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COURT REVIEW OF LABOR ARBITRATION AWARDS UNDER THE FEDERAL ARBITRATION ACT

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I. INTRODUCTION

The law with regard to judicial review of labor arbitration awards¹ is in substantial disarray. Despite two Supreme Court pronouncements on the limits of a court's power to review an arbitrator's award,² the recent decisions of the courts of appeals

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¹ Labor arbitration is a means by which the parties to a collective bargaining agreement—the employer and union—resolve disputes over the meaning and terms of such agreement. It is a stage of dispute resolution that is reached only after a number of preliminary steps have been taken to resolve the dispute. The process begins with an employee filing a grievance with the employer. If the dispute is not resolved, the union and employer discuss the matter verbally or in writing in accordance with the various steps of the contractual grievance procedure. If the dispute is not resolved by these means, as most are, the union must then decide whether to process the grievance to the final step—arbitration. If the union demands arbitration, most agreements require the parties to select a neutral arbitrator and agree on a time and place for a hearing. If the matter is not settled before the hearing, as many are, the parties proceed to a hearing, which may involve legal representation and the production of a hearing transcript. While the format is admittedly adversarial, arbitration procedures are less formal than those required in a court of law. The arbitrator determines his or her resolution of the issues, most often through a written award and opinion. Most collective bargaining agreements provide that such determination by the arbitrator shall be "final and binding." For an overview of the labor arbitration process, see F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS (4th ed. 1985). It is estimated that 96% of collective bargaining agreements provide for binding arbitration of contract disputes. COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS, (BNA) Vol. 2, § 51.5.

² See W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers of America, 461 U.S. 757 (1982); United Steelworkers of America

(57)
v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). In W.R. Grace & Co., the Court reaffirmed the standards set forth in Enterprise Wheel:

Under well-established standards for the review of labor arbitration awards, a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). When the parties include an arbitration clause in their collective-bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "draw[ ] its essence from the collective bargaining agreement," id., at 597, a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous. Id. at 598.

461 U.S. at 764. In W.R. Grace & Co., the court enforced the arbitrator's award after determining that the collective bargaining agreement did not violate public policy. 461 U.S. at 770. In this case, W.R. Grace & Co. ("company") faced possible liability for violating Title VII of the Civil Rights Act of 1964 for discriminatory hiring of blacks and women. Id. at 759. The company signed an agreement with the Equal Employment Opportunity Commission to conciliate the dispute. Id. Pursuant to the conciliation agreement, the company laid off several employees who asserted protection under the seniority provisions of the collective bargaining agreement and filed grievances. Id. at 761. The company refused to arbitrate the employees' grievances and sought an injunction barring the arbitration of grievances that conflicted with the conciliation agreement. Id. at 760. Two years after the district court granted the company summary judgment, the court of appeals reversed. Id. at 761-62. The appellate court granted the union's original counterclaim and compelled the company to arbitrate. Id. at 762. The arbitrator found that the collective-bargaining agreement did not provide a good-faith defense for the company's violations of the seniority provision of the collective bargaining agreement. Id. at 765.

In W.R. Grace & Co., the Court also gave deference to the arbitrator's analysis of the merits of the grievances. Id. Judge Blackmun wrote: "Although conceivably we could reach a different result were we to interpret the contract ourselves, we cannot say that the award does not draw its essence from the collective bargaining agreement." Id. at 765-66 (footnote omitted). For an analysis of W.R. Grace & Co., see Christensen, W.R. Grace and Co.: An Epilogue to the Trilogy? Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions, Proc. Of The Thirty-Seventh Ann. Meeting Nat'l Acad. Of Arb. 21 (1985).

In Enterprise Wheel, a group of employees who left their jobs in protest against one employee's discharge were also discharged. 363 U.S. at 595. When the employees filed grievances and the employer refused to arbitrate, the union brought a suit to enforce the arbitration provisions of the collective-bargaining agreement. Id. After the district court ordered arbitration, the arbitrator found that the discharge of the employees was not justified and required reinstatement of the employees. Id. Disagreeing with the arbitrator's construction of the collective-bargaining agreement, the court of appeals refused to enforce the employees' reinstatement. Id. at 598. The Supreme Court reversed and stated that the question of interpretation of the collective-bargaining agreement is a question for the arbitrator. Id. at 599. The Court noted that even though the arbitrator's opinion for the award was ambiguous, ambiguity is not a reason for refusing to enforce an award. Id. at 598. The Court reasoned that requiring opinions free of ambiguity may result in arbitrators not writing supporting opinions, a scenario which is undesirable because a "well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement." Id. The Court concluded that "[i]t is the arbitrator's
vary greatly in approach. Some, following the precepts of the Supreme Court’s decision in United Steelworkers of America v. Enterprise Wheel & Car Corp., give great weight to the factfinding and analysis of labor arbitrators and rarely overturn an award.\

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.” Id. at 599.

3. Compare Morgan Serv. v. Local 323, Chicago & Central States Joint Bd., 724 F.2d 1217, 1222-24 (6th Cir. 1984) (overturning arbitrator’s award of reinstatement without back pay) and Sears, Roebuck & Co. v. Teamsters Local Union No. 243, 683 F.2d 154, 156 (6th Cir. 1982) (per curiam) (intimating that to find an implied condition, arbitrator must first find language of contract to be ambiguous), cert. denied, 460 U.S. 1023 (1983) with Ethyl Corp. v. United Steelworkers of America, 768 F.2d 180, 186 (7th Cir. 1985) (judicial review of arbitration awards limited to determination of whether award “can be rationally derived from some plausible theory of the general framework or intent of the agreement”), cert. denied, 106 S.Ct. 1184 (1986), and Drummond Coal Co. v. UMW Dist. 20, 748 F.2d 1495, 1498 (11th Cir. 1984) (award upheld because “at least rationally inferable” from collective bargaining agreement and intent of parties) (quoting Brotherhood of R.R. Trainmen v. Central Ga. Ry. Co., 415 F.2d 403 (5th Cir. 1969), cert. denied, 396 U.S. 1008 (1970)).


5. See, e.g., New Meiji Market v. United Food & Commercial Workers Local Union 905, 789 F.2d 1334 (9th Cir. 1986). In New Meiji, the employer fired an employee for cash register discrepancies. Id. at 1334. After the union filed a grievance and submitted the matter to arbitration, the arbitrator found the employer had violated the collective bargaining agreement by firing the employee without good cause. Id. The arbitrator ordered reinstatement of the employee and awarded back wages. Id. In the employer’s suit to vacate the arbitrator’s award, the district court granted the employer’s motion for summary judgment and vacated the award. Id. at 1335. The union appealed this order to the Ninth Circuit which reversed the lower court and ordered enforcement of the arbitration award. Id. at 1336. The appellate court reasoned that the question of interpretation of a clause in the collective bargaining agreement was for the arbitrator and, because the arbitrator’s interpretation drew its essence from the agreement, the court was required to give deference to the arbitrator. Id. Similarly, the appellate court disagreed with the district court’s finding that the arbitrator’s award was ambiguous for failing to impose any discipline after the determination that the employer imposed too severe discipline and that some discipline was appropriate. Id. In addition, the court stated that even if a slight ambiguity did exist, minor ambiguities are not a basis to deny enforcement of an award. Id.; see also Shopmen’s Local 599 of the Int’l Ass’n of Bridge Workers v. Mosher Steel Co., 796 F.2d 1361, 1365 (11th Cir. 1986) (“[I]t is not the function of the Court to second guess the arbitrator on matters that were within his power to decide.”); International Bhd. of Firemen & Oilers, Local 261 v. Great N. Paper Co., 765 F.2d 295, 296 (1st Cir. 1985) (courts are precluded from interfering with arbitration awards for mere errors in assessing credibility of witnesses); Abernathy v. United States Postal Serv., 740 F.2d 612, 618 (8th Cir.
Others, also claiming to apply the standards of *Enterprise Wheel,* are more willing to second-guess arbitrators and more likely to overturn an award.  

One subject on which these courts disagree, and the focus of this article, is the applicability of the United States Arbitration Act ("Act") to suits seeking to vacate or enforce labor arbitration awards. Enacted in 1925, the Act contains specific standards under which the award of an arbitrator can be vacated.10 Promul-

1984) (federal courts will not review merits of arbitration award); Office and Professional Employees Int'l Union, Local 2 v. Washington Metro. Area Transit Auth., 724 F.2d 133, 142 (D.C. Cir. 1983) (arbitral decision enforceable where arbitrator did not demonstrate partiality, did not reach award contrary to public policy and issued award sufficiently definite for enforcement).

6. For a discussion of *Enterprise Wheel,* see supra note 2.

7. See, e.g., HMC Management Corp. v. Carpenters Dist. Council of New Orleans and Vicinity, 750 F.2d 1302 (5th Cir. 1985). In HMC, the employer fired two employees who had been placed on probation "for wasting time and for performing substandard work." *Id.* at 1303. After the union filed grievances on behalf of the discharged employees, HMC rehired one of them. *Id.* An arbitrator reviewed the case of the employee who had not been rehired and ordered his reinstatement with backpay. *Id.* The court of appeals affirmed the district court's finding that the arbitrator's award was not grounded in the bargaining agreement and thus, unenforceable. *Id.* at 1304. The court found that the arbitrator failed to base his opinion on lack of just cause or denial of equal opportunity, both valid reasons for reinstatement since provisions for each were in the collective bargaining agreement. *Id.* The arbitrator stated that HMC acted improperly when it decided to rehire one employee and not the others. *Id.* The court viewed the arbitrator's decision as a dispensing of his own industrial justice, which is not enforceable. *Id. ; see also* United Food & Commercial Workers Union v. United Markets, Inc., 784 F.2d 1413, 1416 (9th Cir. 1986) (arbitrator's award vacated because resolution directly conflicted with language of agreement); Johnston Boiler Co. v. Local Lodge No. 898, Int'l Bd. of Boilermakers, 753 F.2d 40, 44 (6th Cir. 1985) (court refused to uphold arbitration award where it departed from clear and unambiguous meaning of collective bargaining agreement).


10. Section 10 of the Act provides:

In either of the following cases the United States court in and for the district wherein the award was made 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
gated well before establishment of our current national labor policy, however, the Act does not clearly state whether it is to apply

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.

(d) 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.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.


11. Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957), and the three Supreme Court decisions comprising the Steelworkers Trilogy, established the importance of labor arbitration in collective bargaining agreements. In 1957, in Lincoln Mills, the Supreme Court held that section 301 of the Labor Management Relations Act authorized federal courts to fashion a body of federal law for the enforcement of agreements to arbitrate grievance disputes. 353 U.S. at 451 (citing 29 U.S.C. § 185 (1982)). For the facts and a further discussion of Lincoln Mills, see infra note 17.

Subsequently in 1960, in the Steelworkers Trilogy, the Supreme Court defined the nature of the collective bargaining agreement and the role of the arbitrator in relation to the collective bargaining process. In the first Trilogy case, United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960), the Court ruled that a court cannot weigh the merits of a grievance when parties have agreed in a collective bargaining agreement to submit the grievance to an arbitrator. Id. at 567-68. In United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the second case of the Trilogy, the Court framed a rule of presumption of arbitrability in a collective bargaining agreement containing an arbitration clause. Id. at 582-83. The Court noted: “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.” Id. (footnote omitted). Writing the opinion of the Court, Justice Douglas recognized the significance of arbitration to a collective bargaining agreement. Id. at 581. Justice Douglas noted:

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.

Id.

In the last Trilogy case, Enterprise Wheel, the Supreme Court defined the scope of review of an arbitration award. Recognizing that the award must relate to the collective bargaining agreement, the Court noted that the arbitrator’s award is “legitimate only so long as it draws its essence from the collective bargaining agreement.” Enterprise Wheel, 363 U.S. at 597. Moreover, the Court noted that a mere ambiguity in the arbitrator’s opinion accompanying his award is not a reason to refuse enforcement of the award. Id. at 598. The Court concluded by indicating that parties bargain for the arbitrator’s construction of the contract; therefore, courts cannot overrule the arbitrator’s decision because their interpretation of the contract differs from the arbitrators. Id. at 599. For a review of the Steelworkers Trilogy, see Morris, Twenty Years of Trilogy: A Celebration, Decisional Thinking of Arbitrators and Judges, Proc. of the Thirty-Third Ann. Meeting Nat’l Acad. of Arb. 331 (1980).
to arbitrations arising under collective bargaining agreements. Instead, section 1\(^12\) of the Act provides only 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.”\(^13\) Whether this language excludes collective bargaining agreements as “contracts of employment of . . . workers engaged in . . . interstate commerce”\(^14\) has been a source of substantial disagreement.\(^15\) The legislative history has not given a clear answer\(^16\) and the Supreme Court has not specifically addressed the issue. It has been argued, however, that the Court implicitly rejected the availability of the Act to enforce arbitration clauses in collective bargaining agreements by failing to consider the issue in Textile Workers Union of America v. Lincoln Mills of Alabama,\(^17\) a case in which application of the Act had been ex-

\[\text{In 1982 in W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers of America, 461 U.S. 757 (1982), the Supreme Court affirmed its holding in Enterprise Wheel. In considering whether an arbitration award should be enforced, the Court stated that “a federal court may not overrule an arbitrator’s decision simply because the court believes its own interpretation of the contract would be the better one.” Id. at 764. Additionally, the Court noted that as long as the arbitrator’s decision draws its essence from the collective bargaining agreement, “a court is bound to enforce an award and is not entitled to review the merits of the contract dispute.” Id. For the facts and further discussion of W.R. Grace, see supra note 2. The standards of labor arbitration provided by the Supreme Court in the Steelworkers Trilogy continue as the basis for lower court decisions in labor arbitration disputes. For further explanation of the arbitration process, see F. Elkouri & E. Elkouri, supra note 1.}\]

12. 9 U.S.C. § 1 (1982). Section 1 provides:

“Maritime transactions”, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; “commerce”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but 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.

Id.

13. Id.

14. Id.

15. For a discussion of the disparate views of circuits considering the applicability of the Act to collective bargaining agreements, see infra notes 21-29 and accompanying text.

16. For a discussion of the legislative history of the Act, see infra notes 40-74 and accompanying text.

17. 353 U.S. 448 (1957). In Lincoln Mills, the union and employer entered
tensively discussed by the court below.\textsuperscript{18}

The issue was hotly debated by courts of appeals prior to the decision of the Supreme Court in \textit{Lincoln Mills}.\textsuperscript{19} In \textit{Lincoln Mills}, the Court held that collective bargaining agreements, including arbitration clauses, are enforceable under section 301 of the law into an agreement that provided there would not be strikes or work stoppages. \textit{Id.} at 449. Any employee filing a grievance had to follow a specific procedure in which the last step was arbitration. \textit{Id.} Several grievances were filed and processed until they reached the arbitration step when the employer refused the union's request for arbitration. \textit{Id.} The union brought suit against the employer to compel arbitration. \textit{Id.} The district court concluded that it had jurisdiction and ordered the employer to comply with the arbitration. \textit{Id.} The court of appeals reversed and held that the district court had jurisdiction to entertain the suit but had no authority to grant relief. \textit{Id.} The Supreme Court reversed the court of appeals and held that in applying section 301(a) of the Labor Management Relations Act the district court properly decreed specific performance of the agreement to arbitrate the grievance. \textit{Id.} at 456-69.

The Court determined that section 301(a) of the Labor Management Relations Act "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements." 353 U.S. at 451. Because section 301(b) provides a procedural remedy lacking at common law, section 301 serves as the source of substantive and procedural law for labor arbitration. \textit{Id.} Prior to \textit{Lincoln Mills}, one view was that section 301(a) was not a source of substantive law, but merely gave federal courts jurisdiction over labor controversies in industries affecting commerce. \textit{Id.} at 450. To support its decision that section 301(a) serves as a source of substantive law, the Court stated:

Plainly the agreement to arbitrate grievance disputes is the \textit{quid pro quo} for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements and that industrial peace can be best obtained only in that way. \textit{Id.} at 455. For the text of section 301 of the Labor Management Relations Act, see infra note 37.

In the majority opinion of \textit{Lincoln Mills}, Justice Douglas did not discuss the United States Arbitration Act although the Court had an opportunity to rule on its applicability to collective bargaining agreements. In his dissent, Justice Frankfurter noted this implicit rejection of the availability of the Act in enforcing arbitration clauses in collective bargaining agreements. \textit{Id.} at 466 (Frankfurter, J., dissenting).

\textsuperscript{18} Lincoln Mills of Alabama v. Textile Workers Union of America, 230 F.2d 81 (5th Cir. 1956), \textit{aff'd}, 353 U.S. 448 (1957). The court of appeals reviewed decisions from other circuits addressing the issue of whether the Act authorizes enforcement of an arbitration agreement. 230 F.2d at 85-86. The Fourth Circuit concluded that the provision excluding from the Act all contracts of employment of workers engaged in interstate commerce applied to the entire Act, and not to any particular section. \textit{Id.} at 86. The Fifth Circuit in \textit{Lincoln Mills} then chose to follow the Fourth Circuit and held that the collective bargaining agreement was a contract of employment and was therefore excluded from the Act. \textit{Id.}

boring Management Relations Act.\textsuperscript{20} While the issue is less often debated now, the courts of appeals still substantially disagree on whether the Act applies to cases involving labor arbitration. A substantial number of circuits, including the First,\textsuperscript{21} Second,\textsuperscript{22} Sixth\textsuperscript{23} and Seventh\textsuperscript{24} have, in recent years, applied the Act to

\textsuperscript{20} For a discussion of the Supreme Court’s decision in \textit{Lincoln Mills}, see supra note 17.

\textsuperscript{21} \textit{See} Hoteles Condado Beach v. Union De Tronquistas Local 901, 763 F.2d 34 (1st Cir. 1985). In \textit{Hoteles Condado Beach}, the union filed a grievance on behalf of a discharged employee who was covered by a collective bargaining agreement between the hotel company and the union. \textit{Id.} at 36. After an arbitration hearing, the arbitrator found that the company dismissed the employee unjustifiably and ordered it to reinstate him. \textit{Id.} at 37. As a result, the company brought suit to vacate the arbitration award. \textit{Id.} The court of appeals affirmed the district court’s granting of summary judgment to the company and vacating of the arbitration award. \textit{Id.} at 37-38. The court of appeals explained that under section 10(c) of the United States Arbitration Act, an award may be vacated if the arbitrator refuses to hear evidence pertinent and material to the controversy. \textit{Id.} at 38. The arbitrator in \textit{Hoteles Condado Beach} refused to give any weight to a trial transcript that was relevant in determining whether the employee violated the company’s disciplinary regulations. \textit{Id.} at 40. Under section 10(d) of the Act a court may vacate an award where the arbitrator exceeds his power. \textit{Id.} at 38. An additional reason for the court’s vacating the arbitrator’s award was that the arbitrator improperly interpreted and disregarded the plain language of the collective bargaining agreement. \textit{Id.} at 41. \textit{See also} Mobil Oil Corp. v. Local 8-766, Oil Workers Int’l Union, 600 F.2d 322 (1st Cir. 1979) (court considered vacating arbitration award under section 10 of Act).

\textsuperscript{22} \textit{See} Bell Aerospace Co. v. Local 516, Int’l Union, United Auto. Workers of America, 500 F.2d 921 (2d Cir. 1974). In \textit{Bell}, one of two unions in an employer’s plant filed a grievance claiming that jobs belonging to members of its union had been improperly assigned to members of the other union. \textit{Id.} at 922. The grievance was heard by an arbitrator who issued an award that one union and the employer claimed was improperly executed. \textit{Id.} The district court ordered the arbitrator to clarify the award and subsequently confirmed the award as clarified. \textit{Id.} On appeal by one union and the employer, the court of appeals held that the award was ambiguous and remanded the case for another arbitration award. \textit{Id.} at 924-25. The court relied on section 10(d) of the Arbitration Act that states an award may be vacated where the arbitrator ‘‘so imperfectly executed [his powers] that a mutual, final, and definite award upon the subject matter submitted was not made.’’ \textit{Id.} at 923 (quoting United States Arbitration Act, 9 U.S.C. \S 10(d) (1982)).

\textsuperscript{23} \textit{See} National Post Office Mailhandlers v. United States Postal Serv., 751 F.2d 834 (6th Cir. 1985). In \textit{National Post Office}, the union representing postal workers filed two grievances on behalf of a postal employee who had been arrested for trafficking in marijuana and thus discharged from his job. \textit{Id.} at 836. Because the charges against the employee were dropped, the arbitrator ordered that the employee be reinstated. \textit{Id.} at 837. However, the Postal Service would not permit his return after a grand jury indicted him for drug trafficking. \textit{Id.} The union filed a second grievance that resulted in a second arbitrator sustaining the discharge because he believed the employee had pleaded guilty to the charge of drug trafficking on the day of the indictment. \textit{Id.} at 838. However, the employee had not plead guilty until four weeks after his discharge had become final. \textit{Id.} The court of appeals applied section 11 of the Act, which permits a court to modify and correct an award to effect the intent of and promote justice between the parties. \textit{Id.} at 840. Although the arbitrator mistakenly be-

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suits involving the arbitration of collective bargaining disputes. The Fourth Circuit\textsuperscript{25} has specifically rejected application of the Act to such arbitration and a number of others have either issued somewhat conflicting opinions,\textsuperscript{26} specifically reserved the ques-

lied that the employee’s plea of guilty preceded his discharge, the court viewed the discharge to have been improper for only the 31 days between the time of discharge and the guilty plea. \textit{Id.} at 844. Thus, the court modified the award and ordered that the employee receive back pay for the 31-day period. \textit{Id.; see also} Ford Motor Co. v. Plant Protection Ass’n Nat’l, 770 F.2d 69, 74 (6th Cir. 1985) (Arbitration Act has emphasized limited role of judiciary); Detroit Coil Co. v. International Ass’n of Machinists, Lodge 82, 594 F.2d 575, 577 (6th Cir. 1979) (arbitrator exceeded scope of his authority), \textit{cert. denied}, 444 U.S. 840; Chattanooga Mailers Union v. Chattanooga News - Free Press Co., 524 F.2d 1305, 1315 (6th Cir. 1975) (district court was correct in looking to Act to provide method for choosing disinterested arbitrator).

\textsuperscript{24} See Pietro Scalzitti Co. v. International Union of Operating Eng’rs, Local No. 150, 351 F.2d 576 (7th Cir. 1965). In Pietro Scalzitti, a construction company brought an action against the engineers’ union for violating a no-strike clause in the collective bargaining agreement. \textit{Id.} at 577. The union demanded arbitration of the complaint. \textit{Id.} at 578. The Seventh Circuit affirmed the district court’s order of a stay of the proceedings pending arbitration of the issue. \textit{Id.} at 580. Although the company asserted that the collective bargaining agreement is a contract of employment excluded by section 1 of the Act, the court of appeals held that the exclusion related only to workers engaged in transportation involving interstate or foreign commerce. \textit{Id.} Thus, the collective bargaining agreement was not within the exclusion and the Act was applicable to permit the court to require arbitration of the dispute. \textit{Id.; see also} Milwaukee Typographical Union No. 23 v. Newspapers, 639 F.2d 386, 389 (7th Cir. 1981) (‘‘This court has held that the Act’s exclusion relates only to workers in transportation industries.’’).

\textsuperscript{25} See Sine v. Local No. 992 Int’l Bd. of Teamsters, 644 F.2d 997 (4th Cir.), \textit{cert. denied}, 454 U.S. 965 (1981). In Sine, two employees brought suit seeking to vacate an arbitration decision denying them back pay from their employer, an interstate carrier. \textit{Id.} at 998. Although the employees asserted that the Act was applicable, the court of appeals concluded that the Act excluded contracts of employment of workers engaged in interstate commerce under section 1 of the Act. \textit{Id.} at 1002; \textit{see also} United Elec. Workers of America v. Miller Metal Prod., 215 F.2d 221, 224 (4th Cir. 1954) (court would not use distinction between collective bargaining agreements and contracts of employment to enforce agreement under Act). \textit{But cf.} International Chem. Workers Union Local No. 566 v. Mobay Chem. Corp., 755 F.2d 1107 (4th Cir. 1985) (discussed parties’ allegations under Act without approving or rejecting applicability of Act).


In \textit{Newark Stereotypers’ Union}, as required by a collective bargaining agreement, an arbitration panel resolved a dispute between the company and the union about the number of employees required to operate a new machine. \textit{Id.} at 596. The union sought vacation of the award under section 10 of the Act claiming that the arbitration panel intimidated the union’s expert witness which resulted in his not testifying before the panel. \textit{Id.} The court of appeals applied section 10 of the Act to conclude that the union received a fair hearing before the arbitration panel and that the award should be confirmed. \textit{Id.} at 600.

\textit{Compare also} Sheet Metal Workers Int’l Ass’n Local Union #420 v. Kinney
27. See, e.g., General Warehousemen & Helpers Local 767 v. Standard Brands, Inc., 579 F.2d 1282, 1294-95 n.9 (5th Cir. 1978) (en banc), cert. dismissed, 441 U.S. 957 (1979). In Standard Brands, the Teamsters brought suit to enforce an arbitration award that was a remedy for the employer's breach of the collective bargaining agreement. 579 F.2d at 1284. The court of appeals affirmed the district court's decision not to enforce the award as rendered and remanded the case for further proceedings. Id. at 1296. The court noted that it could reach the same result under the United States Arbitration Act but chose to rely on federal common law. Id. at 1294-95 n.9. In the extensive footnote, the court discussed other circuits that have applied the Act to collective bargaining agreements. Id.

28. See, e.g., Grahams Serv. v. Teamsters Local 975, 700 F.2d 420 (8th Cir. 1982). In Grahams Service, the company asserted that the arbitrator's award should be vacated under section 10(c) of the Act. Id. at 422. Although the court discussed the Third Circuit's interpretation of section 10(c), the court relied on Judge Learned Hand's analysis in American Almond Products Co. v. Consolidated Pecan Sales, 144 F.2d 448 (2d Cir. 1944), to decide that, based on the nature and purpose of arbitration, the court would not vacate the award. Id. at 423. In his brief concurring opinion, Judge Gibson stated: "I would make clear that the Court is not squarely deciding the issue of whether the United States Arbitration Act applies to the review of labor arbitration awards, an issue on which courts are presently divided." Id. at 424; see also United Elec. Workers of America v. Litton Microwave Cooking Products, 704 F.2d 399, 995-96 n.2 (8th Cir. 1983) (Eighth Circuit has not squarely decided whether Act applies to collective bargaining agreement), rev'd on rehearing, 728 F.2d 970 (8th Cir. 1984); Note, Judicial Review of Labor Arbitration Awards: Refining the Standard of Review, 11 Wm. Mitchell L. Rev. 993 (1985) (court may apply section 10 review standard without adopting entire Arbitration Act).

29. While this situation is most likely due to the moving party's failure to include the Arbitration Act in its complaint, the omission can cause confusion for those attempting to determine the status of the law. See, e.g., Local 1445, United Food Workers Int'l Union v. Stop & Shop Companies, 776 F.2d 19 (1st Cir. 1985) (applying common law to affirm arbitration award without considering applicability of Act); United Steelworkers of America v. Adhill Management Corp., 754 F.2d 138 (3d Cir. 1985) (affirming arbitration award without relying on Act); Johnston Boiler Co. v. Local Lodge 893, Int'l Bhd. of Boilermakers, 753 F.2d 40 (6th Cir. 1985) (overturning arbitration award without mentioning Act); Jones Dairy Farm v. Local P-1236, United Food Workers Int'l Union, 755 F.2d 583 (7th Cir. 1985) (same), vacated, 760 F.2d 173 (7th Cir.) (arbitrator's award enforced).
which are not well-founded. Such appeals lead to delay and, most importantly, this delay undercuts the entire labor arbitration process by threatening both the finality of the process and the positive labor relations benefits of a final decision.

While the primary focus of this article is judicial review of arbitration awards, the issue of whether the Act applies to labor arbitration may also be important in determining whether an arbitrator has authority to issue a subpoena, whether venue or jurisdiction are proper and the appropriate statute of limitations.

This article takes the position that the Act does not and should not apply to arbitration arising under a collective bargaining agreement. While the legislative history is not extensive, a review of the concerns of Congress at the time the Act was passed reveals that it was directed at commercial arbitration and the

30. Section 7 of the Act permits an arbitrator to summon witnesses in the same manner as a subpoena provides. 9 U.S.C. § 7 (1982). Section 7 provides in pertinent part:

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.

Id.

In states lacking statutes that give arbitrators subpoena authority, applicability of the Act can be important. See Emerson, Reluctant Witnesses in Discharge and Discipline Arbitration, 11 Employee Relations L.J. 716, 718 (Spring 1986) (although Act grants arbitrators right to subpoena witnesses, applicability of Act to collective bargaining arbitration not yet resolved); Heinsz, Lowry & Torzewski, The Subpoena Power of Labor Arbitrators, 1979 Utah L. Rev. 29, 45 (1979) (Act provides precarious base for exercising arbitral subpoena power; however, arbitrators have implied power to subpoena witnesses under section 301 of Labor Management Relations Act).

31. See, e.g., Central Valley Typographical Union, No. 46 v. McClatchy Newspapers, 762 F.2d 741 (9th Cir. 1985). In McClatchy, the Ninth Circuit ruled on the issue of what is proper venue under section 10 of the Act. Id. at 744. Section 10 provides that “the United States court in and for the district wherein the award was made may make an order vacating the award. . . .” 9 U.S.C. § 10 (1982). Although McClatchy asserted that the arbitration award was “made” where the arbitrator lived and where the award was written, mailed and served, the court held that an award is “made” where the arbitration hearing is held. 762 F.2d at 744.

32. See, e.g., San Diego County Dist. Council of Carpenters v. Cory, 685 F.2d 1137, 1140 n.5, (9th Cir. 1982). The court noted that Congress did not enact a statute of limitations for section 301 of the Labor Management Relations Act. Id. at 1139. However, observed the court, in actions to vacate arbitration awards, courts have applied the three-month limitations period of the United States Arbitration Act as well as the limitations period of the relevant forum state statute. Id. at 1140 n.5. Nonetheless, the Ninth Circuit concluded that uniform use of the Act’s limitation period should not be applied when it is unclear whether the Act applies to collective bargaining agreements. Id. at 1142.

needs of merchants and traders.\textsuperscript{34} While a number of circuits have held the Act to apply to labor arbitration,\textsuperscript{35} the early decisions of these courts were based, at least in part, on the courts' perception that national labor policy required that a forum be available to resolve disputes involving collective bargaining agreements.\textsuperscript{36} Such a forum has now been provided by section 301 of the Labor Management Relations Act,\textsuperscript{37} as interpreted by the Supreme Court in the \textit{Steelworkers Trilogy}.\textsuperscript{38} Thus, there is no longer a need to stretch statutory interpretation to provide a forum.

Finally, the Act provides an all too detailed blueprint for the

\textsuperscript{34} For a discussion of the legislative history demonstrating that the Act was directed at commercial arbitration and the needs of merchants and traders, see \textit{infra} notes 51-62 & 231-32 and accompanying text.

\textsuperscript{35} For a discussion of those circuits that have held the Act to apply to labor arbitration, see \textit{supra} notes 21-24 and accompanying text.

\textsuperscript{36} For a discussion of those courts' perception that national labor policy requires such a forum, see \textit{infra} notes 86-135 and accompanying text.

\textsuperscript{37} 29 U.S.C § 185 (1982). Section 185 provides:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and on behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

\textit{Id.}

\textsuperscript{38} For a definition and discussion of the \textit{Steelworkers Trilogy}, see \textit{supra} notes 2, 4 & 11 and accompanying text.
challenge of arbitration awards in court. The attributes of labor arbitration are speed, flexibility, informality and finality. Contracts are often drafted by non-lawyers and the continuing bargaining relationship of the parties is harmed when a dispute is not finally settled by arbitration but, rather, is continued in the courts. By contrast, commercial arbitration, for which the Act was most likely designed, involves more carefully drafted contracts and fewer continuing long-term relationships.

The sections which follow examine the legislative history of the Act, with emphasis on the exclusion for contracts of employment, the early judicial decisions interpreting the exclusion and those current decisions which have applied the Act to review of labor arbitration awards. The final section discusses the premise of this article that the Act should not apply to review of labor arbitration awards.

II. LEGISLATIVE HISTORY

The legislative history of the Act reveals that the primary focus of Congress was on remedying the problems of commercial arbitration and that little time or discussion was spent on the ultimate exclusion for contracts of employment. The Act originated in the Committee on Commerce, Trade and Commercial Law of the American Bar Association, and a draft of the bill was submitted at the Association’s meeting in 1921. In 1922, the Association adopted the recommendations of the Committee. The federal arbitration bill, in the form adopted by the American Bar Association, was then, in December, 1922, introduced in the Sen-

39. For a discussion arguing that the continuing bargaining relationship of the parties is harmed when a dispute is not settled by arbitration, see infra notes 236-38 and accompanying text.
40. For a discussion of the application of the Act to commercial arbitration, see infra notes 51-62 & 231-32 and accompanying text.
41. The United States Arbitration Law and Its Application, 11 A.B.A. J. 153 (1925) [hereinafter Arbitration Law]. For a review of the Act’s legislative history, with focus on the exclusion for contracts of employment, see Burstein, The United States Arbitration Act - A Reevaluation, 3 Vill. L. Rev. 125, 129-34 (1958). It is not uncommon for the A.B.A. and similar organizations to assume a quasi-legislative function and to draft model legislation for submission to Congress or state legislatures. See, e.g., Arbitration Law, supra, at 156 (noting A.B.A. consideration of model state arbitration statute).
42. Arbitration Law, supra note 41, at 153. The Association adopted the revised draft of the bill for a uniform state arbitration law, a revised draft of a Federal Arbitration statute, and a revised draft of a treaty for commercial arbitration. Id. In adopting these measures, the Association also passed thirteen resolutions, one of which referred to the National Conference of Commissioners on Uniform State Laws, the bill regarding a uniform state arbitration law. Id.
ate by Senator Thomas Sterling and in the House by Congressman Wilbur Mills. The bill was not, however, reported out by the committees to which it was referred.

In December, 1923, the federal arbitration bills were reintroduced in both houses of Congress. On January 29, 1924, the subcommittees of the Senate and House Committees on the Judiciary held a joint hearing on the bills. Both committees reported favorably on their respective bills, and a bill was passed in the House on June 6, 1924, and in the Senate, with amendments, on January 31, 1925. On February 12, 1925, President Calvin Coolidge signed the bill.

The Senate Committee on the Judiciary, in its May 14, 1924, report, spoke specifically to the need for enforcement of commercial arbitration provisions in contracts. In describing the historical anomalies that led to the then current non-enforcement of arbitration provisions, the Committee Report states:

But it is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in bar of the action; nor would such an agreement be ground for a stay of proceedings until arbitration was had. Further, the agreement was subject to revocation by either of the parties at

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44. Arbitration Law, supra note 41, at 153. After a congressional committee votes favorably on a bill, the legislation is "reported out" of the committee. C. ZINN, HOW OUR LAWS ARE MADE 18 (1974). The legislation is reported out by a committee member, who is designated to write the committee report. Id. The report generally describes the purpose and scope of the bill and the reasons for its recommended approval. Id. In this instance, the bills were not reported out of committee because of the lateness of the session and the pressure of other important business. Arbitration Law, supra note 41, at 153.
47. S. REP. No. 536, 68th Cong., 1st Sess. (1924); H.R. REP. No. 96, 68th Cong., 1st Sess. (1924). The House bill was reported out on January 24, 1924, and the Senate bill on May 14, 1924. Id.
48. 65 CONG. REC. 11,080-82 (1924).
49. 66 CONG. REC. 2759-62 (1925) (citations omitted).
any time before the award. With this as the state of the law, such agreements were in large part ineffectual, and the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy. 52

The Report speaks of the need to make arbitration agreements enforceable, noting that the "settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals." 53

The January 29, 1924, hearing, held by the Joint Committee of Subcommittees on the Judiciary of the House and Senate, provides some insight into the concerns which Congress attempted to address. Senator John Kendrick of Wyoming endorsed the bill because it was favored by "business men of my section of the West." 54 Charles Bernheimer represented the New York State Chamber of Commerce, the Importers and Exporters Association and the Merchants Association of New York. 55 He spoke of the difficulties of merchants and the expense of litigation to merchants and society, mentioning lawyer fees in litigation as "an economic wastage in the everyday commercial transactions." 56

An extensive brief on the statute was introduced by W.W. Nichols, president of the American Manufacturers Export Association of New York. It provided in part: "An agreement for arbitration is in its essence a business contract. It differs in no essential form from other commercial agreements. It should stand upon the same plane and be regarded by the law in the same light." 57 Nichols' brief further stated: "In what respect does an arbitration agreement differ from any other commercial contract, and, if such agreements ought to be enforced, why should not the national power be exerted in their support.

When the bill reached the floor of Congress its commercial orientation became even more clear. In the House, Representa-

52. Id. at 2.
53. Id. at 3. The House Report contains similar sentiments, stating that "[a]rbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement." H.R. REP. No. 96, 68th Cong., 1st Sess. 5088 at 1 (1924).
54. Joint Hearings, supra note 46, at 5.
55. Id. at 6.
56. Id.
57. Id.
58. Id. at 40.
tive Wilbur Mills spoke in response to an objection to consideration of the bill on the consent calendar.\textsuperscript{59} Noted Mr. Mills: "This bill provides that where there are commercial contracts and there is disagreement under the contract, the court can force an arbitration agreement in the same way as other portions of the contract."\textsuperscript{60} The objection was withdrawn and the bill was reported\textsuperscript{61} and passed.\textsuperscript{62}

The legislative history of the Act does not clearly speak to the reasons behind the exclusion for "contracts of employment" contained in Section 1,\textsuperscript{63} an exclusion which was not in the original bill but was included in the bill introduced in December, 1923.\textsuperscript{64} For this reason, it has been necessary for commentators and courts to look behind the Congressional debates and committee reports. What has been discovered is that some representatives of organized labor opposed the bill as originally drafted.

In late 1922, when the original bill was introduced in the Senate and House, the president of the International Seamen's Union of America, Andrew Furuseth, charged that the bill as then drafted constituted a "compulsory labor" bill.\textsuperscript{65} Similarly, the American Federation of Labor protested against the bill and later claimed that its intervention and protest caused Congress to adopt the exclusionary provisions of Section 1, which the Federation reported "exempts labor from the provisions of the law."\textsuperscript{66}

Further, hearings on the proposed bill contained assurances from a spokesman for the American Bar Association that the bill

\textsuperscript{59} 65Cong. Rec. 11,080 (1924). Each day Congress is in session, it prints a calendar for the House representatives, together with a history of all measures reported by a standing committee of either house. C. Zinn., How Our Laws Are Made 21 (1974). As soon as a bill is favorably reported it is assigned a calendar number on one of two principal calendars of business, the Union Calendar and the House Calendar. Id. If a measure pending on either of these calendars is of a noncontroversial nature, it may be placed on the consent calendar. Id. If objection is not made to the placement of a bill on the calendar and if the bill is not "passed over" by request, it is passed by unanimous consent without debate. Id. at 21-22.

\textsuperscript{60} 65Cong. Rec. 11,080 (1924) (statement of Rep. Mills).

\textsuperscript{61} Id. at 11,081.

\textsuperscript{62} Id. at 11,082.

\textsuperscript{63} See 9 U.S.C. § 1 (1982). Reports by the congressional committees are silent as to the reason for this exclusion. Sturges & Murphy, Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act, 17 Law & Contemp. Probs. 580, 605 (1952). For the text of section 1, see supra note 12.

\textsuperscript{64} Burstein, supra note 41, at 130 (citing Joint Hearings, supra note 46).

\textsuperscript{65} See Proceedings of the Twenty-Sixth Annual Convention of the International Seamen's Union of America 203 (1923).

\textsuperscript{66} Proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor 52 (1925).
was not “to make an industrial arbitration in any sense” and Senator Thomas Sterling, chairman of the subcommittee, acknowledged that the purpose of an amendment similar to the exclusion of Section 1 was to limit the law to commercial arbitration.

Other support also exists for the claim that labor's complaints led to amendment of the proposed statute. A January 21, 1923 letter from then Secretary of Commerce Herbert Hoover to Senator Sterling contains the following passage: “If objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.' This letter was submitted for the record to the Joint Committee which, in 1924, considered the bill ultimately enacted, including the Section 1 exclusions, which otherwise went unmentioned in the Committee hearings.

The 1924 Committee Reports also reveal that no representatives of organized labor appeared before the Committee. Thus, one can assume that the needs and concerns of labor were believed met by Section 1's exclusion for contracts of employment.

67. Hearing Before A Subcommittee of the Committee on the Judiciary on S. 4213 and S. 4214, 67th Cong., 4th Sess. 9 (1923). The A.B.A. spokesman suggested language quite similar to that of the exclusionary clause in section 1 of the Act. Id. at 10.
68. See generally supra note 41, at 130-31 (noting that testimony at hearings and floor debate indicates “persuasively” that bill was intended to apply to commercial arbitration only and that absence of labor representatives from hearings supports this conclusion).
70. Id.
71. Id.
73. See Burstein, supra note 41, at 130 (noting absence of labor representatives at hearings).
74. See S. Rep. No. 536, 68th Cong., 1st Sess. (1924); H.R. Rep. No. 96, 68th Cong., 1st Sess. 5088 (1924). The House Report notes that the legislation was drafted by a committee of the American Bar Association and was sponsored by that association and by a large number of trade bodies whose representatives appeared before the committee on the hearing. Id. Significantly, there was no opposition to the bill before the House Committee. Id.
III. JUDICIAL INTERPRETATION

While the Supreme Court has not discussed the applicability of the Act to arbitration arising under a collective bargaining agreement, its failure to discuss the issue in *Lincoln Mills*\(^7\) caused Justice Frankfurter to argue in dissent that the majority had, by implication, rejected application of the Act to arbitration under collective bargaining agreements.\(^7\)

The Court's failure to discuss the Act in *Lincoln Mills* is particularly puzzling in light of the detailed discussion of the subject in the opinion of the court below.\(^7\) In its *Lincoln Mills* opinion,\(^7\) the Fifth Circuit carefully reviewed the state of the law on the issue before deciding that a collective bargaining agreement is "a contract of employment" within the meaning of the Act and, as such, is excluded from the Act under Section 1.\(^7\)

It is to the courts of appeals decisions of the 1950's, of which *Lincoln Mills* is an example, that one must look for the most detailed analysis of the issue. Before the *Steelworker's Trilogy*\(^8\) and the Supreme Court's pronouncement in *Lincoln Mills*\(^8\) that arbitration clauses of collective bargaining agreements could be enforced via section 301 of the Labor Management Relations Act,\(^8\)

\(^7\) The Supreme Court held that section 301(a) of the Labor Management Relations Act "authorizes federal courts to fashion a body of federal law for the enforcement of ... collective bargaining agreements." *Id.* at 451. Pursuant to this principle, the Court further held that federal courts can specifically enforce agreements to arbitrate contained in collective bargaining agreements. *Id.* For further discussion of *Lincoln Mills*, see supra notes 17-20 and accompanying text.

\(^7\) 553 U.S. at 466. Justice Frankfurter noted that when Congress enacted the United States Arbitration Act, it authorized federal courts to enforce arbitration provisions in contracts generally, but it explicitly excluded "contracts of employment." *Lincoln Mills*, 553 U.S. at 466, (Frankfurter, J., dissenting). If the Act had applied to collective bargaining agreements, Frankfurter stated that the "Court would hardly spin such power out of the empty darkness of § 301." *Id.* Thus, from the Court's silent treatment of the Act, Justice Frankfurter found the Court had rejected the availability of the Act to enforce arbitration clauses in collective bargaining agreements. *Id.*

\(^7\) For a discussion of the lower court's opinion in *Lincoln Mills*, see infra notes 78-79 and accompanying text.


\(^7\) 230 F.2d at 86.

\(^7\) For a definition and discussion of the *Steelworkers Trilogy*, see supra notes 2, 4 & 11 and accompanying text.

\(^7\) For a discussion of *Lincoln Mills*, see supra notes 17-20 and accompanying text.

the United States Arbitration Act\textsuperscript{83} offered unions and employers a potential means of enforcing agreements to arbitrate and, for unions, a means of obtaining stays of judicial injunctions pending arbitration of such issues as alleged wildcat strikes.\textsuperscript{84} While some courts now reserve judgment on the issue of whether the Act applies and, instead, apply section 301,\textsuperscript{85} courts of the 1950's sometimes reserved judgment on the issue of whether section 301 applied and issued decisions based on interpretation of the Act.\textsuperscript{86} These decisions of the 1950's are marked by creativity as some courts sought to find a way to enforce labor arbitration agreements; this approach later became national labor policy as adopted under section 301 in \textit{Lincoln Mills}.\textsuperscript{87}

The decisions are marked by a sharp split between those courts that sought to apply the Act to all\textsuperscript{88} or most\textsuperscript{89} collective bargaining agreements in order, in part, to further what they saw as a developing national labor policy to favor labor disputes, and those courts that believed the Act to be confined in purpose to commercial arbitration and to be unrelated to labor arbitration.\textsuperscript{90} The debate centered on the language of section 1 excluding certain or all "contracts of employment."\textsuperscript{91}

A number of courts of appeals held the Act inapplicable to arbitration arising under a collective bargaining agreement hold-

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\textsuperscript{84} See Tenney Eng'g, Inc. v. United Elec. Workers, Local 437, 207 F.2d 450 (3d Cir. 1953); International Union United Furniture Workers of America v. Colonial Hardwood Flooring Co., 168 F.2d 33 (4th Cir. 1948); Gatliiff Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1944).

\textsuperscript{85} See, e.g., General Warehousemen & Helpers Local 767 v. Standard Brands, Inc. 579 F.2d 1282, 1294-95 n.9 (5th Cir. 1978) (where parties did not invoke jurisdiction under Arbitration Act, court declined to base holding on Act), cert. dismissed, 441 U.S. 957; 443 U.S. 913 (1979). For a discussion of Standard Brands, see supra note 27. For a discussion of the current views of the various circuits on the applicability of the Act, see supra notes 21-28 and accompanying text.

\textsuperscript{86} See, e.g., Tenney Eng'g v. United Elec. Radio & Machine Workers Local 437, 207 F.2d 450, 454 (3d Cir. 1953) (unnecessary for court to decide whether defendant would be entitled to relief under section 301).

\textsuperscript{87} For a discussion of the national labor policy set out in \textit{Lincoln Mills}, see supra note 75 and accompanying text. For a detailed review of the early cases, see generally W. Sturges & O. Murphy, supra note 63.

\textsuperscript{88} For a discussion of these cases, see infra notes 128-35 and accompanying text.

\textsuperscript{89} For a discussion of these cases, see infra notes 104-27 and accompanying text.

\textsuperscript{90} For a discussion of these cases, see infra notes 92-103 and accompanying text.

\textsuperscript{91} 9 U.S.C. § 1 (1982). For the text of section 1, see supra note 12.

ing, as did the Fifth Circuit in *Lincoln Mills*,92 that a collective bargaining agreement is a "contract of employment" under section 193 and, therefore, excluded.

*International Union United Furniture Workers of America v. Colonial Hardwood Flooring Co., Inc.*,94 involved a suit by an employer under the Labor Management Relations Act of 194795 to recover damages caused by a strike.96 The Fourth Circuit affirmed the denial of the defendant union's motion to stay the proceedings so that there could be arbitration pursuant to the Act, and held that the collective bargaining agreement was within the exclusionary clause of section 1 because it was a contract relating to interstate commerce within the Act.97 The court stated: "It is perfectly clear, we think, that it was the intention of Congress to exclude contracts of employment from the operation of all of these provisions [of the Act]. Congress was steering clear of compulsory arbitration of labor disputes. . . ."98

In *Mercury Oil Refining Co. v. Oil Workers Int'l Union*,99 the union sued to enforce an arbitration award made under the terms of a collective bargaining agreement.100 The district court invalidated the award and ordered further arbitration.101 Both parties appealed.102 The Tenth Circuit reversed that part of the judgment directing additional arbitration and followed the Fourth Circuit in holding that labor contracts are specifically excluded from

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92. 230 F.2d 81 (5th Cir. 1956), aff'd, 353 U.S. 448 (1957).
93. See United Elec. Radio & Mach. Workers of America v. Miller Metal Products, Inc., 215 F.2d 221 (4th Cir. 1954); Mercury Oil Ref. Co. v. Oil Workers Int'l Union, 187 F.2d 980 (10th Cir. 1951); International Union United Furniture Workers of America v. Colonial Hardwood Flooring Co., Inc., 168 F.2d 33 (4th Cir. 1948); Gatilff Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1944).
94. 168 F.2d 33 (4th Cir. 1948).
96. *Colonial Hardwood*, 168 F.2d at 34. The union moved for a stay of proceeding pursuant to section 3 of the United States Arbitration Act, on the ground that the contract that was the basis of the suit contained an arbitration provision. *Id.*
97. *Id.* at 35.
98. *Id.* at 36.
99. 187 F.2d 980 (10th Cir. 1951).
100. *Id.* at 981. The company contended that the award was ineffective and asked that an award which was originally given be enforced. *Id.* Apparently, after the first award was made, the union representative and the neutral participant modified the first award. *Id.* at 982. It is this second award that the union attempted to enforce. *Id.*
101. *Id.* at 981.
102. *Id.*
Another group of courts, led by the Third Circuit, held that even assuming a collective bargaining agreement was a "contract of employment," the exclusionary clause in section 1 applied only to employees actually in the transportation industries and not those merely producing goods for commerce. The Third Circuit held in Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of America, Local Division 1210 v. Pennsylvania Greyhound Lines that the Act was inapplicable to an action to enforce a labor arbitration agreement of a collective bargaining agreement which was viewed as an excluded "contract of employment." Two years later, however, in Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of America, Local 437, the court distinguished Pennsylvania Greyhound Lines on the ground that the bus line employees had been "directly engaged ... in interstate transportation" and that the Act's exclusion did not bar contracts of employees producing goods for subsequent resale in interstate commerce. Thus, applying the Act, the court allowed a union to obtain a stay

103. Id. at 983. The court also affirmed the district court's holding that both arbitration awards were invalid. Id. The first award was ineffective because it was not sufficiently definite as to require only ministerial acts of the parties to effectuate the award. Id. at 982. The second award was invalid because the first purported to be final and thereby the arbitrator had no power to proceed further under the common law doctrine of functus officio. Id. at 983.

104. For a discussion of courts which held that section 1 applied only to employees actually in the transportation industries, see infra notes 105-27.

105. 192 F.2d 310 (3d Cir. 1951).

106. Id. at 315. The court first construed the words "nothing herein contained" in section 1, contrary to its earlier decisions, to mean "nothing contained in Title 9 [of the U.S.C.]" based on Congress' amendment of the caption to section 1. Id. at 312-13. The court then concluded that it follows from this construction that arbitration of a dispute arising out of a "contract of employment" cannot be required under the Act. Id. at 313.

Next, the court had to ascertain whether a collective bargaining agreement was included in the Act's exception of "contracts of employment." The court found it unreasonable to believe that Congress would have provided in the Act for judicial intervention in the arbitration of collective bargaining agreement disputes. Id. The court also found that the term "contract of employment" had a broad enough meaning to include collective bargaining agreements. Id.

For the text of section 1, see supra note 12. For the Third Circuit's earlier construction of the words "nothing herein contained" as meaning "nothing in the foregoing definition of commerce," see Watkins v. Hudson Coal Co., 151 F.2d 311 (3d Cir. 1945), cert. denied, 327 U.S. 777 (1946); Donahue v. Susquahanna Collieries Co., 138 F.2d 3 (3d Cir. 1943).

107. 207 F.2d 450 (3d Cir. 1953).

108. For a discussion of Pennsylvania Greyhound Lines, see supra notes 105-06 and accompanying text.

109. 207 F.2d at 453 & n.13.

110. Id.
of a damages action pending arbitration.\textsuperscript{111}

The \textit{Tenney} court held that, in writing the exclusionary language of section 1,\textsuperscript{112} the draftsmen of the Act were concerned with the problems of exempting classes of workers for whom Congress had already provided arbitration or dispute adjustment machinery, such as seamen,\textsuperscript{113} whose union representative had opposed application of the Act to seamen's contracts,\textsuperscript{114} and railroad employees.\textsuperscript{115} The addition of "any other class of workers engaged in foreign or interstate commerce" was intended, reasoned the court, to reach only those employees who, like seamen and railroad employees, were "actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it."\textsuperscript{116}

The court also noted that, in 1925, the concept of interstate commerce was narrow.\textsuperscript{117} The court felt that the language of the Act paralleled language which had been construed by the Supreme Court in 1916 to apply only to employees engaged in interstate transportation or work closely related.\textsuperscript{118} Rather, the

\textsuperscript{111} \textit{Id.} at 454. \textit{See also} 9 U.S.C. § 3 (1982) (authorizing court to stay proceedings).
\textsuperscript{112} \textit{See} 9 U.S.C. § 1 (1982). For the text of section 1, see \textit{supra} note 12.
\textsuperscript{113} 207 F.2d at 452. In support of this the court pointed to a statute which provides for arbitration by shipping commissioners. \textit{Id.} at 452 n.7 (citing 46 U.S.C. § 651).
\textsuperscript{114} \textit{Id.} at 452 & n.7. The court quoted the following language from the report of the bar association committee which drafted the Act:

\begin{quote}
Objections to the bill were urged by Mr. Andrew Furuseth as representing the Seamen's Union, Mr. Furuseth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1 as follows: 'but 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.'
\end{quote}
\textit{Id.} at 452 (quoting 48 A.B.A. Rep. 287 (1923)).
\textsuperscript{115} \textit{Id.} at 452 & n.8. The court cited two federal acts in support of this point. \textit{Id.} at 452 n.8 (citing Transportation Act, 1920, ch. 91, §§ 300-316, 41 Stat. 456, 469-74 (1920), and the Railway Labor Act, 45 U.S.C. § 157).
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.} at 453. The court stated that "[i]t must be remembered that the Arbitration Act of 1925 was drawn and passed at a time when the concept of Congressional power over individuals whose activities affected interstate commerce had not developed to the extent to which it was expanded in succeeding years." \textit{Id.} (footnote omitted).
\textsuperscript{118} \textit{Id.} at 453 n.11 (citing Shanks v. Delaware L. & W. R.R. Co., 239 U.S. 556 (1916)). In \textit{Shanks}, the court had to determine whether an employee who worked for a railroad and who was injured while working in a repair shop could recover for his injuries under the Federal Employer Liability Act of 1908. 239 U.S. at 557-58. The \textit{Shanks} Court quoted the pertinent part of the Act as fol-
Third Circuit stated that when Congress wanted to reach a broader class, it spoke not only to employees "engaged in commerce" but also to those engaged "in the production of goods for commerce" as it had done in the Fair Labor Standards Act. 119

Following the lead of the Third Circuit, the Court of Appeals for the Second Circuit, in Signal-Stat Corp. v. Local 475, United Elec. Radio and Mach. Workers of America, 120 held that the Act was applicable to a collective bargaining agreement and, thus, declined to decide whether a collectively bargained arbitration agreement was enforceable under section 301 of the Labor Management Relations Act. 121 The court reached this result by concluding that exclusion in section 1 of the Act applies only to those workers actually involved in the transportation industries. 122 In support of this conclusion, the court then noted that the Seamen’s union had requested that Congress insert the exclusionary language of section 1 because the union did not want its contracts subject to arbitration. 123 Thus, the court found that if it held that collective bargaining agreements involving workers of the transportation industries were not “contracts of employment,” and hence not

119. Tenney, 207 F.2d at 453 (citing 29 U.S.C. § 206 (1938)). The pertinent part of the Fair Labor Standards Act (“FLSA”) states: “Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates. . . .” Ch. 676, § 6(a), 52 Stat. 1060, 1062 (1938) (codified as amended at 29 U.S.C. § 206 (1982)) (emphasis added). The Supreme Court later noted that Congress was well aware of the difference in the coverage of the language used in the FLSA. See McLeod v. Threlkend, 319 U.S. 491, 498 n.2 (1943). The Court also noted that the purpose of the FLSA was to extend coverage to the "farthest reaches of the channels of interstate commerce." Walling v. Jacksonville Paper Co., 317 U.S. 564, 567 (1943) (footnote omitted).

120. 235 F.2d 298 (2d Cir. 1956).

121. Id. at 301 (footnote omitted).

122. Id. at 302 (citing Tenney).

123. Id. Apparently, the Seamen’s union felt that its contractual disputes came within the admiralty jurisdiction and, therefore, should not be subjected to arbitration. Id. For a discussion of the union’s opposition, see supra note 114 and accompanying text.
within the section 1 exclusion, the court would be defeating the congressional intent.\textsuperscript{124}

In applying its conclusion to the present case, the \textit{Signal-Stat} court found that the employee involved in the case was "merely engaged in the manufacture of goods for interstate commerce" and thus, "not actually engaged in interstate and foreign commerce."\textsuperscript{125} Additionally, the court noted that "the present, almost universal, approval of arbitration as a means for settling labor disputes, including the express approval of Congress,"\textsuperscript{126} led it to conclude that courts should interpret the Act "so as to further, rather than impede arbitration in this area."\textsuperscript{127}

Finally, some courts took a narrower view of section 1 and held the Act applicable to all collective bargaining agreements. For example, in \textit{Hoover Motor Express Co., Inc. v. Teamsters Local Union No. 327},\textsuperscript{128} the Sixth Circuit held that collective bargaining agreements were within the purview of the Act.\textsuperscript{129} In distinguishing its earlier stance that the Act did not apply,\textsuperscript{130} the court found persuasive the argument that a collective bargaining agreement was a trade agreement rather than a contract of employment.\textsuperscript{131} For this proposition, the court relied on the Supreme Court's analysis in \textit{J.I. Case Co. v. NLRB},\textsuperscript{132} a leading case on the relation

\textsuperscript{124} 235 F.2d at 302.
\textsuperscript{125}  Id. at 303. The workers involved in this case manufactured automotive electrical equipment. \textit{Id.} at 300.
\textsuperscript{126} \textit{Id.} at 302-03 (citing 29 U.S.C. §§ 171(c), 173(d)).
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} 217 F.2d 49 (6th Cir. 1954).
\textsuperscript{129} \textit{Id.} at 53.
\textsuperscript{130} \textit{See} Gatliff Coal Co. v. Cox, 142 F.2d 876, 882 (6th Cir. 1944). In Gatliff, an employee of the union sought to recover wages that Gatliff allegedly owed him under a collective bargaining agreement. \textit{Id.} at 878. Gatliff moved for a stay of proceedings under section 3 of the Act until arbitration had been completed. \textit{Id.} at 879. The district court denied the motion and Gatliff appealed. \textit{Id.}

The court of appeals found the exclusionary language of section 1 applicable to the entire Act. \textit{Id.} at 882. The court reasoned that the use of the word "herein" in a section where "none of the substantive matter set up in the succeeding sections of the Act appeared must mean that it is to be applied to the whole Act. . . ." \textit{Id.} The court then concluded that the contract at issue was a "contract of employment" and affirmed the district court's order denying the stay of proceedings. \textit{Id.}

\textsuperscript{131} \textit{Hoover Motor Express}, 217 F.2d at 52. The court denied that Gatliff stood for the proposition that a collective bargaining agreement was a contract of employment. \textit{Id.} Instead, the court stated that Gatliff supports the proposition that an "individual hiring for wages falls within the exception [of the Act]." \textit{Id.}

\textsuperscript{132} 321 U.S. 332 (1944).
between individual and collective agreements, where Justice Jackson had stated:

Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement rather than in a contract of employment.\(^{133}\)

The *Hoover Motor Express* court then concluded that the exception contained in section 1 “was intended to avoid the specific performance of contracts for personal services and not to apply to collective labor agreements.”\(^{134}\) Rather, the court saw only the individual hiring of a person employed under a collective agreement to be the “contract of employment” which the Act excluded.\(^{135}\)

IV. **RECENT APPLICATIONS OF THE UNITED STATES ARBITRATION ACT TO REVIEW AWARDS**

Section 10 of the United States Arbitration Act\(^{136}\) provides that an arbitration award may be vacated:

(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.

\(^{133}\) *Id.* at 334-36.

\(^{134}\) *Hoover Motor Express*, 217 F.2d at 53 (citing *Lewittes & Sons v. United Furniture Workers of America*, 95 F. Supp. 851, 855 (S.D.N.Y. 1951)).

\(^{135}\) *Id.*

(d) 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.\textsuperscript{137}

On their face, these provisions seem to give courts wide latitude to review arbitration awards, latitude which in the field of labor arbitration can lead to litigation and delay that compromise the finality of awards. Fortunately, those courts that apply the Act to arbitration arising under collective bargaining agreements have not pushed their authority to the limits and have used discretion in interpreting these provisions. The mere existence of these statutory standards, however, may have encouraged litigation by parties who fail to understand the narrow grounds under which courts will vacate awards.

The terms "fraud" or "undue means" used in section 10(a)\textsuperscript{138} could theoretically render vulnerable every award where there is a factual dispute with the losing party charging fraud. Fortunately, the courts have generally read the provisions narrowly. In \textit{Local 261 v. Great Northern Paper Co.},\textsuperscript{139} the district court was faced with a claim that an arbitration award upholding the discharge of a company employee was procured by "fraud or undue means" under section 10(a).\textsuperscript{140} The union claimed that the company's post-arbitration hearing brief to the arbitrator contained a misstatement of fact.\textsuperscript{141} Looking at standards developed in the Ninth Circuit\textsuperscript{142} and Second Circuit,\textsuperscript{143} the court rejected

\textsuperscript{137} \textit{Id.} Section 10(e) allows the court to order a new hearing when it has vacated the award. This provision states: "[w]here an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators." \textit{Id.} § 10(e).

\textsuperscript{138} \textit{Id.} § 10(a).

\textsuperscript{139} 118 L.R.R.M. 2317 (D. Me. 1984).

\textsuperscript{140} 9 U.S.C. § 10(a) (1982).

\textsuperscript{141} \textit{Great Northern Paper}, 118 L.R.R.M. at 2322. The union pointed to a statement in the company's post-arbitration brief to the effect that the union's safety defense was not raised as required in the pre-arbitration grievance stage. \textit{Id.}

\textsuperscript{142} The court quoted the Ninth Circuit for the proposition that:

[I]n order to protect the finality of arbitration decisions, courts must be slow to vacate an arbitral award on the ground of fraud . . . . The fraud must not have been discoverable upon the exercise of due diligence prior to the arbitration . . . . The fraud must materially relate to an issue in the arbitration . . . [and] must be established by clear and convincing evidence. \textit{Id.} at 2322 (quoting Dogherra v. Safeway Stores, Inc., 679 F.2d 1293, 1297 (9th Cir. 1982)).
the claim and held that the alleged misstatement did not constitute "fraud or undue means." The court also noted that the union could have countered any asserted misstatement in its own post-hearing brief. Finally, the court stated: "The Court rejects any suggestion that an arbitrator is not capable of distinguishing the evidence actually presented to the arbitrator at the arbitration hearing from a recitation of nonevidence appearing in the post-hearing brief by a party to the arbitration." The court also rejected a claim under section 10(a) that the company case was based on perjured testimony, noting that the union had presented no reason for its failure to present to the arbitrator the new testimony it now sought to present in court to prove the award incorrect.

While section 10(a) is directed at fault on the part of one of the parties ("procured by corruption, fraud, or undue means"), section (b), (c), and (d) are directed at possible fault on the part of the arbitrator. With regard to section 10(b), no one would disagree that "corruption" on the part of the arbitrator is grounds for vacating an award. Courts which do not apply the Act will also overturn awards based on corruption. The term "evident partiality," however, may tend to

143. The court quoted the Second Circuit for the proposition that: [T]he "undue means" if [9 U.S.C. § 10(a)], when read in conjunction with "corruption" and "fraud," does not cover a case where a party openly offered evidence even for the sole purpose of causing prejudice, at least when, as here, the arbitrators declined to receive it and stated that they had not been prejudiced and would act only on the evidence before them.

144. Id. at 2322-23 (quoting Drayer v. Krasner, 512 F.2d 348, 352 (2d Cir. 1978)).

145. Id. at 2323.

146. Id. at 2323 n.1.


149. 9 U.S.C. § 10(a) (1982).

150. Id.

151. Id. § 10(b).

152. Id. § 10(c).

153. Id. § 10(d).

154. Id. § 10(b).

155. See, e.g., Doghera v. Safeway Stores, Inc., 679 F.2d 1293 (9th Cir.), cert. denied, 459 U.S. 990 (1982) (fraud on part of arbitrator is ground for vacating judgment under section 10(b)). However, courts have generally been reluctant to find fraud. See, e.g., Morelite Construction Corp. v. N.Y.C. District Council Carpenter's Benefit Funds, 748 F.2d 79 (1984) (although standards of disqualification for arbitrators are less stringent than those for judges, something more than "appearance of bias" is required to vacate award).

156. Courts that do not apply the Arbitration Act, but instead follow the
encourage litigation. In the labor sector, parties may be very involved in the correctness of their positions and, in the emotionally charged atmosphere of the hearing room, every procedural or evidentiary ruling that goes against a party may be viewed as "evident partiality."  Here, too, however, the courts have used discretion in applying the appropriate standard. The mere fact that an arbitrator consistently rules against a party at hearing and in his or her award is not sufficient to show partiality. For example, in *Bell Aerospace Co. v. Local 516*, 159 Local 516 filed two grievances, claiming that jobs properly belonging to its members under the collective bargaining agreement had been assigned to another union. 160 After losing in arbitration, Local 205 attacked the award, alleging evident partiality on the part of the arbitrator. 161 The Court of Appeals for the Second Circuit found no evidence of bias or prejudice as the only evidence was that the arbitrator’s rulings consistently favored the other union. 162

Section 10(c) of the Act allows vacation of an award where the arbitrator was guilty of "misconduct" in refusing postponement for cause shown or in refusing to hear material and pertinent evidence, or "of any other misbehavior by which the rights of any party have been prejudiced." 163 This section, if taken literally, renders vulnerable every arbitration decision that is the result of a hearing where there are contested matters of procedure and/or evidence. While the courts have not usually read this section broadly in recent arbitration cases, one suspects that the section is the cause of much groundless litigation in circuits which apply the Act to labor arbitration. Arbitral refusals to hear or consider evidence have been frequent sources of litigation under this section. Courts have generally ruled that it is for the arbitrator to determine the weight and relevance of the evidence and that every failure to admit relevant evidence is not misconduct.

*Enterprise Wheel* standard, are presented with a problem in that *Enterprise Wheel* makes no explicit provision for review based on misconduct of the arbitrator. For a discussion of the *Enterprise Wheel* standard, see *supra* notes 2 & 4 and accompanying text.

158. Id. For the text of section 10(b), see *supra* text accompanying note 137.
159. 500 F.2d 921 (2d Cir. 1974).
160. Id. at 922.
161. Id. at 923.
162. Id.
sufficient to vacate an award.\textsuperscript{164} Only if the refusal is to hear pertinent and material evidence and this refusal prejudices the rights of the parties may an award be vacated under section 10(c).\textsuperscript{165} The mere refusal to hear evidence that is only cumulative or irrelevant will not meet this standard.\textsuperscript{166} Basically, the question has become whether the party was "deprived of a fair hearing."\textsuperscript{167}

In \textit{Grahams Service Inc. v. Teamsters Local 975},\textsuperscript{168} the Court of Appeals for the Eighth Circuit reviewed the employer's claim that an award directing reinstatement of a discharged employee should be vacated under section 10(c) of the Act for misconduct.\textsuperscript{169} After making reference to Third Circuit precedent interpreting section 10(c), the court ruled that the employer's complaints about the arbitrator's refusal to admit certain notarized letters and his refusal to postpone the hearing to allow the company to present witnesses in lieu of the excluded letters did not constitute misconduct and did not deprive the company of a fair hearing.\textsuperscript{170}

\begin{footnotesize}

\textsuperscript{165} 9 U.S.C. \$ 10(c) (1982). For the text of section 10(c), see supra text accompanying note 137.

\textsuperscript{166} See, e.g., National Post Office Mailhandlers v. United States Postal Service, 751 F.2d 834, 841 (6th Cir. 1985).

\textsuperscript{167} See, e.g., Newark Stereotypers Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir.) (error of arbitrator must not simply be error of term, but error which so affects rights of party that party was deprived of fair hearing), \textit{cert. denied}, 393 U.S. 954 (1968); Trident Technical College v. Lucas & Stubbs, Ltd., 286 S.C. 98, 103, 333 S.E.2d 781, 788 (1985) (touchstone in considering claims of arbitrator misconduct is fairness), \textit{cert. denied}, 106 S. Ct. 803 (1986).

\textsuperscript{168} 700 F.2d 420 (8th Cir. 1982). Concurring, Judge Gibson wrote separately to point out that the Eighth Circuit was not necessarily adopting the Act as applicable to labor arbitration. \textit{Id.} at 424 (Gibson, J., concurring).

\textsuperscript{169} \textit{Id.} at 422.\textsuperscript{170} \textit{Id.} at 422-23. The letters excluded pertained to an employee's work record. The issue before the arbitrator was whether that employee's conduct constituted a major violation of company rules and if not, whether the company warned the employee in writing before it fired him. \textit{Id.} Since the company produced testimony regarding the nature of the employee's offense, the letters were said to be of little relevance. \textit{Id.}
\end{footnotesize}
Similarly, in *Bell Aerospace*, the Court of Appeals for the Second Circuit refused to vacate an award under section 10(c) where the losing union alleged it had been prejudiced by the arbitrator's "misbehavior" in referring to an affidavit allegedly not placed in evidence. In dismissing this claim, the court noted that the affidavit was part of an NLRB case record stipulated as relevant and that "[i]n handling evidence an arbitrator need not follow all the niceties observed by the federal courts. He need only grant the parties a fundamentally fair hearing."  

In *Local Union No. 251 v. Narragansett Improvement Co.*, a case involving the contractual validity of a discharge, the company sought a postponement to present further testimony about previous discharges and the employee's accident record. The arbitrator denied the request and the company sought to have the arbitrator's award granting reinstatement vacated on the ground that the refusal constituted "misconduct" under section 10(c) of the Act. In upholding the district court's refusal to vacate the award, the Court of Appeals for the First Circuit interpreted section 10(c) as allowing the arbitrator discretion and held that the company had not been deprived of a fair proceeding. The court noted that the company provided no explanation in support of its motion at arbitration, there was no indication that witnesses were not available at the time of hearing, and there was no assertion of surprise. The court held that a mere request for postponement does not constitute a right to postponement.

As noted above, most cases concerning the weight of evidence and procedural matters have upheld the arbitrator's broad discretion in these areas. One recent exception, however, occurred in the First Circuit. In its 1985 decision in *Hoteles Condado Beach v. Loc. 901*, the court held that the arbitrator had abused

171. 500 F.2d 921 (2d Cir. 1974).
172. 9 U.S.C. § 10(c) (1982).
173. *Bell Aerospace*, 500 F.2d at 923.
174. *Id.; see also M. Hill & A. Sinicropi, Evidence in Arbitration* 22 (1980) (arbitrator is judge of admissibility of evidence submitted in arbitration proceeding). For further discussion of *Bell Aerospace*, see supra notes 159-62 and accompanying text.
175. 503 F.2d 309 (1st Cir. 1974).
176. *Id. at 311.*
177. *Id. at 310.*
178. *Id. at 312.*
179. *Id.*
180. *Id.*
181. 763 F.2d 34 (1st Cir. 1985).
his discretion by refusing to give weight to testimony given at criminal proceedings against a discharged employee.\textsuperscript{182} In the case of an employee discharged for allegedly exposing himself before a hotel guest, the court ruled that the arbitrator correctly concluded he was not bound to find the discharge justified by the grievant’s criminal conviction,\textsuperscript{183} but that the arbitrator erred by refusing to give any weight to the transcript of testimony given at the criminal proceedings which had been admitted into evidence over the union’s objection.\textsuperscript{184} The arbitrator had granted the union’s motion to sequester the husband of the company’s only witness. The witness then refused to testify since her husband was prohibited from being present during her testimony.\textsuperscript{185}

The company, over union objection, then introduced the transcript of her testimony at criminal proceedings.\textsuperscript{186} The arbitrator admitted the transcript but ultimately ruled that the transcript provided insufficient evidence to justify discharge because it did not enable him to assess the credibility and demeanor of the witness.\textsuperscript{187} The court held that the arbitrator’s refusal to give any weight to the criminal trial transcript, coupled with his ruling that the husband of the witness could not be present for her testimony, denied the company a full and fair hearing even though the sequestration itself was not deemed beyond the arbitrator’s authority.\textsuperscript{188} This case demonstrates the risk of section 10(c).\textsuperscript{189} It permits a court to substitute its judgment for that of the arbitrator.

Section 10(d)\textsuperscript{190} explicitly authorizes a court to examine the award to determine if the arbitrator has exceeded his or her “powers or so imperfectly executed them that a mutual, final, and

\begin{itemize}
  \item \textsuperscript{182} \textit{Id.} at 40. The court concluded that the testimony of the criminal proceeding was unquestionably relevant to a determination of whether the discharged employee engaged in immoral conduct in violation of the company’s disciplinary regulations. \textit{Id.} The evidence excluded was “central and decisive” to the company’s decision; therefore, in the court’s view, its exclusion denied the company the right to present its case. \textit{Id.}
  \item \textsuperscript{183} \textit{Id.} at 39. The court agreed that the arbitrator was not bound by either the criminal court’s assessment of the credibility of the witnesses or the judgment rendered in the criminal proceedings. \textit{Id.} The criminal conviction was later overturned. \textit{Id.} at 36.
  \item \textsuperscript{184} \textit{Id.} at 40.
  \item \textsuperscript{185} \textit{Id.} at 37.
  \item \textsuperscript{186} \textit{Id.}
  \item \textsuperscript{187} \textit{Id.}
  \item \textsuperscript{188} \textit{Id.} at 42.
  \item \textsuperscript{189} 9 U.S.C. § 10(c) (1982).
  \item \textsuperscript{190} \textit{Id.} § 10(d).
\end{itemize}
definite award upon the subject matter submitted was not made."191 In many cases, this section has provided the basis for a court to remand a matter to the arbitrator for clarification of the scope of an award or to clarify its application.192 In cases of more serious ambiguity, awards have been remanded for clarification of the issue of whether an award was made at all with respect to a particular issue.193

With regard to whether the arbitrator has exceeded the powers delegated him or her by the parties under section 10(d), the Court of Appeals for the Seventh Circuit has suggested that the "exceeded their powers" test of the Act is "in meaning if not in words"194 the same as the "draws its essence from the collective bargaining agreement" standard articulated in Enterprise Wheel.195 In support of the proposed similarity between the two tests, the Enterprise Wheel standard can be and has been used by courts to modify or vacate arbitration awards based on alleged mistakes of fact, despite the fact that courts using the standard usually refrain

191. See id.

192. See, e.g., Grand Rapids Die Casting Corp. v. Local Union No. 159, 684 F.2d 413, 416 (6th Cir. 1982) (since arbitrator did not decide question presented to him, remand appropriate); International Ass’n of Machinists & Aerospace Workers v. Southern Pacific Transp. Co., 626 F.2d 715 (9th Cir. 1980) (court could not determine whether overtime pay award applied to similarly situated employees as well as named claimants); Refino v. Fever Transp. Inc., 480 F. Supp. 562 (S.D.N.Y. 1979) (court cannot enforce any part of arbitration award which is so ambiguous that it lends itself to no definite interpretation, aff’d. 633 F.2d 205 (2d Cir. 1980). Teamsters Local 25 v. Penn Transp. Corp., 359 F. Supp. 344 (D. Mass. 1973) (matter resubmitted to arbitrators to determine how back pay should be calculated and method to be followed in reinstating employees).

193. See, e.g., United States Steelworkers of America v. Timken Roller Bearing Co., 324 F.2d 738 (6th Cir. 1963) (whether back pay was awarded); International Longshoremen’s Ass’n v. West Gulf Maritime Ass’n, 594 F. Supp. 670 (S.D.N.Y. 1984) (whether arbitration panel rendered final award under unusual voting procedures that parties had apparently adopted).

194. Ethyl Corp. v. United Steelworkers of America, 768 F.2d 180, 184 (7th Cir. 1985).

195. However, the Ethyl court noted that application of the Enterprise Wheel standard invites error by the judge who applies it to a situation where the arbitrator misread the agreement. Id. at 184. This misinterpretation may be termed by the reviewing judges as not "draw[ing] its essence from the collective bargaining agreement." Id. "But so long as the award is based on the arbitrator’s interpretation—unsound though it may be—of the contract, it draws its essence from the contract [and the award may not be vacated.]” Id. According to the Ethyl court, under the Enterprise Wheel test, the award may be vacated only if the award must be based on some factor outside the contract. Id. at 185. The Ethyl court suggested the better wording of the test would be the "exceeded their powers" test of the Act. Id. at 184. For a discussion of the standard articulated in Enterprise Wheel, see supra note 2.
from reviewing the merits of the award.196

In Detroit Coil Co. v. International Ass'n of Machinists & Aerospace Workers,197 the company claimed that the arbitrator exceeded his authority under the bargaining agreement by ignoring its express terms when making his determination.198 The district court refused to review the correctness of the arbitrator's decision, so long as it was based on the contract and its past interpretation and application.199 The Sixth Circuit reversed, holding that "'if an examination of the record before the arbitrator reveals no support whatever for his determinations, his award must be vacated.'"200 In a similar, more recent case,201 Justice Stewart, sitting by designation, spoke for the Sixth Circuit202 in citing section 10(d)203 for the proposition that:

Where the record that was before the arbitrator demonstrates an unambiguous and undisputed mistake of fact and the record demonstrates strong reliance on that mistake by the arbitrator in making his award, it can fairly be said that the arbitrator "exceeded [his] powers or so imperfectly executed them" that vacation may be proper.204

V. ANALYSIS AND RECOMMENDATION

The issue of whether the United States Arbitration Act205 ap-

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196. It has been stated that "applicability of the Federal Arbitration Act to labor collective bargaining agreements is of particular significance because it may provide a statutory standard of review that would preempt the judicial standard that has evolved from the Steelworkers Trilogy and subsequent cases." Markham, Judicial Review of an Arbitrator's Award under Section 301(a) of the Labor Management Relations Act, 39 Tenn. L. Rev. 613, 642 (1972).

197. 594 F.2d 575 (6th Cir. 1979).

198. Id. at 577.

199. Id.

200. Id. at 581 (citation omitted).


202. Id. For a discussion of the holding in that case, see infra note 204 and accompanying text.

203. 751 F.2d at 843 (citing 9 U.S.C. § 10(d) (1982)).

204. National Post Office, 751 F.2d at 843. In National Post Office, the arbitrator upheld the discharge of a postal employee who had been indicted for drug trafficking. Id. at 838. The arbitrator's decision was based in part on his mistaken belief that the employee had pleaded guilty to the charge prior to his being fired. Id. The court held this to be an indisputable mistake of fact that played a central if not essential role in the arbitrator's decision to uphold the discharge. Id.

plies to review of labor arbitration awards is not an easy one to resolve.\textsuperscript{206} Current courts are split\textsuperscript{207} and early decisions on the issue are conflicting and confusing.\textsuperscript{208} It is the position of this article that the answer to the question is to be found in the limited legislative history of the Act and in the national labor policies that are served by a swift, binding, and final labor arbitration process. It is the position of this article that the Act should not be applied to the review of arbitration awards issued under collective bargaining agreements and, instead, the common law approach of \textit{Enterprise Wheel}\textsuperscript{209} should be allowed to further evolve to properly recognize the unique status of the labor arbitrator operating under a collective bargaining agreement.

That the Act should not apply to arbitration arising under collective bargaining agreements is supported both by analysis of the legislative history of the section 1 exclusion and by a look at the overall purpose of the Act. While the legislative history of the section 1 exclusion for "contracts of employment" has been accurately described as "slender,"\textsuperscript{210} this should not cause us to ignore what history does exist nor to ignore the overwhelming evidence that the Act itself was directed to the problems of commercial arbitration and not to labor arbitration.

As to the exclusion, it seems clear that at least parts of organized labor spoke out against the bill as originally drafted without the exclusion.\textsuperscript{211} With the exclusion, there was no opposition

\textsuperscript{206} See, e.g., Cox, \textit{Grievance Arbitration in the Federal Courts}, 67 \textit{Harv. L. Rev.} 591, 598-99 (1954). "As a matter of substantive law an agreement to arbitrate future disputes is valid and binding on the parties." \textit{Id.} at 601. But problems arise when one party refuses to submit to arbitration under an agreement providing for such arbitration. \textit{Id.} The author proceeds to examine the circumstances under which a party may seek judicial enforcement of an arbitration provision. \textit{Id.} Noting that the then current legislation reflected a congressional belief in the necessity of expanding the courts' role in labor relations, the author recognized the possible effects of such expanded judicial power: "If some measure of judicial intervention is the inevitable price of judicial assistance, providing for judicial enforcement of arbitration awards and agreements to arbitrate will inevitably stir up litigation by dissatisfied parties and bring about a number of decisions quite contrary to the results of the arbitration process." \textit{Id.} at 605.

\textsuperscript{207} For a discussion of cases indicative of the split of authority, see \textit{supra} notes 21-29 and accompanying text.

\textsuperscript{208} For a discussion of these early cases, see \textit{supra} notes 94-135 and accompanying text.

\textsuperscript{209} 363 U.S. 593 (1960). For a discussion of \textit{Enterprise Wheel}, see \textit{supra} notes 2 & 4 and accompanying text.

\textsuperscript{210} Cox, \textit{supra} note 206, at 596.

\textsuperscript{211} For a discussion of the original draft of the bill, see \textit{supra} notes 63-69 and accompanying text.
from any quarter.\textsuperscript{212} While the opposition appears to have been initially led by the Seafarers Union,\textsuperscript{213} the exclusion speaks not only in terms of excluding seamen but also of excluding "any other class of workers" in interstate commerce.\textsuperscript{214} Thus, it was aimed at a broader group than seamen. The term seems to encompass all persons reachable by the statute itself.

It is reported that other parts of labor opposed the initial bill as well.\textsuperscript{215} Organized labor had reason to distrust courts in 1924. Numerous decisions hostile to labor had been issued in the early 1900's.\textsuperscript{216} Further, organized labor of the time generally opposed compulsory arbitration to settle labor disputes. The American Federation of Labor ("Federation") of the early 1920's was itself concerned about and opposed to laws requiring compulsory arbitration.\textsuperscript{217} A number of states had passed or were considering compulsory arbitration legislation which limited picketing and strikes and gave courts power to regulate terms and conditions of employment as well as to set wages.\textsuperscript{218} Thus, it is quite understandable that organized labor would want labor completely excluded from any federal statute dealing with arbitration. Indeed, it was the official position of the Federation in the mid-1920's to reject almost all forms of governmental involvement in labor relations including "compulsory arbitration, compulsory investigation of industrial disputes, industrial courts, and similar devices which involve limitations upon the right to strike and regulation of relations between employers and employees by law."\textsuperscript{219}

This position of opposing laws and legislation on arbitration was carried into practice as well. For example, the Building Trades Department of the American Federation of Labor had, at

\begin{itemize}
  \item \textsuperscript{212} For a discussion of the legislative history on this point, see supra note 73.
  \item \textsuperscript{213} Cox, supra note 206, at 596.
  \item \textsuperscript{214} 9 U.S.C. § 1 (1982). For the complete text of section 1 see supra note 12.
  \item \textsuperscript{215} For a discussion of the opposition to the initial bill, see supra notes 54-62 and accompanying text.
  \item \textsuperscript{216} See, e.g., Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) (allowing injunction under antitrust laws against boycott activity despite Clayton Act limits on injunctions); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917) (enforcing "yellow dog contract" by enjoining union from trying to organize persons who had signed contracts promising not to become union members); and Loewe v. Lawlor, 208 U.S. 274 (1908) (potential antitrust liability for strike and boycott activity).
  \item \textsuperscript{217} Lorwin, The AMERICAN FEDERATION OF LABOR 213 (1933).
  \item \textsuperscript{218} Id.
  \item \textsuperscript{219} Id. at 401-02, (citing Proceedings of the 46th Annual Convention of the American Federation of Labor).
\end{itemize}
the time, a rule providing that no local building trade council could enter into any agreement with an employer’s association providing for compulsory arbitration.\(^{220}\)

For these reasons, it is quite legitimate to read section 1 as excluding from the coverage of the Act all labor agreements. Labor opposed the original bill. Once it was changed, labor no longer spoke against it.\(^{221}\)

The decisions of the 1940’s and 1950’s which attempted to interpret the section 1 exclusion do not compel a different result.\(^ {222}\) As Professor Cox has pointed out,\(^ {223}\) cases holding that Congress intended the words “engaged in foreign or interstate commerce,” to reach only a limited number of contracts of employment, are open to substantial question.\(^ {224}\) As Professor Cox notes, Congress in 1924 would not have been familiar with either the precise words of art or the fine distinctions regarding the commerce power which were only later developed.\(^ {225}\) Thus it is equally likely, if not more likely, that Congress did intend to exclude all contracts of employment within the reach of federal regulation and the Act.

Similarly, cases holding the Act applicable because they interpret the exclusion for “contracts of employment” as not including collective bargaining agreements are suspect.\(^ {226}\) They rely on chance words in a 1944 Supreme Court definition of the term “collective bargaining agreement.”\(^ {227}\) The statutory lan-

\(^{220}\) Id. at 376.

\(^{221}\) For a discussion of labor’s reaction to the change, see supra notes 65-74 and accompanying text.

\(^{222}\) For a discussion of the cases which attempted to interpret the section 1 exclusion, see supra notes 94-135 and accompanying text.

\(^{223}\) Cox, supra note 206, at 598.

\(^{224}\) Id.

\(^{225}\) Id.; see, e.g., McLeod v. Threlkeld, 319 U.S. 491, 498 (1943) (holding that cook for maintenance men on railroad not “engaged in commerce”); Walling v. Jacksonville Paper Co., 317 U.S. 564, 566 (1943) (holding that employees engaged in procurement or receipt of goods from other states are “engaged in commerce”); Kirschbaum Co. v. Walling, 316 U.S. 517, 524 (1942) (holding that employees “‘engaged in commerce or in the production of goods for commerce’” includes those “‘engaged in occupations ‘necessary to the production’ of goods for commerce’”); Federal Trade Commission v. Bunte Bros., 312 U.S. 349, 355 (1941) (where court read “‘unfair methods of competition in [interstate] commerce’” to mean same as “‘unfair methods of competition in any way affecting interstate commerce’”).

\(^{226}\) For a discussion of the cases which interpret “contracts of employment” as not including collective bargaining agreements, see supra notes 94-103 and accompanying text.

\(^{227}\) See J.I. Case, 321 U.S. 332. In this case, J.I. Case offered identical contracts of employment to all of its employees to sign at their option. Id. at 333.
guage was drafted in 1924, long before the *J.I. Case* opinion was issued.\(^{228}\) The issue before the Court there was the impact of individual contracts on collective bargaining, not the definition of statutory terms.\(^{229}\) As Justice Jackson himself noted in the *J.I. Case* opinion, "[c]ontract in labor law is a term the implications of which must be determined from the connection in which it appears."\(^{230}\)

In addition, and even more compelling, is the fact that the bill itself, even without the exclusion, was aimed clearly and directly at the problems of commercial arbitration exclusively. In Congressional hearings\(^{231}\) and on the floor of Congress,\(^{232}\) the emphasis was on the problems of "merchants" and "commercial arbitration." There is no evidence of an intent to affirmatively reach arbitration under a collective bargaining agreement. This is not particularly surprising because modern grievance arbitration, as we know it, did not exist in 1924. While there were some agreements providing for voluntary labor arbitration by impartial arbitrators, particularly in the garment trades, the printing indus-

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The contract terms provided for the company's paying a specified wage and maintaining hospital facilities for employees, while employees signing were to accept the provisions, serve the employer faithfully, and abide by company rules. \(\textit{Id.}\) Approximately 75% of the company's employees signed the contracts. \(\textit{Id.}\)

After the National Labor Relations Board ("Board") received a union petition for certification as the bargaining representative of Case's employees, the Board directed an election which resulted in the union becoming the exclusive bargaining representative of the employees. \(\textit{Id.}\) Upon union request for bargaining, Case refused to negotiate any matters contained in the employment contracts before their expiration, maintaining that the contracts represented the benefits to signatory employees and prevailed during their effective term. \(\textit{Id.}\) at 334.

The Board held Case in violation of the National Labor Relations Act, and the court of appeals granted an order of enforcement. \(\textit{Id.}\) The Supreme Court agreed with the appellate court, and held that a collective trade agreement - produced by negotiations between the union and the employer - is not a contract for employment. \(\textit{Id.}\) at 335. The procedures prescribed by the National Labor Relations Act or by a particular collective trade agreement cannot be impeded by individual employment contracts. \(\textit{Id.}\) The contracts here were held by the Court to be subsidiary to collective trade agreements to be negotiated by the union, and Case was ordered to proceed to negotiations. \(\textit{Id.}\)

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\(^{228}\) \(\textit{Id.}\) at 335-37.

\(^{229}\) \(\textit{Id.}\) at 334.

\(^{230}\) \(\textit{Id.}\). It has also been noted that collective bargaining agreements were referred to as employment contracts throughout the congressional debates on the 1947 Labor Management Relations Act. Burstein, supra note 41 at 134.

\(^{231}\) For a discussion of these hearings see \textit{supra} notes 46-60 and accompanying text.

try, and some railroads, the real growth of labor arbitration for resolution of grievances occurred only after World War II. Arbitration was initially limited to interest disputes, especially the setting of the terms of a new contract in strike situations. Thus, it is not reasonable to infer that Congress intended to reach a form of arbitration which is substantially different from the commercial arbitration upon which Congress focused and which did not even exist in 1924.

Not only is coverage of labor arbitration under the Act not compelled or even justified by the terms of the Act or its history, there is no sound policy reason for interpreting the Act to reach labor arbitration. Labor arbitration is different from typical litigation and from commercial arbitration because it involves a continuing relationship between the parties to the contract. The award of a labor arbitrator involves not only a possible remedy for a past breach but also a ruling governing the ongoing operations of the parties under the collective bargaining agreement. Rather than being merely an efficient substitute for litigation as it is in a commercial context, arbitration in a labor context is much more. Labor agreements are often drafted by non-lawyers and contain ambiguities which the parties realize may have to be resolved by a labor arbitrator. In many ways, the labor arbitrator is part of this continuing relationship.

Further, labor arbitration is only a small part of the overall relationship of employer and union. Even as a dispute settlement mechanism, it is but a small part of the grievance resolution

233. Lorwin, supra note 217, at 532.
235. Id. at 1247. The author notes that labor arbitration has had different meanings throughout its history, from mediation and conciliation in collective bargaining, to setting the terms of new contracts through interest arbitration, to the current practice of final resolution of contract grievances. Id. at 1247-48 (citing Witte, Historical Survey of Labor Arbitration 3 (1952)).
236. See, e.g., United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). The Court recognized that different policy considerations apply to labor arbitration cases than apply to commercial arbitration cases, stating that:

In the commercial case, arbitration is the substitute for litigation. Here 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.

Id. at 578. Warrior & Gulf is one of the Steelworkers Trilogy cases. For a further discussion of Warrior & Gulf, see supra notes 4 & 11.
scheme. Labor disputes reach arbitration only after being processed through the numerous steps of the grievance procedure. Most are settled. Thus, the possibility of final and binding arbitration serves initially as an incentive to the parties to resolve the dispute before resorting to arbitration. If arbitration is seen only as a preliminary step to court resolution, the process of negotiation and settlement is extended and harmed.

When seen as part of the grievance resolution process, arbitration can assume its proper role: the final stage. If court review of a “final and binding” decision can be too easily obtained, such review can cause mistrust because one party is reneging on its promise that the award will be final; review may, therefore, interfere with other parts of the bargaining relationship. For example, court review might prevent the parties from solving at the bargaining table any problems possibly caused by an award. While the ruling of the arbitrator under a collective bargaining agreement is to be final as to the dispute before him or her, the parties are free to bargain changes into the next agreement to correct or modify what either party might view as a “wrong” result. This is part of the clarification and evolution of the labor contract.

If the parties are falsely encouraged to seek court review, this healthy bargaining process is delayed. Instead, the parties must live with uncertainty over the meaning of the contract until their disagreement is resolved in court. Given the delays in our judicial system, this is a genuine risk. Even where the courts of appeals ultimately use discretion and limit the reaches of judicial review, the harm has already been done. The party seeking review has


238. See, e.g., General Telephone Co. v. Communications Workers, 648 F.2d 452, 456 (6th Cir. 1981). This case involved an employee’s grievance under a union contract. The employee’s reporting center was moved and the employee requested the employer company to pay his moving cost. *Id.* at 453. The employee relied on a provision in the union contract that “[c]osts of moving to new work locations will be assumed by the Company.” *Id.* The company refused to pay, claiming that only the employee’s reporting center and not his work location had changed, and in the alternative, that the employee’s failure to move constituted a waiver of his right to moving expenses. *Id.* The arbitrator, in an initial and subsequent clarifying award, granted the employee the costs of moving and the total daily mileage expenses he had incurred in the time since the company had refused to pay the moving cost. *Id.* at 455. The district court approved the award of moving expenses but found the daily mileage award to exceed the arbitrator’s authority. *Id.*

The Sixth Circuit first noted the “extremely narrow role” of courts in reviewing an arbitrator’s award. *Id.* at 456. The court went on to hold that the “district court erred by substituting its judgment on the merits for that of the
been encouraged to seek review by the words of the statute and the district court may have already applied the Act to reverse the award. By the time the court of appeals overturns the lower court's ruling, substantial time has elapsed and the bargaining relationship of the parties has been damaged.

Further, national labor policy requires that the awards of labor arbitrators not be subject to a gauntlet of rules designed to open them to judicial scrutiny and possible reversal because the application of such rules takes time. Judicial review is not quick and rules which may encourage the parties to seek review add to the delays. As Judge Posner of the Seventh Circuit recently noted: "The most important reason for deference to labor arbitrators is that labor disputes ought to be resolved rapidly; and, to be fast, arbitration must be final."239 Rather, review of labor arbitration awards must be done in an atmosphere sensitive to both the differences between commercial and labor arbitration and the importance of finality in the labor arbitration process.

In addition to being inconsistent with present policy, application of the Act to labor arbitration is inconsistent with the ideal model of labor policy in the future. Numerous distinguished commentators have written, for example, on the need for narrowing the scope of court review of labor arbitration awards.240 While their proposals differ in some regards, all suggest a model

arbitrator." Id. at 457. The appellate court then remanded with instructions to the district court to enter judgment enforcing the entire arbitral award. Id.

239. Jones Dairy Farm v. UFCW Local P-1236, 755 F.2d 583, 586 (7th Cir. 1985) (Posner, J., dissenting).

The Supreme Court has recognized this need for finality in labor arbitration in the related area of fair representation suits. See, e.g., United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981). In United Parcel, a suit against the employer and union by an employee claiming that the union had violated its duty of fair representation and that the employer had violated the collective bargaining agreement, the Court reversed a lower court ruling that a six year statute of limitations applied. Id. As the Court stated:

This system, with its heavy emphasis on grievance, arbitration, and the "law of the shop," could easily become unworkable if a decision which has given "meaning and content" to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as six years later.

Id. at 64.

Congress, too, has declared the desirability of "[f]inal adjustment by a method agreed upon by the parties . . . for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 179(d) (1982) (emphasis added).

240. See Feller, The Coming End of Arbitration's Golden Age, in PROG. OF THE 29TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 97,107 (B. Dennis & G. Somers eds. 1976) (deference to arbitral awards is result of "recognition that arbitration is not a substitute for judicial adjudication, but a part of a system
for court review that differs from the formal checklist approach of the Arbitration Act.241

Professor St. Antoine presents the concept of the arbitrator as "contract reader."242 As "contract reader," the arbitrator acts for the parties when he or she strikes "whatever supplementary bargain is necessary to handle the anticipated unanticipated omis-

The author stated:

It is hoped that judges will learn to temper their activist instincts with an appreciation that the agreement before them is a unique type of contract, and that an apparently erroneous award may in fact just reflect the creative search for special rules that the parties need from their private judge, and for which they have negotiated.

*Id.*; see also St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L. Rev. 1137, 1160-61 (1977) (arbitrator is "reader" of parties' contract, his award becomes part of their contract, and therefore courts defer to arbitrator whose award should stand absent procedural violations or illegality of resulting contract); Summers, supra note 237, at 27 (considering role of courts in reviewing merits of grievance, author finds that "courts have a function, but it is the limited one of exercising only enough supervision to prevent labor arbitration from destroying itself")

Courts do at times directly review the merits of labor arbitrators' awards. Perhaps the most famous case of this nature is a Second Circuit decision. See Torrington Co. v. Metal Prod. Workers, Local 1645, 362 F.2d 677 (2d Cir. 1966) (overturning arbitrator's award of time off for election despite arbitrator's reliance on past practice, conduct of negotiations and the agreement reached at bargaining table, finding that arbitrator exceeded his authority in finding implied provision).

A more recent case exemplifies the conduct of a district judge placing himself in the role of a labor arbitrator. See DuPont v. Grasselli Employees Ass'n, 790 F.2d 611 (7th Cir.), cert. denied, 107 S.Ct. 186 (1986). In this case, an employee was discharged for assaulting fellow employees and destroying company property. 790 F.2d at 613. An arbitrator determined that the employee had had a mental breakdown, had not misused drugs, and was not likely to have a similar breakdown in the future. *Id.* Finding that the employee lacked fault with respect to his transgressions, the arbitrator held that the company had discharged him without just cause. *Id.* On the basis of this finding, and of the employer company's failure to conduct a full investigation before the discharge, as was required by company policy, the arbitrator ordered the employee reinstated. *Id.*

The district court denied a motion to enforce the arbitrator's award on the basis that the arbitration had failed to sufficiently consider the extent of violence and that procedural irregularities were not relevant. *Id.* The Seventh Circuit reversed, stating that "'[w]hile this Court does not necessarily agree with the arbitrator's conceptions of just cause, mere disagreement does not allow an overturning of the award.' *Id.* at 615. The court thus recognized the standard of limited judicial review of the arbitrator's award, and finding no sufficient grounds for nonenforcement, made its order accordingly. *Id.*

241. Compare St. Antoine, supra note 240, at 1146 (advocating that awards not be reversed for "gross error" because award of contract reader is parties' stipulated adopted remedy) with Kaden, supra note 240, at 297 (arguing that judges could reverse "outrageous" awards or awards disclosing clear error such as wrongful assumption of a crucial fact).

242. St. Antoine, supra note 240, at 1138.
sions of the initial agreement." Under this view, there can be no "misinterpretation" because the award is the contract of the parties. Professor St. Antoine notes also that parties to a contract not containing an arbitration clause do not usually agree that a trial court's interpretation shall be "final and binding" as is generally agreed in an arbitration clause. Thus, an arbitrator's award should be entitled to more deference than that of a district court.

Professor Kaden argues that the source of deference to an arbitrator's judgment is not his or her expertise but rather the fact that "it is the arbitrator's assignment to read the parties' agreement against the backdrop of ongoing practices and habits in the plant, with the understanding that his reading will become part of the agreement itself." Similarly, Professor Feller has suggested that the deference accorded to arbitral awards under collective bargaining agreements is due to a distinction between arbitration as rule-making and adjudication as rule-application. Commercial arbitration, for which the statute was designed, more closely resembles adjudication in this regard.

None of these formulations can be safely accommodated within the framework of an arbitration act designed for commercial arbitration. Rather, they can become law only through modification and evolution of the Enterprise Wheel standard of review. Perhaps the necessity of judicial restraint was best stated by Professor Summers who argued that what is needed is "an attitude of tolerance and humility, not a mathematical formula." The checklist approach of the United States Arbitration Act looks too much like such a formula to satisfy the objectives of national labor policy.

VI. Conclusion

There is little, if any, justification for continued federal court

243. Id. at 1140.
244. Id. at 1141.
246. Feller, supra note 240, at 97-101; see also Feller, A General Theory of the Collective Bargaining Agreement, 61 CALIF. L. REV. 663, 750 (1973) ("There is little doubt that orders directing . . . remedial action are what the parties intend the arbitrators to issue, and arbitrators will grant this kind of relief, usually without question, whether or not there is specific language in the agreement authorizing it.").
247. For a discussion of the Enterprise Wheel standard, see supra note 2.
application of the United States Arbitration Act to review the awards of labor arbitrators operating under collective bargaining agreements. Through the statute, Congress in 1924 sought to make enforceable commercial arbitration agreements. Labor arbitration, which was not prevalent at the time, was not within Congress' purview. Further, in response to potential labor opposition, the Act was amended to exclude contracts of employment, a term which, based on Congress' intent and the common meaning of the words, should be interpreted to cover collective bargaining agreements.

Even were the statute and its legislative history more ambiguous, the national labor policy favoring speed and finality in labor arbitration favors a broad reading of the exclusion for contracts of employment. The Act, designed for commercial arbitration and not for labor arbitration, provides an all too inviting avenue for dissatisfied parties to continue a dispute via litigation.

For these reasons, it is suggested that the courts of appeals reevaluate their positions on this issue and follow the lead of the Fourth Circuit in holding the Act inapplicable to labor arbitration. If this is not done, the Supreme Court may have to provide final resolution to the question left unanswered in *Lincoln Mills*. 