Although the remedy

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employer an option to discharge employees without cause upon payment of a statutorily calculated amount of money. Prince, *A Model Proposal: The Statutory "No Cause" Alternative to Wrongful Discharge in California*, 24 SAN DIEGO L. REV. 137 (1987).

231. *See, e.g.*, Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 106 S. Ct. 278 (1985).

232. *See, e.g.*, Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 598 F. Supp. 353 (N.D. Ala. 1984); Willis v. Shearson/American Express, Inc., 569 F. Supp. 821 (M.D.N.C. 1983); Baker v. Sadick, 162 Cal. App. 3d 618, 208 Cal. Rptr. 676 (1984); Grissom v. Greener & Sumner Constr., Inc., 676 S.W.2d 709 (Tex. Ct. App. 1984); *see also* M. HILL & A. SINICROPI, REMEDIES IN ARBITRATION 184-92 (1981).

233. *See, e.g.*, Howard P. Foley Co. v. International Bhd. of Elec. Workers Local 639, 789 F.2d 1421 (9th Cir. 1986); Shaw v. Kuhnel & Assocs., 102 N.M. 607, 698 P.2d 880 (1985); Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976). *But see* Stipanowich, *Punitive Damages and Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B.U.L. REV. 953 (1986).

234. *See* Gould, *supra* note 203, at 34-36.

235. The Supreme Court has allowed analogous proceedings under Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e-1 to -17 (1982). If an employee successfully processes an employment discrimination charge through a state agency or state court proceedings, the successful plaintiff can bring a Title VII action in federal court for the purpose of collecting an additional remedy of attorney's fees. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980); *see also* Unger v. Consolidated Foods Corp., 657 F.2d 909 (7th Cir. 1981) (allowing possible recovery for attorney's fees due to local proceedings where the employee did not prevail, but eventually won the Title VII action in federal court); Moreno v. City & County of San Francisco, 567 F. Supp. 458 (N.D. Cal. 1983) (attorney's fees allowed in Title

issue is a thorny problem, it should not result in totally ignoring an arbitrator's award in a subsequent wrongful discharge action.

Where an employee has utilized the arbitration process and the devolution principles are applicable, a court should defer to that system of dispute resolution. To abandon any consideration of the labor arbitration decision in this area of increasing litigation would seriously impinge not only upon the finality of arbitral awards but also on the arbitration system itself.

IV. CONCLUSION

Despite its inherent ambiguity, the *Enterprise Wheel* "essence" formula has worked well as a standard of judicial review for arbitration cases involving solely private contractual rights. In such situations courts should be wary of expanding the number of judicial exceptions under a court's notion of what parties would have expected in the way of industrial justice. If there is a sufficient link between the award and the contract, the court should affirm the labor arbitration decision. It is in arbitration cases where questions involving external law beyond the parties' private agreement have arisen that the essence standard alone has proved inadequate.

As the area of public rights for individuals continues its expansion, an even greater impact on collective bargaining agreements and the arbitration system is inevitable. This tension has put significant strain on the arbitration process. Like it or not, on many occasions today arbitrators cannot simply look to the agreement between a company and a union to resolve a contractual dispute. Rather, oftentimes considerations of external law are interwoven into the contractual issue and necessitate a judgment involving public as well as private interests. When this occurs, the arbitrator becomes more like an adjudicator rather than a mere contract interpreter. What accommodation courts should make in these instances to the arbitral process has remained an unsettled issue. While ignoring the arbitral process entirely would be inappropriate, so would totally acquiescing to the decision of a labor arbitrator in cases involving public interest. However, parties practicing in the field of labor law deserve a more certain legal standard as to the amount of weight and degree of deferral that an arbitration award will receive from courts when public policy rights collide with the labor arbitration system. One possible resolution is the principle of devolution outlined in this Article.

VII action in which fees were incurred in successfully prosecuting a claim of employment discrimination before city civil service commission even though the claimant was not required to pursue the state remedy before filing a federal action); Annotation, *Award of Attorney's Fees Under § 706(k) of Civil Rights Act of 1964 Authorizing Court to Allow Prevailing Party, Other Than Equal Employment Opportunity Commission or United States, Reasonable Attorney's Fees As Part of Costs in Action Under Equal Employment Opportunities Part of Act*, 16 A.L.R. Fed. 643 § 5[3] (Supp. 1986).

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Although the "golden age" of labor arbitration as a system separate and unto itself perhaps has passed, the institution of labor arbitration has by no means withered away. Rather the era has been replaced by what one might refer to as the "age of sophistication," which will require more demanding analysis and complex decision making by all involved in the system.