CHAPTER II

REFLECTIONS UPON LABOR ARBITRATION IN THE LIGHT OF THE *LINCOLN MILLS* CASE*

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Apart from the protection afforded union organization by the Wagner Act[1] the law played a minimal role in labor relations during the years in which management and labor were evolving the institutions necessary for mature collective bargaining. Collective bargaining agreements were negotiated without much regard to whether they were legally enforceable contracts[2] or rested exclusively upon a foundation of mutual interdependence backed by moral force and fear of economic reprisals. Since neither the courts nor an administrative agency furnished an appropriate forum for resolving grievances arising under an existing agreement, there was some truth to the saying that arbitration was a substitute not for a lawsuit but for a

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[1] 49 Stat. 449 (1935).

[2] Prior to 1947 there was considerable academic discussion about the legal character of collective bargaining agreements based chiefly upon suits by individual employees. E.g. Rice, "Collective Labor Agreements in American Law," 44 *Harv. L. Rev.* 572 (1931). During the Taft-Hartley debates many students of labor relations argued that collective agreements should not be enforceable by legal sanctions.

strike. The general attitude of most trade-unionists and many employers and "public representatives" was expressed in the common saying that labor-management relations would benefit most by the exclusion of lawyers. Shortly before his death Harry Shulman gave us a notable statement of the view that the law should stay out of grievance arbitration—

> The arbitration . . . is a means of making collective bargaining work and thus preserving private enterprise in a free government. When it works fairly well, it does not need the sanction of the law of contracts or the law of arbitration. It is only when the system breaks down completely that the courts' aid in these respects is invoked. But the courts cannot, by occasional sporadic decision, restore the parties' continuing relationship, and their intervention in such cases may seriously affect the going systems of self-government. When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on the arbitration award? I suggest that the law stay out—but, mind you, not the lawyers.[3]

The complex, highly-developed grievance procedures and umpireships will not be easily affected by changes in the surrounding legal structure, certainly not at an early date, but I doubt whether others can expect to go unaffected by the changes wrought by section 301 of the Labor-Management Relations Act[4] and the *Lincoln Mills* decision.[5] For better or worse they bring the courts into grievance adjustment by providing a forum in which to compel or resist arbitration and they seem likely to bring in their wake influential decisions upon the interpretation and significance of collective bargaining agreements. Whether the result is better or worse will depend chiefly upon the reaction of both the courts and the labor relations specialists concerned with grievance arbitration. If the courts impose their approach to the construc-

[3] Shulman, "Reason, Contract, and Law in Labor Relations," 68 *Harv. L. Rev.* 999, 1024 (1955).

[4] 61 Stat. 156 (1947), 29 U.S.C. § 185 (1952).

[5] *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

tion of wills, trusts and tightly-drawn commercial contracts upon the interpretation of collective bargaining agreements on the theory that those who seek judicial aid must accept existing judicial standards regardless of their workability in the new environment of labor relations, then section 301 and the *Lincoln Mills* case may severely damage labor arbitration and industrial relations. If professional arbitrators, the advocates who appear before them and the interested academicians go their separate way complaining of judicial ineptitude, there is little hope of achieving a workable accommodation. Two and a half centuries ago Lord Mansfield took the customs and practices of the world of commerce—the law merchant—and made them a part of the common law administered by courts of general jurisdiction. If a philosophy of grievance arbitration could be articulated in terms susceptible of application by the courts, perhaps some modern Mansfield might make this industrial jurisprudence into a body of law governing judicial interpretation and enforcement of collective bargaining agreements.

This paper has three purposes: (A) to show why the world of arbitration cannot long ignore the judicial decisions under section 301; (B) to present a view of the process of interpreting collective bargaining agreements with special attention to the characteristics of labor contracts which differentiate collective bargaining agreements from the construction of the general run of contracts; and (C) to consider the bearing of this rationale upon the respective roles of the court and the arbitrator in actions under section 301.

I

The *Lincoln Mills* decision established three fundamental rules:

> (1) Section 301 requires the judiciary to develop a federal substantive law of collective bargaining agreements derived

from the provisions and policies of NLRA,[6] general legal principles and other appropriate sources.[7]

(2) One of the rules embodied in this federal law of collective bargaining agreements is that an agreement to arbitrate disputes arising under the agreement is binding and enforceable by a decree for specific performance.[8]

(3) The Norris-LaGuardia Act,[9] which restricts the power of the federal courts to issue injunctions in labor disputes, is not applicable to a union's suit for specific performance of an employer's promise to arbitrate.[10]

These rulings establish the machinery necessary for the effective judicial enforcement of agreements to arbitrate and arbitration awards except when a union resorts to a strike upon an arbitrable grievance. The latter situation is not governed by the *Lincoln Mills* decision because the case involved only the procedural requirements of section 7, whereas an application for an injunction against a strike or picketing would fly in the face of the plain words of section 4 which prohibit any injunction against a peaceful strike, boycott or picketing. Nevertheless there is good reason to think that the issuance of injunctions in the latter situation may ultimately be sustained by the Supreme Court despite the contrary views expressed in two courts of appeals.[11] The Norris-LaGuardia

[6] *Id.* at 457. For a case indicating parties can choose the law to govern the merits of their disputes but not arbitrability, see *Butte Miners Union* v. *Anaconda Co.*, 42 LRRM 2452 (D.C. Mont. 1958).

[7] *Ibid.* For a case suggesting a variety of these general principles in the area of contract interpretation, see, *Refinery Employees Union* v. *Continental Can Co.*, 42 LRRM 2586 (W.D. La. 1958).

[8] *Id* at 456. See the following federal court cases applying this principle: *Fruit Packers Union* v. *Torvig Fruit Co.*, 41 LRRM 2804 (E.D. Wash. 1958); *Independent Circulation Union* v. *Item Co.*, 42 LRRM 2358 (E.D. La. 1958), affirmed sub nom *Item Co.* v. *Newspaper Guild*, 42 LRRM 2360 (5th Cir. 1958).

[9] 47 Stat. 70 (1932), 2 U.S.C. §§ 101 et seq. (1952).

[10] 353 U.S. at 457-59.

[11] *W. L. Mead Co.* v. *International Brotherhood of Teamsters*, 217 F.2d 6 (1st Cir. 1954); *A. H. Bull Steamship Corp.* v. *Seafarers International Union*, 250 F.2d 332 (2d Cir. 1957), cert. denied 355 U.S. 932 (1958). The denial of certiorari lacks significance not only because of the familiar rule that it implies no opinion on the merits but also because the petition sought to review an interlocutory order—a procedure which the Court uniformly refuses to follow.

Act immunized peaceful conduct in labor disputes on the flood tide of a belief that law had no contribution to make to labor-management relationships. Apparently no one in Congress perceived the inconsistency between this view and the Railway Labor Act,[12] which plainly imposes legal rights and duties that can be enforced only by private suits for an injunction. When the contradiction was presented to the Supreme Court, the Court read exceptions into the Norris-LaGuardia Act, first from the procedural requirements of section 7 in suits brought by employees and labor unions [13] and later from the verbally unqualified prohibitions of section 4 in suits against labor organizations.[14] LMRA section 301 likewise reflects a Congressional belief that law does have a role to play in disputes arising under collective bargaining agreements. The Supreme Court has excepted suits to enforce contracts against employers from the procedural requirements of section 7.[15] The parallel of the Railway Labor Act cases suggests that it may also make the converse exception to section 4.[16] Certainly policy calls for granting such relief and the reading of an exception into the bare words would be only a further instance of the proper judicial functions of harmonizing successive statutes within the same general field.[17]

The supplying of legal sanctions for arbitration agreements and awards is not likely to have immediate impact upon the arbitration process. The new judicial remedy keeps a company or union with overwhelming economic power and few scruples from violating its contract obligations but these were exceptional situations and those who have always performed their obligations voluntarily might suppose for a time that

[12] 45 U.S.C. §§ 1 et seq. (1952).
[13] *Virginian R. Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952).
[14] *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30 (1957).
[15] *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957).
[16] Cf. "Accommodation of the Norris-La Guardia Act to Other Federal Statutes," 72 *Harv. L. Rev.* 354 (1958).
[17] Cf. *United States* v. *Hutcheson*, 312 U.S. 219 (1940).

they could continue to eschew the courts and thereby ignore legal developments. I submit that if this course is followed the world of arbitration will eventually feel the impact of external events in much the same way as the ostrich which seeks to escape its enemies by hiding its head in the sand.

Some interaction between arbitration and federal law is inevitable simply because section 301 provides a forum in which to bring suits upon collective bargaining agreements. The volume of litigation seems likely to increase. The resulting rules of decision will affect later arbitration awards even though arbitrators are not required to follow the law. All arbitrators occasionally use court decisions as precedents. Those who are lawyers will be influenced by legal analysis. So will the attorneys who represent companies and labor unions. When experienced bargainers negotiate a contract, they do not ignore settled legal doctrines. Upon an application to compel or stay arbitration or to enforce or vacate an award the court's attitude is bound to be affected by any prior judicial rulings upon any issue tendered for the arbitrator's decision. Even though the thought projects us some distance into the future, does it not seem likely also that the willingness to arbitrate will be affected by any sharp differences between the attitudes of arbitrators and the doctrines which would prevail in a judicial forum?

The ruling that the federal courts are to develop a substantive law of collective bargaining agreements also presents a challenge to labor specialists and the legal profession. The federal judges start with a clean slate. The Supreme Court has instructed them to fashion a law of collective bargaining agreements from the express provisions, the penumbra and the policy of our national labor laws. "The range of judicial inventiveness will be determined by the nature of the problem." [18] Outside of the area controlled by statute there is no more important treasury of experience than the record of

[18] 353 U.S. at 457.

grievance arbitrations. We may have been bemused by the precepts that justice requires deciding each case upon its merits and that no two contracts are quite the same, but surely we have not labored at the administration of collective agreements for almost two decades without arriving at some generalizations upon which the unbiased can agree even though partisan interests preclude unanimity. Perhaps only a few rules have developed, but I submit that there are attitudes, approaches, and even a number of flexible principles. More effort may have to go into distilling generalizations from the amorphous mass of arbitration opinions before the courts can be expected to use them. Counsel will face the further problem of translating the ways of the industrial world into legal doctrines comprehensible to judges who lack industrial experience. However, if the professional arbitrators and labor lawyers who work with them can surmount these obstacles, the industrial jurisprudence which they have been developing might give wisdom and vitality to conventional law.

Insofar as litigation and arbitration are alternate but coordinate procedures they affect each other by the interchange of ideas and the force of competition. When a motion is filed to compel or stay arbitration or to enforce or vacate an award, the court becomes a superior tribunal and the arbitrator can make only such adjudications as the court permits. Section 301 and the *Lincoln Mills* case are bound to increase litigation over questions of arbitrability.[19] So long as agreements to arbitrate were unenforceable, an employer could submit the dispute to the arbitrator or face the charge of a breach of faith. Today he can require the union to sue under section 301 and raise the issue of arbitrability as a defense; perhaps he can even bring an action to stay arbitration.[20] As yet there is little evidence of a

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[19] See p. 54 *infra* for a discussion of recent cases involving this issue.

[20] Such an action was brought by the employer in*Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283, United Rubber etc. Workers,* 36 Lab. Cas. par. 65,001 (D.C. Conn. 1958) but decided adversely on the merits. For State actions in the absence of statute see *Post Publ. Co.* v. *Cort,* 334 Mass. 199, 134 N.E.2d 431 (1956); *Brampton Woolen Co.* v. *Local Union No. 112,* 95 N.H. 255, 61 A.2d 796 (1948).

trend towards this strategy but it is the kind of development which picks up momentum as it goes along for if one person finds that litigation over questions of arbitrability produces results more favorable to one party than voluntary adherence to the contract procedure, others will follow suit. Thus section 301 and the *Lincoln Mills* case have given the federal courts power to shape the fate of grievance arbitration. They may strengthen the institution by putting the force of law behind the arbitration clause and the ultimate award. They may shrivel and distort it by excessive intervention.

The record thus far is not encouraging. There is a wide and distressing gap between the judicial conception of the function of arbitrators and the views of the profession. On some issues one can predict with certainty a conflict of judicial and arbitral opinion.[21] Further evidence of a schism is found in the uniform academic criticism of the decision applying the *Cutler-Hammer* doctrine.[22] The evidence is confirmed by the strong support among arbitrators for legislation forbidding the courts to decide questions of arbitrability.

In the past we have noted the gap and brushed the judges off as stupid fellows unnecessarily intruding into a world which they did not understand. But this attitude will hardly do. The judges hold the trumps. The price of judicial support for arbitration is a measure of judicial intervention. It is certainly a

[21] Compare *United Furniture Workers of America* v. *Little Rock Furniture Mfg. Co.,* 148 F.Supp 129 (E.D. Ark. 1957); *Held* v. *American Linen Supply Co.,* 6 Utah 2d 106, 307 P. 2d 210 (1957), with *Coca-Cola Bottling Co.,* reprinted in Cox, *Cases on Labor Law,* 4th ed., 583 (1958). *Atwater Mfg. Co.,* 13 L. A. 747 (1949); *Pilot Freight Carriers, Inc.,* 22 L. A. 761 (1954). But see *Okenite Co.,* 22 L. A. 756 (1954). Also compare *Amalgamated Assn. of Street Electric Railway Employees* v. *The Greyhound Corp.,* 231 F.2d 585 (5th Cir. 1956); *International Longshoremen's Union* v. *Inland Waterways Corp.,* 213 L.A. 670, 35 S. 2d 425 (1948); Anno. 57 A.L.R. 2d 1399 (1958) with *A. D. Juilliard Co.,* 21 L. A. 713 at 724 (1953); *Celanese Corp.,* 14 L. A. 31 (1950); *Stockholders Publ. Corp.,* 16 L. A. 644 (1951).

[22] *Local 402, Int. Ass'n. of Machinists* v. *Cutler-Hammer, Inc.,* 271 App. Div. 917, 67 N.Y.S. 2d 317 (1st Dep't 1947), affirmed 297 N.Y. 519, 74 N.E. 2d 464 (1947). For criticisms see Summers, "Judicial Review of Labor Arbitration," 2 *Buffalo L. Rev.* 1 (1952); Scoles, "Review of Labor Arbitration Awards on Jurisdictional Grounds," 17 *U. Chi. L. Rev.* 616 (1950).

natural reaction—perhaps it is even inevitable—for a judge to balk at lending the assistance of the judicial process to a proceeding which he regards as unconscionable. Under these conditions we would do better, I submit, to ask why the division of opinion has occurred. The answer might enable us to begin to bridge the gap before we fall into it.

One reason for the division of opinion may be the kind of jurisdictional rivalry such as arose in the seventeenth century between courts of law and equity and much later between courts and administrative agencies. Those who follow judicial decisions interpreting social and economic legislation know that the "look-in-the-dictionary" school of interpretation has not yet yielded the entire field to willingness to read statutes "not as theorems of Euclid but with some imagination of the purposes which lie behind them."[23] The tendency to be literal is often enhanced by lack of familiarity with the subject matter. Judges (and sometimes lawyer-arbitrators) are tempted to take refuge in the literal meaning of language when they fail to understand the industrial problem just as lay arbitrators sometimes display extraordinary rigidity in verbalization when they feel that a case should turn upon some legal doctrine which is not quite comprehensible to the layman. But these explanations are hardly adequate. The root of the trouble, I think, is our own failure to work out a philosophy of grievance arbitration in terms which are familiar to the courts. We speak of the special nature of labor arbitration. We call a collective bargaining agreement a unique legal document utterly unlike ordinary contracts and therefore subject to special rules which only members of the cult can fully understand. In truth, there is no single type of "ordinary contract" although there are many points of contrast between labor agreements, on the one hand, and deeds, leases, bills of sale and trust indentures, on the other. Lawyers have developed rules from a model, just as economists, but any careful student of contracts will point out

[23] *Lehigh Valley Coal Co.* v. *Yensavage*, 218 F. 547, 553 (2d Cir. 1914), cert. denied 235 U.S. 705 (1915).

that there are as wide differences in the substantive rules and precepts of contract interpretation applicable to different kinds of commercial contracts as there are between what labor relations specialists call "ordinary contracts" and collective bargaining agreements. A long term requirements contract poses different problems from the sale of real estate. An insurance policy is not a contract to build a house. The functional differences produce different legal consequences and different attitudes towards questions of interpretation.

The interpretation and application of collective bargaining agreements should be analyzed in like fashion. We should examine the practical aspects of collective bargaining which give the interpretation and application of labor contracts unique characteristics and then point out why the functional differences sometimes require different rules of law and different methods of construction. Other familiar principles of contract law work pretty well when applied to collective bargaining agreements.[24] We should then press on to a synthesis of our notions concerning the interpretation of collective agreements—a coherent description not merely of the trappings of arbitration but of its inner logic in terms related to the construction of other legal instruments. Such analysis and synthesis would not only produce better understanding of grievance arbitration but it might pave the way to a wiser definition of the proper roles of the court and the arbitrator under the *Lincoln Mills* decision.

II

In the beginning it seems useful to observe the characteristics of a collective bargaining agreement which might affect the terms in which it is written and consequently, the process of interpretation. One unique characteristic is the number of people affected. The habit of speaking of negotiations "between the parties" or of "a triangular relationship between

[24] For an introductory discussion of this question, see Cox, "The Legal Nature of Collective Bargaining Agreements," 57 *Mich. L. Rev.* 1 (1958).

employer, employees and labor union" obscures the number of employees and the complexity of their interests. If we think of the union as an agent and the employees as principals, we have the paradox that the agent is the principals acting as an organization. The group, moreover, has interests of its own which may conflict with the claims of individuals because several classes of individuals may have divergent interests, because the demands of group organization and coherence clash with individual self-interest, or even because the union officialdom is not immediately responsive to wishes of a numerical majority of the members.

A collective agreement also covers a wide range of conduct and an enormous variety of problems. No state or federal statute, except possibly the tax laws, covers as wide a variety of subjects or impinges upon as many aspects of the ordinary company's business or a worker's life—wages, hours of employment, working conditions, health and accident insurance, retirement and pensions, promotions, lay-offs, discipline, subcontracting, technological changes, work loads and a host of minor items. Yet a collective bargaining agreement must also be kept short and simple enough for the ordinary worker to read and understand. Verbal incompleteness is inevitable because the meticulous detail of a corporate mortgage is unsuited to administration by ordinary workers. The details must be filled in outside of the words.

A labor contract operates prospectively over substantial periods. Nearly all run for at least one year. Many run for two or three years. The last basic steel contract was for four years and although they are now shorter, the automobile contracts used to cover a five year span. Not all commercial contracts but surely those which are most familiar relate to a single transaction—the conveyance of land, the sale of a horse, the assignment of a copyright. Since one can hardly foresee all the problems that will develop in an industrial establishment within even a single year, more scope must be left for decisions made in the course of performing the agreement.

The parties to collective agreements share a degree of mutual interdependence which we seldom associate with simple contracts. Sooner or later an employer and his employees must strike some kind of a bargain. The costs of disagreement are heavy. The pressure to reach agreement is so great that the parties are often willing to contract although each knows that the other places a different meaning upon the words and they share only the common intent to postpone the issue and take a gamble upon an arbitrator's ruling if decision is required.[25] Sometimes the issue is simply ignored. The issue of arbitrability is a prime illustration. Union lawyers argue that arbitrability is a question for the arbitrators to decide. Company attorneys often contend that it is for the courts. The matter could be put beyond dispute by a few words stipulating one rule or the other but neither party quite dares to press the point to an impasse. The costs of disagreement also affect grievance arbitration. Once a contract is executed the pressure to maintain it is so great that the arbitrator can hardly acknowledge that since there was no meeting of the minds upon the question before him, there was no contract, and therefore the parties should go back and negotiate a solution.[26]

One consequence of these four characteristics is that many provisions of the labor agreement must be expressed in general

[25] The same phenomenon appears in legislation, probably more often than outsiders realize. The best example to come to my attention is NLRA § 8(c), 61 Stat. 142 (1947), 29 U.S.C. (1952) § 158(c). The House bill [H.R. 3020, 80th Cong., 1st sess. (1947)] immunized an employer's anti-union speech "if it does not *by its own terms* threaten force or economic reprisal." As passed by the Senate [S. 1126, 80th Cong., 1st sess. (1947)], the bill granted immunity "if such statement contains *under all the circumstances* no threat, *express or implied,* of reprisal or force. . . ." Conference committee deleted the italicized phrases from both bills.

[26] The point is illustrated by a typical arbitration case. The issue was whether a company, at a time of very heavy cut-backs, could put foremen back to work in the bargaining unit according to seniority based upon total years of service with the company or, if not, then according to seniority accumulated between the date of first employment and the date of promotion. The contract was absolutely blind. It seems certain that the parties had never thought about the pending situation. I am certain, however, that both sides would have been outraged if I had said that this was an omitted case on which they should go back and negotiate because there had been no meeting of the minds.

and flexible terms. The concept of "just cause" is an obvious illustration. Sometimes the negotiators can do no more than establish an appropriate set of procedures for resolving a class of problems; witness the provisions for fixing workloads and piece rates in many textile contracts. A collective agreement rarely expresses all the rights and duties falling within its scope. One cannot spell out every detail of life in an industrial establishment, or even of that portion which both management and labor regard as matters of mutual concern. As Harry Shulman put it—

> [The collective agreement] is not the typical offer and acceptance which normally is the basis for classroom or text discussion of contract law. It is not an undertaking to produce a specific result; indeed, it rarely speaks of an ultimate product. It is not made by parties who seek each other out to make a bargain from scratch and then go his own way. . . . Though cast in an adversary position, both are dependent upon their common enterprise. . . . They meet in their contract negotiations to fix the terms and conditions of their collaboration in the future.[27]

The resulting contract is essentially an instrument of government, not merely an instrument of exchange. "The trade agreement becomes, as it were, the industrial constitution of the enterprise setting forth the broad general principles upon which the relationship of employer and employee is to be conducted."[28] It is largely for these reasons that collective bargaining agreements provide their own administrative or judicial machinery—the ascending steps of the grievance procedure culminating in final and binding arbitration. The administration of a labor contract often resembles the administration of a basic statute by a specialized agency such as the Federal Trade Commission or National Labor Relations Board.

The process works with a measure of success because the con-

[27] Shulman, "The Role of Arbitration in the Collective Bargaining Process," an address delivered at the Institute of Industrial Relations, Univ. of California, 1949.

[28] *NLRB* v. *Highland Park Mfg. Co.*, 110 F.2d 632, 638 (1940).

tract is put down into a going enterprise which has evolved innumerable ways of doing things. To quote Shulman once more—

> The parties to a collective agreement start in a going enterprise with a store of amorphous methods, attitudes, fears and problems. . . . [The contract] covers only a small part of their joint concern. It is based upon a mass of unstated assumptions and practices as to which the understanding of the parties may actually differ, and which it is wholly impractical to list in the agreement[29]

This background not only gives meaning to the words of the instrument but is itself a source of contract rights.

The generalities, the deliberate ambiguities, the gaps, the unforeseen contingencies and the need for a rule even though the agreement is silent all require a creativeness in contract administration which is quite unlike the attitude of one construing a deed or a promissory note or a three hundred page corporate trust indenture. The process of interpretation cannot be the same because the conditions which determine the character of the instruments are different.

III

The accepted practice of arbitrators shows the extent to which the functional characteristics of collective bargaining agreements affect the process of interpretation. There appear to be at least five areas in which arbitrators regularly base awards upon some foundation other than the language of the contract even though their jurisdiction is expressly limited to the adjudication of "disputes concerning the interpretation or application of any provision of this agreement."

(1) Meaning must be poured into general phrases by the evaluation of a complex of interests and the development of subordinate rules. One cannot decide whether working for a

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[29] Shulman, *op. cit. supra.* n. 27.

competitor [30] or being a Communist [31] is "just cause" for a discharge merely by reading the words. A contract which stipulates—

> Promotions to higher paid jobs or better jobs with equal pay are based primarily upon merit and ability, but when these are equal the employee having the greatest seniority will receive preference

must be implemented by the development of subordinate rules governing such questions as what group shall be considered in making a promotion.[32] The arbitrator must lay down these rules if the parties do not agree upon them. The contract is the ultimate source of the rights but it does not provide the actual criteria of decision. Nevertheless, perhaps we may call this interpretation in the same sense that the courts interpret the phrase "contract . . . in restraint of trade" [33] and the NLRB expounds the duty "to bargain collectively." [34]

(2) Arbitrators frequently fashion remedies for breach of a collective agreement without a shred of contract language to guide them. Although a few agreements prescribe the remedy for an unjust discharge, the majority simply forbid discharge without just cause. Despite earlier court decisions to the contrary,[35] it is generally understood that such a contract gives the arbitrator authority to order reinstatement with or without back pay.[36] In a case arising at International Harvester Co.,

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[30] E.g. *Armen Berry Casing Co.,* 17 L. A. 179 (1950); *Mechanical Handling Systems Inc.,* 26 L. A. 401 (1956).

[31] E.g. *Bethlehem Steel Co.,* 24 L. A. 852 (1955); *Pratt & Whitney Co.,* 28 L. A. 668 (1957).

[32] E.g. *Ford Motor Co., Opinions of the Umpire,* A-17, reprinted Cox, "Cases on Labor Law," 4th ed., 608 (1958); *Ford Motor Co., Opinions of the Umpire,* A- , reprinted Cox, *op. cit. supra* 611.

[33] Sherman Act § 1, 26 Stat. 209 (1890), 15 U.S.C. § 1 (1952).

[34] NLRA §§ 8(a)(5), 8(b)(3).

[35] See *Simon* v. *Stag Laundry, Inc.,* 259 App. Div. 106, 18 N.Y.S. 2d 197 (1st Dep't. 1940).

[36] *Niles-Bement-Pont Co.* v. *Local 405, UAW, AFL-CIO,* 23 Lab. Cas. ¶ 67,681 (Conn. Sup. Ct. 1952); *Samuel Adler Inc.* v. *International Brotherhood of Teamsters,* 282 App. Div. 142, 23 Lab. Cas. ¶ 67,669 (1st Dep't 1953). Compare *Refinery Employees Union* v. *Continental Can Co.,* 42 LRRM 2586 (W.D. La. 1948).

W. Willard Wirtz held that he had authority to formulate a measure of damages when the employer violated the contract by failing to tell employees the piece rates at the start of a shift when they were transferred to temporary jobs.[37] At least one arbitrator has imposed monetary penalties for breach of a no-strike clause.[38]

The arbitrator's power to fashion remedies is so generally accepted today that these cases can be explained by saying that the power to determine whether a collective bargaining agreement has been violated carries the implied power to grant a remedy for the violation. The implication, however, rests upon the dictates of necessity. The power is essential to the successful functioning of the institution. Not a word in the average labor contract expresses the intention.

(3) It is equally plain that grievance arbitration sometimes involves the application of substantive doctrines which are not mentioned in the collective agreement. Suppose that a contract fixes a seven day limit upon the appeal of grievances from the foreman's ruling and that the employee and shop steward wait ten days to appeal in reliance upon the personnel director's specific assurance that the company will not invoke the time limit. Surely there are only a few stern literalists who would deny the grievance without examining the merits if the company's attorney subsequently invoked the time limit as a bar to arbitration. The customary disposition would be to ignore the time limit upon grounds of waiver or estoppel.[39] These doctrines are based upon notions of justice. They have no contractual foundation.

Occasionally arbitrators and courts have come into conflict because of the court's failure to perceive this need for an indus-

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[37] *International Harvester Co.*, 9 L. A. 894 (1947).

[38] *Canadian General Electric Co., Ltd.*, 18 L. A. 925 (1952); *Newark Newsdealers Supply Co.*, 20 L. A. 476 (1953).

[39] See *Lawrence Products Co.*, 14 L. A. 310 (1950); *Joerns Bros. Furniture Co.*, 20 L. A. 715 (1953); *A. D. Juilliard and Co., Inc.*, 15 L. A. 934 (1951). But cf. *Mosaic Tile Co.*, 13 L. A. 949 (1950) on degree of proof of waiver.

trial jurisprudence within the area of labor-management relations brought under the regime of the collective agreement. A Remington Rand contract provided: "Seniority . . . is defined to mean length of service with the company since the last date of hire at whatever location and in whatever capacity employed." An employee who had resigned was rehired on September 25, 1950. As a result of a mistake, however, the company record gave him the seniority date of May 21, 1945, which was the date of his original employment prior to the resignation. The erroneous date was carried forward for five years in published seniority listings. It was the basis upon which two prior grievances had been adjusted at the local level. Thereafter the company attempted to correct the seniority date in offering an opportunity for promotion. The arbitrator held that the seniority list had become frozen despite the mistake. "[T]here must come a time when past errors which have not been challenged or corrected by either party, or by individual employees, must be accepted as the agreed understanding and no longer subject to change."[40]

The Supreme Court of New York vacated the award upon the employer's motion. The judge declared that the ruling "flies in the face of the words of the contract" and expressed wonderment that "highly qualified and sincere arbitrators" could have reached such a result.[41] The explanation is both simple and revealing. The arbitrator recognized that every contract must be interpreted and applied through an industrial jurisprudence. The judge felt bound to the written word, although courts have exercised greater liberality for centuries in applying the Statute of Frauds. In my opinion the judge made a serious error.

(4) Collective bargaining agreements, like many commercial contracts, impose enforceable obligations which are not expressed in words. Suppose that during the term of a collec-

[40] *Remington Rand Co.*, 27 L. A. 880 at 887-889 (1956).
[41] *In re IUE*, 27 L. A. 779 at 780 (1957).

tive bargaining agreement an employer carried on a vigorous campaign of unfair labor practices designed to oust the incumbent bargaining representative climaxing the campaign with the discharge of union officials.[42] It is an ancient principle that, "where a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct the other in doing that thing."[43] Surely a gross attack upon the existence of a labor union increases the difficulty of performing its contract obligations. Williston tells us that there is also in every contract "an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing."[44] One who sells a retail milk business impliedly promises that he will not solicit former customers.[45] A lease of coal lands in exchange for a schedule of royalties implies an obligation to mine the coal diligently even though none is expressed.[46] A successful attack upon the status of the collective bargaining representative obviously deprives it of the fruits which are expected to flow from a collective bargaining agreement. The promise not to engage in such attacks can fairly be inferred.[47]

The implied covenant of good faith and fair dealing serves to explain other arbitration decisions. Suppose that a collective bargaining agreement contains seniority, grievance and arbitration clauses but that there are no words limiting the employer's freedom to discharge employees with or without just

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[42] See *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 170 (1956), affirming (2d Cir. 1954) 214 F.2d 462, which enforced 103 N.L.R.B. 511 (1953).

[43] *Gay* v. *Blanchard*, 32 La. Ann. 497 at 504 (1880). See also Contracts Restatement § 315(1) (1932).

[44] 3 Williston, *Contracts*, rev ed. § 670 (1936).

[45] Cf. *Colton* v. *Duval*, 254 Mich. 346, 237 N.W. 48 (1931).

[46] *Mendota Coal and Coke Co.* v. *Eastern Ry. and Lumber Co.*, 53 F.2d 77 (9th Cir. 1931).

[47] See discussion in Cox, "The Legal Nature of Collective Bargaining Agreements," 57 *Mich. L. Rev.* 1, 16 (1958).

cause. During a seasonal decline in business which necessitates reduction in the working forces the employer discharges two senior employees in a fifteen man department and retains the junior men. The union claims that there was work for only thirteen men and that the senior men were discharged in order to circumvent the seniority clause. Surely the men should be reinstated if the truth of the allegation were proved. The requisite covenant is implied even though the contract says nothing about discharges because such a discharge would destroy the right of the employees to have the fruits of their bargain. Upon this familiar principle of contracts one might fairly conclude in the absence of other evidence that the provisions of a collective bargaining agreement establishing wages and labor standards imply an obligation not to seek a substitute labor supply at lower wages or inferior standards. The implied promise would prohibit subcontracting for this purpose. But there are limitations to the covenant of honesty and fair dealing. A manufacturer who sells goods when the price is high is not precluded from doubling his output because this would impair the value of the buyer's purchase. A collective bargaining agreement does not imply a promise that the employer will not deprive the union and the employees of its benefits by closing an obsolete plant or dropping an unprofitable line of business. Similarly, the implied covenant of good faith and fair dealing can hardly be supposed to reach subcontracting which is based upon business considerations other than the cost of acquiring labor under the collective agreement. In such a case either management is free to act or some limitation must be found in the very nature of a collective bargaining agreement.

It is not clear in ordinary contract law whether these implied covenants rest upon a conclusion concerning the intent of the parties or a judicial notion of fairness and sound policy which supplies the obligation in the absence of some manifestation of a contrary intent. Probably there are elements of both. Many judicial and statutory rules of construction fill up gaps by formulating presumptions based upon notions of fairness and convenience mixed with an informed hunch as to the probable intent.[48] Whatever the correct explanation, obviously something more is involved than determining the meaning of language regardless whether the source of the alleged right be a commercial contract or a collective bargaining agreement.

(5) The preceding examples involve familiar aspects of the arbitrators' function under the standard clause authorizing them to resolve disputes concerning the "interpretation and application" of a collective agreement. Only the first calls for no more than giving meaning to a particular word or phrase and even here the meaning cannot be found without resort to materials outside the four corners of the instrument. I find it hard to bring the cases within any normal meaning of the word "application" with reference to the application of a specific provision, although possibly one can stretch the word far enough to include any claim ultimately traceable to a provision of the contract. However that may be, there is a fifth class of cases in which arbitrators adjudicate substantive rights which cannot be traced to any specific provision of the contract. Consider for example the familiar contract which reserves to management the right to direct the working force but forbids a discharge without just cause. Under such circumstances it is common practice for arbitrators to entertain grievances involving lesser discipline.[49] Again, suppose that a collective bargaining agreement stipulates that layoffs shall be made in reverse order of seniority and that the senior man shall be given preference in making transfers or promotions within the bargaining unit. The contract is silent with respect to overtime except that it provides premium pay for work in excess of eight hours a day or forty hours a week. A foreman distributes the available overtime work to a small group whom the other employees and the union claim are his favorites but whom the

[48] See *Pritchard* v. *Norton*, 106 U.S. 124 (1882), (absent contrary manifestations, parties are presumed to intend law which allows validity to govern a contract).

[49] *Commercial Pacific Cable Co.*, 11 L. A. 219, 220 (1948).

foreman calls the most efficient. Might not a grievance be sustained claiming that overtime opportunities should be allocated in order of seniority? Certainly this would be the ruling if that had been the past practice and the foreman was introducing a change.[50] In either case the arbitrator would be sustaining a claim not founded in the language of the contract but falling within its interstices and covered by rather plain implication.

IV

At this point we may draw two conclusions:

First, it is not unqualifiedly true that a collective bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive sources of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining the institutional characteristics and the logic of the governmental nature of the process of collective bargaining demand a common law of the shop which furnishes the context of, and also implements, the agreement. We must assume that intelligent negotiators acknowledge so plain a need unless they state a contrary rule in pretty plain words.[51]

Second, the "interpretation" and "application" of a collective bargaining agreement through grievance arbitration is not limited to the documentary construction of language. The failure to recognize this truth probably explains much of the conflict between arbitral and judicial thinking. Paradoxically,

[50] See *Corn Products Refining Co.*, 12 L. A. 389 (1949).

[51] Such acknowledgment may be no more than "instinct with an obligation imperfectly expressed." See *Wood* v. *Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917).

no jurist would suggest that a promissory note, a trust or indeed any simple contract contained all the rules required to do justice in actions to enforce the contract or recover damages for its breach. A contract is executed in the context of common law and legislation which governs the rights and duties of the parties under the contract. Usually the law simply fills in the background and interstices but occasionally it imposes obligations inconsistent with the very words of the agreement.[52] The line between interpreting a commercial contract and applying the principles of contract law is rarely significant. The court performs both functions. They blend almost imperceptibly in borderline cases.[53] Sometimes we use the terms "interpretation" or "construction" to denominate the process of gathering the meaning of particular words and rely on "the law of contracts" for the rights, duties, and remedies requisite to the implementation of the contract. On other occasions the law pretends that it is engaged only in "interpretation" using the term very loosely to supply "implied" covenants and conditions which fairness dictates should go with the bargain but which the parties did not consciously contemplate and the words do not suggest.

The interpretation and application of a collective bargaining agreement embraces the same two functions. The arbitrator applies a common law of the plant to grievances arising under a collective labor agreement just as the courts apply the common law of contracts to actions upon commercial agreements. He performs the function because it is inescapable even though the collective agreement confines him to "interpretation and application." Yet the task is markedly different in two important respects. Collective agreements, because of the institutional

[52] See *Knights of Pythias* v. *Withers*, 177 U.S. 260 (1900); *Bekken* v. *Equitable Life Assurance Society of U.S.*, 70 N.D. 122, 293 N.W. 200, 209, 212 (1940). Compare *Bishop* v. *Williams*, 221 Ark. 617, 255 S.W. 2d 171 (1953). See also Williston, *Contracts*, rev. ed. §§ 614, 626; *Contracts Restatement* § 234.

[53] *Lohre* v. *Aitchson*, 3 Q.B.D. 558, 562, cited in Williston, *Contracts*, rev. ed. § 614 (". . . the rules determined by . . . decisions and customs are part of the contract.").

characteristics already mentioned, are less complete and more loosely drawn than many other contracts; therefore there is much more to be supplied from the context in which it was negotiated. The governing criteria are not judge-made principles of the common law but the practices, assumptions, understandings and aspirations of the going industrial concern. The arbitrator is not bound by conventitonal law,[54] although he may follow it. If we are to develop a rationale of grievance arbitration, more work should be directed towards identifying the standards which shape arbitral opinions; and if the process is rational, as we assert, a partial systematization should be achievable even though scope must be left for art and intuition. I can pause only to note some of the familiar sources: legal doctrines, a sense of fairness, the national labor policy, past practice at the plant and perhaps good industrial practice generally. Of these perhaps past practice is the most significant; witness the cases in which it is even argued that a firmly established practice takes precedence over the plain meaning of the words.[55]

V

Thus far I have stated only half my thesis. Although the very nature of the collective agreement calls for arbitrators to create and apply an industrial jurisprudence unrestricted by the bare meaning of its words, it is even plainer that there are limits to the arbitrator's function. Even though an arbitration clause covering only "disputes concerning the interpretation and application" of the collective agreement cannot mean barely the translation of words, it must impose some limit. The phrasing of the arbitration clause is often an important issue in collective bargaining. Experienced negotiators are thoroughly aware of their ability to choose between the comparatively

[54] Williston, *Contracts*, rev. ed. § 1929; *Mayberry* v. *Mayberry*, 121 N.C. 248, 250, 28 S.E. 349 (1897); *Smith et al.* v. *Hillerich and Bradsby Co., Inc.*, 19 L. A. 745 (1952).

[55] *California Cotton Mills Co.*, 14 L. A. 377 (1950). But cf. *Gibson Refrigerator Co.*, 17 L. A. 313 (1951).

narrow clause noted above and a wide-open undertaking to arbitrate "any dispute, difference, disagreement or controversy of any nature or character" which may arise during the term of the agreement. When the former clause is selected, the company believes that a limit has been imposed upon the power of the arbitrator. The union would also acknowledge that his authority is narrower than if the union had been able to persuade the company to accept a wide-open clause. There are many arbitration decisions sustaining the defense of non-arbitrability.[56] The arbitrator, in short, is not free, as are courts of general jurisdiction, to draw upon a complete legal system to adjudicate all the rights and duties of the parties.[57]

Accordingly we are driven to ask where the boundary line lies between the area in which an arbitrator may apply the law of the shop and the forbidden territory from which he is excluded by the admonition that he is to confine himself to the "interpretation and application" of the agreement. To make the problem concrete let me use two familiar examples upon which courts and arbitrators have differed.

Suppose that an employee is discharged for what the union thinks is insufficient cause during the term of a collective bargaining agreement which contains most of the customary provisions, including recognition, seniority, grievance and arbitration clauses but which imposes no express limitation upon the management's power to discharge. Of course the exact words of the contract make a difference but one reading the opinions gets the feeling that it is not the language which leads courts to deny relief while arbitrators examine the merits of the discharge.[58] In *Coca-Cola Bottling Co. of Boston* Saul Wallen reasoned that ". . . the meaning of the contract, when viewed as a whole, is that a limitation on the employer's right to dis-

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[56] *Armstrong Rubber Co.*, 16 L. A. 149 (1951).

[57] See *Markel Electric Products, Inc.* v. *U.E.*, 202 F.2d 435 (2nd Cir. 1953); *Kosley* v. *Goldblatt Brothers*, 251 F.2d 558 (7th Cir. 1958); *Kroger Co.* v. *Local 347, Meat Cutters Union*, 41 LRRM 2545 (S.D.W. Va. 1958); *Dairy Workers Union* v. *Dairy Products Corp.*, 42 LRRM 2446 (W.D. Mich. 1958).

[58] See p. 31, n. 21.

charge was created with the birth of the instrument. Both the necessity for maintaining the integrity of the contract's component parts and the very nature of collective bargaining agreements are the basis for this conclusion."[59]

There is little force to the argument that the implication of a clause limiting discharges to cases of just cause is necessary to preserve the integrity of a seniority clause or grievance procedure. The integrity of the seniority and grievance clauses would not be affected by the arbitrary and capricious discharge of a junior employee who had no grievance. They can be enforced by implying an undertaking not to discharge a man for the purpose of evading seniority or preventing the prosecution of a grievance.

Mr. Wallen's reliance upon "the very nature of collective bargaining agreements" cuts much deeper. He thereby asserts that a company which signs a collective bargaining agreement automatically assumes some obligations and submits certain management actions to the jurisdiction of the arbitrator even though the agreement says nothing about them. The dissenting member of the arbitration board spoke the truth when he protested that the majority "have taken a contract which contained no language which could possibly be construed as a limitation on the Company's right of discharge and have implied a very stringent limitation on that right,"[60] but this assertion did not meet the basic contention that employees had rights cognizable by the arbitrator in addition to those which the contract expressly gave them. There are also decisions denying a company the right to subcontract upon grounds reminiscent of Mr. Wallen's reasoning in the *Coca-Cola* case. In one case it was held—

> ". . . the Recognition clause, where considered together with the Wage clause, the Seniority clauses, and other clauses establishing standards for covered jobs and employees limits the Company's

[59] *Coca-Cola Bottling Co.*, reprinted in Cox, *Cases on Labor Law*, 4th ed. 583, 586 (1958).

[60] *Id.* at 590.

> right to subcontract during the term of the Contract. . . . To allow the company . . . to lay off the employees and transfer the work to employees not covered by the agreed standards would subvert the contract and destroy the meaning of the collective bargaining relation."[61]

If the arbitrator has power to read these obligations into the recognition clause, where is the limit?

I suggested earlier that a collective bargaining agreement, unlike most other contracts, is an instrument of government because it regulates diverse affairs of many people with conflicting interests over a substantial period of time. One can phrase the basic problem of interpretation in the discharge and subcontracting cases by saying that the parties differ with respect to the kind of government which they propose to establish. Is it a monarchy except insofar as the employer has assumed the obligations explicitly stated or fairly implied from the contract? Or has the whole realm of matters of mutual concern to employer and employees been brought within the joint authority of the company and union under a regime in which the legislative process is performed in annual contract negotiations and the judicial process is carried out under a grievance procedure ending in arbitration? Usually the realm of matters of mutual concern is divided, part to be regulated by the employer and part to be governed by joint authority under the regime established by the contract. The issue then becomes, which matters are regulated by one form of government and which by the other. Did the Coca-Cola contract move discharges into the area of collective bargaining, *i.e.*, of joint responsibility, or were they left to the sole responsibility of management? What about subcontracting?

It is conventional to refer such questions to "intent," and the governmental nature of a collective bargaining agreement suggests that it should be interpreted somewhat as a basic statute creating an administrative agency, a process in which

[61] *A. D. Juilliard Co.*, 21 L. A. 713 at 724 (1953). See also *Celonese Corp.*, 14 L. A. 31 (1950); *Stockholders Publ. Corp.*, 16 L. A. 644 (1951).

the accepted formula refers us to the intent of the legislature. Yet it is misleading to speak of intent. No one supposes that the tens of senators and hundreds of representatives who vote for a bill have one common state of mind. I trust, also, that arbitrators who speak of "the intent of the parties" do not mean to imply that they are concerned with the secret, unexpressed intent of either party. Those who listen seriously to the testimony of negotiators concerning what they understood or supposed or intended run the risk of imposing upon one side the unilateral suppositions of the other. The true standard of interpretation must be objective.[62] To speak of intent as if the Congressmen or negotiators had reached a conclusion upon the specific issue is also misleading. The troublesome issues during the administration of a statute or contract are usually those which the authors either refused to face or failed to anticipate. Yet to speak of intent, when the word is properly understood, serves two useful functions. It reminds the interpreter that a statute or a contract is a purposive instrument. The metaphor also cautions the interpreter that it is his duty to effectuate the will of the Congress—or of the parties to the contract—even though he himself might reach an infinitely wiser decision. The interpreter must strive, therefore, to apply the instrument on a doubtful occasion in the way which is most consistent with the provisions whose meaning is clear. The reference to "intent" envisages an imaginary legislature—or parties to a contract—believing in all the provisions, limitations and compromises of the instrument. It then adjures the interpreter to give the instrument the application which this imaginary author would have provided if he had consciously determined the issue.

In the case of a statute the best guide to this meaning is often its policy or purpose. Behind the words there usually lies a general aim, an objective, which embodies specific meanings, half-understood, half-unarticulated; and by these one may judge specific cases. Judge Learned Hand reminds us:

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[62] *Contracts Restatement,* § 20 (1932).

> "Life overflows its molds and the will outstrips its own universals. Men cannot know their own meaning till the variety of its manifestations is disclosed in its final impacts and the full content of no design is grasped till it has got beyond its general formulation and become differentiated in its last incidence. It should be, and it may be, the function of the profession to manifest such purposes in their completeness if it can achieve the genuine loyalty which comes not from obedience, but from the according will, for interpretation is a mode of the will and understanding is a choice."[63]

Many questions of interpretation can be handled in this fashion under collective bargaining agreements. The most ambiguous phrase may be directed to a practical problem, and it is an obvious mistake to read the words without attention to the problem. Because the problems are usually unfamiliar and are often subtle, counsel may find it hard to persuade the judge to read the provisions of a labor contract "not as theorems of Euclid, but with some imagination of the purposes which lie behind them."[64] It may sometimes be extraordinarily difficult to convey a sense of purpose through testimony, briefs and oral argument; but these familiar problems of advocacy hardly affect the nature of the issues.

Unfortunately many of the most important questions of interpretation in collective bargaining are not soluble by reference to a fundamental purpose of the collective agreement—at least not in the sense in which that term is usually understood. The difficulty arises from the fact that management and labor often have conflicting objectives,[65] and the interpretation put upon the contract may depend upon which objective is chosen as the major premise. The difficulty is especially acute in determining what area has been brought under the regime of the contract, for management and labor are usually in basic conflict over the size of the area of joint responsibility. Going a

[63] Hand, "The Speech of Justice," 29 *Harv. L. Rev.* 617 at 620 (1916).
[64] *Lehigh Valley Coal Co.* v. *Yensavage,* 218 F. 547 at 553 (2d Cir. 1914), cert. denied, 235 U.S. 705 (1915).
[65] See *Hart Cotton Mills, Inc.,* 11 L. A. 992 (1948). See also p. 35, n. 25.

step further may we not say that this is the very essence of large parts of a collective bargaining agreement—it is an armed truce in a continuing struggle yet the armistice line has not been put on the map.

Nevertheless we must follow Judge Hand's adjuration. Occasionally the sphere of joint government is expressly delineated with all the rest reserved as management prerogatives. More often the impossibility of making an explicit compromise, coupled with the impossibility of not reaching an agreement, results in a pregnant silence. The task of finding where the boundaries would have been drawn if the parties who signed the contract had drawn them explicitly is a problem of interpretation, for it is the agreement that draws the boundary line even though it does not draw it expressly. The interpreter must remember that the contract goes a distance but also that it stops, because it is a product of competing wills and its policy inheres as much in its limitations as in its affirmations.[66] Nor is the interpreter left wholly without guidance. Even a vague management-functions clause suggests that the boundaries may be narrower than under a contract without it. An integrated writing clause bespeaks narrow interpretation. Surely an open-ended arbitration clause indicates a wider area of joint sovereignty than a clause limiting the arbitrator to the interpreta-

[66] What the interpreter must strive to do, therefore, is to give the instrument the application which the author would have provided. As good an illustration as any is *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944). The issue was whether newsboys could properly be found to be "employees" within the National Labor Relations Act despite the employer's want of control over the manner in which the work was done. According to the conventional common law view there is no employment relation unless the putative employer enjoys a right of control. The NLRB argued for a broader standard which would determine the applicability of the statute in doubtful situations by the underlying economic facts showing whether the particular workers were subject to evils the statute was intended to eradicate and whether the remedies were appropriate rather than by technical, previously established legal classifications. The Supreme Court observed that the Wagner Act sometimes adopted and sometimes rejected established legal classifications. In choosing between the alternatives the Court inquired which interpretation was the more consistent with the fundamental purposes of the act, and therefore rejected the conventional, common law definition.

tion and application of the contract. In the discharge case it would not be implausible to conclude, if the words of the contract are otherwise blind, that review of discharges to determine whether there is just cause is more consistent with a contract granting other forms of job security and industrial justice than is the reservation of untrammelled power to discharge for any reason which the employer deems sufficient. The plausibility is less, if indeed there is any, in the case of subcontracting or shift schedules.

Whatever the indicia, however, they must be found in the relationship created by the particular contract, and no obligation may be imposed upon a company by an arbitrator which is not within the context of the contract. In this sense the management rights theory seems sound.[67] The imperative which requires a body of "industrial jurisprudence" within the general area marked off for joint government has no place in deciding what area has been marked off.

A single word may be added in conclusion. Try as he must to penetrate the spirit of the agreement the judge or arbitrator who is confronted with a borderline case will be influenced by his own philosophy concerning the arbitrator's function. He may be an activist and impose his view upon the agreement when its words leave scope, bringing doubtful territory into the joint realm because he thinks that he knows that this is fair and good industrial relations. A wise and respected man may do much good through this conception of the arbitrator's function. Or the arbitrator may follow the quieter role which Learned Hand assigns a judge in interpreting a statute the reach of which is sharply disputed.

> ". . . But the judge must always remember that he should go no further than the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop,

[67] The reserved rights theory may have to be modified in order to accommodate it to the theory of collective bargaining developed under the National Labor Relations Act. See Cox and Dunlop, "The Duty to Bargain Collectively During the Term of an Existing Agreement," 63 *Harv. L. Rev.* 1097 (1950). At the moment I am concerned only with what is brought under the rule of the contract.

> for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for theirs; otherwise it would not be the common-will which prevails, and to that extent the people would not govern." [68]

Even here the parties can make the choice for they select their arbitrator.

VI

In considering the bearing of this rationale upon the respective functions of court and arbitrator it may be well to clarify the slippery term "arbitrability." Because "arbitrability," like its twin, "jurisdiction," covers several concepts, we tend to slide unconsciously from one to another. Our footing will be more secure if we start from the premise that a suit to compel arbitration under LMRA Section 301 is an action to enforce a promise. The promise is the undertaking to arbitrate and to carry out the award. Common law actions to enforce arbitration awards have been entertained on this theory for generations.[69] The theory is the essential predicate of State legislation making agreements to arbitrate future disputes judicially enforceable.[70] Section 301 covers only "Suits for violation of contracts . . . ," which means suits to enforce a promise or to recover damages for the breach. Two conclusions logically follow: (1) that the plaintiff must lose unless he shows nonperformance of a promise to arbitrate; (2) that the court must decide whether the plaintiff has made his case. Possibly it would be wiser to make arbitrators into administrative agencies to which all disputes between employers and employees

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[68] Hand, "How Far Is a Judge Free in Rendering a Decision?" in Law Series 1, Lecture 14 at 5 (National Advisory Council on Radio in Education, 1933).

[69] See *McCullough* v. *Clinch-Mitchell Construction Co.,* 71 F.2d 17, 22 (8th Cir. 1934), cert. denied 293 U.S. 582 (1934); *Fuerst* v. *Eichberger,* 224 Ala. 31, 138 So. 409 (1931). Compare *Food Handlers Local 425* v. *Pluss Poultry, Inc.,* 41 LRRM 2668 (W.D. Ark. 1958); *Clothing Workers* v. *Kornman Co.,* 41 LRRM 2276 (M.D. Tenn. 1957).

[70] See N.Y. Civil Practice Act, § 1448.

must be referred in the first instance[71] or even to treat them as courts of general jurisdiction. This solution cannot be imposed in blanket fashion, however, as long as arbitration is consensual and the function of the court is to enforce a voluntary undertaking. In my judgment there is not the slightest basis for criticizing judicial opinions which say that the question of arbitrability is for the court, insofar as they mean only that the court must decide whether the defendant has broken the promise to arbitrate.[72]

A simple example will emphasize the point. Suppose that the only arbitration clause in a labor contract provides:

> In the event that the parties are unable to adjust a grievance relating to seniority, discharge or promotion at prior steps of the grievance procedure, the grievance shall be submitted at the request of either party to final and binding arbitration under the rules of the American Arbitration Association.

Assume further that the union brings suit to compel the employer to arbitrate its claim that the recognition clause of the contract bars subcontracting which would result in reduction of opportunities to work overtime. Surely the court would and should enter judgment for the defendant on the ground that there had been no breach of the promise to arbitrate. There is no basis for distinguishing cases in which the issue may be disputable.

The remaining questions turn upon the correct interpretation of the promise. A specific stipulation giving the arbitrator power to decide all questions of arbitrability is in substance a promise to submit to arbitration all questions concerning the meaning of the arbitration clause. There is no doubt about the

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[71] See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) for an example of the doctrine of "exhaustion of administrative remedies."

[72] *Local No. 149 American Federation of Technical Engineers (AFL)* v. *General Electric Co.*, 250 F.2d 922, 927 (1st Cir. 1957). See also *American Lava Corp.* v. *Local 222 UAW, AFL-CIO*, 250 F.2d 137 (6th Cir. 1958).

effectiveness of such a stipulation.[73] An undertaking to arbitrate "any dispute, difference, disagreement or controversy of any nature or character" is certainly broad enough to cover disputes about the meaning of the arbitration clause; if either party refuses to submit a question of arbitrability to the arbitrator, there is the breach of promise necessary for judicial relief.[74]

A strong argument can be made for putting this construction upon the conventional undertaking to arbitrate any "dispute concerning the interpretation or application of any provision of this agreement," for a dispute about the meaning of the arbitration clause is literally a dispute about the meaning of a provision of the agreement. There is nothing startling about this distribution of power. Courts determine their own jurisdiction. One wishing to challenge the jurisdiction of an administrative agency must raise the question before the agency and exhaust all administrative procedure upon the jurisdictional question and also upon the merits before he may raise it in court, unless the agency action is a patent usurpation of power which would cause irreparable hardship.[75] Reading the arbitration clause as an undertaking to allow the arbitrator to interpret that clause among others would economize time and effort. The evidence bearing upon questions of arbitrability is often relevant to the merits. The true nature of the claim may not be discernible until all the facts are in evidence. Appraising its character demands the same specialized experience with industrial relations as a decision on the merits. The principal purpose of an arbitration clause, which is to provide a specialized tribunal for the relatively informal development of

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[73] *Matter of Kelley*, 240 N.Y. 74, 147 N.E. 363 (1925); *United Electrical Workers* v. *General Electric Co.*, 233 F.2d 85, 101 (1st Cir. 1956) (dicta); *Local 149 American Federation of Technical Engineers (AFL)* v. *General Electric Co.*, *supra* (dicta). But cf. *Machinists Ass'n.* v. *Cameron Iron Works*, 257 F.2d 467 (5th Cir. 1958).

[74] *Freydberg Bros.* v. *Corey*, 177 Misc. 560, 31 N.Y. S. 2d 10 (1945); *Rogers Diesel and Aircraft Corp.* v. *Amalgamated Local 259*, 15 LRRM 848 (1945).

[75] *Nolan* v. *Fitzpatrick*, 9 N.J. 477, 89 A.2d 13 (1952); *Parker* v. *Lester*, 122 F. Supp. 433 (N.D. Cal. 1953).

the facts, would be implemented by reading the contract as a delegation of power to decide what disputes fall within its ambit.

Nevertheless I am persuaded that the conventional arbitration clause is not an agreement to allow an arbitrator to interpret its meaning, thereby determining his own jurisdiction. The contrast between the wide-open clause and the conventional phraseology is too plain to be put down to inadvertence. The apparent purpose is to confine the power of the arbitrator. Apparently the parties choose it because one party, usually the employer, distrusts arbitration at least to the point of insisting upon the inclusion of some safeguard against the arbitrator's imposing significant obligations not contemplated by the agreement and quite beyond its scope. The clause does not tell what the arbitrator *should not* do. It tells what he *cannot* do. The protection sought by the employer would be drastically reduced by a construction which gave the arbitrator unlimited jurisdiction and merely warned against its exercise, for as a practical matter he would then have the power to impose obligations outside the contract limited only by his understanding and conscience. We can give effect to the underlying purpose only by excepting the interpretation of the arbitration clause from the general power to interpret, thus giving the court the duty to determine whether the claim which one side wishes to arbitrate gives rise to a dispute concerning the "interpretation and application" of the collective bargaining agreement.

This does not mean that the court must decide every question antecedent to a determination of the merits of a grievance which might be thought to involve the arbitrability. In *Boston Mutual Life Insurance Company* v. *Insurance Agents' International Union*[76] the contract established a detailed grievance procedure with strict time limits. It also called for the arbitration of any "dispute about the interpretation or application of any provision of this Agreement" in the event that the com-

[76] 258 F. 2d 516 (1958).

pany and union "shall fail to reach an agreement on any grievance." There were strict time limits in the arbitration clause except that none was stipulated for requesting the American Arbitration Association to designate an arbitrator. In processing a grievance growing out of a discharge the union delayed in invoking the services of the American Arbitration Association. The district court ruled that the Association's services had to be requested within a reasonable time but concluded that the determination of what was a reasonable time was for the arbitrator.[77] The Court of Appeals reversed on the ground that the district court should make the decision.

> "In the present case we cannot possibly say that the parties had promised in the collective bargaining agreement to submit to arbitration on the preliminary issue of arbitrability. Under Art. XIX it is only a 'grievance' which is subject to arbitration. The issue of arbitrability cannot be considered a 'grievance,' as is apparent from Art. XVIII, labeled 'Grievances.'"[78]

It is submitted that both courts erred. Whether the contract required the moving party to invoke the services of the American Arbitration Association within a reasonable time involved interpretation of the contract. *A fortiori* it was for the arbitrator to decide whether the delay was unreasonable. The appellate court put too broad a meaning upon "arbitrability" and too narrow a meaning upon the undertaking to arbitrate "grievances." Some grievances are only questions of procedure. Others raise preliminary issues as the standing of the union to file the grievance, the sufficiency of the reduction to writing, and the timeliness of appeals. Processing a grievance through arbitration so often involves procedural questions that I doubt whether anyone experienced in labor relations and detached from the particular controversy would have supposed for a moment that the *Boston Mutual* contract separated the procedure for dealing with preliminary issues not going to the scope of the arbitration from the procedure for ruling on the merits.

[77] 161 F. Supp. 222 (1958).
[78] 258 F. 2d at 522.

We should not attribute to general words a meaning which serves no useful purpose.

Perhaps the point can be clarified by an hypothetical example. Suppose that the senior employee was denied a promotion even though the contract stipulated that in making promotions seniority should govern among men with ability to do the job. The employee presents a grievance, which the foreman denies. The contract provides for an appeal to the second step if the grievance is reduced to writing and filed with the plant superintendent "within five days." The written grievance is not filed until ten days have elapsed but the union seeks to excuse the delay by offering to prove that the plant superintendent assured both the shop steward and the employee that he would not insist upon the time limit. The company denies the waiver. Surely the resulting question of fact is one for the arbitrator. No one would want to divide the responsibility for deciding simple questions of fact between two different forums. The reason for giving the court power to decide what subject matter is within the arbitration clause does not extend to such an issue. Similarly if the written grievance had been filed on the seventh calendar day but the fifth working day it would be for the arbitrator to determine whether the expression "within five days" referred to calendar days or working days. A dispute about the meaning of "within five days" is just as much a dispute about the interpretation of the contract as a controversy over the meaning of "just cause."

Using the technical language of the law I suggest that the conventional arbitration clause limiting the arbitrator to disputes concerning interpretation and application of the contract reserves a party the right to a judicial determination upon whether the arbitrator has jurisdiction over the subject matter but that all other questions, procedural, jurisdictional or substantive, are solely within the power of the arbitrator to determine.

The utility of this principle depends upon the meaning which the courts put upon the phrase "interpretation and application." In an earlier part of my paper I sought to show that grievance arbitration necessarily involves much more than the linguistic interpretation of words. Even when the subject matter is pretty plainly within the scope of the contract it is necessary to determine what covenants are implied, to fashion remedies, and to develop out of the intricate network of a continuing relationship that "law of the shop" or "industrial jurisprudence" which will implement the contract and supply its omissions. The necessity arises from the nature of collective bargaining agreements and the complexities of industrial relations. Courts often exercise this function in enforcing other kinds of contracts, sometimes under the name of interpretation. They should recognize that grievance arbitration would be a constricted, dying institution if it were limited to the definition of terms. They should allow the arbitrator to exercise the creative role his function demands, always confining him within the scope of the contract. When actions for breach of the substantive terms of the contract are instituted under section 301, the courts should not assume the arbitrator's responsibility.

Once again it must be acknowledged that the First Circuit has taken a contrary view.[79] The American Federation of Technical Engineers and General Electric Company entered into a collective bargaining agreement which stipulated —

> Job classifications, job rates and step rates are as shown on Exhibit B.

Exhibit B listed six job grades by number showing a monthly salary and step increases for each. The arbitration clause was in standard form. The union filed grievances alleging that four employees were incorrectly graded. When the company denied the grievances and refused to arbitrate, the union brought an action to compel arbitration under section 301. The court held that the petition should be dismissed because —

[79] 250 F. 2d at 922.

> There is no language in the collective bargaining agreement to be interpreted and applied for the purpose of determining whether the duties performed by a particular employee entitled him to be classified in any particular grade.[80]

The truth of this statement seems doubtful. One might inquire what was the meaning of Exhibit B and of the references to numbered grades. Why should they have been set forth in the contract if not to give the employees some form of guarantee? Possibly the guaranty was of specified step increases according to grade. On the other hand the words "grade 14, grade 13 etc" had meaning to everyone in the plant for the established grades were part of the context in which the contract was executed and although there might be argument about borderline cases the system must have been plain enough so that one could classify most of the men with assurance. The entire wage scale could be upset by wholesale downgrading. In my view there plainly was a dispute about the "interpretation" to be put upon the words and symbols of Exhibit B. They had significance to the supervisors and rank and file workers to whom they were directed even though the court might not know their meaning.

The most disturbing aspect of the circuit court's opinion is the insistence that there is nothing to arbitrate when "there is no language in the collective bargaining agreement to be interpreted and applied" [81] for the purpose of resolving the controversy. This restricted conception of an arbitrator's function is inconsistent with the basic qualities of a collective bargaining agreement and the nature of the arbitral process. It would exclude from arbitration most of the examples given in the earlier part of this paper.

It would also be unfortunate for the federal courts to adopt the so-called *Cutler-Hammer* doctrine under which the New York courts hold that —

[80] *Id.* at 930.
[81] *Ibid.*

> . . . the mere assertion by a party of a meaning of a provision which is clearly contrary to the plain meaning of the words cannot make an arbitrable issue. . . . If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.[82]

The Second Circuit has flirted with this approach in an action under section 301 [83] but the First Circuit rejected it.[84]

The *Cutler-Hammer* doctrine is inconsistent with the words of the typical grievance clause. In the *Cutler-Hammer* case the undertaking was to arbitrate "*any* dispute . . . as to the meaning, performance, non-performance or application of the provisions of this agreement." [85] Nothing suggests a limitation to two-sided disputes. The words "any dispute" imply that no limitation is intended. The New York courts treated the clause as if it read "Any dispute about the meaning of a provision of this contract which the court finds susceptible of two reasonable interpretations . . ." These are not the words of the typical grievance arbitration clause. I find it hard to believe that many of the parties who negotiate the typical clause would accept this language as equivalent.

In this environment it is dangerous to speculate about the intent of the parties. Since the union is usually the moving party, we may fairly suppose that it desires the arbitrator to hear all the claims it may press. At the time of contract negotiations the employer may be more than willing to provide a forum for expeditiously settling disputes within the contract but we must acknowledge that most employers desire to pro-

[82] 271 App. Div. 917 at 918.

[83] *Engineers Association* v. *Sperry Gyroscope Co.*, 251 F.2d 133 at 137 (2nd Cir. 1957).

[84] *New Bedford Defense Products Division of Firestone Tire and Rubber Co.* v. *Local 1113, International Union, UAW, AFL-CIO*, 258 F.2d 522 at 526 (1st Cir. 1958). Compare *Furniture Workers Union* v. *Little Rock Co.*, 40 LRRM 2008 (E.D. Ark. 1957); *Steelworkers* v. *New Park Mining Co.*, 43 LRRM 2277 (D.C. Utah 1958) where federal courts applied general doctrines of specific performance to deny enforcement of arbitration clauses.

[85] 271 App. Div. 917 at 918.

tect themselves as far as possible against arbitration awards which cut into management functions or add significant costs. A number of companies would be concerned about harassment through frivolous grievances. Many employers, therefore, would like to write the *Cutler-Hammer* doctrine into collective bargaining agreements, while the unions involved would be bitterly opposed. Neither side appears to be strong enough as a rule to write its view into the contract in specific terms.[86] The doctrine has never been so widely accepted that we can say that it is incorporated by reference. Under such circumstances the conventional arbitration clause should be given the interpretation which makes arbitration the most effective instrument for resolving disputes and promoting constructive labor-management relations.

The *Firestone* ruling is more convenient, more practical and more consistent with the interpretative process by which collective agreements must be applied to concrete situations. Branding a claim as frivolous is hardly more than an expression of the strength of one's own conviction. What one man considers frivolous another may find meritorious. Frivolous cases, moreover, are often taken, and are often expected to be taken, to arbitration. The cathartic value of arbitrating even a frivolous grievance on which employees place value balances the inconvenience and cost. The *Cutler-Hammer* doctrine erroneously presupposes that the meaning of the words — or at least the possibility of two reasonable interpretations — can be derived from the face of the instrument. The institutional characteristics of a collective bargaining agreement prevent its terms in the detail necessary to validate this assumption. There are implied covenants, as I have sought to show, and there is also need for a "shop law" or "industrial jurisprudence." Even the meaning of words depends upon the frame of reference including the unarticulated major premises. Within the inter-

[86] Such a suggestion is made, however, by Chief Judge Magruder in 250 F.2d 922, *supra*.

stices familiarity with the parties' way of life and still wider industrial practice is essential to sound interpretation. A written instrument must be read with the eyes of those to whom it is addressed. The bare fact of an arbitration clause shows a desire to commit such questions to a tribunal with specialized knowledge and experience necessary to perceive the substance which lies beyond dictionary definitions and may be implicit in the collocation of ideas even though there is no single phrase or sentence in which it finds expression. And surely no collective agreement contemplates elaborate proof of its industrial context first in the suit to compel arbitration and later in arbitration. A court should send to arbitration any dispute within the scope of the contract in which the union (or the employer) pitches its claim upon the contract however frivolous the claim may seem.

The remaining question is, which tribunal should determine the scope of the contract? To return to the earlier metaphor, does the court or the arbitrator have power to determine the armistice line between the area marked off for administration under the regime established by the contract and the area reserved for regulation by the employer (or perhaps left unregulated). Since drawing the line is a question of contract interpretation even though the contract does not draw it expressly,[87] one might conclude that the issue is always one for the arbitrator no matter how ridiculous the claim may be. Under this view the court's role would be confined first to asking whether the union pitched its claim upon the contract and then to entering a decree which ordered the arbitrator to confine himself to the issue whether the contract sustains the claim without roaming about in pursuit of equity or sound industrial relations. I would like to see this rule established but I cannot say honestly that it is consistent with the apparent purposes of a contract which limits arbitration to disputes concerning the interpretation and application of the agreement.

[87] See p. 52 *supra,* n. 66.

The apparent purpose is to confine the arbitrator's power. If any ruling, however remote from the contract, may be made an interpretation by the arbitrator's own assertion, then he can lift himself by his bootstraps and the safeguard is gone which the company sought to establish. It may be argued that this is a much smaller risk than the danger of excessive judicial interference. Much of the danger would be eliminated by following the *Firestone* decision in preference to the *Cutler-Hammer* doctrine upon all questions within the scope of the contract and what danger remains is not for us to weigh but for the parties.

The result is a dilemma. Determining the scope of the contract is interpretation, which is for the arbitrator, yet the arbitrator is not to be allowed to lift himself by his bootstraps. The solution appears to lie in a distinction paralleling the test of federal jurisdiction over the subject matter of an action. The federal courts have jurisdiction over actions arising under the laws of the United States.[88] The plaintiff is not required to plead a good claim in order to give the federal court jurisdiction of the subject matter. If the bill or declaration makes a claim which if well founded is within the jurisdiction of the court, it is within that jurisdiction whether well founded or not — "at least where not patently frivolous." [89] ". . . the case should be decided on the merits unless the want of jurisdiction is clear." [90] Upon parallel reasoning arbitration should be ordered in an action under section 301 whenever the claim might fairly be said to fall within the scope of the collective bargaining agreement. If the latter contention be made but is patently frivolous, arbitration should be denied.

The suggested analysis preserves something of the *Cutler-Hammer* doctrine within a very limited sphere. It would have no place in dealing with subjects within the general scope of

[88] 28 U.S.C. § 1331.

[89] *Hart* v. *B. F. Keith Vaudeville Exchange et al.*, 262 U.S. 271, 274 (1923). See also *Bell* v. *Hood*, 327 U.S. 678 (1946).

[90] 262 U.S. at 274.

the contract. It would be applicable to petitions to compel arbitration concerning its scope. In the *Cutler-Hammer* case itself and in the *General Electric* case [91] which followed, arbitration should have been ordered because the subject matter of the union's claims was plainly within the scope of the contract; both claims rested upon the meaning of particular words. The discipline less than discharge,[92] promotion [93] and overtime [94] examples discussed earlier plainly would be arbitrable for although the claims did not rest upon the words, the subjects were well within the general scope of the bargain. Perhaps we should reserve judgment upon the merits of the *Coca-Cola* discharge case but I would have no hesitation in sending it to arbitration upon the ground that the contract could be honestly construed to grant job security against arbitrary discharge.[95] On the other hand no court should compel a company to arbitrate a claim that the recognition clause of a contract, properly interpreted, covers the subject of union security and therefore empowers the arbitrator to establish a union shop.[96]

In conclusion let me emphasize the need for judicial caution against jumping too quickly to the conclusion that a claim indisputably falls outside the scope of the contract on a motion to compel arbitration. Since the true nature of a grievance often cannot be determined until there is a full hearing upon the facts, the reasonable course is to send all doubtful cases to arbitration reserving the right to vacate any award which indisputably goes beyond the scope of the agreement. Suppose that a manufacturer of heavy steam valves is a party to a contract which makes no mention of subcontracting but contains, in addition to the arbitration clause, such customary provisions as a recognition clause, a seniority clause, a discharge clause and

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[91] p. 31, n. 22; p. 55, n. 72, *supra.*
[92] p. 43, n. 49, *supra.*
[93] p. 59, *supra.*
[94] p. 44, n. 50, *supra.*
[95] pp. 47-49, n.'s 58, 59, 60 and 61, *supra.*
[96] See *Consolidated Vultee Aircraft Corporation* v. *UAW, Local* 904, 160 P. 2d 113 (1945).

a schedule of wage rates. The manufacturer sublets the machining of certain parts to an independent concern instead of following his previously unbroken practice of doing all his own production. There are layoffs and a reduction of overtime. The union protests that the contract has been violated and sues under section 301 to compel arbitration. If there were no more to the case, a court might well conclude that the claim that subcontracting fell within the scope of the contract was patently frivolous. If there was also evidence that the subcontracting was only a subterfuge by which to obtain a supply of labor at wages below those fixed by the contract, the issue would be within the scope of the wage clauses and any implied covenant of good faith and fair dealing. There should be no obligation to adduce evidence upon these points before the case goes to arbitration. To require the union to go to trial on the facts twice would be both wasteful and expensive. The delay would impair the value of arbitration. These costs outweigh the expense of trial and the pressure that an employer may feel to comply with an award even though it goes beyond the arbitrator's power.