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Harold W. Davey

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## THE SUPREME COURT AND ARBITRATION: THE MUSINGS OF AN ARBITRATOR

Harold W. Davey\*

As the Supreme Court moves to put flesh on the bones of *Lincoln Mills*,<sup>1</sup> a clearer picture of the probable scope and direction of the "judicial inventiveness" promised in that landmark decision begins to emerge. This article contains some reflections, from an arbitrator's viewpoint, stimulated by the Court's important rulings in the *Warrior* trilogy.<sup>2</sup>

The gist of the Court's holdings in the three cases may be given briefly. In the *American* case the nub of the Court's ruling was that an agreement to arbitrate must be enforced where the party seeking arbitration is making a claim which on its face is governed by the contract, even though the Court might feel that the grievance in question is frivolous or baseless. The Court dealt another blow in this decision to the by now completely discredited "plain meaning" doctrine of *Cutler-Hammer*<sup>3</sup> by forcibly reminding the lower federal courts that they may not undertake to determine the merits of grievances by ostensibly interpreting the arbitration clause of the contract in question.

In the *Warrior* case, by far the most important of the trilogy in my judgment, the Court held that a grievance over the company's practice of sub-contracting its maintenance work was arbitrable under the contract, notwithstanding a history of unsuccessful attempts by the union in the case to negotiate something on sub-contracting and a clause excluding from arbitration matters which are "strictly a function of management." The Court did so on the basis that doubts over arbitrability should be resolved in favor of coverage and agreements to arbitrate should be enforced unless it may be said with "positive assurance" that the arbitration clause is not susceptible to an interpretation that covers the dispute in question. Mr. Justice Whittaker dissented in *Warrior*.<sup>4</sup>

The *Enterprise* ruling enforced an arbitrator's decision calling for reinstatement and back pay beyond the date of an expired contract, on the ground that the courts have no authority to overrule an arbitrator merely because their interpretation differs from his if there is no showing that the arbitrator has exceeded the authority of the submission agreement. Again Mr. Justice Whittaker dissented.<sup>5</sup>

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\* B.A., M.A., Ph.D.; Professor of Economics, Iowa State University of Science and Technology.

1 *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). This decision established a federal court haven for those seeking judicial enforcement of contractual agreements to arbitrate under the aegis of § 301 of the Taft-Hartley Act.

2 *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). For a comprehensive analysis of these decisions, see 36 *NOTRE DAME LAWYER* 63 (1960).

3 *International Ass'n of Machinists v. Cutler-Hammer, Inc.*, 271 App. Div. 917, *aff'd* 297 N.Y. 519 (1947).

4 363 U.S. 574, 585.

5 363 U.S. 593, 599.

Most of the ensuing comments will be addressed to the *Warrior* decision since the opinions in that case raise fundamental questions concerning the nature of the arbitration process and the proper role of the federal judiciary in relation thereto.

A *caveat* should be entered here. The views expressed are those of one arbitrator and are conditioned by this arbitrator's rather firmly held views as to the proper uses of arbitration.<sup>6</sup> Arbitrators do not hold identical views as to the proper nature and scope of the arbitration process. Arbitrators do, however, share certain basic convictions on grievance arbitration. They believe it can be a useful instrument for furthering the cause of constructive administration of collective bargaining agreements, and that it is unquestionably a preferable alternative to economic force as a means of final determination of disputes arising under an existing contract. Nearly all arbitrators also share the view that arbitrators are better equipped than the courts to determine issues of arbitrability as well as substantive questions of contract interpretation or application. Beyond this it would be rash to claim homogeneity of opinion among practicing grievance arbitrators. What follows therefore is one man's opinion.

As I review the opinions of the justices in the *Warrior* trilogy, my reactions are mixed. Within the conditioning framework of my assumptions as to what is best for the future of the system of grievance arbitration, I find much to applaud, much to question and some to condemn.

The Court's view in all three cases must be regarded as favorable from an arbitrator's viewpoint, in the sense that each decision reflects the judicial conviction that "special heed" should be given to the context in which collective bargaining agreements are negotiated and to the purpose which they are intended to serve. The continued emphasis on narrowing and confining the scope of judicial inquiry under Section 301 must be regarded favorably by one who strongly believes that grievance arbitration machinery is the contractual creation of the parties for their own use and that employers and unions should remain free to construct the type of arbitration system they prefer.

Under such a view, the only proper role for the federal judiciary in entertaining suits to compel enforcement of contractual agreements to arbitrate is that of determining the narrow issue of whether the "reluctant party" has in fact breached his promise to arbitrate. In the Supreme Court, both majority and dissenter agree that the federal courts have no proper concern with the merits of issues which by contract the parties have agreed to submit to the exclusive jurisdiction of arbitrators. Thus, it is clear that the Court as a whole is keenly aware of the inherent dangers of confusing jurisdictional review with substantive review on the merits. But Mr. Justice Whittaker's dissent in *Warrior*<sup>7</sup> raises a real

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6 The writer adheres to what is generally called the "judicial" school of arbitration, as opposed to the "problem-solving" school. Fuller expression of my views on the merits of various theories on the proper role of the arbitrator can be found in my *CONTEMPORARY COLLECTIVE BARGAINING* 136-156 (2d ed. 1959); and in Davey, *The Proper Uses of Arbitration*, 9 *LAB. L.J.* 119 (1958); and Davey, *The John Deere-UAW Permanent Arbitration System*, in *CRITICAL ISSUES IN LABOR ARBITRATION* 161-192 (1957). See *The Legal Framework of Public Intervention in Industrial Disputes*, 35 *NOTRE DAME LAWYER* 654, 677 (1960).

7 363 U.S. 574, 585.

question as to whether the Court properly performed its jurisdictional reviewing function in deciding that the reluctant party had in fact breached his promise to arbitrate.

Arbitrators, being human, cannot fail to be impressed with the respect which the Court manifests for the superior knowledge, ability and wisdom of arbitrators. This deference to the specialized knowledge of arbitrators, which the Court feels apparently cannot be equaled by the "ablest judge,"<sup>8</sup> is certainly most gracious. At the risk of appearing ungrateful and traitorous to the arbitration profession, I shall venture the observation that such unstinted praise is in many cases probably not deserved.

It is true that an arbitrator performs functions which are not normal to the courts and that in some cases the considerations which help him to fashion judgments "may indeed be foreign to the competence of the courts." I do not believe, however, that the Court is correct when it concludes:

The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished.<sup>9</sup>

The foregoing description of how parties choose arbitrators does not conform with my own experience of some 16 years in arbitration. In fact, most employers and unions in my acquaintance do not want arbitrators to function in the "philosopher king" manner suggested by the Court's statement.

On the contrary, most employers and unions choose arbitrators who will go strictly by the *statute law* of their relationship (*i.e.*, the contract) and not by the so-called common law of the shop which might in fact turn out to be nothing more than the arbitrator's personal view as to what would be "good" for the parties. The writer has arbitrated many cases where he felt the subjective considerations referred to in the Court's dictum, such as heightening or reducing tensions in the shop, called for one decision and the contract itself for another. In such cases, most parties expect the arbitrator to follow the contract and to eschew the temptation to become a statesman.

Fairness compels noting that some employers and unions prefer their arbitrators to function in the manner implied by the Court's statement. They usually indicate such a preference by writing a "wide-open" arbitration provision into their contract.

Part of the problem in *Warrior* is the extraordinarily loose contract language on grievance and arbitration procedure. The contract purports to exclude "matters which are strictly a function of management" from arbitration. It then states that arbitration will apply to "differences arising between the Company and

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8 363 U.S. 574, 582.

9 363 U.S. 574, 582.

the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement." So far so good. However, it then goes on to say that arbitration may apply to "*any local trouble of any kind.*" (Emphasis supplied.)<sup>10</sup>

The adding of this last phrase is what converts the language into a wide-open arbitration clause, making virtually anything arbitrable under this particular contract. The Court would have been on much sounder ground had it relied on this "any local trouble" language as the basis for ruling that an agreement to arbitrate the sub-contracting issue existed. Instead it chose to rely on the judicially invented and potentially ambiguous principle that an order to arbitrate a particular grievance should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute."<sup>11</sup> This kind of language may well raise more ghosts than it lays.

The looseness of the contract language under consideration in *Warrior* is appalling to anyone who believes in the propriety of limiting arbitration strictly to questions of contract interpretation or application.

The great majority of employers and unions appear to prefer confining the arbitrator's jurisdiction strictly to questions of contract interpretation or application and take some pains in writing their contract to define the nature and limits of his authority. They expect the arbitrator to interpret the contract language *to which they have agreed*, not to interpret non-existent language which, because of "the compulsion to reach agreement" or "the breadth of the matters covered,"<sup>12</sup> they did not cover contractually. If it be accepted as industrial relations gospel that the parties are entitled to the kind of arbitration they prefer, judicial review of suits to compel enforcement of agreements to arbitrate must take cognizance of the fact that there are significant differences among arbitration relationships. A proper sense of judicial self-restraint requires avoiding at all costs the temptation to cast all arbitration relationships into one mold, particularly if the mold that the Court majority now seems to have in view is one that is not widely in vogue.

This arbitrator takes vigorous exception to the sweeping characterization of the function of arbitration that appears in the majority opinion in *Warrior*:

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. (Emphasis supplied.)<sup>13</sup>

The stressed words indicate the Court's apparent view that most parties prefer wide open arbitration when in fact they do not — at least not in this arbitrator's experience. I respectfully suggest that the Court take cognizance of the

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<sup>10</sup> These contract provisions are quoted in the majority opinion in *Warrior*, 363 U.S. 574, 576.

<sup>11</sup> 363 U.S. 574, 582-83.

<sup>12</sup> 363 U.S. 574, 580.

<sup>13</sup> 363 U.S. 574, 581.

fact that private arbitration systems do differ markedly and that the "variant needs and desires of the parties"<sup>14</sup> are usually reflected in how they write their contract language defining the arbitrator's jurisdiction.

One clearly favorable *practical* consequence of the Court's decisions in the *American* and *Warrior* cases should be a heightened awareness on the part of the lower federal courts of the distinctive nature of the arbitration process and a greater disposition to think twice before ruling a dispute to be non-arbitrable. A second practical result should be a lessening in the flow of cases originating from dilatory or litigious motivations rather than out of a genuine belief by the "reluctant party" that a particular issue is not in fact arbitrable under the contract.

Any decisions tending to give arbitration back to the arbitrators are, by hypothesis, to be favorably regarded by arbitrators. At the same time, the writer cannot help expressing wistful regret that we now find ourselves embarked on a still imperfectly charted sea of future "judicial inventiveness" which may yet prove to encourage more litigation than it discourages. The admittedly perilous voyage has been made necessary by the existence of situations in which parties who have contractually agreed to arbitrate have not fulfilled this commitment, either by refusing to arbitrate in particular cases or by refusing to comply with the terms of an arbitrator's award. If the alternative is between judicial enforcement in such cases and no arbitration or ignored awards, the present course set by *Lincoln Mills* and followed in the *Warrior* trilogy is clearly the preferable one. Counsel for the union in the *Warrior* cases, David Feller, in commenting on *Lincoln Mills* prior to the three decisions now under consideration, said that the course set by *Lincoln Mills* "will lead . . . to a far more hospitable climate to the system we are all anxious to see thrive than will the atmosphere of many state courts."<sup>15</sup> While one must concur with Feller's preference for federal rather than state court review, it is regrettable that the necessity for judicial intervention has originated from the parties themselves. Now that we have set sail with no apparent turning back, it is worth recalling Ben Aaron's trenchant observation made in January, 1959:

Educating the courts in the philosophy of arbitration and passing laws to prevent them from interfering unduly in its processes have become necessary only to the extent that some employers and unions have traded their priceless opportunity to govern themselves under private laws of their own making for the illusory advantages of winning an occasional argument by resorting to litigation.<sup>16</sup>

Fortunately for the cause of constructive management-union relationships, most employers and unions today do not manifest any intention of relinquishing their priceless opportunity to govern themselves. They decide upon the kind of arbitration they prefer, write contract language reflecting that preference, and adhere to it in their practice of contract administration. In short, most private grievance arbitration remains private and will probably continue to do so. Agreements to arbitrate are understood and honored and awards are put into

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<sup>14</sup> *Ibid.*

<sup>15</sup> Commenting on Aaron, *On First Looking into the Lincoln Mills Decision*, in *ARBITRATION AND THE LAW* 1, 18 (1959).

<sup>16</sup> Aaron, *op. cit. supra* note 15, at 14.

effect, albeit reluctantly in some instances. Let us hope that such will continue to be the case in the future. In my judgment it is the best way, far outweighing in its advantages the possible discomfort arising from a "wrong" arbitrator's decision in any particular case.

I am seriously concerned, however, that the role of the arbitrator, as envisaged in Mr. Justice Douglas' opinion in *Warrior*, may trigger divisive conflict in some quarters as to the proper nature and scope of the arbitrator's authority in grievance arbitration. The Douglas view of the arbitrator's role may encourage those parties who share it to go to court to compel arbitration on matters which, under a proper view of their own contract language, are not in fact arbitrable.

The best evidence of the way in which Mr. Justice Douglas' opinion may be construed is the way it has already been construed by his colleague, Mr. Justice Whittaker, in his *Warrior* dissent. After reviewing Douglas' exposition of the role of the arbitrator and the nature of his authority, Whittaker concludes as follows:

I understand the Court . . . to hold that the arbitrators are not confined to the express provisions of the contract, that arbitration is to be ordered unless it may be said with positive assurance that arbitration of a particular dispute is excluded by the contract, that doubts of arbitrability are to be resolved in favor of arbitration, and that when, as here, the contract contains a no-strike clause, everything that management does is subject to arbitration.<sup>17</sup>

As I read Douglas' opinion, Whittaker's understanding of it is a correct one in every particular and I sympathize with his conclusion that to him it is "an entirely new and strange doctrine."<sup>18</sup> Most arbitrators will be surprised to find out that their source of law is not confined to the express provisions of the contract when they have been accustomed for years to hearing that they have no power to add to, subtract from or otherwise modify the terms of the agreement under which they are arbitrating. They will be surprised to learn that "Apart from matters that the parties specifically exclude, *all of the questions on which the parties disagree* must therefore come within the scope of the grievance and arbitration provisions of the collective agreement." (Emphasis supplied.)<sup>19</sup>

In making such a sweeping generalization, Mr. Justice Douglas seems to be blissfully unaware of the fact that many employers and unions make a sharp contractual distinction between what may be termed an "open" grievance procedure and a "closed" arbitration step. That is, many contracts wisely provide for receipt of any grievance relating to wages or other conditions of employment, whether or not covered by contract, but will at the same time make clear that the arbitration step is reserved for grievances raising a question of contract interpretation or application *and only such grievances*. Few arbitrators today possess, nor do they desire, the virtually unlimited charter of authority which Mr. Justice Douglas seems determined to grant to them.

One must applaud Douglas for his appreciation that the grievance procedure is a part of the continuous collective bargaining process and that it is a vehicle by which meaning and content is given to the collective bargaining agree-

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17 363 U.S. 574, 589.

18 *Ibid.*

19 363 U.S. 574, 581.

ment itself. But it is vital to remember that the parties are living together *under a written agreement*. When they are unable to resolve a dispute over the interpretation or application of that agreement, they agree to use arbitration for final determination of the dispute as a preferable alternative to a strike or a lockout. But, in the overwhelming majority of cases, the employer and the union make clear that the arbitrator in exercising his discretion is also under the agreement. He is constrained by the terms of the agreement as much as are the parties themselves. There are not too many cases in which an arbitrator enjoys the type of blanket authority which Mr. Justice Douglas seeks to assign to him.

In the *Warrior* case itself, as previously noted, the contract language on arbitration is extremely loose. Thus, a ruling that the dispute in question is arbitrable could be encompassed under the "any local trouble of any kind" language. Nevertheless, in reviewing the facts in this case, a strong argument against arbitrability of this particular grievance on sub-contracting can certainly be made. The union over a period of years had made repeated unsuccessful negotiation efforts to secure a contractual provision prohibiting the contracting out of maintenance work, including negotiations culminating in the present contract. Faced with this knowledge, it is certainly stretching matters to conclude that the employer here had signified in the arbitration clause his willingness to submit a dispute on this issue to arbitration.

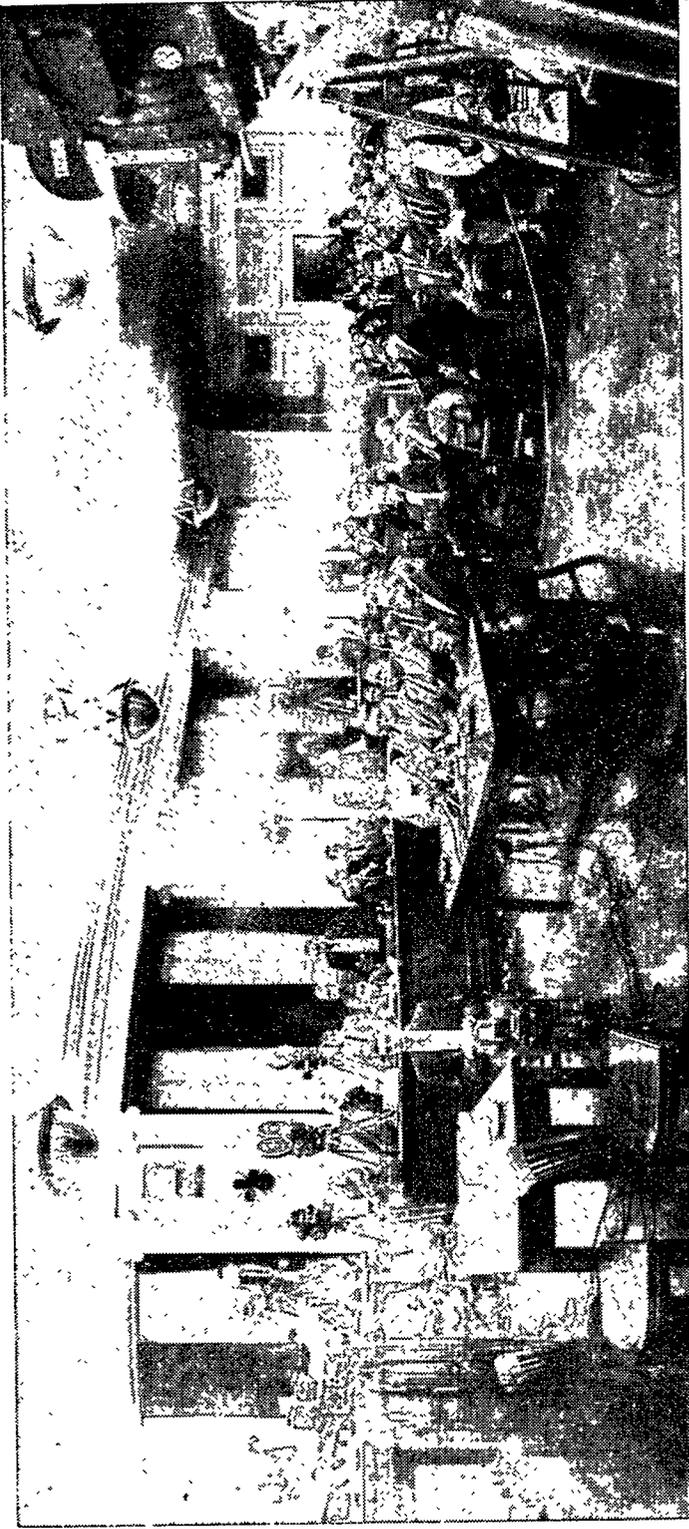
Be that as it may, the Douglas doctrine, which requires "positive assurance"<sup>20</sup> of intention specifically to exclude particular subjects from arbitration, coupled with the ancillary principle that any doubts are to be resolved in favor of arbitrability, *should* result in a sharply reduced demand for further examples of "judicial inventiveness." It may, however, lead to precisely the opposite result.

In summary, the net effect of the *Warrior* trilogy, although impossible to assess accurately at this writing, should be to encourage restoration of arbitration to the arbitrators, a result which arbitrators perforce must applaud. One must also endorse the Court's emphasis on the special nature of collective bargaining contracts and on the need for judicial awareness of the differences between such agreements and ordinary commercial contracts. At the same time, while concurring in the result in all three cases, the writer finds cause for grave concern over the reasoning by which the result was reached in the *Warrior* case in particular. The Court's view, as expressed by Mr. Justice Douglas, of the proper role of the arbitrator and of the nature of his authority, is not the view of many employers, unions or arbitrators, although it is concededly the view held by some in all three categories. One can hope that in future cases there will be a more perceptive recognition by the Court of the fact that differences of opinion exist in American industrial relations as to the proper uses of arbitration and as to the proper function of arbitration in relation to the collective bargaining process as a whole. The kind of arbitration to be found in a particular union-management relationship depends on the agreement of the particular union and employer involved and should be reflected in the contract language they negotiate on that subject. Some may choose to utilize arbitration in the manner and for the purposes described by

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20 363 U.S. 574, 582.

Mr. Justice Douglas. Many will not. The choice is one to be made by the parties themselves. Having made their choice and having reflected it in suitable contract language, the parties have a right to the fulfillment of their joint expectations from arbitration. Neither arbitrators nor courts should fail to respect the choice of the parties as to the type of arbitration they prefer.



**CAMERA COVERAGE OF 1956 SENATE COMMITTEE HEARINGS.** Orville Hodge, former Illinois State Auditor, was convicted in the Summer of 1956 of embezzling over \$1,500,000 in state funds. In October, 1956 (just before the November general election), the United States Senate Committee on Banking held "hearings" on the Hodge matter in a federal courtroom in Chicago. This wide-angle photograph shows seven of the 12 television and movie cameras, the bright lights, and the maze of wires and microphones. The effect of all this clearly forces attention away from the fact-finding to the sensational-news aspect of the "hearings."  
(Photo courtesy of the Chicago Daily News.)