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Labor Arbitration as a Continuation of the Collective Bargaining Process

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In the commercial case, arbitration is the substitute for litigation. [In the labor setting], arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.¹

I. INTRODUCTION

Section 1 of the National Labor Relations Act of 1935 (NLRA)² declared it "to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . . ."³ Section 1 provided private sector employees with "the right to self-organization, to form, join, or assist labor organizations [and] to bargain collectively [with their respective employers] through representatives of their own choosing."⁴ The NLRA contributed significantly to the growth of labor organizations and to the negotiation and execution of collective bargaining agreements.

In 1947, Congress amended the NLRA to indicate specifically that the duty to bargain involves "the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to . . . the negotiation of an agreement, or any question arising thereunder . . . ."⁵ Congress simultaneously enacted section 301 of the Labor-Management Relations Act (LMRA)⁶ to provide federal district courts with jurisdiction over suits to enforce collective bargaining agreements.

¹ Copyright 1991 by Charles B. Craver.
³ 1. United Steelworkers v. Warrior & Gulf Navigation Co. (363 U.S. 574, 578 (1960)).
In *Textile Workers Union v. Lincoln Mills*, the Supreme Court held that section 301 did not merely grant federal courts jurisdiction over contract actions involving collective agreements. The Court found that Congress envisioned the development of an entire body of federal common law that would be designed to reflect the unique nature of labor-management contracts. The Court further noted that since “the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike,” judges should recognize that the NLRA and § 301 of the LMRA evidence a clear legislative policy favoring the enforcement of arbitration provisions.

In two contemporaneous law review articles, Dean Harry Shulman and Professor Archibald Cox cogently suggested that collective bargaining agreements are not analogous to traditional commercial contracts. Professor Cox emphasized the fact that collective contracts often lack precise language.

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 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.

Dean Shulman noted also that employers and labor organizations are not always able to define all of the terms of their relationship in their bargaining agreements.

There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source 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 governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.

In *United Steelworkers v. Warrior & Gulf Navigation Co.*, the

8. *Id.* at 456-57.
9. *Id.* at 455.
12. *Id.* at 1490-91. See Shulman, *supra* note 10, at 1004 ("Since the parties earnestly strive to complete an agreement, there is almost irresistible pressure to find a verbal formula which is acceptable, even though its meaning to the two sides may in fact differ.").
Supreme Court specifically accepted the Shulman-Cox description of collective contracts.

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. It calls into being a new common law—the common law of a particular industry or of a particular plant. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is "a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith." Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement.\textsuperscript{15}

The Supreme Court thus acknowledged that a labor-management agreement is like an industrial constitution. A collective contract provides general guidelines regarding wages, hours, and working conditions, but does not expressly define every conceivable employment term.

When the parties to a labor contract are unable to agree upon the appropriate interpretation of a particular provision, or they maintain that existing employment terms have been implicitly incorporated in their agreement, they have several options available to them. The dissatisfied party may interrupt operations through a strike or lockout. That party may seek redress through costly, time-consuming, and cumbersome judicial procedures. It may alternatively employ grievance-arbitration procedures set forth in the bargaining agreement.

The \textit{Warrior \& Gulf} Court emphasized the importance of systems of "industrial self-government" established by the negotiating parties themselves.\textsuperscript{16}

The grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.\textsuperscript{17}

Almost all contemporary bargaining agreements provide for the res-

\textsuperscript{15} \textit{Id.} at 578-80 (citing Shulman, \textit{supra} note 10, at 1005).
\textsuperscript{16} \textit{Id.} at 580.
\textsuperscript{17} \textit{Id.} at 581.
olution of disputes concerning the interpretation and application of contractual provisions through grievance-arbitration machinery. During the initial stages of grievance-arbitration procedures, the parties endeavor to achieve an accommodation of their competing interests through negotiations. In the relatively infrequent instances in which no mutual accord is attained, and the losing party continues to feel sufficiently aggrieved, arbitration may be invoked.

Some experts have suggested that grievance arbitration is not part of the collective bargaining process. These experts maintain that arbitral procedures are more akin to judicial proceedings.

I do not regard arbitration as a part of the bargaining process. I see it as a quasi-judicial function—construing and applying contract terms to ascertained fact situations. If the contract is ambiguous but covers the matter involved, the arbitrator must construe, apply and even adapt. If the matter is not covered at all, he should not read into the contract something that is not there.

Other experts have noted that grievance arbitration is not merely a substitute for judicial action.

[A]rbitration is not a substitute for judicial adjudication, but a method of resolving disputes over matters which, except for the collective agreement and its grievance machinery, would be subject to no governing adjudicative principle at all . . . . [G]rievance arbitration is not quite the same thing as adjudication . . . . [P]arties to the collective bargaining process have substituted for the strike, as a method of resolving differences between them as to the proper application and interpretation of their agreement, a system of adjudication against the standards set forth in that agreement; but that system of adjudication, since it is not a substitute for litigation, is not the same, in principle, historical background, or effect, as the system of adjudication used by the courts to resolve controversies over the meaning and application of contracts.

[The arbitrator] is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which tran-

19. In a recent survey of representative bargaining agreements, grievance procedures culminating in binding arbitration were found in 98% of the contracts. See Basic Patterns: Grievances and Arbitration, 2 COLLECTIVE BARGAINING, NEGOTIATIONS AND CONTRACTS (B.N.A.) 51:1 (1989). See also U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 2095, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS 112 (1981) (indicating that 97% of 1,550 major collective bargaining agreements reviewed contained arbitration provisions).
scends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement.22

The *Warrior & Gulf* Court appropriately accepted the view that grievance-arbitration is more analogous to the bargaining process than to the quasi-judicial function. It noted that "[t]he grievance procedure is . . . a part of the continuous collective bargaining process" and indicated that "[i]t, rather than a strike, is the terminal point of a disagreement."23 The Court further emphasized that labor arbitration involves more than the quasi-judicial interpretation and application of express contractual provisions.

Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.24

If grievance arbitration were considered quasi-judicial in nature, the neutral arbiters would merely perform functions similar to those performed by traditional judges. The parties would be expected to present cases in a relatively formal and legalistic manner. Arbitrators would be expected to interpret and apply contractual language the same way in which judges interpret and apply statutory provisions. Judges would be fully conversant with the function being performed by arbitrators and would feel wholly competent to determine whether such neutrals have performed their assigned tasks in a judicial fashion. Such an approach would undermine the grievance-arbitration process by depriving the contractual parties of their fundamental bargain.

Labor and management representatives generally provide that all disputes regarding the interpretation and application of bargaining agreement terms should be finally resolved through the specified grievance-arbitration procedures. Grievance-arbitration procedures are a substitute for both economic warfare and judicial action. Negotiating parties


24. 363 U.S. at 581.
appreciate the fact that their contractual provisions are not always unambiguous. The negotiating parties also recognize that the express terms of their collective contract do not encompass every enforceable condition of employment. They thus adopt grievance-arbitration mechanisms to provide a means of fleshing out the gaps in their agreement and determining the manner of application for any ambiguous language in their agreement. As Professor Theodore St. Antoine has insightfully noted, such contracting parties have elected to have grievance arbitrators act as their designated “contract readers.”

If unresolved grievances were allowed to fester, employee morale would decline, and the likelihood of industrial self-help would increase. Grievance-arbitration procedures enable contracting parties to resolve their bargaining agreement disputes in an informal, inexpensive, and relatively expeditious manner. Both sides are given the opportunity to articulate their respective positions, and the arbitrator is expected to resolve their controversy. It is often less important whether or not the arbitrator reaches the “correct” result, than it is that he or she achieve some solution. Such a denouement enables the parties to move on to other matters. The arbitral determination alleviates the tension associated with unresolved disputes. An arbitral determination also permits the unsuccessful participant to impose blame for the result on an outside individual, instead of the other member of the continuing labor-management relationship. If the losing party is truly dissatisfied with the arbitral determination, it can always seek a modification of that interpretation when the next collective contract is negotiated.

Some writers have suggested that employers and labor organizations prefer to have their contractual disputes resolved by labor arbitrators, because such neutrals are particularly knowledgeable about labor-management relations and the industrial law of the shop. Other writers have been less generous, however, indicating that most labor arbitrators are marginally competent, at best, and are more desirous of guaranteeing future acceptability than of deciding issues in a wholly objective manner. Although I accept the notion that most labor arbitrators do pos-

25. See supra note 12 and accompanying text.
26. See supra note 13 and accompanying text.
29. See P. HAYS, supra note 20, at 111-12.
sess a greater understanding of industrial relations than people unfamiliar with such unique settings, the issue of arbitral competence is not very significant. The parties who select arbitrators—usually from lists provided by the Federal Mediation and Conciliation Service or the American Arbitration Association—are generally familiar with their respective backgrounds and arbitral records. If such parties wish to employ experienced persons, they may certainly do so. If, however, they prefer to retain the services of neophytes, that too is their prerogative.

Regardless of how professionally capable a particular arbitrator may be, he or she will normally issue a decision which resolves the underlying controversy. The finality aspect is an important feature of the arbitration process.

The parties' stake in arbitral finality...exists not so much because the arbitrator has special competence, experience, or understanding...Instead, the parties have an institutional stake in finality because the arbitrator is their creation; he functions by their consent and at their sufferance, and his powers and roles can and should be molded by them to suit their own purposes.

If losing parties regularly appealed arbitral determinations to state or federal courts, this fundamental aspect of arbitral decisionmaking would be lost. If judges mistakenly considered arbitration decisions analogous to judicial determinations and subjected those awards to searching review, the party that prevailed before the arbitrator would be deprived of its bargain, and labor-management relations would be adversely affected.

This article will evaluate the way in which courts and the NLRB should treat grievance arbitration decisions, based upon the premise that such determinations should be considered an integral part of the collective bargaining process. The article will initially assess the manner in which pre-hearing challenges to arbitral jurisdiction should be resolved. It will next analyze the appropriate judicial function with respect to post-arbitration judicial review, to contemplate how reviewing courts should evaluate arbitral fact-finding and interpretative determinations and resolve challenges to arbitration awards based upon public policy considerations. The relationship between the NLRB authority and arbitral jurisdiction will then be explored, to decide when the Labor Board should direct parties to resolve unfair labor practice allegations through arbitral proceedings, and the degree of deference the NLRB should accord to prior arbitral determinations. The article will finally discuss the

way in which contracting parties and arbitrators should modify their behavior to guarantee that arbitral proceedings will optimally enhance labor-management relationships.

II. PRE-ARBITRATION JUDICIAL INTERVENTION

Labor and management representatives are able to resolve most contractual disputes during the pre-arbitration stages of the grievance procedure. In those relatively infrequent instances in which they are unable to achieve an amicable solution and the moving party continues to feel sufficiently aggrieved, arbitration may be invoked. In most cases involving resort to the ultimate step of the grievance-arbitration machinery, the parties simply select an arbitrator and schedule the requisite hearing. If the responding party believes that the grievance is not arbitrable, it generally submits to the arbitrator's authority and raises the jurisdictional issue before that neutral authority. In a few cases, however, the responding party does not voluntarily participate in the requested arbitral proceeding. The responding party may instead seek a declaratory judgment from a state or federal court finding that the particular controversy is not subject to arbitral jurisdiction. The reluctant entity may alternatively refuse to submit to the arbitrator's authority, forcing the grieving party to seek a state or federal court injunction directing the recalcitrant entity to arbitrate the underlying contractual dispute.

Prior to 1960, state courts had not been very supportive of grievance-arbitration provisions. State courts frequently indicated an unwillingness to enforce executory promises to arbitrate future contractual disputes which might arise. Even when state courts were willing to enforce such executory commitments, they often did so reluctantly. For example, in International Association of Machinists v. Cuttler-Hammer, 31. See Jones, The Name of the Game is Decision—Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration, 46 Tex. L. Rev. 865, 866 (1968); Smith & Jones, The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties, 52 Va. L. Rev. 831, 871 (1966).

32. State courts possess jurisdiction concurrent with federal district courts over suits under § 301 of the LMRA, but state tribunals are required to apply federal substantive law to such actions. See Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962). Such federal question suits may be removed from state to federal court under 28 U.S.C. § 1441 (1982). See Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968).

33. In Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), the Supreme Court held that the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 101 et seq. (1982), do not deprive federal courts of authority to issue injunctive orders in favor of arbitration, since such judicial orders were "not a part and parcel of the abuses against which the [Norris-LaGuardia] Act was aimed." Id. at 458.

The court held that a judge must initially review the pertinent contractual language and determine whether the parties had actually intended their arbitration clause to cover the existing controversy. Whenever a court concluded that the grieving party could not prevail on the merits of the dispute, it refused to order arbitration. "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."36

In United Steelworkers v. Warrior & Gulf Navigation Co.,37 the United States Supreme Court rejected the traditional common-law approach. Since the Warrior & Gulf Court recognized that grievance arbitration is "part and parcel" of the bargaining process,38 it decided that the role of judges confronting arbitrability issues should be highly circumscribed. Although the Court acknowledged that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," the Court emphasized the "congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration . . . ."39 The Supreme Court thus delineated an extremely narrow function for courts asked to determine pre-arbitration questions concerning arbitral jurisdiction:

[T]he judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance . . . . An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage . . . .

In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . . .40

In the companion case of United Steelworkers v. American Manufacturing Co.,41 the Court expressly repudiated the Cutler-Hammer doctrine and stressed that courts are not to weigh the merits of particular disputes when determining the arbitrability of such controversies.42

The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitra-

36. 271 A.D. at 918, 67 N.Y.S.2d at 318.
38. See supra note 1 and accompanying text.
39. 363 U.S. at 582.
40. 363 U.S. at 582-83, 584-85.
42. Id. at 567.
tor. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator . . . .

The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.43

The Warrior & Gulf Court also indicated that grieving parties need not always rely upon explicit contractual language to support their arbitrability contentions.

The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, [and] his judgment whether tensions will be heightened or diminished . . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.44

The Warrior & Gulf and American Manufacturing decisions clearly recognized that courts should rarely permit pre-arbitration judicial intervention to preclude arbitral consideration of contractual grievances. In such situations, judges are merely to ask whether the underlying controversy is even "arguably" subject to the scope of the grievance-arbitration provisions. Only when the resisting party can unequivocally demonstrate that the contracting parties definitely intended to exclude such issues from arbitral jurisdiction may a judge decline to sanction arbitration.45 All doubts must be resolved in favor of arbitration.

43. Id. at 567-68.
44. Id. at 581-82.
Several years after the *Warrior & Gulf* and *American Manufacturing* cases, the Supreme Court delineated a crucial distinction between substantive and procedural arbitrability challenges. In *John Wiley & Sons v. Livingston*, the Court limited the *Warrior & Gulf/American Manufacturing* evaluative criteria to substantive arbitrability questions. Since the court recognized that procedural arbitrability claims frequently raise equitable issues that are particularly suited to arbitral determination, and that are often inextricably intertwined with the merits of the underlying contractual dispute, the Court decided that such procedural matters should be left to arbitral resolution.

Doubt whether grievance procedures . . . have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration . . . .

Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.47

The *Warrior & Gulf/American Manufacturing* presumption in favor of arbitrability has had a salutary effect upon grievance arbitration. Since employers and labor organizations realize that courts will almost always conclude that contractual disputes are arbitrable—no matter how frivolous cases may appear on the merits—parties generally recognize that they should simply present their arbitrability claims and their substantive contentions to the arbitrators. In a recent study of all reported federal court cases from 1960 through the end of 1988 pertaining to grievance arbitration litigation, Professors Peter Feuille and Michael LeRoy found only 143 district court decisions involving pre-arbitration judicial intervention.48 Feuille and LeRoy were thus able to locate only 5.1 pre-arbitration federal court cases per year during that twenty-eight year period. Of the 136 district court decisions which actually resolved the arbitrability question, 103 (76%) culminated in judicial orders directing arbitration.49 In only thirty-three instances—slightly more than one case per year—did district courts decline to compel arbitration.50 When one recognizes that thousands of contractual disputes were taken to arbitra-

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47. Id. at 557. See also Operating Engineers v. Flair Builders, Inc., 406 U.S. 487, 490-92 (1972) (the Supreme Court reaffirmed the *John Wiley & Sons* view that procedural arbitrability questions should be resolved by arbitrators and not judges).
49. Id.
50. Id.
tion during those twenty-eight years, it becomes apparent that the Supreme Court approach has encouraged parties to conclude their bargaining process with respect to contractual disputes in the arbitral forum, instead of through resort to judicial intervention.

In \textit{AT & T Technologies v. Communication Workers}, the Supreme Court expressly reaffirmed the \textit{Warrior & Gulf/American Manufacturing} arbitrability approach. The Court, nonetheless, went on to suggest a more intrusive role for courts confronting arbitrability challenges.

\textit{[T]he question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator . . .} 

The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.

Under the \textit{Warrior & Gulf/American Manufacturing} formulation, judges deciding arbitrability challenges should merely determine if the underlying contractual dispute is "arguably" subject to the grievance-arbitration provisions. All doubts must be resolved in favor of arbitration. Under the \textit{AT & T Technologies} approach, one has reason to believe that district court judges may become more enmeshed in the validity of the underlying controversies. While endeavoring to assess arbitrability, the judges may be tempted to examine contractual language, bargaining history, and even past practice. Such conduct would be entirely inappropriate.

The more intrusive \textit{AT&T Technologies} approach was evident in the recent \textit{Litton Financial Printing v. NLRB} decision. \textit{Litton Financial} involved a bargaining agreement containing a broad grievance-arbitration provision and a clause specifying that in the case of layoffs, seniority would be the determining factor "if other things such as aptitude and ability [were] equal." The contract expired in October of 1979. No new agreement had been achieved when, in August and September of 1980, Litton Financial unilaterally modified its operations and laid off ten

\begin{itemize}
\item \textit{See id. at 41 (Table 1).}
\item 475 U.S. 643 (1986).
\item \textit{See 475 U.S. at 648-50.}
\item \textit{Id. at 649.} The Court reiterated the fact that courts are not to review the merits of grievances in the guise of deciding arbitrability, since the merits of disputes are always for the arbitrators to determine. \textit{Id.} at 649-50.
\item \textit{See supra} note 45 and accompanying text.
\item 111 S. Ct. 2215 (1991).
\end{itemize}
workers, including six of the most senior employees. Litton Financial refused to process grievances filed by the union, and a section 8(a)(5) refusal to bargain charge\(^{57}\) was filed with the NLRB. The Labor Board held that the unilateral changes contravened section 8(a)(5), since Litton Financial had failed to provide the union with the opportunity to discuss the proposed modifications. The Board directed Litton Financial to bargain with the union over the layoffs and to process the grievances. It refused, however, to order arbitration, since it concluded that the grievances did not arise under the expired contract. A five-Justice majority sustained the Board determination.

The *Litton Financial* majority erroneously permitted the Labor Board to substitute its interpretation of the bargaining agreement for that of the arbitrator. It also ignored its prior holding in *Nolde Bros., Inc. v. Bakery Workers*,\(^{58}\) in which it has directed an employer to arbitrate employee claims to severance pay with respect to layoffs that had occurred after the existing collective contract had expired.

In *Litton Financial*, both the NLRB and the Supreme Court majority disregarded the crucial fact that an order directing arbitration would not necessarily have indicated that the seniority rights in question had survived expiration of the bargaining agreement. Since the Board had found that the grievance procedures had survived the expiration of the contract, it should have directed arbitration of the seniority dispute. While an arbitrator may have determined that the seniority rights did not survive expiration of the agreement, he or she may have found a sufficiently established past practice of applying those rights to periods between contracts to create an enforceable contractual term. It should have been obvious that the union claims arose under the pertinent bargaining agreement. The grievances relied upon a specific contractual provision. The Board and the Court should have left it to the arbitrator to decide whether the grievant's seniority rights had survived the expiration of the bargaining agreement.

\(^{59}\) 430 U.S. at 249, 253 (emphasis in original).
Grievance-arbitration clauses generally provide that all controversies, with respect to the interpretation and application of bargaining agreement terms, will be resolved exclusively through the specified contractual procedures. If one views such dispute-resolution machinery as a continuation of the collective bargaining process, it becomes clear that judicial intervention can accomplish nothing but mischief. At best, such pre-arbitration intervention will significantly delay submission of the underlying contract dispute to arbitration. At worst, pre-arbitration intervention might deprive a labor organization, or an employer, of a hearing before the tribunal which the parties specified would resolve all of their contractual disagreements.

Courts should realize that pre-arbitration litigation always involves a party that has refused to honor its contractual commitment to the grievance-arbitration process. Either one party is seeking a judicial declaration that it is not obliged to arbitrate a particular question, or the moving party is being compelled to seek injunctive relief against a responding entity that has declined to participate voluntarily in an arbitral proceeding. In either instance, the reluctant party could adequately protect its interests by simply submitting to the arbitrator's authority and raising the arbitrability issue before that individual. If the grievance is actually not arbitrable, the neutral person should dispose of the case on that narrow basis. In those rare instances in which the arbitrator rules in favor of arbitrability, when it should be obvious to all unbiased observers that the parties specifically intended to exclude such controversies from arbitral consideration, post-arbitration judicial review would be available to correct the error.60

Since the AT & T Technologies decision, most lower courts have continued to apply the Warrior & Gulf/American Manufacturing presumption in favor of arbitrability. When the pertinent contractual language is ambiguous, and it is not abundantly apparent that the parties intended to exclude the particular grievance from arbitral consideration, courts continue to rule in favor of arbitral jurisdiction.61 Even cases in which employers have alleged that the individual grievants were not bar-

60. If a party challenging arbitrability of the underlying grievance unsuccessfully presents its jurisdictional objection to the arbitrator, it may thereafter request judicial review of that arbitral determination. See IAM Lodge 1777 v. Fansteel, Inc., 900 F.2d 1005, 1008-10 (7th Cir.), cert. denied, 111 S. Ct. 143 (1990).

61. See, e.g., E.M. Diagnostic v. Local 169, Int'l Brotherhood of Teamsters, 812 F.2d 91, 95-97 (3d Cir. 1987); Local Union 453, IBEW v. Independent Broadcasting Co., 849 F.2d 328, 330-31 (8th Cir. 1988); Winery Workers Union, Local 186 v. E & J Gallo Winery, Inc., 857 F.2d 1353, 1356 (9th Cir. 1988); Oil Workers' Int'l Union, Local 4-447 v. Chevron Chemical Co., 815 F.2d 338, 344 (5th Cir. 1987).
gaining unit “employees” covered by the grievance-arbitration procedures, judges have usually directed submission to arbitral authority.\textsuperscript{62} Only on rare occasions have appellate courts misapplied the \textit{Warrior & Gulf/American Manufacturing} test.

\textit{Morristown Daily Record v. Graphic Communications Union, Local 8N}\textsuperscript{63} involved an employer that challenged the arbitrability of a grievance. Since the district court judge decided that the arbitrability question was inseparable from the merits of the underlying contractual dispute, the judge directed the parties to present the entire case to the arbitrator. The Third Circuit Court of Appeals reversed. Instead of recognizing that the district judge had effectively and properly concluded that the controversy was “arguably” arbitrable, the appellate court found that \textit{AT & T Technologies} obliged the district judge to make a more definitive arbitrability evaluation. That judicial official had to find whether or not the grievance was actually arbitrable. The Third Circuit Court did note, however, that the district court should only deny arbitral jurisdiction if “the company has produced strong and forceful evidence of the parties’ intention to remove the issue of status from the general arbitration clause.”\textsuperscript{64}

In \textit{Teamsters Local 315 v. Union Oil Co. of California},\textsuperscript{65} the Ninth Circuit Court went well beyond the bounds of judicial authority. While reversing a district court finding in favor of arbitrability, the court of appeals relied upon the contractual language and the bargaining history to support its conclusion that the parties had no intent to submit such grievances to arbitration.\textsuperscript{66} When arbitrability decisions cannot be definitively made, without such an intrusive examination of the operative contract provisions and the bargaining history, the dispute should be referred to the arbitrator. Such industrial relations experts are especially well-suited to interpret bargaining agreement provisions, and the nuances associated with bargaining history. By directing the district court to engage in such a searching process, the Ninth Circuit Court usurped arbit-

\textsuperscript{62. See, e.g.}, Communication Workers of Am. v. US West Direct, 847 F.2d 1475, 1477-78 (10th Cir. 1988); CWA v. Michigan Bell Telephone Co., 820 F.2d 189, 193 (6th Cir. 1987). \textit{But cf.} Construction Workers, Local 682 v. Bussen Quarries, Inc., 849 F.2d 1123, 1124-25 (8th Cir. 1988) (issue whether certain owner-operator truck drivers constituted “employees” covered by bargaining agreement was representation question within exclusive jurisdiction of the NLRB). \textit{See also} United Food \& Commercial Workers, Local 7 v. Gold Star Sausage Co., 897 F.2d 1022 (10th Cir. 1990); Local 106, Service Employees Int’l Union v. Homewood Memorial Gardens, Inc., 838 F.2d 958 (7th Cir. 1988) (correctly indicating that rights which did not vest or accrue during the term of contract are not subject to arbitration after agreement has expired).

\textsuperscript{63.} 832 F.2d 31 (3d Cir. 1987).

\textsuperscript{64.} \textit{Id.} at 35.

\textsuperscript{65.} 856 F.2d 1307 (9th Cir. 1988), \textit{cert. denied}, 109 S. Ct. 869 (1989).

\textsuperscript{66.} See 856 F.2d at 1310-14.
tral authority and deprived the labor organization of its contractual right to have disputes resolved through the grievance-arbitration procedures.

Appellate courts continue to acknowledge that procedural arbitrability questions are generally to be determined by arbitrators, not judges. They appropriately realize that a labor organization's failure to satisfy a specified time limit may be excused for various reasons. The grievant or union representative may have been induced to delay processing of a formal grievance by managerial representations that the matter would be resolved. The parties may not have followed their stated limitations in prior cases, thus waiving compliance with those rules. Such procedural issues involve equitable considerations that are optimally left to arbitral determination. General Drivers, Local Union 89 v. Moog Louisville Warehouse provides a perfect example of judicial overreaching. The Sixth Circuit Court reversed the district court's decision to have a timeliness issue resolved by the arbitrator, and substituted its own conclusion that the discharge grievance had not been filed on time. The court clearly ignored the John Wiley & Sons edict to have such procedural questions decided by the arbitrator.

Courts have generally limited pre-arbitration intervention to those few cases in which the recalcitrant party could demonstrate that the contracting parties unequivocally intended to exclude the particular grievance from the scope of the grievance-arbitration procedures. Such judicial respect for the Warrior & Gulf/American Manufacturing presumption in favor of arbitrability has appropriately enhanced the bargaining process.

This presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements, "furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining." 70

67. See, e.g., Oil Workers' Int'l Union, Local 4-447 v. Chevron Chemical Co., 815 F.2d 338, 341-42 (5th Cir. 1987); Automotive Industries Employees Union, Local 618 v. Town & Country Ford, 709 F.2d 509, 511-14 (8th Cir. 1983).
68. 852 F.2d 871, 873-75 (6th Cir. 1988).
69. See supra notes 46-47 and accompanying text.

Even when a court rejects a pre-arbitration challenge to arbitral authority and orders the parties to submit their controversy to arbitral procedures, the arbitrator should be able to consider the arbitrability question more fully. The court in such a situation is merely required to determine whether the underlying dispute is "arguably" arbitrable, with doubts being resolved in favor of arbitral jurisdiction. Such a preliminary finding should not deprive the arbitrator of the right to decide on the merits that the contracting parties actually intended to exclude the instant issue from arbitral consideration. See Gould, Judicial Review of Labor Arbitration Awards—Thirty Years of the Steel-
III. POST-ARBITRATION JUDICIAL REVIEW

In 1956, Professor Cox sagely noted that "[t]he principles determining legal rights and duties under a collective bargaining agreement should not be imposed from above; they should be drawn out of the institutions of labor relations and shaped to their needs." Parties to collective bargaining agreements typically provide that all disputes concerning the interpretation and application of contractual terms shall be finally and exclusively resolved through the grievance-arbitration procedures. Although the parties recognize that arbitrators will not always reach perfect decisions, they acknowledge the need to have existing controversies resolved expeditiously and with minimal disruption to the basic labor-management relationship.

Courts asked to review labor arbitration awards "have shown an ingrained reluctance to defer to awards they felt to be unfair or wrong." When judges decide to negate arbitral determinations, they disrupt the collective bargaining process, and deprive the parties of the finality they specified in their grievance-arbitration provisions.

[W]hen the losing party in arbitration asks a court not to give effect to an award, it is asking that the conclusiveness which is at the heart of the process be withheld. The core considerations seem clear. First, the parties have contracted for a final and binding award; the party who resists adherence to it is therefore seeking to be relieved of his bargain. Second, whether judicial intercession results in enforcement or vacation of the award, expediency in the resolution of the dispute is lost. Finally, an employer's resistance to compliance with the award may also encourage strike action by the union to press for enforcement.

Judges who are asked to review grievance-arbitration decisions must realize that "the parties freely agreed to give up some accuracy in arbitration awards in exchange for greater efficiency." Courts should especially appreciate that "the greater good is sometimes served by making certain classes of decisions final and ending litigation, even though in a particular case the individual is prevented by review from correcting


some error which has injured him."\textsuperscript{75}

Judicial concern that parties adversely affected by questionable arbitral decisions may be hesitant to accept grievance-arbitration procedures in the future is unfounded, "because the collective bargaining process is uniquely qualified to suffer and absorb the most outrageous errors by arbitrators."\textsuperscript{76} If the losing party is dissatisfied with an arbitral award, it may easily act to protect its interests.

If the arbitrator errs and one of the parties loses confidence in him, he is readily expendable. The error itself is not immutable and can be corrected at the next negotiation of the agreement or sooner . . . \textsuperscript{77}

If reviewing courts provide losing parties with the least encouragement to ignore the finality of labor arbitration decisions, the negative consequences for harmonious labor-management relations would be significant. It can easily take a year or more to obtain a district court decision with respect to a challenged arbitral award, and an additional year may be expended if appellate court review is thereafter sought.\textsuperscript{78}

[Even if the outcome of judicial intercession is enforcement of the award, litigation is of itself damaging to the values the award is designed to serve. Resort to litigation is inconsistent with the genius of arbitration as an essentially autonomous system of self-government which draws its sustenance from the parties' self-determined voluntary commitment to it.\textsuperscript{79}

Judicial recognition of the fact that grievance-arbitration procedures constitute an extension of the collective bargaining process should encourage courts to restrict their review of arbitral awards. Judges would be extremely reluctant to void a particular contract term formulated by negotiating parties—unless that provision clearly contravened applicable law. The Courts should exercise similar restraint with respect to interpretative decisions by labor arbitrators who are merely endeavoring to discern how the contracting parties must have intended to deal with the issues raised by the grievances before them. Only in situations involving egregious arbitral misconduct should post-award judicial intervention be available.


\textsuperscript{76} Bornong, \textit{supra} note 74, at 660.

\textsuperscript{77} Dunau, \textit{supra} note 75, at 219. \textit{See} Aaron, \textit{Judicial Intervention in Labor Arbitration}, 20 \textit{Stan. L. Rev.} 41, 51-52 (1967) ("A party dissatisfied with an award can always seek to undo its effect at the next negotiation, and in the rare but not-unheard-of situation in which both sides are dissatisfied with an award, they may mutually agree to disregard it.").


\textsuperscript{79} Dunau, \textit{supra} note 75, at 177.
The United States Arbitration Act\textsuperscript{80} contains limited guidelines which should be followed by judges asked to vacate labor arbitration awards. Although section 1 of that enactment specifically provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,"\textsuperscript{81} several courts have concluded that the section 1 exclusionary language was not designed to exempt collective bargaining agreements.\textsuperscript{82} Others Courts have reached the opposite conclusion.\textsuperscript{83} The Supreme Court recently intimated that the U.S. Arbitration Act does not apply to bargaining agreements.\textsuperscript{84} Even if Congress did not intend the U.S. Arbitration Act to be applied to bargaining agreements,\textsuperscript{85} it would be entirely appropriate for courts to adopt the Arbitration Act's standards, as part of the federal common law governing the enforcement of labor arbitration determinations under section 301 of the LMRA.\textsuperscript{86} Section 10 of that enactment sets forth limited guidelines which should be followed by judges asked to vacate labor arbitration decisions.

[A court] may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

82. See, e.g., Pietro Scalzitti Co. v. Operating Engineers, 351 F.2d 576, 579-80 (7th Cir. 1965); Signal-Stat Corp. v. Local 475, United Electrical Workers, 235 F.2d 298, 302-03 (2d Cir. 1956), cert. denied, 354 U.S. 911 (1957); Hoover Motor Express Co. v. Teamsters Local 327, 217 F.2d 49, 53 (6th Cir. 1954).
83. See, e.g., American Postal Workers Union v. United States Postal Service, 823 F.2d 466, 471-73 (11th Cir. 1987); Derwin v. General Dynamics Corp., 719 F.2d 484, 488 (1st Cir. 1983); United Electrical Workers v. Miller Metal Products, Inc., 215 F.2d 221, 224 (4th Cir. 1954).
85. "[T]he position that collective bargaining agreements are not 'contracts of employment' within the meaning of the exclusionary language of the USAA was a distinctly minority view even prior to Lincoln Mills, and it cannot be cited with any confidence as the current view of any of the federal courts of appeals."
86. See Paperworkers v. Misco, Inc., 484 U.S. at 40 n.9 (1987); Derwin v. General Dynamics Corp., 719 F.2d 484, 488 n.4 (1st Cir. 1983).
Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.\(^8\)

It should be obvious that no arbitral award "procured by corruption, fraud, or undue means" or issued by an arbitrator who demonstrated "evident partiality or corruption" should be judicially sustained.\(^9\) Similarly, where the record clearly indicates that the arbitrator has capriciously refused to postpone a hearing or has improperly declined to hear relevant evidence, and such action has caused demonstrable prejudice to a party, the resulting decision should not be enforced.

Judges should be especially circumspect with respect to cases in which it is alleged that arbitrators "exceeded their powers" or "imperfectly executed them." Only when it is unequivocally established that an arbitrator has issued a decision wholly beyond the specific authority delineated in the grievance-arbitration provisions, should a court refuse enforcement.\(^9\) In those rare instances in which a court finds that an arbitrator has "imperfectly executed" his or her powers, the appropriate course would be to remand the controversy to the arbitrator for further proceedings.\(^9\) A judge should not simply "correct" the arbitral award, since the parties have contractually bound themselves to a final resolution by their privately designated neutral.

Courts should almost never overturn a grievance arbitrator's factual determinations. "The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity to observe [the witnesses] and to be familiar with the plant and its problems."\(^9\) So long as there is any evidence to support the arbitrator's factual conclusions, the decision should be given judicial respect.

In *Paperworkers v. Misco, Inc.*,\(^9\) the Supreme Court emphasized that judges "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts."\(^9\) State and federal judges asked to vacate arbitral awards

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89. See infra Part III(A) and accompanying discussion in text.

90. See, e.g., United Steelworkers, Local 4839 v. New Idea Farm, 917 F.2d 965, 968 (6th Cir. 1990).


93. Id. at 38.
should recognize that the judicial system is not responsible for questionable arbitral determinations. Courts are not asked to place a judicial imprimatur on such decisions. The Courts' function is much more limited. The parties and the arbitrator are the ones who must accept responsibility for arbitral awards which constitute an integral part of the "system of self-government created by and confined to the parties." Courts that enforce arbitral determinations merely direct the contracting parties to honor the results of their own private, dispute-resolution machinery. While the judicial confirmation of such awards has significance for the litigants themselves, it has no precedential effect with respect to future court cases.

A. Judicial Review of Contractual Interpretations

In 1959, Professor Cox recognized the dilemma facing federal courts asked to review the propriety of grievance-arbitration determinations.

[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 following year, the Supreme Court decided to formulate a narrow standard of judicial review that would encourage labor and management reliance on the arbitration process. In United Steelworkers v. Enterprise Wheel & Car Corp., the Court properly acknowledged that expansive judicial review of labor arbitration awards would negate the promise of the negotiating parties to resolve their contractual disputes exclusively and finally through their specified grievance-arbitration procedures.

It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

The Enterprise Wheel & Car Court expressly ruled that judges are not empowered to reevaluate the merits of arbitral determinations.

When an arbitrator is commissioned to interpret and apply the

95. Cox, supra note 11, at 1487.
97. Id. at 599.
98. Id.
99. Id. at 596.
collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair resolution of a problem. . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.100

The Supreme Court thus recognized that reviewing courts should give substantial deference to arbitral determinations. So long as such decisions "draw their essence" from the applicable collective contract, they are entitled to enforcement, even when judges wholly disagree with the interpretive analyses set forth in the awards.101 The approach appropriately acknowledged the crucial fact that arbitrators are not performing a quasi-judicial function. The arbitrators are performing tasks that are part of the collective bargaining process itself.

[I]t is important to draw a sharp distinction between the role of an arbitrator in construing and applying the collective bargaining agreement and that of a court in enforcing a contract. The collective bargaining agreement is not a contract but an instrument of government, and when the Supreme Court says that courts shouldn't review arbitrators' decisions, what it really is saying is that it is improper to judge an arbitrator's performance in adjudicating disputes arising out of this system of government by the standards a court would use in judging a breach-of-contract suit.102

A more intrusive standard of judicial review would have the deleterious consequence of inducing arbitrators to prepare detailed and legalistic decisions to protect their awards from judicial reversal.103 The greater scrutiny would cause arbitral proceedings to become more formal, more time-consuming, and more expensive. To preclude such negative effects, the Enterprise Wheel & Car Court emphasized that "[a]rbitrators have no obligation to the court to give their reasons for an award."104 The Court further emphasized that "[a] mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award."105

100. Id. at 597.
102. Feller, supra note 21, at 103.
104. 363 U.S. at 598.
105. Id.
Only when it is unequivocally demonstrated that arbitrators have exceeded their contractual authority should courts decline to enforce their awards.\textsuperscript{106} All doubts should be resolved in favor of enforcement.\textsuperscript{107} Even when arbitral awards are not based entirely upon express contractual provisions, they may still be entitled to judicial respect. If the arbitral awards are based upon the unwritten, common law of the shop and they draw their essence from such established industrial policies, they should be enforced.

In the companion \textit{Warrior \& Gulf} case, the Supreme Court specifically recognized that the collective bargaining agreement is more than a contract. "[I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."\textsuperscript{108} The gaps in such "industrial constitutions" are "to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement."\textsuperscript{109} Some reviewing courts ignore this critical distinction between commercial contracts and bargaining agreements, and the courts occasionally reject arbitral determinations that are based primarily upon past practices or the common law of the shop.\textsuperscript{110} Judges must realize that arbitral interpretations of established shop practices are entitled to as much judicial deference as constructions of express provisions.\textsuperscript{111}

In \textit{Paperworkers v. Misco, Inc.},\textsuperscript{112} the Supreme Court reaffirmed the narrow \textit{Enterprise Wheel \& Car} standards of judicial review. It noted that while "[t]he arbitrator may not ignore the plain language of the contract; . . . a court should not reject an award on the ground that the arbitrator misread the contract."\textsuperscript{113} The Court further indicated that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his


\textsuperscript{107} Professor David Feller has even suggested that judges should provide arbitral determinations with respect analogous to that they give to the decisions of courts in other states, pursuant to the Full Faith and Credit Clause of the United States Constitution, (Article IV, Section 1). See Feller, \textit{supra} note 21, at 106-07.


\textsuperscript{109} 363 U.S. at 580.

\textsuperscript{110} For an egregious example of overly intrusive judicial intervention, see Torrington Co. v. Metal Products Workers, Local 1645, 362 F.2d 677, 680-82 (2d Cir. 1966) wherein the court failed to resolve doubts in favor of enforcement and substituted its own interpretation of ambiguous circumstances for that of the designated arbitrator. See \textit{St. Antoine}, \textit{supra} note 27, at 1152-53.

\textsuperscript{111} See Kaden, \textit{supra} note 30, at 295-96; \textit{St. Antoine}, \textit{supra} note 27, at 1146-48; Cox, \textit{supra} note 11, at 1499.

\textsuperscript{112} 484 U.S. 29 (1987).

\textsuperscript{113} \textit{Id.} at 38.
decision.”

The fact that judicial review is sought with respect to less than one percent of private sector arbitral awards certainly attests to the fact that the limited availability of judicial review has beneficially encouraged parties to comply voluntarily with even those arbitration decisions they do not like. Courts should thus continue to affirm arbitral determinations, except in those extraordinary situations when it can be clearly demonstrated that arbitrators have ignored unambiguous contractual provisions or have acted wholly beyond the scope of their specified authority. Such judicial deference appropriately prevents “judicialization” of the arbitration process.

Judicial deference also acknowledges the important fact that the arbitrator is the parties’ “officially designated ‘reader’ of the contract.”

[The arbitrator] is their joint alter ego for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement. Thus a “misinterpretation” or “gross mistake” by the arbitrator becomes a contradiction in terms. In the absence of fraud or an overreaching of authority on the part of the arbitrator, he is speaking for the parties, and his award is their contract . . . . In sum, the arbitrator’s award should be treated as though it were a written stipulation by the parties setting forth their own definitive construction of the labor contract.

Judicial review of arbitral awards is probably sought most frequently with respect to cases pertaining to disciplinary matters. The typical case involves an employer that has decided to suspend or terminate a worker because of alleged misconduct. The arbitrator decides that the employer has demonstrated the existence of “just cause” warranting some discipline, but concludes that the penalty imposed was excessive. In Enterprise Wheel & Car, the Supreme Court noted that it is particularly appropriate for arbitrators to utilize their “informed judgment . . . .

114. Id. See United Food & Commercial Workers, Local 7R v. Safeway, 889 F.2d 940, 946-47 (10th Cir. 1989); Stead Motors v. Automotive Machinists Lodge 1173, 886 F.2d 1200, 1205-09 (9th Cir. 1989), cert. denied, 110 S. Ct. 2205 (1990). The Misco Court also reiterated the view that “grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining.” 484 U.S. at 38.

115. See Feuille & LeRoy, supra note 48, at 42.


117. St. Antoine, supra note 27, at 1140.

when it comes to formulating remedies." The Court emphasized that while arbitrators do "not sit to dispense [their] own brand of industrial justice . . . [they] may . . . look for guidance from many sources, . . . so long as [their awards] draw [their] essence from the collective bargaining agreement."

Employers which do not wish to have arbitrators evaluate the propriety of the disciplinary penalties they impose may seek contractual language expressly restricting the scope of arbitral authority. An illustrative limitation of this variety might provide that "[s]hould it be determined by the arbitrator that an employee has been suspended or discharged for proper cause . . . , the arbitrator shall not have jurisdiction to modify the degree of discipline imposed . . . ." When such restrictive language is present, the arbitrator may determine whether "proper cause" for suspension or discharge has been established. The penalty imposed may not be modified, unless the absence of "proper cause" is found.

Only when the relevant contractual language unambiguously restricts arbitral authority, with respect to the degree of punishment imposed, should courts decline to enforce arbitration decisions that modify disciplinary penalties. For example, if a provision merely provides that certain conduct is "considered cause for discharge," the arbitrator should be the one to decide whether the parties actually intended that language to preclude arbitral review of the penalty imposed for such behavior. In S.D. Warren Co. v. United Paperworkers Int'l Union, the court inappropriately found that such a provision removed the penalty question from arbitral jurisdiction. In doing so, the court effectively construed the agreement language the parties selected the arbitrator to interpret. It was perfectly reasonable for the arbitrator to find that such a clause was not intended to restrict the usual arbitral authority to assess the severity of the discipline imposed. Since the arbitrator had "arguably constru[ed] or appl[ied] the contract and act[ed] within the scope of his authority," the court should have deferred to the arbitrator's determination.

Courts occasionally permit loosely employed language in arbitration opinions to provide a basis for overturning otherwise proper awards.

122. 873 F.2d at 819. See IBEW, Local 429 v. Toshiba America, Inc., 879 F.2d 208, 210-11 (6th Cir. 1989); Magnavox Co. v. Int'l Union of Electrical Workers, 410 F.2d 388, 389 (6th Cir. 1969).
123. 846 F.2d 827 (1st Cir. 1988).
For example, in *HMC Management Corp. v. Carpenters Dist. Council*, the court refused to sustain an arbitral decision modifying a discharge penalty which the arbitrator believed was inappropriate since a similarly terminated individual had been reinstated by the company. The reviewing judges should have realized that the arbitrator had effectively concluded that the employer had failed to demonstrate sufficient cause to support the termination of the grievant in light of the less severe treatment given the other worker. Nonetheless, since the arbiter had not expressly found a lack of "just cause," but had inadvertently indicated the presence of cause for some discipline, the court vacated his award. The *HMC Management Corp.* judges wholly ignored the *Enterprise Wheel & Car* Court warning that "[a] mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award." The judges also overlooked the established fact that arbitrators generally do not permit disparate penalties to be imposed upon similarly situated employees.

When specific contractual language does not preclude arbitral consideration of the degree of punishment imposed, courts generally defer to arbitrator conclusions regarding this issue. The Courts understand that parties permitting grievants to challenge disciplinary penalties necessarily recognize the authority of arbitrators to determine not only whether the employer can establish "just cause" for some discipline, but also whether it can demonstrate the existence of "just cause" for the particular penalty imposed. On occasion, however, courts inexplicably ignore this fundamental principle.

*Delta Queen Steamboat Co. v. District 2* provides a perfect example of judicial overreaching. Orders issued by the captain of the Mississippi Queen, a commercial passenger vessel, almost caused a collision with a towboat and its barges. The captain grieved his resulting termination. Although the arbitrator found that the captain's maneuver had evidenced "gross carelessness," he concluded that the employee had been the victim of disparate discipline based upon the fact that other pilots,

125. 750 F.2d 1302 (5th Cir. 1985).
126. Id. at 1304.
128. See F. ELKOURI & E. ELKOURI, supra note 34, at 684-87.
129. See, e.g., Federated Dep't Stores v. United Food & Commercial Workers, Local 1442, 901 F.2d 1494, 1496-98 (9th Cir. 1990); Dixie Warehouse v. Teamsters Local 89, 898 F.2d 507, 510-11 (6th Cir. 1990); Eberhard Foods, Inc. v. Handy, 868 F.2d 890, 892-93 (6th Cir. 1989); Florida Power Corp. v. IBEW, 847 F.2d 680, 681-83 (11th Cir. 1988).
130. 889 F.2d 599 (5th Cir. 1989), reh'g denied, 897 F.2d 746 (5th Cir.), cert. denied, 111 S. Ct. 148 (1990).
who had engaged in similar conduct, had not been discharged. He thus converted the captain's termination to a suspension. The Fifth Circuit Court of Appeals was indignant regarding the willingness of the arbitrator to second-guess the Delta Queen Company with respect to such an important safety issue. As a result, the Fifth Circuit completely exceeded its authority and affirmed vacation of the arbitral award. Even a cursory consideration of the arbitrator's reasoning would have indicated that it "drew its essence" from the "just cause" language set forth in the bargaining agreement. It is thus apparent that it was the district court and the appellate judges, not the arbitrator, who inappropriately decided to ignore the applicable contract provision and "to dispense [their] own brand of industrial justice."  

Reviewing courts are frequently unfamiliar with conventional arbitral practices, and they fail to comprehend the propriety of typical arbitrator behavior. For example, judges not aware of the generally accepted concept of "progressive discipline" might not realize that termination is normally reserved today for cases of extreme misconduct or situations involving incorrigible, repeat offenders. The reviewing judges might not understand that contemporary arbitrators also tend to require more substantial "just cause" to support suspensions and terminations, than oral and written reprimands. Since the negotiating parties have promised to resolve their contractual disputes through the arbitration process, courts should accept the resulting arbitral determinations so long as the determinations remotely appear to "draw their essence" from the express or implied terms of the bargaining agreement.

Courts are likely to subject arbitral determinations to more searching judicial review in cases in which arbitrators are asked to interpret and apply external legal doctrines. Such a situation might arise when one party contends that a requested application of a contractual term would contravene external law. Arbitrators reasonably assume that parties intend to adopt lawful provisions. Arbitrators do not hesitate to consider legal principles as interpretive tools when construing ambiguous bargaining agreement provisions, in a manner designed to ensure a lawful result. In those rare instances in which it is apparent that unambiguous bargaining agreement provisions conflict with external law, arbitrators

131. Id. at 601.
132. See supra note 115 and accompanying text.
133. See F. ELKOURI & E. ELKOURI, supra note 34, at 670-73.
134. Id. at 666-67.
135. Id. at 350.
should apply the contractual terms. In the absence of authorization from the parties to consider such non-contractual legal doctrines, an arbitrator would simply be without power to do otherwise.

In some instances, statutory rules have been expressly incorporated in bargaining agreements, or submission agreements have authorized arbitrators to apply statutory laws. Where the parties have explicitly incorporated statutory language in their bargaining agreement, and subjected questions regarding application of that clause to grievance-arbitration coverage, it must be remembered that they have provided for arbitral determination of those issues. So long as the arbitral decision "draws its essence" from the contractual language, it should receive judicial acceptance, even though the court might have interpreted the provision differently. A similar result should generally prevail where parties have requested arbitral interpretation of an external statutory provision in their submission agreement.

When construction of the contract implicitly or directly requires an application of "external law," the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it. Since the arbitrator is the "contract reader," his interpretation of the law becomes part of the contract and thereby part of the private law governing the relationship between the parties to the contract. Thus, the parties may not seek relief from the courts for an alleged mistake of law by the arbitrator.

Only when the arbitral construction of "external law" is unequivocally erroneous, should a court contemplate judicial intervention. Judges must recognize that the contracting parties jointly chose their arbitrator. When making their selection, the parties were generally familiar with the professional background and previous awards of that individual. They thus had every opportunity to determine whether that person was a strict or a liberal constructionist. A court asked to vacate an arbitral decision

136. See Kaden, supra note 30, at 289; St. Antoine, supra note 27, at 1155; Meltzer, supra note 103, at 557-58. For a contrary view, see Howlett, The Arbitrator, the NLRB, and the Courts, 20 NAT'L ACAD. ARBS. 67, 83 (1967).

137. If an arbitral award is "based solely upon the arbitrator's view of the requirements of enacted legislation, [this] would mean that he exceeded the scope of the submission." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. at 597 (1960). See Heinsz, supra note 118, at 258. See also Local No. P-1236, Amalgamated Meat Cutters v. Jones Dairy Farm, 680 F.2d 1142, 1144 (7th Cir. 1982) (arbitrator may not base award exclusively on considerations of public policy). On the other hand, if an arbitrator ignores external law that directly conflicts with applicable contract language, a reviewing court will refuse to enforce the award because it either permits or requires the performance of a clearly unlawful act. See St. Antoine, supra note 27, at 1155.

138. See Kaden, supra note 30, at 288.

139. See supra note 101 and accompanying text.

not popular with the losing party should thus "give short shrift to those plaintiff cries of surprise and outrage from the party who now discovers that it has lost its taste for the brand [of arbitrator] it had investigated and then bought."\textsuperscript{141} The enforcement of such challenged awards will not eternally prejudice the dissatisfied party. As soon as the current collective contract expires, the dissatisfied party may seek an appropriate modification through the bargaining process.\textsuperscript{142}

B. Judicial Intervention Based on Public Policy Considerations

\textit{Black v. Cutter Laboratories}\textsuperscript{143} involved an employee allegedly terminated because of her Communist Party membership. The arbitration panel found that the real reason for the discharge concerned her protected union activity, and the panel directed her reinstatement. The California Supreme Court vacated the arbitral decision, since "an arbitration award which directs that a member of the Communist Party who is dedicated to that party's program of 'sabotage, force, violence and the like' be reinstated to employment in a plant which produces antibiotics . . . is against public policy."\textsuperscript{144} The California Supreme Court thus decided to ignore the findings of the arbitration panel and "to dispense [its] own brand of industrial justice."\textsuperscript{145}

If the public policy rationale espoused in \textit{Cutter Laboratories} had been expanded to other areas, the sanctity of labor arbitration decisions would have been substantially undermined. Following the \textit{Cutter Laboratories} decision, however, most courts were reluctant to vacate arbitral awards unless they sanctioned clearly unlawful conduct. For example, in \textit{Local 453, IUE v. Otis Elevator Co.},\textsuperscript{146} the court refused to overturn an arbitration decision that directed the reinstatement of an employee who had been discharged following his conviction for gambling on company premises. The court found that the state policy against gambling had been sufficiently vindicated through the criminal sanction imposed upon the grievant, and it found no reason to suspect that the reinstated worker would continue to engage in unlawful conduct in the future.\textsuperscript{147}

\begin{itemize}
\item \textsuperscript{141} Jones, supra note 28, at 893. See Ray, \textit{Protecting the Parties' Bargain After Misco: Court Review of Labor Arbitration Awards}, \textit{64 Ind. L.J.} 1, 10-11 (1988).
\item \textsuperscript{142} See Jones, supra note 28, at 896.
\item \textsuperscript{144} 43 Cal. 2d at 798-99, 278 P.2d at 911.
\item \textsuperscript{146} 314 F.2d 25 (2d Cir.), \textit{cert. denied}, 373 U.S. 949 (1963).
\item \textsuperscript{147} \textit{Id.} at 29.
\end{itemize}
In *W.R. Grace & Co. v. Rubber Workers*, the United States Supreme Court emphasized the narrow scope of the public policy exception. Although it acknowledged that "a court may not enforce a collective-bargaining agreement that is contrary to public policy," it noted that judges are not authorized to negate arbitral awards anytime such determinations offend their personal notions of public policy. "Such a public policy . . . must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"

Following the *W.R. Grace & Co.* decision, several appellate courts evidenced a surprising willingness to vacate arbitral determinations based upon public policy considerations. For example, the Fifth Circuit Court of Appeals refused to enforce an arbitration award that ordered the reinstatement of a truck driver who had been caught drinking while on duty.

In a nation where motorists practically live on the highways, no citation of authority is required to establish that an arbitration award ordering a company to reinstate an over-the-road truck driver caught drinking liquor on duty violates public policy. If the employer had itself decided to impose a suspension instead of a discharge, would the court have found it guilty of unlawful conduct? Could any other company offer this person a driving position in the future without contravening public policy?

A similar result was achieved by the First Circuit Court of Appeals. The Court vacated an arbitral award that directed the reinstatement of a postal service employee who had been convicted of embezzling several thousand dollars in postal funds, even though the worker would have been transferred to another position, which did not involve access to stamps and money.

[W]e cannot avoid the common sense implications that requiring the rehiring of [the grievant] would have on other postal employees and on the public in general. Other postal employees may feel there is less reason for them to be honest than they believed—the Union could always fix it if they were caught. Moreover, the public trust in the Postal Service, and in the entire federal government, could be dimin-

150. *Id.* at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).
152. *Id.* at 124.
ished by the idea that graft is condoned.\textsuperscript{154}

It is difficult to believe that a long suspension without pay would not have been sufficient to impress upon both the grievant and other postal service employees the consequences associated with dishonest behavior. If another federal agency were ultimately to employ the discharged postal service employee, would its action constitute a breach of public trust?

*Paperworkers v. Misco, Inc.*\textsuperscript{155} involved an employee who had been apprehended by police in the rear seat of a fellow worker's automobile in the company parking lot with marijuana smoke in the air and a lighted marijuana cigarette in the front seat ashtray. A subsequent police search of the employee's own car revealed marijuana gleanings. When Misco learned of the cigarette incident, it terminated the employee for having violated a disciplinary rule that prohibited the bringing or consuming of intoxicants or controlled substances on plant property. The employee grieved his discharge. Although the employee operated a dangerous slitter-rewinder machine, the arbitrator ordered his reinstatement. The arbitrator found the cigarette incident insufficient to establish that the employee had himself brought or used marijuana on company premises.\textsuperscript{156} Since Misco had not learned about the marijuana gleanings found in the grievant's car until after it had made its termination decision, the arbitrator ruled that such evidence could not be used to support the worker's discharge.\textsuperscript{157}

The district court vacated the arbitral award and the Fifth Circuit Court of Appeals affirmed, based upon the perceived public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol."\textsuperscript{158} The Supreme Court, however, unanimously reversed. The Court initially emphasized that the doctrine set forth in *W.R. Grace & Co.* merely permits courts to vacate arbitral awards based upon "some explicit public policy" that is "well defined and dominant" and "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"\textsuperscript{159} The Supreme Court found that the Fifth Circuit formulation was not based upon "laws and legal precedents," but upon that court's general notions of public interest.\textsuperscript{160} The Court thus concluded that the

\textsuperscript{154} Id. at 825.

\textsuperscript{155} 484 U.S. at 29 (1987).

\textsuperscript{156} Id. at 34.

\textsuperscript{157} Id.

\textsuperscript{158} Misco, Inc. v. United Paperworkers Int'l Union, 768 F.2d 739, 743 (5th Cir. 1985), rev'd, 484 U.S. 29 (1987).

\textsuperscript{159} Id. at 43 (quoting W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983)).

\textsuperscript{160} Id. at 44.
lower courts had improperly overturned the arbitrator's determination.

It should now be apparent that the public policy exception is extremely limited. "Precisely because this doctrine allows courts to by-pass the normal heavy deference accorded to arbitration awards and potentially to 'judicialize' the arbitration process, the judiciary must be cautious about overruling an arbitration award on the ground that it conflicts with public policy." It judges must recognize that they have no right to dispense their own brand of industrial justice when applying the public policy exception. When public policy challenges are raised, the judiciary must first determine whether there is a "well defined and dominant" public policy that is rooted in statutory or decisional law. If such a significant policy is found, judges must then ask whether the arbitral award in question has created an irreconcilable conflict with that policy.

Recent appellate court decisions have generally applied the public policy exception in an appropriately narrow manner. Courts have declined to employ that doctrine to vacate arbitral awards ordering the reinstatement of commercial pilots charged with flying while under the influence of alcohol, a letter carrier who was convicted of unlawful delay of the mail, a person accepted for work at a nuclear power plant who was terminated after he failed a psychological test used to determine which individuals might be security risks, and a postal worker who had fired gunshots into his supervisor's unoccupied vehicle. Another case involved an automobile mechanic who was discharged for having failed for the second time to tighten wheel lug nuts. After the arbitrator directed reinstatement of this person, the mechanic's em-

ployer sought judicial relief. The district court vacated the award, and a
panel of the Ninth Circuit Court affirmed based upon public policy con-
siderations. The panel decision was thereafter withdrawn, and the en
banc court decided to sustain the arbitrator’s determination.169 The en
banc court noted that before an arbitral award may be judicially over-
turned, “[a] court must both delineate an overriding public policy rooted
in something more than ‘general considerations of supposed public inter-
ests,’ and . . . it must demonstrate that the policy is one that specifically
militates against the relief ordered by the arbitrator.”170 Since the en
banc court found no “explicit, well defined and dominant public policy
. . . that bars reinstatement of a mechanic who commits a reckless act in
the course of his employment,” the court sustained the arbitrator’s reme-
dial order.171

One rarely finds appellate decisions vacating arbitral awards based
upon public policy considerations. One of the most notorious cases in-
volved the Eighth Circuit Court of Appeals.172 A nuclear power plant
mechanic was discharged for having deliberately compromised the facil-
ity’s secondary containment system. The worker had decreased mobility
due to a temporary cast on one leg. He intentionally disarmed an inter-
lock containment door, so that he could get to lunch more easily.
Although the arbitrator found this individual’s conduct improper, he
concluded that the termination penalty was excessive. The Eighth Cir-
cuit Court refused to enforce the arbitrator’s reinstatement directive.
The court found a strong public policy in favor of nuclear plant safety in
the general Nuclear Regulatory Commission regulations. Since the court
decided that reinstatement of a worker who had deliberately undermined
nuclear safety would contravene that dominant policy, it refused to en-
force the arbitral award.173 If the nuclear facility had decided to impose
a substantial suspension, instead of a discharge, it is doubtful that the
facility would have lost its license to operate. Since the employer pos-
sessed the right to take such action unilaterally, one finds it difficult to
understand how the court could have found that the arbitrator’s rein-
statement order could not be sustained.174

169. See Stead Motors v. Automotive Machinists Lodge 1173, 886 F.2d 1200 (9th Cir. 1989),
170. 886 F.2d at 1212-13 (quoting Paperworkers v. Misco, Inc., 484 U.S. 29, 43 (1987)).
171. Id. at 1216. See Parker, supra note 163, at 708-09.
172. Iowa Electric Light & Power v. Local Union 204, IBEW, 834 F.2d 1424 (8th Cir. 1987).
173. See 834 F.2d at 1427.
174. See Parker, supra note 163, at 709. See also Newsday v. Long Island Typographical Union,
915 F.2d 840, 844-45 (2d Cir. 1990), cert. denied, 111 S. Ct. 1314 (1991), wherein the court sus-
tained the district court’s refusal to enforce an arbitral award that directed the reinstatement of an
Courts that recognize the narrow scope of the public policy exception, but wish to overturn questionable arbitral determinations, occasionally use the disingenuous device of finding that arbitrators have exceeded their contractual authority. For example, *S.D. Warren Co. v. United Paperworkers Int’l Union* involved the propriety of an arbitration decision directing the reinstatement of an employee who had violated a company rule precluding possession of marijuana on plant premises. The First Circuit Court of Appeals initially denied enforcement of the arbitral award on public policy grounds. The Supreme Court vacated that opinion and remanded the case for reconsideration in light of the intervening *Misco* decision. The First Circuit Court thereafter interpreted the management rights clause in a questionable manner to preclude enforcement of the arbitrator’s directive. So long as the arbitral award had drawn its essence from the express or implied terms of the bargaining agreement, and did not contravene a clearly established and dominant public policy, the arbitral award should have been enforced, even though the court did not particularly like the outcome.

The public policy exception should be applied with circumspection. Courts that have applied this doctrine in an inappropriate fashion have significantly undermined the arbitration process. These courts have engaged in unprincipled and unwarranted judicial activism, because the awards in question did not violate any statute, regulation or other manifestation of positive law, or compel conduct by an employer, union or employee that would violate such a law. Under the guise of public policy, these courts have substituted their own views of industrial justice for the views of the arbitrator.

Courts should recognize that grievance-arbitration procedures constitute a crucial part of the collective bargaining process. They should thus restrict application of the public policy exception to those extremely rare instances in which the action ordered by the arbitrator would be wholly improper if directed by the negotiating parties themselves.

The critical inquiry is not whether the underlying act for which the employee was disciplined violates public policy, but whether there is a public policy barring reinstatement of an individual who has com-

individual found to have engaged in sexual harassment of female co-workers due to the well-defined and dominant public policy against such conduct.

175. 845 F.2d 3 (1st Cir. 1988), cert. denied, 488 U.S. 992 (1988).
178. See *United States Postal Service v. National Ass’n of Letter Carriers*, 847 F.2d 775, 778 (11th Cir. 1988), for another example of judicial overreaching.
mitted a wrongful act . . . . [I]t is only if the grievant is likely to engage in wrongful conduct which violates public policy in the future that his reinstatement could be said to violate public policy.\footnote{180}

Reliance upon the public policy exception to avoid compliance with distasteful arbitral awards has not been a frequent occurrence. From 1960 until 1988, only seventy-three cases taken to federal district court involved such claims.\footnote{181} It is somewhat disturbing to note, however, that there were almost as many public policy challenges from 1982 through 1988 as there were during the entire 1960 through 1981 period.\footnote{182} The Supreme Court’s unanimous \textit{Misco} decision reaffirming the narrow scope of the public policy exception should diminish the number of such cases. The labor-management system of industrial self-government is undermined far more by inappropriate judicial intervention than by questionable arbitral awards. The parties can always correct an erroneous arbitration determination during their next round of collective bargaining. The deleterious consequences for employer-employee relations caused by resort to external judicial proceedings tend to linger for many years.

IV. NLRB Deferral Policies

Section 10(a) of the NLRA empowers the NLRB “to prevent any person from engaging in any unfair labor practice.”\footnote{183} Section 10(a) further provides that “[t]his power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.”\footnote{184} In 1947, when Congress was considering possible amendments to the NLRA, the Senate Labor Committee formulated a proposal that would have made it an unfair labor practice for parties “to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration.”\footnote{185} The provision was ultimately deleted from the 1947 NLRA amendments, since the House Conference concluded that “[o]nce parties have made a

\footnotesize{\begin{flushleft}180. Stead Motors v. Automotive Machinists Lodge 1173, 886 F.2d 1200, 1215, 1217 (9th Cir. 1989), cert. denied, 110 S. Ct. 2205 (1990) (emphasis in original). See Hexter, supra note 78, at 107; Edwards, supra note 179, at 32-33; Dunau, supra note 75, at 199. \\
181. See Feuille \& LeRoy, supra note 48, at 43-44 \& Table 1. \\
184. \textit{Id}. \\
185. S. 1126, 80th Cong., 1st Sess. §§ 8(a)(6) \& 8(b)(5) (1947), \textit{reprinted in} 1 NLRB, \textsc{Legislative History of the Labor Management Relations Act,} 1947, at 111, 114 (1959) [hereinafter \textsc{Legislative History}]. See S. Res. No. 105, 80th Cong., 1st Sess. 20-21 (1947), \textit{reprinted in} 1 \textsc{Legislative History} at 426-27.\end{flushleft}}
collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."  

This perspective was finally embodied in section 203(d) of the LMRA: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."  

If one party merely contends that the other party has violated their bargaining agreement, the aggrieved party must normally seek recourse through the specified grievance-arbitration procedures. The controversy would simply not be cognizable before the NLRB. There are occasions, however, when one party's conduct may raise issues under both the unfair labor practice sections of the NLRA and express provisions contained in the applicable bargaining agreement. For example, an employer may unilaterally change existing employment conditions, and endeavor to defend a resulting section 8(a)(5) refusal-to-bargain charge, through reliance upon the authority given to it in a management prerogative clause. The fact that resolution of the basic NLRA dispute would involve construction of the contractual management rights provision would not divest the Labor Board of its unfair labor practice jurisdiction. The Labor Board has the power to interpret relevant bargaining agreement terms to the extent necessary to enable it to resolve the interrelated unfair labor practice question. Such overlapping jurisdictional issues may be similarly raised when parties have included contractual protections analogous to those rights set forth in the NLRA. 

When contractual disputes overlap with NLRA controversies, the Labor Board must determine the appropriate way in which it should treat applicable grievance-arbitration procedures. If the unfair labor practice charge is filed before arbitration proceedings have been instituted, the Labor Board will frequently direct the disputing parties to utilize their arbitral forum before they seek NLRB assistance. When an arbitral award has been issued prior to the invocation of Labor Board jurisdiction, the Board will usually defer to the pertinent findings of the private adjudicator. If grievance-arbitration procedures are properly viewed as a continuation of the collective bargaining process, it becomes

188. See 29 U.S.C. § 158(a)(5) (1982), which makes it an unfair labor practice for an employer to fail to bargain in good faith with the designated bargaining representative of its employees.  
apparent that the NLRB’s pre-arbitration and post-arbitration deferral policies are overly broad.

A. Pre-Arbitration Deferral

_Dubo Manufacturing Corp._190 involved a union claim that the employer had committed a section 8(a)(5) refusal to bargain, and had impermissibly discharged certain employees because of their exercise of protected rights.191 The labor organization filed unfair labor practice charges with the NLRB, and commenced a section 301 action in U.S. district court requesting an order directing the company to arbitrate the propriety of the worker terminations. While the unfair labor practice charges were pending, the district court ordered arbitration. The Labor Board decided to hold the unfair labor practice charges in abeyance, pending completion of the arbitration process. The Labor Board noted the LMRA section 203(d) policy in favor of private dispute resolution procedures, and concluded that it would best effectuate that policy by deferring the section 8(a)(3) discharge cases to arbitration.192

In _Joseph Schlitz Brewing Co._,193 the NLRB employed pre-arbitration deferral in a section 8(a)(5) refusal-to-bargain case involving a unilateral change that the employer claimed was authorized by the contractual management prerogative clause. The action was taken despite the fact that the labor organization had neither sought nor wished to obtain arbitral resolution of the underlying issues. The Board described the circumstances in which pre-arbitration deferral would be presumptively appropriate in refusal-to-bargain cases.

[Where . . . the contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the Union and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the [NLRA], then the Board should defer to the arbitration clause conceived by the parties.194

Two years later, in _Collyer Insulated Wire_,195 the Labor Board reaf-

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192. See 142 N.L.R.B. at 432-33.
194. Id. at 142.
firmed the standards enunciated in *Joseph Schlitz Brewing*, as it deferred another unilateral change case to arbitration. The Board emphasized that it would only order such deferral when the respondent has evidenced no enmity with respect to the exercise of protected rights and has indicated a willingness to participate in the arbitral process. The Board also reserved jurisdiction "solely for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act."

In *National Radio Co.*, the Labor Board decided to expand the *Collyer* pre-arbitration deferral doctrine to include cases involving claims of individual discrimination under section 8(a)(3). The Board majority expressly rejected the suggestion that deferral of individual rights cases constituted an inappropriate denial of NLRB unfair labor practice jurisdiction to persons who deliberately chose Board procedures over the arbitral process.

"Abstention simply cannot be equated with abdication. We are, instead, adjuring the parties to seek resolution of their dispute under the provisions of their own contract and thus fostering both the collective relationship and the Federal policy favoring voluntary arbitration and dispute settlement. And by reserving jurisdiction we preserve the right of the Charging Party to seek from us vindication of statutory rights should the arbitration reach a result not tolerable under the statute."

Dissenting Members Fanning and Jenkins strenuously protested *Collyer* deferral in cases involving alleged discrimination against individual employees, who opposed resolution of their claims through arbitral procedures.

Statutory protection against discrimination on the job because of engaging in, or refraining from, union activity is an *individual* right, unlike the union or group right to be protected from unilateral changes

196. *Id.* at 841-42.
197. *Id.* at 842.
198. *Id.* at 843. The post-arbitration review standard set forth in part (b) was taken from *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955). See infra notes 238-39 and accompanying text.
199. 198 N.L.R.B. 527 (1972).
200. *Id.* at 531. In *Kansas Meat Packers*, 198 N.L.R.B. 543 (1972), the Board indicated that it would decline to order *Collyer* deferral in those infrequent cases in which it is apparent that the interests of individual discriminates are in conflict with the interests of the representative labor organization or its officials.
in the collective-bargaining agreement. Because it is granted by the statute to individuals, it cannot be reduced, altered, or displaced by any agreement between the employer and the union . . . . A union and employer may lawfully agree to arbitrate any differences they have over provisions in their agreement. But they cannot lawfully agree that they will arbitrate between themselves discrimination by one of them against an employee, unless that employee joins in or plainly acquiesces in and adopts that method of determining his rights . . . .

In General American Transportation Corp., 202 the concerns expressed by dissenting Members Fanning and Jenkins about the need for Labor Board protection of individual rights induced the NLRB to reconsider the expansive deferral doctrine that had been articulated in National Radio. The two-member plurality noted that section 10(a) provides that the Board’s power to rectify unfair labor practices “shall not be affected by any other means of adjustment . . . established by agreement, law, or otherwise,” and they concluded that the NLRB is statutorily obliged to resolve all unfair labor practice allegations. 203 They further emphasized that “[t]he protection . . . afforded employees by the Act is clearly an individual, as contrasted with a union or group, right.”

In her concurring opinion, Chairman Murphy rejected the notion that all NLRB pre-arbitration deferral constituted an inappropriate abdication of unfair labor practice authority.

In cases alleging violations of sections 8(a)(5) and 8(b)(3), based on conduct assertedly in derogation of the contract, the principal issue is whether the complained-of conduct is permitted by the parties’ contract. Such issues are eminently suited to the arbitral process, and resolution of the contract issue by an arbitrator will, as a rule, dispose of the unfair labor practice issue. On the other hand, in cases alleging violations of sections 8(a)(1), (a)(3), b(1)(A), and b(2), although arguably also involving a contract violation, the determinative issue is not whether the conduct is permitted by the contract, but whether the conduct was unlawfully motivated or whether it otherwise interfered with, restrained, or coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act. In these situations, an arbitrator’s resolution of the contract issue will not dispose of the unfair labor practice allegation. 205

201. 198 N.L.R.B. at 533 (citations omitted) (emphasis in original).
203. Id. at 808.
204. Id.
Chairman Murphy thus concluded that while pre-arbitration deferral would continue to be appropriate with respect to cases involving section 8(a)(5) and 8(b)(3) refusal-to-bargain allegations, such deferral would not be proper with regard to alleged violations of individual rights. Dissenting Members Penello and Walther would have continued to follow the broad National Radio deferral policy.206

In United Technologies Corp.,207 a new Labor Board majority reexamined the diverse rationales that had been articulated in National Radio and General American Transportation, and they concluded that pre-arbitration deferral would be appropriate with respect to both refusal-to-bargain and individual rights cases.

[Deferral is not akin to abdication. It is merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed. The Board's processes may always be invoked if the arbitral result is inconsistent with the standard of Spielberg.208

The Board thus overruled General American Transportation and reestablished the National Radio doctrine. Dissenting Member Zimmerman would have continued to follow the deferral policy set forth in General American Transportation.209

In United Beef Co.,210 the Labor Board indicated that it would permit the pre-arbitration deferral doctrine to preclude NLRB consideration of section 8(a)(1) and 8(a)(3) charges, even though the representative labor organization was unwilling to proceed to arbitration. Shop Steward Roberto Rodriguez claimed that the employer had harassed and ultimately discharged him because of his processing of employee grievances. He had filed a grievance protesting his adverse treatment, and the union had requested arbitration. A hearing had been scheduled before the industry arbitrator. After it had received several unfavorable rulings from the arbitrator on other matters, the labor organization decided to withdraw Mr. Rodriguez's case from arbitration. When Mr. Rodriguez endeavored to obtain redress before the Labor Board, it decided to defer to the incomplete grievance-arbitration procedures. "To permit [the union's] withdrawal [from arbitration] in circumstances where the Respondent is willing to proceed and absent any showing that the arbitral
process or result would be repugnant to the Act is clearly contrary to the principles of United Technologies." 211

The judicial response to the Labor Board's pre-arbitration deferral policies has not been entirely favorable. The Supreme Court has approvingly quoted from Collyer Insulated Wire, 212 and other courts have expressly accepted the deferral approach set forth in that decision. 213 Appellate courts have also sustained the more expansive pre-arbitration deferral policy articulated in United Technologies Corp. 214 Nonetheless, in Hammontree v. NLRB, 215 a 2-1 panel of the D.C. Circuit Court of Appeals rejected pre-arbitration deferral with respect to most unfair labor practice claims concerning individual rights.

Deferral to arbitration is perfectly legitimate when the issues submitted to the arbitrator require contractual interpretation. However, when an unfair labor practice against an employee is involved, the Board, by deferring to arbitration, is asking a potentially hostile or indifferent agent to enforce the employee's statutorily mandated rights. Although the Board argues that it retains jurisdiction in such cases to ensure that the result reached is not repugnant to the NLRB, the great amount of deference that the Board pays to the arbitration committee's decision makes it extremely difficult for an employee to have an arbitration decision overturned . . . . We hold that the NLRB's current policy of deferring non-contractual ULP claims to arbitration represents an abdication of the Board's statutory duty. 216

The Hammontree panel majority aptly noted that the original version of the NLRA introduced by Senator Wagner in 1935 contained a section that would have provided that the Labor Board "may, in its discretion, defer its exercise of jurisdiction over any . . . unfair labor practice in any case where there is another means of prevention provided for by agreement . . . which has not been utilized." 217 The fact Congress decided not to include this provision led the panel majority to conclude that the Labor Board should normally determine unfair labor practice questions despite the availability of contractual arbitration procedures.

The Court of Appeals for the D.C. Circuit recently decided to vacate the prior Hammontree panel decision and to consider the case on an

211. Id. at 68.
213. See, e.g., Local 700, IAM v. NLRB, 525 F.2d 237, 244-45 (2d Cir. 1974); Local Union 2188, IBEW v. NLRB, 494 F.2d 1087, 1090 (D.C. Cir.), cert. denied, 419 U.S. 835 (1974).
214. See, e.g., Lewis v. NLRB, 800 F.2d 818, 820-21 (8th Cir. 1986).
216. Id. at 447.
The *en banc* majority rejected the reasoning that had been adopted by the panel majority. It instead sustained the authority of the Labor Board to employ pre-arbitration deferral even with respect to unfair labor practice charges involving alleged interference with the statutorily protected rights of individual employees. The *en banc* majority found no persuasive evidence in the language of the NLRA or its legislative history to indicate that the NLRB may not employ pre-arbitration deferral in appropriate unfair labor practice cases concerning either collective bargaining rights or the protections afforded to individual employees.\(^{219}\)

If grievance-arbitration procedures are viewed as a continuation of the collective bargaining process, it becomes apparent that pre-arbitration deferral is appropriate in refusal-to-bargain cases, but not in cases concerning individual employee rights. Section 8(a)(5) and 8(b)(3) cases concern claims that employers or representative labor organizations have not negotiated in good faith. The rights protected by these unfair labor practice provisions involve collective and organizational interests. The rights pertain to the viability of labor unions as group representatives. It should be clear that labor organizations will generally pursue their collective rights diligently, since violations in this area tend to undermine the ability of unions to perform their basic representational function. Labor Board deferral with respect to these cases would not diminish the bargaining process—it would actually enhance the process.\(^{220}\) The recalcitrant parties would be forced to acknowledge the representational legitimacy of their respective counterparts by participating in joint arbitration hearings.

Unfair labor practice proceedings are more formal than grievance-arbitration hearings, and they involve the enforcement of external, legal rights. Arbitral proceedings, on the other hand, are less formal, and they concern the enforcement of mutually accepted contractual rights. It should thus be obvious that Labor Board deferral to grievance-arbitration procedures is appropriate to resolve refusal-to-bargain allegations that pertain to the interpretation and enforcement of express or implied bargaining agreement provisions. Such Board deferral mandates continued respect for the very collective bargaining process that has been adversely affected by one party's alleged refusal to negotiate. It is also entirely consistent with the substantial federal labor policy favoring reso-

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218. Hammontree v. NLRB, 925 F.2d 1486 (D.C. Cir. 1991) (*en banc*).
219. *Id.* at 1496-99.
lution of "grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement" through the procedures agreed upon by the contracting parties themselves.221

Individual rights protected by sections 8(a)(1), 8(a)(3), 8(b)(1)(A), and 8(b)(2) differ significantly from the collective and organizational rights covered in sections 8(a)(5) and 8(b)(3). The rights do not emanate from the bargaining relationship nor from the collective contract, but from the NLRA itself. In section 10(a), Congress empowered the Labor Board to rectify unfair labor practice violations, and it expressly stated that "[t]his power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ."222 Given this unmistakable legislative mandate, the NLRB should be extremely hesitant to transfer its adjudicatory function to private decision-makers. While deferral in refusal-to-bargain cases compels the disputing parties to endeavor to resolve their statutory controversy through a continuation of the collective bargaining process, deferral in individual rights cases serves no such function.

Individual statutory rights may be jeopardized during arbitral proceedings because of diverse employee and labor organization interests.223 Union representatives may not particularly like the grievant involved.224 It is also possible that the labor organization believes that the collective good may be enhanced through the sacrifice of individual rights. It is important to recognize that labor arbitrators are selected by employers and unions, without meaningful input from grievants, and that those entities control the hearing procedures.225 It is thus easy to comprehend why the rights of individual employees may not be optimally protected before conventional arbitration tribunals. With respect to NLRB proceedings, however, such claimants receive free representation from experienced NLRB attorneys, and their cases are heard by wholly independent administrative law judges.

When individual rights are concerned, the Labor Board should per-

224. When it is clear that union animosity toward a particular grievant would likely deprive that individual of a fair arbitral hearing, deferral will not be ordered. See Hendrickson Bros., Inc., 272 N.L.R.B. 438 (1984) [misdated in NLRB Reports], affirmed by order, 762 F.2d 990 (2d Cir. 1985).
mit the directly affected employees to choose between resort to grievance-arbitration procedures and adjudication before the NLRB. 226 "When the grieving party forgoes or rejects arbitration, a strong presumption arises that the collective bargaining relationship is suffering severe distress." 227 The individual grievant may fear that the representative labor organization may not process the case diligently. The claimant may alternatively be concerned about the financial capacity of the union to retain the services of a competent legal advocate. "Pre-arbitral deferral might constitute an effective denial of any remedy if . . . arbitration of the dispute would impose an undue financial burden upon one of the parties." 228 The statutory rights of individual employees should not be so dependent upon the willingness and financial capacity of representative labor organizations to present their cases before relatively expensive arbitral tribunals. 229

The fact that individual rights protected by section 7 of the NLRA differ significantly from collective bargaining rights, secured by section 8(a)(5), also militates in favor of a bifurcated approach to pre-arbitration deferral. Although the submission of duty-to-bargain disputes to arbitral procedures that are part of the bargaining process itself actually furthers the collective rights, NLRB deferral of individual rights cases does not generate the same beneficial result. Labor unions may lawfully waive their right to bargain through management prerogative provisions, 230 and they may even relinquish the collective right of bargaining unit personnel to engage in concerted activity. 231 The labor organizations may not, however, agree to waive basic rights provided to individual employ-


227. Zimmer, Wired For Collyer: Rationalizing NLRB and Arbitration Jurisdiction, 48 IND. L.J. 141, 166 (1973). When a section 8(a)(5) refusal-to-bargain charge is involved, it is not inappropriate to direct pre-arbitration deferral—unless the labor organization can demonstrate that the employer's challenged action was "designed to undermine the union [or] . . . is [not] based on a substantial claim of contractual privilege." Joseph Schlitz Brewing Co., 175 N.L.R.B. 141, 142 (1969). See supra note 194 and accompanying text. So long as there is no evidence to indicate that the employer is endeavoring to denigrate the union's representational authority, it is proper to require the parties to utilize the collective bargaining process to resolve their dispute—i.e., complete the internal grievance-arbitration procedures—before they seek assistance from external Labor Board proceedings.


ees in section 7 of the NLRA. In the dissenting opinion in *National Radio Co.*, Members Fanning and Jenkins succinctly acknowledged this critical distinction between individual and collective rights.

Statutory protection against discrimination on the job because of engaging in, or refraining from, union activity is an *individual* right, unlike the union or group right to be protected from unilateral changes in the collective-bargaining agreement. Because it is granted by the statute to individuals, it cannot be reduced, altered, or displaced by any agreement between the employer and the union.

If pre-arbitration deferral is employed with respect to unfair labor practice charges alleging violations of wholly individual rights, labor unions will effectively be able to control the enforcement of those statutory protections. The labor organizations might directly waive such rights through grievance settlements that do not fully protect individual employee interests. They might indirectly accomplish the same result through arbitral presentations that do not forcefully advance the claims of individual grievants. The Labor Board should not be able to employ a pre-arbitration deferral policy that permits representative labor organizations to directly or indirectly "waive" individual employee rights that could not be lawfully waived through the traditional collective bargaining process.

The resolution of individual rights claims through NLRB procedures would optimally protect those rights and would be consistent with the Labor Board's section 10(a) obligation to rectify unfair labor practice violations. Such important statutory interests would be determined by the expert administrative agency established by Congress to accomplish that result, and it would guarantee a uniform national labor policy. When arbitration decisions incorrectly permit unilateral employer action with respect to mandatory subjects of bargaining, the adversely affected labor organizations can easily rectify the problem during the next round of bargaining discussions. When, however, arbitral awards erroneously sacrifice individual rights protected by the NLRA, it is less likely that losing unions will endeavor to reverse those decisions through the bar-

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234. See, e.g., Mahon v. NLRB, 808 F.2d 1342, 1344-45 (9th Cir. 1987); Roadway Express, Inc. v. NLRB, 647 F.2d 415, 419-25 (4th Cir. 1981); Alpha Beta Co., 273 N.L.R.B. 1546, 1547 (1985).
236. See Isaacson & Zifchak, supra note 225, at 1387.
gaining process, except in those infrequent instances in which numerous bargaining unit members feel aggrieved.

B. Post-Arbitration Deferral

Unfair labor practice charges occasionally concern factual or legal questions that have been the subject of a previous grievance-arbitration proceeding. The party which prevailed in the prior contractual forum may ask the NLRB to accept the arbitrator's findings. In *Spielberg Manufacturing Co.*, the Labor Board recognized the federal labor policy favoring grievance arbitration would be enhanced through NLRB deferral to such arbitral determinations in appropriate unfair labor practice cases. The Board therefore announced that it would accept post-arbitration deferral whenever certain standards are satisfied.

[T]he [arbitration] proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In *Raley's Supermarkets*, the Board held that such post-arbitration deferral would also be employed in representation cases. In subsequent cases, the NLRB indicated that it would similarly defer to settlement agreements negotiated by the disputing parties during previous grievance discussions.

In *Monsanto Chemical Co.*, the Labor Board refused to defer to a prior arbitral award, since the arbitrator had expressly declined to consider the unfair labor practice issue. Arbitral deferral was rejected in *Raytheon Co.*, because it was apparent that the arbitrator had failed to determine a factual question that was critical to the subsequent unfair labor practice proceeding. In *Yourga Trucking Inc.*, the NLRB emphasized that deferral would be inappropriate, unless the party request-

239. Id. at 1082. When the record indicated that the prior arbitral hearing was not "fair and regular" (see Gateway Transportation Co., 137 N.L.R.B. 1763 (1962)), or that the arbitral result was inconsistent with NLRA policy (see NLRB v. Max Factor & Co., 640 F.2d 197, 203-04 (9th Cir. 1980), cert. denied, 451 U.S. 983 (1981)), the Board declined to defer under the *Spielberg Manufacturing* standards.
243. 140 N.L.R.B. 883, 885 (1963), enforcement denied on other grounds, 326 F.2d 471 (1st Cir. 1964).
ing deferral could demonstrate that the arbitrator had been presented with, and had considered, the relevant unfair labor practice issues.

In *Electronic Reproduction Service Corp.*,245 the NLRB substantially relaxed its post-arbitration deferral standard. The Labor Board feared that the *Yourga Trucking* approach would encourage parties to withhold relevant evidence during arbitration proceedings, to preserve the availability of NLRB consideration of related unfair labor practice issues in case they failed to prevail before the arbitrator.246 The Board thus decided that it would henceforth defer to arbitral awards when the parties had the opportunity to present the pertinent evidence. Even if the parties failed to do so, unless the party opposing deferral could show that "unusual circumstances" prevented the submission of such evidence.247

The Ninth Circuit Court rejected the *Electronic Reproduction Service* approach.248 The court noted that "the presence of arbitration machinery does not oust the Board of jurisdiction to adjudicate unfair labor practices," and the court held that "when it is impossible to determine what issues the arbitration panel considered . . . the Board should . . . not defer."249 In *Suburban Motor Freight, Inc.*,250 the NLRB overruled *Electronic Reproduction Service* and reinstated the prior *Yourga Trucking* standard requiring "the party seeking Board deferral . . . to prove that the [unfair labor practice] issue . . . was litigated before the arbitrator."251

In *Olin Corp.*,252 the Labor Board significantly liberalized its post-arbitration deferral standards.

We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," *i.e.*, unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

246. 1d. at 761.
247. 1d. at 762.
248. Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977).
249. 550 F.2d at 537. See Banyard v. NLRB, 505 F.2d 342, 347 (D.C. Cir. 1974).
Finally, we would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award. 253

Only where the party opposing deferral can demonstrate that the arbitrator was not presented with the factual circumstances pertinent to the unfair labor practice issues, 254 or that the arbitral award is "palpably wrong," 255 will the Labor Board now reject post-arbitration deferral. 256

The judicial response to the new Olin Corp. standards has not been entirely favorable. A few decisions have simply deferred to the Labor Board’s expertise and sustained the new criteria. 257 Other decisions have accepted the Olin Corp. standards, but concluded that the NLRB improperly applied its own deferral test. For example, in Garcia v. NLRB, 258 the court found that the Labor Board had inappropriately deferred to a prior arbitral award which had converted a discharge to a ten-day suspension for a delivery driver, who had refused to obey a supervisory order to tap his horn when stopping to make residential deliveries, where state law prohibited horn honking except when required for safety reasons. Since the court found that the imposition of discipline on an employee who declines to violate state law contravenes section 8(a)(1), the court concluded that the arbitral determination was repugnant to the policies of the NLRA. 259

253. Id. at 574.
255. The mere fact that the Labor Board might have resolved the statutory question differently does not preclude deferral, so long as the arbitral determination is not completely erroneous. See United Parcel Service, Inc., 274 N.L.R.B. 667, 669 (1985). See also NLRB v. Pincus Bros., Inc.-Maxwell, 620 F.2d 367, 374 (3d Cir. 1980):

[I]t is an abuse of discretion for the Board to refuse to defer to an arbitration award where the findings of the arbitrator may arguably be characterized as not inconsistent with Board policy. In other words, "[i]f the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was 'clearly repugnant' to the Act." Douglas Aircraft Co. v. NLRB, 609 F.2d 352, 354 (9th Cir. 1979).

256. A similar standard is applied to determine whether the NLRB should defer to previous grievance settlements. The Board will defer to such settlement arrangements, even though they fail to provide grievants with the make-whole relief to which they would be entitled if they prevailed in an unfair labor practice proceeding. See Alpha Beta Co., 273 N.L.R.B. 1546, 1547 (1985); Mahon v. NLRB, 808 F.2d 1342, 1344-45 (9th Cir. 1987).

257. See, e.g., Bakery, Confectionery & Tobacco Workers v. NLRB, 730 F.2d 812, 815-16 (D.C. Cir. 1984).
258. 785 F.2d 807 (9th Cir. 1986).
259. Id. at 809-10.
Darr v. NLRB\(^{260}\) involved a shop steward who had been discharged because of activities she and other employees had engaged in to protest the termination of three other stewards. The arbitrator found that there was not "just cause" for the discharge, and he indicated that the "primary motive" of the employer had concerned her protected union activities.\(^{261}\) Although he noted that the NLRB would probably award full backpay in such a case, the arbitrator decided to deny such relief, since the grievant had failed to follow supervisory directives during her protest. The administrative law judge found the arbitrator's failure to award backpay repugnant to the policies of the NLRA, and he ordered such relief.\(^{262}\) The NLRB, however, deferred to the arbitral determination. The court of appeals decided to remand the case to the Labor Board for an explanation why it accepted an arbitral award that had failed to provide compensatory relief commensurate with what the NLRB would normally have provided in the same circumstances. "We have profound doubts that the Board may defer to an arbitrator's award merely because the award is roughly analogous to that which the Board would grant... without explicitly articulating its view of the interrelationship between the law of a particular collective bargaining agreement and the NLRA."\(^{263}\)

In Taylor v. NLRB,\(^{264}\) the Eleventh Circuit Court reviewed the traditional post-arbitration deferral standards, and concluded that the new Olin Corp. criteria were simply inconsistent with the legislative intent underlying the NLRA. The court emphasized the fact that section 10(a) obliges the Labor Board to prevent unfair labor practices and expressly provides that this Board responsibility "shall not be affected by any other means of adjustment or prevention."\(^{265}\) The court then concluded that the revised deferral standards conflicted with the Board's statutorily prescribed mandate.

[I]t is apparent that the Olin Corp. standard... does not protect sufficiently an employee's rights granted by the National Labor Rela-

\(^{260}\) 801 F.2d 1404 (D.C. Cir. 1986).
\(^{261}\) Id. at 1406.
\(^{262}\) Id.
\(^{263}\) Id. at 1409. On remand, the Labor Board finally decided that deferral to the previous arbitral award was not warranted, since it could "find nothing in the arbitrator's opinion that provides a rational basis for the [employer's] discharging Darr, apart from her union activities, or that recounts misconduct that would justify withholding her back pay." Cone Mills Corp., 298 N.L.R.B. No. 70, 134 L.R.R.M. 1105, 1110 (1990). Had the Board accepted the original rationale of the administrative law judge, it would have done more to preserve individual NLRA rights and less to invade the traditional province of the labor arbitrator. See United Cable TV, 299 N.L.R.B. No. 20, 135 L.R.R.M. 1033 (1990).
\(^{264}\) 786 F.2d 1516 (11th Cir. 1986), cert. denied, 110 S. Ct. 237 (1989).
\(^{265}\) Id. at 1518.
tions Act. By presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, *Olin Corp.* gives away too much of the Board’s responsibility under the NLRA . . . . *Olin Corp.* either overlooks or ignores those instances where contract and statutory issues may be factually parallel but involve distinct elements of proof and questions of factual relevance.  

The *Taylor* court thus decided that the Labor Board should continue to follow the traditional *Spielberg Manufacturing* deferral standards.  

The Labor Board’s post-arbitration deferral policy is both too easily satisfied and overly expansive. The revised *Olin Corp.* standards no longer require a showing that the arbitrator actually considered the unfair labor practice issue. The NLRB presumes adequate arbitral consideration whenever (1) the contractual question is “factually parallel” to the unfair labor practice claim, and (2) the arbitrator was presented generally with the facts relevant to a resolution of the unfair labor practice issue.  

Such a loose standard inappropriately permits Board deferral even when there is no clear showing that the facts pertinent to the unfair labor practice case have been presented to and adequately considered by the contractual adjudicator.  

The revised *Olin Corp.* criteria ignore the critical distinction between arbitration and Labor Board proceedings. Labor arbitrators are merely empowered to interpret and apply pertinent contractual provisions. The labor arbitrators derive their authority exclusively from the bargaining agreement and are not usually authorized to apply external legal doctrines. Even when contractual issues and unfair labor practice issues overlap, arbitrators are obliged to focus primarily upon the bargaining agreement terms. There will thus be many instances in which arbitral awards involving disputes that are “factually parallel” to unfair labor practice charges, arising from the same operative circumstances, will not be determinative of the external NLRA issues.  

Post-arbitration deferral should not be viewed as a right, but rather a privilege. Under section 10(a), it is legislatively presumed that unfair labor practice questions will be resolved by the Labor Board. In any case

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266. *Id.* at 1521-22.
267. *Id.* at 1522.
in which it is clear that a previous arbitral determination thoroughly and appropriately disposed of a pending unfair labor practice charge, the NLRB should consider deferral. The party requesting such deferral should be obliged to demonstrate that: (1) the arbitral proceedings were fair and regular and the parties had agreed to be bound by the result; (2) the facts relevant to the unfair labor practice case were presented to and fully considered by the arbitrator; (3) the arbitral decision has effectively resolved the dispute underlying the pending unfair labor practice charge; and (4) the arbitral conclusions are not repugnant to the policies embodied in the NLRA. While the Board should not hesitate to accept arbitral fact findings that satisfy these prerequisites, the Board should be careful to review statutory interpretations to preserve a uniform national labor policy.

The existing Board deferral doctrine also fails to acknowledge the important difference between refusal-to-bargain and individual rights cases. The congruency between contractual disputes and unfair labor practice disputes is greatest with respect to refusal-to-bargain cases involving unilateral employer action. The employer generally admits that it has modified employment conditions, but maintains that a management prerogative clause authorized such conduct. In such cases, resolution of the contractual claim will normally dispose of the section 8(a)(5) controversy. If the arbitrator concludes that the employer was contractually empowered to act unilaterally, there is no 8(a)(5) violation. Conversely, if no such authorization is found, the arbitrator will order restoration of the status quo ante and direct the employer to refrain from such unilateral action in the future. So long as the arbitral determination "draws its essence" from the express or implied terms of the collective bargaining agreement, and the arbitral proceedings have been fair and regular, the Labor Board should defer to that decision.

Such refusal-to-bargain disputes are more directly concerned with the interpretation and application of bargaining agreement terms than with external NLRA provisions. It is thus more appropriate to have the parties' "designated contract reader" construe their contractual language, than to have the Labor Board interpret those provisions. This practice is consistent with the LMRA section 203(d) policy favoring the resolution of "disputes arising over the application or interpretation of an existing collective-bargaining agreement" through the procedures estab-

270. See supra note 235, 67 VA. L. REV. at 625-27.
271. See supra note 27 and accompanying text.
lished by the contracting parties.\textsuperscript{272} The approach is also compatible with the notion that grievance-arbitration procedures constitute the final stage of the collective bargaining process, and the belief that refusal-to-bargain claims are optimally resolved by the parties through the ultimate stage of the negotiation process.

Arbitral deferral is generally inappropriate with respect to unfair labor practice charges concerning the rights of individual employees. In individual rights cases, grievants not only seek redress for their own injuries but also endeavor to vindicate the important congressional policies embodied in section 7 of the NLRA. This crucial fact has been recognized by the Supreme Court in cases asking courts to give preclusive effect in statutory rights cases to prior arbitral determinations involving related contractual disputes. In \textit{Alexander v. Gardner-Denver Co.},\textsuperscript{273} the Supreme Court unanimously ruled that plaintiffs alleging employment discrimination contravening Title VII of the Civil Rights Act of 1964\textsuperscript{274} should not be prevented from having their Title VII claims heard in district court merely because they had lost previous arbitral cases in which they had raised the discrimination question.

The \textit{Gardner-Denver} Court initially compared the Title VII remedial procedures with those applicable to unfair labor practice cases.

The [Title VII] scheme is somewhat analogous to the procedure under the National Labor Relations Act ... where disputed transactions may implicate both contractual and statutory rights. Where the statutory right underlying a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge . . . \textsuperscript{275}

The Court further emphasized the limited role performed by grievance arbitrators.

\textit{[T]}he arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties . . . If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the

\textsuperscript{272} See supra note 187 and accompanying text.
\textsuperscript{273} 415 U.S. 36 (1974).
\textsuperscript{275} 415 U.S. at 50.
The court thus concluded that a prior arbitral award would not preclude *de novo* consideration of related Title VII claims.\(^{277}\) It did, however, acknowledge that district courts could, in appropriate situations, give "great weight" to arbitral fact findings that are supported by a preserved record.\(^{278}\)

Post-arbitration deferral should not be readily available with respect to individual rights cases raising questions under section 8(a)(1) or 8(a)(3).\(^{279}\) Most bargaining agreements do not have language specifically protecting the section 7 rights of bargaining unit members. Such questions are indirectly raised through grievances alleging that discipline has been imposed without "just cause." Although arbitrators should refuse to sustain discipline imposed because of an employee's exercise of protected section 7 rights, it must be acknowledged that not all arbitrators are NLRA experts, and many Labor Board doctrines concerning protected concerted activity are not defined with unambiguous precision.\(^{280}\)

It is thus understandable how an arbitrator might not recognize the exact boundary between protected and unprotected behavior. Even when it is apparent that an employer's adverse action toward an employee was partially motivated by impermissible considerations, the arbitrator might inappropriately dilute statutory protections by sustaining some discipline in circumstances in which the Labor Board would not have done so.

When a party seeks post-arbitration deferral with respect to an individual rights case, the party should be obliged to demonstrate that the arbitrator has considered and decided the underlying unfair labor prac-

\(^{276}\) 415 U.S. at 53 (quoting from United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

The Court's recent decision in Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991), directing arbitration of a brokerage firm employee's age discrimination claim, did not concern the basic premise underlying the *Gardner-Denver* holding. Gilmer was not covered by any bargaining agreement. He had voluntarily signed an agreement in which he promised to arbitrate all legal controversies arising from his employment. The arbitrator was expressly authorized to decide legal questions, and the Supreme Court merely directed Gilmer to honor his contractual pledge.\(^{277}\) 415 U.S. at 59-60. See Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 734-46 (1981) (employee wage claims under Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (1982), not barred by prior submission of grievances to contractual dispute-resolution procedures); McDonald v. City of West Branch, 466 U.S. 284, 287-292 (1984) (prior arbitral award not bar to subsequent action under 42 U.S.C. § 1983 (1982)).

\(^{278}\) 415 U.S. at 60 n.21.

\(^{279}\) Post-arbitration deferral should be similarly rejected with respect of cases arising under section 8(b)(1)(A) or 8(b)(2). When it is alleged that the representative labor organization has interfered with the individual rights of bargaining unit members, it is doubtful whether the employer or the union would adequately represent the interests of the adversely affected employees in arbitral proceedings. Kansas Meat Packers, 198 N.L.R.B. 543 (1972) (denying arbitral proceeding in unfair labor practice action).

\(^{280}\) See generally F. Bartosic & R. Hartley, supra note 230, at 187-211.
tice issues. To ensure a uniform national labor policy, the Labor Board should carefully review the arbitral determination to be certain that the arbitrator has not inadvertently undermined NLRA protections. The standard of review in such individual rights cases should be similar to that accorded to administrative law judge decisions. Deference should be given to fact findings that are "supported by substantial evidence on the record considered as a whole."281 Such deference should not, however, be extended to statutory interpretations. With respect to statutory issues, the NLRB should review the arbitral reasoning to ensure that individual employee rights are fully protected.

V. IMPLICATIONS FOR PARTIES AND ARBITRATORS

Although court decisions have recognized that grievance-arbitration procedures are "part and parcel of the collective bargaining process itself,"282 labor and management representatives have generally considered those procedures to be highly confrontational. Labor organizations and employers have traditionally regarded each other as participants in an adversarial, rather than a cooperative, process.283 They have frequently viewed their relationship as a win-lose endeavor, rather than a win-win situation. Only when dire economic crises have threatened the continued viability of the business enterprise have workers and managers tended to adopt cooperative systems providing more direct labor involvement in managerial decisionmaking.284

Grievance-arbitration procedures should not be viewed as inherently competitive and adversarial. They simply represent the means through which employees may question management decisions they believe are contrary to express or implied terms of the collective contract. Both labor and management officials should consider this process a mutual search for cooperative solutions to possibly divisive problems. If an employer is able to impose employment conditions that are unfair and contrary to the spirit and intent of the bargaining agreement, the employer will frequently encounter increased grievances and decreased worker morale and productivity. If, on the other hand, a representative labor or-

281. This represents the deference appellate courts are required to give to NLRB factual conclusions. See 29 U.S.C. § 160(e) (1982).
282. See supra note 1 and accompanying text.
rganization is able to obtain provisions that impede necessary managerial flexibility, or undermine the competitive status of the business enterprise, that union may precipitate production transfers to other facilities or bankruptcy proceedings designed to obtain relief from oppressive contractual obligations.285 Both sides must acknowledge their symbiotic relationship. Either they work together in a win-win, cooperative manner, or they risk a win-lose, adversarial result that will benefit neither party.

Grievance-arbitration procedures should thus be considered a means of achieving mutual accommodations of competing interests. To enhance the likelihood of such beneficial objectives, negotiating parties should endeavor to maximize cooperative behavior. The negotiating parties should strive during the initial stages of the grievance procedure to settle their less controverted disagreements. When they are forced to confront more momentous conflicts, they should try to stipulate the pertinent facts and agree upon the objective principles that should guide their grievance deliberations.286 This would enhance the probability of achieving optimal resolutions of their contractual difficulties. To ensure maximum disclosure of information and positional theories during the early stages of the grievance process, they should specify that only those evidentiary matters and interpretive contentions disclosed during grievance discussions may be presented at subsequent arbitral hearings. Failure to comply with such a disclosure obligation should only be excused with respect to newly discovered evidence that could not have been ascertained earlier through reasonably diligent efforts.

Grievance discussions should be less formal and less legalistic. Too many labor and management representatives think that they are functioning as proverbial Philadelphia lawyers. They should not hesitate to concede uncontroversial factual circumstances and persuasive positional contentions. They should not advance positions they know are specious merely to obfuscate the real issues. Both sides need to acknowledge the gains they jointly attain when contractual disputes are resolved amicably through the negotiation process. Neither party should ever seek an unconscionable result simply because it believes it might prevail through resort to disreputable tactics. Grievance-arbitration procedures should not be considered analogous to poker games in which the most deceitful person may triumph.

When grievance representatives are unable to achieve a settlement of

their contractual dispute, the dissatisfied party may invoke arbitration. By this time, the parties have generally concluded that a mutual accord cannot be attained. Before the parties schedule an arbitral hearing, however, they should interpose one final grievance step—pre-arbitration mediation. They can arrange a mediation session before a respected neutral. They can summarize their respective positions and receive important feedback from the mediator. That person can ask pertinent questions and suggest alternative solutions. Skilled mediators frequently reopen blocked communication channels and help parties to explore options they have not yet contemplated. During such discussions, the parties must be receptive to reasonable mediator suggestions. In their seminal study, Professors Stephen Goldberg and Jeanne Brett found that proficient neutrals were able to induce labor and management representatives to resolve amicably approximately 85% of the grievance disputes that were otherwise destined for arbitral adjudication.

In those relatively infrequent instances in which negotiating parties are unable to resolve their contractual disputes through the grievance process, they may resort to arbitration. Arbitral procedures have recently become increasingly adversarial and legalistic. The vast majority of cases I have heard during the past decade have involved court reporters and the filing of post-hearing briefs. The claims have been presented in a manner approaching the formalism of a judicial proceeding. Such an approach unnecessarily heightens the adversarial aspect of the situation, and induces participants to view the transactions as win-lose exercises.

Parties should recognize that even arbitral proceedings constitute a continuation of the collective bargaining process. The parties are merely asking a neutral third party to assist them with the resolution of a controverted issue. The more cooperatively they approach the arbitral hearing, the more likely they will be to achieve a beneficial result. They should readily stipulate uncontroverted factual circumstances, the applicable contract language, and the operative decisional criteria. Through this process, they can narrow the distance between their respective positions, and they may even create a cooperative environment that will generate a belated settlement agreement.

Court reporters should not be required, except when the relevant factual circumstances are either highly controverted or unusually com-

289. Id. at 6. When grievances cannot be resolved through such mediation efforts, they are scheduled for hearing before other arbitrators.
plex. In the vast majority of cases, the presiding arbitrators can simply take written notes of the factual presentations. Post-hearing briefs should only be utilized when difficult interpretive questions are involved. In most cases, the parties should be able to summarize their respective positions orally at the conclusion of the arbitral hearing. Such a procedure would both expedite arbitral determinations and significantly decrease litigation costs. The parties would not have to assume the high cost of transcript preparation, or compensate attorneys for the drafting of superfluous post-hearing briefs.

Arbitrators can facilitate cooperative behavior through the manner in which they conduct hearings. Arbitrators should not reward parties who seek to present new evidence or advance novel contentions during the arbitration proceeding. Although many arbitrators have been willing to admit evidence not disclosed during prior grievance discussions, and have even accepted new positional theories never presented to the other side, they should be reluctant to encourage such uncooperative conduct. Except when unusual circumstances precluded the discovery of relevant information through reasonable efforts, evidence not shared with the other party during prior grievance discussions should not be admitted. Arguments not previously raised should be similarly rejected. The parties must be encouraged to maximize their exchange of factual items and positional theories during their grievance sessions. Recalcitrant participants must learn that they will not obtain a tactical advantage through the disingenuous withholding of pertinent information.

Arbitrators should acknowledge the therapeutic benefits to be derived from arbitral proceedings even by losing parties. It is imperative that both sides leave the hearing with the belief that they were given full opportunity to present all arguably relevant material. The admonition of the late Dean Shulman is as applicable today as it was when originally articulated in 1955: "The more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant." Arbitrators should not permit technical evidentiary rules to prevent the admission of seemingly relevant evidence. Doubts should be resolved in favor of admissibility. This will ensure that non-prevailing parties will feel that their entire cases were presented and considered.

Arbitrators should recognize that they also constitute participants in

290. See F. ELKOURI & E. ELKOURI, supra note 34, at 302-04.
291. Id. at 234-37.
292. Shulman, supra note 10, at 1017.
the continuing collective bargaining process. The arbitrators should not simply view themselves as stoical adjudicators who can only listen to evidence presented by the parties. They should not hesitate to ask questions to clarify areas they do not understand. If it becomes apparent that the parties have failed to consider a possible solution to their controversy, arbiters should not be reluctant to halt the formal hearing, to point out the seemingly ignored alternative, and to offer to leave the room while the parties evaluate this new option. With the permission of both sides, they might even endeavor to function as a mediator. Parties should always realize that they are better off with settlements they jointly structure, than with results imposed by outside neutrals who might not fully appreciate their special needs.

Parties would probably obtain preferable results through the use of permanent umpires who are appointed to hear grievance disputes throughout the life of the collective contract, than through resort to ad hoc arbitrators who are merely appointed to hear specific cases. Such permanent arbiters would become intimately familiar with the parties and their respective needs and interests. They would more readily comprehend the exigencies underlying particular controversies, and would be more likely to recognize when mediative efforts might be propitious. Where mature relationships have developed, such neutral persons may regularly employ pre-arbitration mediation techniques to encourage the joint resolution of disputes that do not really require an adjudicated solution.

VI. CONCLUSION

Labor and management representatives, arbitrators, the Labor Board, and courts should recognize that grievance-arbitration procedures constitute a continuation of the collective bargaining process. When pre-arbitration disputes challenge arbitral jurisdiction, courts should resolve doubts in favor of arbitral authority. When parties question arbitral determinations, judges should be similarly hesitant to substitute their judgment for that of the persons selected by the parties to resolve their contractual controversies. Only when it is unequivocally clear that arbitrators have ignored their obligation to interpret and apply the express and implied terms of the bargaining agreement, or have issued decisions that require the performance of acts, which the parties themselves could not legally agree to perform, should arbitral awards be judicially rejected.

293. All disclosures made during such settlement discussions would have to be disregarded by the arbitrator if the parties were unable to achieve a mutually acceptable accord.
When deciding pre-arbitration and post-arbitration deferral questions pertaining to unfair labor practice claims, the Labor Board should recognize the bargaining component of the arbitration process. The Labor Board should thus distinguish between refusal-to-bargain and individual rights cases. Since refusal-to-bargain charges involve collective interests of immediate concern to representative labor organizations, it is appropriate to employ pre-arbitration deferral to compel the parties to resolve their bargaining dispute through the final stage of the negotiation process. Individual rights charges, however, should not be deferred to arbitral procedures. The resolution of such cases will generally not be dependent upon the interpretation of specific contractual language, and the NLRB is the agency Congress established to ensure the optimal protection of individual rights. Post-arbitration deferral is similarly appropriate with respect to refusal-to-bargain issues that have been presented and carefully determined in previous arbitral proceedings. Since the unique aspects of individual rights disputes are frequently not considered thoroughly in arbitral proceedings, the Labor Board should subject prior arbitral determinations involving such issues to relatively searching review.

Negotiating parties should seek to encourage cooperative rather than adversarial behavior during grievance-arbitration procedures. Participants should be induced to disclose evidentiary information and positional theories during early grievance discussions to enhance the likelihood of settlement agreements. When grievance sessions do not culminate in mutual accords, pre-arbitration mediation should be employed to avoid resort to unnecessary arbitral resolution. Arbitrators and advocates should endeavor to minimize needless legal formalism. Parties should stipulate to uncontroverted factual circumstances and contractual claims. The parties should be encouraged to consider unexplored settlement options even during arbitral hearings. Through such actions, labor and management representatives could enhance their use of grievance-arbitration procedures that are part and parcel of the collective bargaining process.