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Principles in collision: Judicial authority vs. private adjudication of labor rights

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Between 1956 and 1958, the Warrior & Gulf Navigation Company laid off about 20 maintenance workers who were employed at one its terminals.[1] Then and now, the company operated barges along the coast of the Gulf of Mexico and the inland rivers of the southern United States, particularly in Alabama, transporting steel and hauling raw materials. At the time, the company's maintenance employees were represented by the United Steelworkers of America. During the period of the layoffs, the company hired subcontractors to carry out the maintenance work. The subcontractors, in turn, hired a number of the laid off workers, at lower rates of pay and benefits. Not surprisingly, the union was upset at the turn of events.

This was not the first time that Warrior & Gulf used subcontractors for maintenance work. Subcontractors had been retained by the company for almost 20 years, despite protests by the Steelworkers after it was recognized as the bargaining representative in 1952. Previously, in negotiations with management over new language for a collective bargaining agreement, the union proposed terms that would restrict subcontracting, but the company resisted any limitation. Eventually, the union dropped its proposal. As a result, the collective bargaining agreement made no mention of subcontracting. There matters stood as Warrior & Gulf continued its subcontracting activity in the 1950s.

Responding to the company's subcontracting and its use of laid off employees, the Steelworkers filed a grievance charging the company with a "partial lockout" affecting "employees who would otherwise be working." Under the labor agreement, grievances could be initiated over any "differences...as to the meaning and application of the provisions" of the agreement. In this case, the union cited that portion of the contract that prohibited lockouts and strikes. As the last step of the grievance procedure, the parties agreed that a final and binding arbitration would resolve a disagreement. However, the contract's arbitration clause contained an exception which stated that matters which were "strictly a function of management" would be excluded from arbitration.

In Warrior & Gulf's objection to arbitration, it insisted that the exclusion for matters that are

[1] The facts recited in this essay are taken from the reported decisions in Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960), and related cases (see n. 3, infra), and in Murphy, How the Trilogy was Made, 47 NAA Proceedings (1994) 327. The latter source is based on an interview with David Feller, the main attorney for the union involved in the case. Another excellent source is Stone, The Steelworkers' Trilogy: The Evolution of Labor Arbitration, in Labor Law Stories (Foundation Press, 2005), pp. 149-189.

"strictly a function of management" was supported by past practice of using subcontractors and by negotiating history. Taken together, the company argued that these considerations permitted the company to undertake subcontracting free from review by an arbitrator. At lower judicial levels, the company prevailed against the union's suit to compel arbitration, but the union appealed.

Late in 1959, the United States Supreme Court entered the picture by agreeing to hear the case. Out of this disagreement emerged a landmark decision of the Supreme Court limiting intervention by the judiciary in assessing whether disputes between labor and management would be resolved by private adjudication as negotiated by the parties, or by courts. The Warrior & Gulf decision was one of three issued by the court on the same day in June 1960, known thereafter as the Steelworkers' Trilogy.[2]

As the foundation for the Supreme Court's analysis in the Trilogy, it adopted as its model a system of industrial affairs that substituted peaceful dispute resolution for more volatile collective action, especially strikes. As part of this trade-off, the court accepted deferral of labor disputes to private adjudication through arbitration, rather than judicial determinations in the courts. As a group, the Trilogy decisions prescribe how courts should decide whether a dispute is subject to arbitration, and, after an arbitration, whether the arbitrator's decision should be upheld. The legacy of these decisions has survived to the present day, providing the backdrop to the administration of labor agreements covering millions of U.S. workers.

The first of the three cases, the American Manufacturing decision, involved an employee who had been injured at work, and afterwards settled his claim for a monetary payment. After the settlement, the employee sought to return to work, however a doctor determined that the workers was 25 percent partially but permanently disable. When the company refused to reinstate the worker, the union initiated a grievance relying on the seniority protection under the agreement for long term employees.

Despite the company's argument that the employee (and the union) were barred by the previous injury settlement from seeking his return to work, the Supreme Court ruled that arbitration was required. The court based its decision on a contract provision containing a broad assurance that "any disputes" over the contract's interpretation and application would be resolved by arbitration. In the court's view, the merits of the decision were for the arbitrator to decide, not the courts. This was so, said the court, even if the underlying claim might be seen by some as frivolous, since the parties had bargained for this method of resolving their differences. The court reasoned that, where the union's claim "on its face is governed by the contract," it matters not if the union is right or wrong on the merits since this "is a question of contract interpretation for the arbitrator."[3] The courts, according to the Supreme Court, "have no business weighing the merits of the grievance" in deciding whether arbitration should be required.[4]

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[2] Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Co., supra; Steelworkers v. Enterprise Corp., 363 U.S. 595 (1960).
[3] American Manufacturing, supra, 363 U.S. at 568.
[4] Id.

The second case in the Steelworkers Trilogy was the Warrior & Gulf decision. Compared to the facts in American Manufacturing, the Warrior & Gulf dispute was harder to decide in favor of arbitration because, at first blush, several relevant factors strongly favored the company's objection to arbitration. As noted above, not only was there a long practice of subcontracting maintenance work on the barges, but the Steelworkers union had proposed, without success, a contract restriction on subcontracting. Moreover, the arbitration provision of the labor agreement contained an exception for matters that were "strictly a function of management."

Nevertheless, these considerations did not prevent the court from ruling in favor of the company. Instead, arbitration was ordered. The core of the court's reasoning is reflected in a series of assumptions about labor relations in the U.S. under the National Labor Relations Act adopted by the Congress in 1935, and amended in 1947.[5]

One assumption is that arbitration "is part and parcel of the collective bargaining process itself."[6] The labor agreement resulting from negotiations is "more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."[7] Out of this special process, a "new common law" emerges for each covered workplace as part of building "a system of industrial self-government."[8] Since bargaining agreements that apply to vast settings could not possibly cover each and every workplace dispute, gaps would be "filled in by reference to the practices of the particular industry and of the various shops covered by the agreement."[9]

In resolving disputes arising in the specialized context of labor relations, the court distinguished commercial (that is, traditional contract) arbitration from labor arbitration: "In the commercial case, arbitration is a substitute for litigation. Here arbitration is the substitute for industrial strife."[10] In the court's view, the choice was between having a "relationship governed by an agreed-upon rule of law," or leaving disputes "to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces."[11] Following from this analysis, the court reasoned that the grievance procedure in a labor agreement "is at the very heart" of industrial self-government, assists in "molding a system of private law," and is "part of the continuous collective bargaining process."[12]

Still, while acknowledging the social and economic underpinnings of its legal framework, the court recognized that the courts could not completely abandon the field of labor disputes. As the court observed, since arbitration is a matter of contract, "a party cannot be required to submit to

[5] 29 U.S.C. Section 151, et seq.
[6] Warrior & Gulf Co., supra, 363 U.S. at 578.
[7] Id.
[8] Id. at 579-580.
[9] Id. at 580.
[10] Id. at 578.
[11] Id. at 580.
[12] Id. at 581.

arbitration any dispute which he has not agreed so to submit."[13] The court affirmed that "the question of arbitrability is for the courts to decide."[14] Without this assurance, the right to contract would be thwarted, and arbitration would govern in every instance of a contract dispute.

However, beyond the court's premise of protecting the right to contract, an important question remained; that is, how should the judiciary approach an objection to arbitration without sacrificing its own independence, but also without undermining the industrial system founded on collective bargaining? In answering this question in a manner that supported the private adjudicatory system, the court developed a procedural approach and an operating presumption that provides a decided advantage to arbitration and strengthened unions as an institutional force. The court stated, "[A]n 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."[15] To this day, the court's pronouncement is known as "the positive assurance" test. Another passage amplified the court's approach: "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...."[16]

Adding weight to this analysis, the court noted that the Steelworkers union was subject to a "no strike" prohibition in its contract with Warrior & Gulf. Based on this constraint and the absence of any contract language that specifically mentioned subcontracting, the court treated the issue of whether management had the right to subcontract as a dispute implicitly arising under the agreement. On this point, the court stated that, "in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action its takes, or if not, it is protected from interference by strikes."[17] The court warned that if the contract language excluding matters that are "strictly a function of management" was applied to bar the union's right to invoke arbitration, then "the arbitration clause would be swallowed up by the exception."[18] Briefly stated, the issue before the court was whether the subcontracting dispute was a subject for arbitration, not whether the company had the right to contract out work.

As if proving the wisdom of the Supreme Court's decision, afterwards, when the Steelworkers' claim was taken before an arbitrator, he ruled that Warrior & Gulf's subcontracting following the layoff violated the labor agreement.[19] In particular, the arbitrator relied on evidence that the company had provided assurances in negotiations that it would not engage in subcontracting without limitation, and that the company failed to adequately explain how employee levels declined, while production increased, other than by excessive subcontracting.

Rounding out the Steelworkers Trilogy was a third decision, the Enterprise Wheel case, dealing

[13] Id. at 582.
[14] Id. at 583, n. 7.
[15] Id. at 582-583.
[16] Id. at 584-585.
[17] Id. at 583.
[18] Id. at 584.
[19] Warrior & Gulf Navigation Co., 36 LA 695 (Holly, Arb., 1961).

with the scope of judicial review when an arbitration award is challenged.[20] In this dispute, an arbitrator ordered the reinstatement of 11 workers who had been fired after they walked off the job in solidarity with another employee who had been fired. The labor contract prohibited strikes during the term of the agreement, and also provided for arbitration of disputes over contract differences, such as employee dismissals. As a starting proposition, the Supreme Court stated that "[T]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."[21] To permit otherwise, said the court, would undermine federal labor policy favoring arbitration to settle disputes. Further, in the court's view, arbitrator expertise is especially appropriate in formulating remedies in light of "the need...for flexibility in meeting a wide variety of situations."[22]

Still, while supporting broad leeway for arbitrators to carry out their assignments, the court did not prohibit courts from a limited role for judicial review. The court cautioned that an arbitrator "does not sit to dispense his own brand of industrial justice."[23] An arbitrator's award, stated the court, "is legitimate only so long as it draws its essence from the collective bargaining agreement." From this passage, the "essence test" was born to assure great deference to arbitration decisions, even if not a promise of absolute confirmation in all cases.

Since 1960, the Supreme Court has reaffirmed the basic principles expressed in the Steelworkers Trilogy.[24] The court also has applied its pro-arbitration perspective to the field of commercial arbitration.[25] However, labor's victory did not arise in a vacuum, and has not been without disadvantage.

The basic U.S. statute to protect unionization in private enterprise was passed in 1935, but was amended in 1947 in a way that sharply rolled back some of labor's weapons, in particular by allowing employers to charge unions with unlawful practices, such as the use of secondary boycotts as an economic weapon.[26] One feature of the 1947 amendment authorized lawsuits to enforce labor agreements, in part to afford employers an avenue to sue for damages arising from the breach of "no strike" agreements.[27] Another feature of the revised statute was promotion of new avenues for dispute resolution, including creation of a special federal agency to provide mediators, and a separate statutory section expressing a legislative preference for arbitration.[28]

In this context, the labor movement's options were more circumscribed than they were a decade

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[20] Steelworkers v. Enterprise Corp., supra, 363 U.S. 593 (1960).
[21] Id. at 596.
[22] Id. at 597.
[23] Id.
[24] See, e.g, AT&T Technologies v. Communication Workers, 475 U.S. 643 (1986); Major Leagues Baseball Players Assn. v. Garvey, 532 U.S. 504 (2001).
[25] See, e.g., First Options of Chicago, Inc. V. Kaplan, 514 U.S. 938 (1985); Howsam v. Dean Witter Reynolds, Inc. 537 U.S. 79 (2002).
[26] 29 U.S.C. Section 158(b)(4).
[27] 29 U.S.C. Section 185.
[28] 29 U.S.C. Section 173(d).

before. As a result, organized labor responded, as relevant here, by seeking to protect what it had secured. Union strength was translated into securing arbitration in virtually all collective bargaining agreements, thereby enhancing the availability of alternatives to economic weapons, and demonstrating that labor could be a reasonable, business-like participant at the workplace, and in business and government affairs.

Labor's embrace of arbitration was not, however, a one-sided triumph. Some complain that labor arbitration has stifled organizing, turning union representatives into "giant bar association of nonlicensed attorneys" who are trying to manage mountains of mundane and distracting disputes.[29] On the legal front, strikes now can be enjoined when there is an arbitration clause that covers the dispute, despite the existence of another federal law that long had been applied to bar anti-strike injunctions.[30] Unions also are required, for the bargaining unit employees they represent, to insure that employees in the unit are dealt with in a manner that is neither arbitrary, discriminatory, or in bad faith.[31] Although this test for what is called "the duty of fair representation" is difficult to satisfy in most cases, unions with arbitration responsibilities must be wary of how cases are handle, lest the unions be challenged in financially onerous and time-consuming litigation.

In addition, important areas of public law have been shifted to arbitration, which is a largely private forum. The National Labor Relations Board, the federal agency charged with overseeing labor relations for private sector employers and their unions, has adopted a policy that favors deferral of its administrative caseload to arbitration. One problem with this policy, which applies whenever a contract provision appears to cover an NLRB dispute, is that the deferral policy substitutes arbitration, which is not subject to probing judicial review, for a public law determination by the Board, which is subject to more thorough judicial scrutiny.[32]

These problems areas being noted, it remains the case that arbitration remains a tool at labor's disposal. In the absence of an invigorated labor movement in the U.S. possessing greater leeway to utilize economic leverage against employers, arbitration can assist members on everyday matters, and to secure relief - and victories - when groups of workers suffer injury.

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[29] Geoghegan, *Which Side Are You On: Trying to Be for Labor When It's Flat on Its Back*, p. 163.
[30] Boy's Market v. Retail Clerks, 393 U.S. 235 (1970).
[31] Vaca v. Sipes, 386 U.S. 171 (1967).
[32] United Technologies, 268 NLRB 557 (1984); Olin Corp., 268 NLRB 573 (1984).