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NOTE

JUDICIAL REVIEW OF LABOR ARBITRATION AWARDS:
REFINING THE STANDARD OF REVIEW

The proper standard of review of a labor arbitrator’s award remains a significant issue in federal labor law. This Note discusses the two existing standards, the Enterprise Wheel standard and the standard set forth in section 10 of the United States Arbitration Act, and concludes that the section 10 standard better serves the public policy favoring labor arbitration by discouraging judicial intervention in the arbitration process.

INTRODUCTION

Arbitration allows the parties to a collective bargaining agreement to resolve disputes during the term of the agreement without the disruption caused by strikes. The stability in labor relations due to arbitration has resulted in a strong public policy favoring arbitration. This public policy appears in legislation, in decisions of the

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1. See, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). The Lincoln Mills Court held for the first time that an arbitration clause was enforceable. See id. at 451. This holding established the importance of arbitration in resolving labor-management disputes.

United States Supreme Court,4 and in opinions of the Eighth Circuit Court of Appeals.5 Despite this strong public policy, however, one problem continues to plague the arbitration process: the standard of judicial review of an arbitrator's award.6

The Eighth Circuit Court of Appeals applies the standard of review enunciated by the United States Supreme Court in *Enterprise Wheel*.7 *Enterprise Wheel* states that the arbitrator's award is enforceable if it draws its essence from the collective bargaining agreement.8 This standard continues to be applied by the Supreme Court and the Eighth Circuit Court of Appeals.9

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3. E.g., 29 U.S.C. § 173(d) (grievances to be resolved using method agreed to by the parties to the agreement); id. § 185(a) (allowing courts to enforce collective bargaining agreements by compelling arbitration). Judicial construction of 29 U.S.C. § 185(a) allows courts to enforce collective bargaining agreements by compelling arbitration to which the parties have agreed. See also *Lincoln Mills*, 353 U.S. at 450-55.


5. See, e.g., Daniel Constr. Co. v. International Union of Operating Eng'rs, Local 513, 738 F.2d 296, 301 (8th Cir. 1984); Kewanee Mach. Div. v. Local Union No. 21, Int'l Bhd. of Teamsters, 593 F.2d 314, 316-17 (8th Cir. 1979); Resilient Floor & Decorative Covering Workers, Local 1179 v. Welco Mfg. Co., 542 F.2d 1029, 1032 (8th Cir. 1976); General Drivers, Local No. 120 v. Sears, Roebuck & Co., 535 F.2d 1072, 1075 (8th Cir. 1976).


7. 363 U.S. 593; see also Daniel Constr., 738 F.2d at 300; United Elec. Workers, Local 1139 v. Litton Microwave Cooking Prods., 728 F.2d 970, 971 (8th Cir. 1984) (en banc); Riceland Foods, Inc. v. United Bhd. of Carpenters, Local 2381, 737 F.2d 758, 759 (8th Cir. 1984); Zeviar v. Local No. 2747, Airline Employees, 733 F.2d 556, 559 (8th Cir. 1984); International Bhd. of Elec. Workers, Local No. 53 v. Sho-Me Power Corp., 715 F.2d 1322, 1325 (8th Cir. 1983), cert. denied, 104 S. Ct. 1277 (1984); St. Louis Theatrical Co. v. St. Louis Theatrical Bhd. Local 6, 715 F.2d 405, 407 (8th Cir. 1983); Lackawanna Leather Co. v. United Food & Commercial Workers Int'l Union No. 271, 706 F.2d 228, 230 (8th Cir. 1983) (en banc); Vulcan-Hart Corp. v. Stove Workers Int'l Union Local No. 110, 671 F.2d 1182, 1184 (8th Cir. 1982); Carpenters' Dist. Council of Greater St. Louis v. Anderson, 619 F.2d 776, 778 (8th Cir. 1980); Western Iowa Pork Co. v. National Bhd. of Packinghouse & Dairy Workers, Local No. 52, 366 F.2d 275, 278 (8th Cir. 1966) (arbitrator must interpret and apply collective bargaining agreement); Truck Drivers & Helpers Union Local 784 v. Ulyr-Talbert Co., 330 F.2d 562, 565 (8th Cir. 1964). For a discussion of the *Enterprise Wheel* standard, see infra notes 21-39 and accompanying text.

8. 363 U.S. at 597.

9. See, e.g., W.R. Grace & Co. v. Local Union 759, Int'l Rubber Workers, 103 S. Ct. 2177 (1983). In addition to applying the "draws its essence" language of *Enterprise Wheel*, the W. R. Grace Court reminded courts not to overrule an arbitrator simply
Despite the continued use of the *Enterprise Wheel* standard, problems persist in its application. To determine if an award draws its essence from the collective bargaining agreement, courts must examine the pertinent portion of the collective bargaining agreement and compare it to the arbitrator's award. This method invites a review of the merits of the grievance or of the arbitrator's award. Merit-based reviews are contrary to the stated policy of the Supreme Court, however.

An alternative to the present standard of review is provided by section 10 of the United States Arbitration Act. This standard provides for procedural review of the arbitration process, as compared to the meritorious review of the *Enterprise Wheel* standard. Like the *Enterprise Wheel* standard, the Arbitration Act requires the arbitration award to be an interpretation and application of the collective bargaining agreement. While controversy exists regarding the applicability of the Arbitration Act to collective bargaining agree-

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11. *Enterprise Wheel*, 363 U.S. at 596-99; *Daniel Constr.*, 738 F.2d at 298-301; *Rieland Foods*, 737 F.2d at 759-60; *Litton*, 728 F.2d at 971-72 (en banc) (adopting the dissent of the Eighth Circuit panel decision, at 704 F.2d 393, 400-03); *St. Louis Theatrical Co.*, 715 F.2d at 407-09; *Lackawanna Leather*, 706 F.2d at 230-32.

12. See Kaden, supra note 2, at 270-71; Markham, supra note 6, at 621-22. Professor Kaden stated:

Perhaps it is foolhardy to expect judges who daily interpret and apply standards codified in contracts, regulations and statutes to stand aside and enforce interpretations of collective bargaining agreements that seem to them excessively far off the mark. In any event, it is apparent that this judicial instinct will not be stifled by incantations of finality, or by still more verbal formulations of the proper scope of review.

13. *Enterprise Wheel*, 363 U.S. at 596; *American Mfg.*, 363 U.S. at 568; see infra notes 30-33 and accompanying text.


15. See Bell Aerospace Co. v. Local 516 UAW, 500 F.2d 921 (2d Cir. 1974); see also Electronics Corp. v. International Union of Elec. Workers Local 272, 492 F.2d 1255 (1st Cir. 1974); Capital Dist. Chapter of N.Y. State, P.D.C.A. v. International Bhd. of Painters & Allied Trades, 581 F. Supp. 840 (N.D.N.Y. 1983). The Eighth Circuit applied § 10(c) of the Arbitration Act in Grahams Serv. Inc. v. Teamsters Local 975, but did not clearly adopt the Act. 700 F.2d 420, 422-24 (8th Cir. 1982).


17. See id. at 597.

ments, the section 10 standard can be adopted without adopting the entire Arbitration Act.

This Note examines the two standards of judicial review of labor arbitration decisions. The Note focuses on which standard best serves the public policy supporting arbitration as the preferred method of resolving labor disputes. The actions of the Supreme Court and the Eighth Circuit Court of Appeals are explored, in addition to the public policy favoring labor arbitration. The Note concludes that by adopting and applying the section 10 standard of review, the Eighth Circuit Court of Appeals will assure procedural fairness in the arbitration process and avoid the problems inherent in the Enterprise Wheel standard.

I. THE DEVELOPMENT OF LABOR ARBITRATION

A. The Enterprise Wheel Standard of Review

The Supreme Court squarely considered judicial review of an arbitrator's award for the first time in United States Steelworkers v. Enterprise Wheel & Car Corp. According to the Court, an award is enforceable if it draws its essence from the collective bargaining agreement.


When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collec-
To satisfy this standard, the arbitrator must interpret and apply the collective bargaining agreement.\textsuperscript{23} If the arbitrator fails to stay within these guidelines, he or she dispenses "industrial justice" and the award is not enforced.\textsuperscript{24} In \textit{Enterprise Wheel}, the Court compared the collective bargaining agreement to the arbitrator's award to determine if the award drew its essence from the agreement.\textsuperscript{25}

The \textit{Enterprise Wheel} standard allows the arbitrator to go outside the collective bargaining agreement in arriving at an award.\textsuperscript{26} The arbitrator may consider the customs and practices of the particular industry, in addition to the rules of the individual shop, to interpret an agreement.\textsuperscript{27} Statutory law may be considered if necessary.\textsuperscript{28} Despite the arbitrator's freedom to consider outside sources, the collective bargaining agreement must remain the primary source of the arbitrator's award.\textsuperscript{29}

\textsuperscript{23} \textit{Enterprise Wheel}, 363 U.S. at 597. In \textit{Enterprise Wheel}, the Court required the arbitrator to interpret and apply the collective bargaining agreement. \textit{Id.} If the arbitrator fails to follow this requirement the arbitrator exceeds his or her authority. \textit{See id.} at 597-98. Thus, the Arbitration Act's provision for reversal if the arbitrator exceeds his or her authority can be interpreted to include the failure to base the award on the collective bargaining agreement.

Satisfying the \textit{Enterprise Wheel} standard appears to be especially difficult when it is alleged that the arbitrator exceeded the authority conferred upon him or her by the collective bargaining agreement. In this situation the authority of the arbitrator may be limited by the agreement. \textit{See}, e.g., \textit{St. Louis Theatrical Co.}, 715 F.2d at 407-08. At the same time, the clause is intended to be interpreted by the arbitrator. Thus, the arbitrator is in the position to interpret his or her own grant of authority. The issue is whether courts should defer to the arbitrator's interpretation of the clause, or should fully explore its own interpretation of the limiting clause to determine if the arbitrator exceeded his or her authority. \textit{See Enterprise Wheel}, 363 U.S. at 597.

The Eighth Circuit Court of Appeals appears to have taken the latter approach. \textit{See Riceland Foods}, 737 F.2d at 759-60; \textit{St. Louis Theatrical Co.}, 715 F.2d at 407-08. \textit{But see Ozark Airlines, Inc. v. Air Line Pilots Ass'n, Int'l}, 744 F.2d 1347, 1350-51 (8th Cir.), \textit{reh'g granted}, 744 F.2d 1347 (8th Cir. 1984) (arbitrators allowed to interpret ambiguous language regarding the appointment and role of a fifth arbitrator).

\textsuperscript{24} \textit{Enterprise Wheel}, 363 U.S. at 597.

\textsuperscript{25} This may lead, however, to a review of the merits. \textit{See infra} note 173 and accompanying text.

\textsuperscript{26} \textit{See Enterprise Wheel}, 363 U.S. at 597; \textit{see also Warrior & Gulf Navigation}, 363 U.S. at 581-82.

\textsuperscript{27} \textit{Warrior & Gulf Navigation}, 363 U.S. at 582; \textit{see Enterprise Wheel}, 363 U.S. at 597 (arbitrator "may of course look for guidance from many sources").

\textsuperscript{28} \textit{See Enterprise Wheel}, 363 U.S. at 597-98.

\textsuperscript{29} \textit{Id.} at 597.
The Enterprise Wheel Court cautioned lower courts to defer to the arbitrator's ruling on the merits of the award. Reviewing courts should assure that the award draws its essence from the collective bargaining agreement, but should not review the arbitrator's interpretation of the agreement. In other words, if the award is based on the collective bargaining agreement, the court must enforce the award even if the court disagrees with the arbitrator's interpretation. According to the Court, the parties bargained for the arbitrator's interpretation of the collective bargaining agreement, not the court's. Courts may not overrule arbitrators simply because they disagree on the merits.

Enterprise Wheel, together with its companion cases, expanded and solidified the importance of arbitration in resolving labor disputes. The Court described the collective bargaining agreement as a form of "industrial self government." The collective bargaining agreement provides the rules for that government's operation. Disagreements over interpretation of the rules are to be resolved by the arbitrator. This makes arbitration, not judicial proceedings, the forum for resolving grievances.

B. Eighth Circuit Application of the Enterprise Wheel Standard

Following Enterprise Wheel, the Eighth Circuit compares the collective bargaining agreement with the arbitrator's award to determine if the award draws its essence from the agreement. If the award does not meet this standard it is not enforced. It is unclear at what point the arbitrator crosses the line from rendering an award that draws its

30. Id. at 596.
31. Id. at 599.
33. Enterprise Wheel, 363 U.S. at 599.
35. Fourth Circuit Review, supra note 2, at 790-92; see Markham, supra note 6, at 615.
37. See id. at 581. "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship." Id. at 578-79 (footnote omitted).
38. Enterprise Wheel, 363 U.S. at 599.
40. See Daniel Constr. Co., 738 F.2d at 299-300; Zeviar, 733 F.2d at 558-59; Litton, 728 F.2d at 971; Sho-Me Power Corp., 715 F.2d at 1324-26; St. Louis Theatrical Co., 715 F.2d at 407-08; Lackawanna Leather Co., 706 F.2d at 230; Vulcan-Hart Corp., 671 F.2d at 1183-84; Carpenters Dist. Council, 619 F.2d at 778; Resilient Floor, 542 F.2d at 1032.
41. See, e.g., Riceland Foods, 737 F.2d at 759-60; St. Louis Theatrical Co., 715 F.2d at 407.
essence to dispensing industrial justice. The *Enterprise Wheel* Court did not provide criteria for making this determination. The Eighth Circuit's difficulty with making this determination is demonstrated by two recent decisions.

In *Lackawanna Leather Co. v. United Food & Commercial Workers International Union*, an employee was discharged after receiving a written notice of poor work performance. The employee had received two prior notices, one for an unexcused absence and one for excessive tardiness. Lackawanna Leather discharged the employee under the collective bargaining agreement for receiving three written notices within one year's time. The union contended that the discharge was retaliatory and initiated grievance proceedings.

The arbitrator concluded that the poor work notice was justified, but that the discharge was improper. The arbitrator interpreted the discharge provisions of the collective bargaining agreement as requiring three notices for the same offense. Thus, the company could not discharge the employee without three violations of the inefficiency provision. Since the two prior violations related to absenteeism, the poor work notice was only a first notice under that category.

The Eighth Circuit panel stated that the arbitrator exceeded his authority by interpreting the discharge provision and reversed the district court order enforcing the award. In submitting the issues

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42. See, e.g., Riceland Foods, 737 F.2d 759-60; St. Louis Theatrical Co., 715 F.2d at 407-09.
43. See *Enterprise Wheel*, 363 U.S. at 597-99.
44. *Litton*, 728 F.2d 970; *Lackawanna Leather*, 706 F.2d 228.
45. 692 F.2d 536 (8th Cir.), vacated on reh'gen banc, 706 F.2d 228 (8th Cir. 1982).
46. *Lackawanna Leather*, 692 F.2d at 537. According to the third written notice, the employee had improperly operated a hide shaving machine at the company's Omaha plant.
47. *Id.* Section 8.4 of the collective bargaining agreement stated, "An employee, who during the course of a years [sic] period, receives three written notices in relation to inefficiency, absenteeism [sic], etc. shall be immediately discharged upon receipt of the third notice. . . ." *Id.*
48. *Id.* The union contended that the company's discharge of the employee was due to his election to be laid off rather than use vacation during an inventory shutdown. *Id.*
49. *Id.*
50. *Id.* at 538.
51. *Id.*
52. See *id.* The arbitrator ordered the company to reinstate the employee but the poor work notice was to remain in the employee's personnel file. *Id.*
53. See *id.*
54. *Id.* at 539. *Enterprise Wheel* did not state that each particular clause of the collective bargaining agreement had to be submitted for the arbitrator's consideration before it could be applied by the arbitrator. See 363 U.S. 593.
55. 692 F.2d at 540.
to be arbitrated, neither party indicated that the interpretation of the discharge provision was an issue. Further, neither party offered evidence during the hearing regarding the proper interpretation of the provision. Relying on Enterprise Wheel, the court stated that the arbitrator did not stay within the "areas marked out for his consideration" when he interpreted the discharge provision. According to the court, the arbitrator was not free to interpret the discharge clause without hearing evidence regarding its proper interpretation. The case was remanded to the district court with instructions to order the reopening of the arbitration hearing to determine the proper interpretation of the discharge provision.

The Eighth Circuit granted a rehearing en banc and concluded that the arbitrator did not exceed his authority by interpreting the discharge provision. The court stated that the arbitrator could consider the discharge provision, since discharge provisions are common in collective bargaining agreements and must be interpreted in order to justify discharge. In fact, Enterprise Wheel requires the arbitrator to interpret and apply the collective bargaining agreement. According to the court, in the discharge context the employer carries the burden of proving that the agreement supports the discharge. This proof may include evidence of past practices or other evidence indicating how the agreement is interpreted by the parties. In Lackawanna Leather, the employer failed to introduce

56. 692 F.2d at 540. The court was concerned that allowing the arbitrator to interpret the discharge clause without hearing evidence deprived the company of a fundamentally fair hearing. See id. The review standards of the Federal Arbitration Act, 9 U.S.C. § 10 (1982), are designed to grant a fundamentally fair hearing. See Bell Aerospace, 500 F.2d at 923.

57. 692 F.2d at 540 (quoting Enterprise Wheel, 363 U.S. 598). In the panel opinion, the union argued that Enterprise Wheel prohibits a court from substituting its judgment for that of the arbitrator. Id.

58. See id. at 540.

59. Id. at 540. This is consistent with the action of the Supreme Court in Enterprise Wheel, 363 U.S. at 599; see also 9 U.S.C. § 10(e) (providing for rehearing by arbitrators if award is vacated).

60. Id. at 231-32.

61. See id. at 231.

62. See id. at 231.

63. See 363 U.S. at 597.

64. See 706 F.2d at 231. Arbitration over employee discharge is an issue frequently presented in the Eighth Circuit. See, e.g., Riceland Foods, 737 F.2d 758; St. Louis Theatrical Co., 715 F.2d 405; Grahams, 700 F.2d 420. An arbitrator's authority to modify the employer's discipline is marked by a diversity of opinions. See M. HILL & A. SINICROPI, supra note 2, at 97-105. Courts should, however, remember that Enterprise Wheel grants the arbitrator flexibility in formulating remedies as long as the remedies are based on the collective bargaining agreement. Enterprise Wheel, 363 U.S. at 596-97.

such evidence. Since it was necessary for the arbitrator to interpret
the provision to reach a decision on the grievance, he was free to
give the clause its ordinary meaning.

In *United Electrical Workers, Local 1139 v. Litton Microwave Cooking
Products*, the employer scheduled an inventory shutdown requiring
some employees to either use vacation time or take time off without
pay. The arbitrator concluded that Litton violated the collective bar-
gaining agreement by requiring employees to take vacation at a time
other than the summer months. The arbitrator ordered Litton to
grant an additional week of paid vacation to the affected
employees.

On review, the Eighth Circuit panel held that the award was puni-
tive, a violation of the collective bargaining agreement, and based
on an unsupported factual assumption. The fundamental error in
the award, however, was its violation of express contractual provi-
sions. The collective bargaining agreement provided for a gradu-
ated vacation schedule based on the number of years of service.
According to the court, by granting an additional week of paid vaca-
tion, the arbitrator modified the agreement. The agreement pro-

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66. 706 F.2d at 231.
67. Id. The Eighth Circuit has stated that the arbitrator is allowed to resolve
certain issues not directly addressed in the collective bargaining agreement. See *Rain-
bow Glass Co.*, 663 F.2d at 817 (silence of bargaining agreement creates ambiguity); *Welco Mfg. Co.*, 542 F.2d at 1033 (silence of bargaining agreement allows some discre-
tion). The dissent in the en banc *Lackawanna Leather* decision argued that the case
should have been reopened for further arbitration on the proper interpretation of
the discharge clause in the collective bargaining agreement. 706 F.2d at 235-36
(John Gibson, J., dissenting). The dissent was troubled by the court's refusal to re-
submit the case to arbitration and stated, "The sandbagging that occurred in this
case is simply a miscarriage of justice, and makes the arbitration proceeding in this
case a farce." Id.
68. 704 F.2d 393 (8th Cir. 1983).
69. Id. at 394-95.
70. Id. at 395.
71. Id. at 397-98; see M. Hill & A. Sinicropi, supra note 2, at 4.
72. 704 F.2d at 396-97. The en banc majority adopted the reasoning of the
panel dissent. 728 F.2d at 972.
73. *Litton*, 704 F.2d at 399-400. *Enterprise Wheel* does not expressly provide
grounds for vacating an award that violates express contractual provisions. See 363
U.S. 593. The *Litton* panel decision stated that the number of days of vacation al-
lowed under the collective bargaining agreement was controlling because the sched-
ule was unambiguous. 704 F.2d at 399-400. The panel ignored the fact that the
arbitrator construed three clauses together and resolved the conflict by ruling that
the vacation season clause controlled. See id. at 400-01 (Arnold, J., dissenting).
74. 704 F.2d at 399.
75. See id. Clauses restricting the arbitrator's authority pose particular problems.
Four cases with subtle differences demonstrate this difficulty. In all four cases, the
collective bargaining agreement restricted the power of the arbitrator to alter the
terms. *Riceland Foods*, 737 F.2d at 760 ("arbitrator shall have no power to alter,
hibited the arbitrator from modifying its terms.\textsuperscript{76} As in \textit{Lackawanna Leather}, the Eighth Circuit granted a hearing en banc.\textsuperscript{77} The court concluded that the arbitrator's remedy was based on his interpretation of the collective bargaining agreement and that the agreement was thus enforceable.\textsuperscript{78} The arbitrator was forced to reconcile the conflict between the vacation season and vacation shutdown schedule clauses.\textsuperscript{79} The arbitrator concluded that the vacation season clause made the shutdown, as scheduled by Litton, a violation of the collective bargaining agreement.\textsuperscript{80} The arbitrator's remedy was to award a week of vacation during the vacation season to the affected employees.\textsuperscript{81} This award gave the employees who used va-

\begin{itemize}
\item amend, change, add to, or subtract from any of the terms of this agreement\textquotedblright); \textit{St. Louis Theatrical Co.}, 715 F.2d at 407 (\textquotedblleft Arbitrator . . . shall have no right to alter, amend, modify or change the terms or provisions of this Agreement\textquotedblright); \textit{Kewanee Mach. Div.}, 593 F.2d at 316 (\textquotedblleft arbitrator shall not add to or subtract from, alter or modify any provisions of this agreement\textquotedblright); \textit{Welco Mfg. Co.}, 542 F.2d at 1031 (\textquotedblleft the arbitrator ha[s] no authority to . . . change the provisions of the collective bargaining agreement\textquotedblright).

These four cases contained a restriction on the arbitrator's authority to alter the discipline selected by management. \textit{Riceland Foods}, 737 F.2d at 760 (\textquotedblleft Any arbitration . . . shall not include whether or not the type of discipline selected was appropriate\textquotedblright); \textit{St. Louis Theatrical Co.}, 715 F.2d at 408 (\textquotedblleft Any employee violating this provision may be disciplined or discharged and shall have no recourse to any other provisions of this Agreement except as to the fact of participation\textquotedblright); \textit{Kewanee Mach. Div.}, 593 F.2d at 315 (\textquotedblleft The Company retains the exclusive sole . . . right to discharge employ-ees\textquotedblright); \textit{Welco Mfg. Co.}, 542 F.2d at 1031 (\textquotedblleft the arbitrator ha[s] no authority to . . . modify 'disciplinary action'\textquotedblright).

Despite the similarities in these cases, the results and rationale used by the Eighth Circuit are vastly different. \textit{Compare Riceland Foods}, 737 F.2d 758 (arbitrator's decision unenforceable) and \textit{St. Louis Theatrical Co.}, 715 F.2d 405 (arbitrator's decision unenforceable) \textit{with Kewanee Mach. Div.}, 593 F.2d 314 (arbitrator's decision enforceable as part of collective bargaining agreement) and \textit{Welco Mfg. Co.}, 542 F.2d 1029 (enforcing arbitrator's decision).

\textsuperscript{76} \textit{Litton}, 704 F.2d at 399.
\textsuperscript{77} \textit{Litton}, 728 F.2d 970.
\textsuperscript{78} \textit{id.} at 972. The en banc dissent sharply disagreed with the majority's conclusion that the award drew its essence from the collective bargaining agreement. \textit{See id.} at 972-74 (John Gibson, J., dissenting). The dissent stated that \textit{Litton} together with \textit{Lackawanna Leather} "effectively eliminates any judicial review over the concededly broad powers of arbitrators." \textit{id.} at 974 (John Gibson, J., dissenting).

The circuitous routes taken to affirm the arbitrator and the sharp dissents in \textit{Lackawanna Leather} and \textit{Litton} show how divided the court is over the proper application of the \textit{Enterprise Wheel} standard.

\textsuperscript{79} \textit{Litton}, 704 F.2d at 400-01 (Arnold, J., concurring in part and dissenting in part).
\textsuperscript{80} \textit{id.} at 401. The en banc majority looked at the arbitrator's award only to determine if the award drew its essence from the collective bargaining agreement. \textit{id.} at 395. The panel's majority opinion was highly critical of the arbitrator's award. \textit{See id.} at 396-97. The approach of the en banc \textit{Litton} court is more consistent with \textit{Enterprise Wheel}.

\textsuperscript{81} \textit{id.} at 395. The arbitrator directed that this extra week be a paid vacation. \textit{id.}
cation during the shutdown one more week of vacation than they
would have had otherwise. The court concluded that it may not
have awarded the same remedy as the arbitrator, but that the arbitra-
tor acted within his authority.

The difficulty in determining the threshold for the Enterprise Wheel
standard is illustrated by Lackawanna Leather and Litton. Decisions
frequently begin by stating that an award must draw its essence from
the collective bargaining agreement. Occasionally, some language
limiting the arbitrator’s authority is also introduced. The reason-
ing used by the court to determine whether the award draws its es-
sence, however, is difficult to discern.

Lackawanna Leather reveals another issue created by the Enterprise
Wheel standard. The court in Lackawanna Leather was concerned that
the parties may have had some agreed upon interpretation of the
discharge provision that was not presented to the arbitrator. Under
Enterprise Wheel, the arbitrator may accept evidence of the par-
ties’ understanding, but he or she is not required to do so. The
panel in Lackawanna Leather attempted to make this a requirement.
On rehearing, however, the court disapproved this attempt.

II. THE UNITED STATES ARBITRATION ACT

A. Background of the Arbitration Act

The United States Arbitration Act, enacted in 1925, provides
another standard for judicial review of labor arbitration awards.

82. Id. at 400-01 (Arnold, J., concurring in part and dissenting in part).
83. Litton, 728 F.2d at 972.
84. See, e.g., Lackawanna Leather, 706 F.2d at 230; Litton, 704 F.2d at 395.
85. E.g., Litton, 704 F.2d at 395. “Judicial deference to arbitration, however,
does not grant carte blanche approval to any decision that an arbitrator might make.”

86. See Lackawanna Leather, 692 F.2d at 540 (panel opinion).
87. Cf. Enterprise Wheel, 363 U.S. at 597 (arbitrator may consider many sources).
88. See Lackawanna Leather, 692 F.2d at 540.
89. Cf. Lackawanna Leather, 706 F.2d at 231 (“without evidence as to the meaning
of the contract clause in question, an arbitrator may properly give that clause a read-
ing ordinary to similar labor contracts”).
92. 9 U.S.C. § 10 (a)-(e) (1982). This section states:

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 of 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 post-
pone the hearing, upon sufficient cause shown, or in refusing to hear evi-
The background of the Arbitration Act must be explored because of the controversy surrounding its application to collective bargaining agreements. The controversy centers on the exclusionary language of section 1 of the Arbitration Act. This provision states 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." Thus, the question remains whether this language excludes collective bargaining agreements from the provisions of the Arbitration Act.

The background of the Arbitration Act supports the theory that it was enacted to enforce agreements to arbitrate in commercial contracts. The common law rule which prohibited specific enforcement of agreements to arbitrate labor disputes applied with equal
force to commerical contracts.97 The need for an expedient method of resolving commercial disputes resulted in the American Bar Association sponsoring the original bill.98 Although the bill did not contain language including labor organizations, some unions opposed its passage.99 The bill was reintroduced two years later100 with additional language excluding labor disputes from the Arbitration Act’s coverage.101

Despite this history, circuit courts have posed several theories using section 1 as a rationale both for and against the application of the Arbitration Act to collective bargaining agreements.102 The Third Circuit Court of Appeals concluded that collective bargaining agreements are not contracts of employment, and are not excluded from the provisions of the Arbitration Act.103 The Second Circuit adopted this reasoning, and stated that the Arbitration Act should be interpreted to further the congressional goal that labor disputes be arbitrated.104 The Fourth and Fifth Circuits reached the opposite result applying the same language.105

A different view of the legislative intent was suggested by the appellant in Textile Workers of America v. Lincoln Mills.106 The union argued that Congress could not have intended to include or exclude grievance arbitration in enacting the Arbitration Act.107 The union stated that labor arbitration did not come to connote grievance arbi-

97. See Lincoln Mills, 353 U.S. at 456 (common law rule against enforcement of executory agreements to arbitrate rejected by 29 U.S.C. § 185(a)).
101. See id. at 22.
102. See, e.g., General Elec. Co., 233 F.2d at 98.
103. Tenney Eng’g, Inc. v. United Elec. Workers, 207 F.2d 450, 453-54 (3d Cir. 1953).
104. Signal-Stat, 235 F.2d at 302-03. The Signal-Stat court stated that in the face of vague legislative history on the Arbitration Act, to exclude collective bargaining agreements from coverage under the Arbitration Act would be contrary to legislative intent. Id.
105. Lincoln Mills, 230 F.2d at 86; Miller Metal Prods., 215 F.2d at 224.
107. Brief for Appellant, supra note 106, at 52-53. Despite these arguments the
tration until the 1930's. Prior to that time, labor arbitration consisted of arbitrating wage rates. Thus, the union argued, grievance arbitration could not have been a consideration of Congress when it enacted the Arbitration Act.

In *Lincoln Mills*, the Supreme Court compelled arbitration based on section 301 of the Labor Management Relations Act, rather than the Arbitration Act. The *Lincoln Mills* Court did not rule on the applicability of the Arbitration Act to collective bargaining agreements despite the opportunity to do so. The Court deepened the silence by deciding two companion cases to *Lincoln Mills* based on section 301, although the lower court compelled arbitration based on the Arbitration Act. The Supreme Court affirmed both cases and stated, "We follow in part a different path than the Court of Appeals, though we reach the same result."

**B. The Section 10 Standard of Review**

Despite the controversy surrounding the applicability of the entire Arbitration Act to collective bargaining agreements, the section 10 review standard may be applied without adopting the entire Arbitration Act. The Eighth Circuit Court of Appeals has applied the

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110. *Id.* at 53.

111. *Lincoln Mills*, 353 U.S. at 451-52. The Fifth Circuit in *Lincoln Mills* reviewed the arguments regarding the applicability of the Arbitration Act to collective bargaining agreements and concluded that collective bargaining agreements were contracts of employment subject to exclusion under 9 U.S.C. § 1. *Lincoln Mills*, 230 F.2d at 84-86. In an article written after *Lincoln Mills*, but before *Enterprise Wheel*, Professor Pirsig suggested that the Arbitration Act could have been used by the Supreme Court in *Lincoln Mills* to supplement its holding. Pirsig, *supra* note 20, at 371-72.


116. *See generally General Warehousemen & Helpers Local 767 v. Standard Brands Inc.*, 579 F.2d 1282, 1294 n.9 (5th Cir. 1978) (reviewing recent Supreme Court decisions and the responsive direction taken by the circuit courts). The Fifth Circuit Court of Appeals concluded that the question of applicability of the Arbitration Act to collective bargaining agreements was not properly before them. *Id.* The Fifth Circuit noted, however, that it had held the Arbitration Act applicable to disputes over contracts of employment between a broker and the brokerage firm. *Id.; see also Tullis v. Kohlmeyer & Co.*, 551 F.2d 632, 638 n.8 (5th Cir. 1977). This action may
Section 10 standard of review in this way. Before examining the application of section 10 standards it is necessary to review its elements.

Section 10(a) of the Arbitration Act provides for vacating an arbitral award procured by corruption, fraud or undue means. Under section 10(a), attempting to introduce prejudicial evidence is not grounds for vacating an award if the arbitrator is not prejudiced. This section addresses misconduct by the parties, rather than the arbitrator, which affects the arbitrator's award.

Section 10(b) of the Arbitration Act provides for vacating an award when the arbitrators themselves are guilty of corruption or evident partiality. Arbitrators, selected for their knowledge of the industry, may have limited business dealings with the principals in a dispute. If these dealings are substantial the award may be affected.

If the arbitrator refuses to postpone a hearing where sufficient cause is shown or refuses to hear evidence pertinent and material to the controversy, a court may vacate the award pursuant to section 10(c). Under this section a party's rights must be prejudiced by the error in order to remand the case. In reviewing the arbitrator's evidentiary rulings, the court should not hold the arbitrator to the same procedural standard as a federal judge. Instead, the arbitral award should be reviewed in a manner that reflects the unique characteristics of arbitration. This approach recognizes the voluntary nature of arbitration and the parties' consent to be bound by the arbitrator's decision.
bitrator should be required only to grant a fundamentally fair hearing.  

Section 10(d) provides for vacating an award when it is indefinite or when the arbitrators exceed their powers.  

Section 10(e) of the Arbitration Act allows the court to order a new hearing when it has vacated the award.  

The court focused on the section of the collective bargaining agreement that stated that the arbitrator could only consider whether or not just cause was present.  

The court's analysis is questionable because it removes from the arbitrator the power to determine the merits of the grievance.  

Further, the arbitrator understood that his task was to consider if just cause was present, and if not, determine what the remedy should be.  

that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.

American Almond Prods. Co. v. Consolidated Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944).

127. See, e.g., Grahams, 700 F.2d at 422-23.

128. 9 U.S.C. § 10(d). Especially interesting is the result in Riceland Foods, 737 F.2d 758. The arbitrator determined the issue to be whether just cause existed for the discharge, and if not, what was the proper remedy. See id. The arbitrator concluded that Riceland had not established that the management directive in question was fair, reasonable, and contractual. Id. The arbitrator ordered reinstatement, but penalized the employees one month's pay for failing to "obey now, grieve later." Id.

The court stated that because the employees had violated the "obey now, grieve later" rule they had violated the collective bargaining agreement. Id. Once it was determined that the employees had violated the agreement, the arbitrator was precluded from considering the appropriateness of the discipline. Id.

The court's analysis is questionable because it removes from the arbitrator the power to determine the merits of the grievance. See Enterprise Wheel, 363 U.S. at 596, 598-99 (stating that this power is the arbitrator's). The arbitrator concluded that the employer's rule was not contractual, but because the employees' refusal to follow the rule was unreasonable, they were penalized. Riceland Foods, 737 F.2d at 759-60.

Further, the arbitrator understood that his task was to consider if just cause was present, and if not, determine what the remedy should be. See id. at 758-59. It is reasonable to conclude that since the arbitrator ordered a remedy he did not find just cause for discharge.

129. See supra notes 21-29 and accompanying text.

130. See Bell Aerospace, 500 F.2d at 923-24.

131. See 9 U.S.C. § 10(e).

132. See Bell Aerospace, 500 F.2d at 924-25.

C. Section 10 Applied to Labor Arbitration

Bell Aerospace Co. v. Local 516, UAW provides an example of how to apply the section 10 standard of review to labor arbitration awards. In Bell Aerospace, two unions and the company arbitrated to clarify which employees should perform certain work for Bell. The arbitrator’s first award was remanded by the district court for clarification. Although the second award was still contradictory, it was enforced by the district court.

On appeal, Bell alleged that the arbitrator rendered an ambiguous award. Local 205’s allegation of denial of a fair hearing was based on the arbitrator’s reference to an affidavit not placed into evidence. In reviewing the arbitrator’s use of the affidavit, the court did not require the arbitrator to observe the procedures of a federal court, but instead required that the arbitrator grant a fundamentally fair hearing. The court concluded that the arbitrator’s reliance on the affidavit did not deprive Local 205 of a fundamentally fair hearing.

Next, the court evaluated the claim of Local 205 that the arbitrator was guilty of evident partiality under section 10(b) of the Arbitration Act. The court stated that no evidence established partiality. According to the court, the only basis for Local 205’s claim was that the arbitrator’s award favored the other union.

Finally, the court evaluated the award pursuant to section 10(d) of the Arbitration Act to determine if the award was final, mutual, and

135. Id. at 922.
136. Id.
137. Id.
138. Id. at 923.
139. Id. at 922-23. The district court found that the affidavit was part of the record of an NLRB case which the parties had stipulated was relevant. Id. at 923.
140. Id.; see also Grahams, 700 F.2d at 423 & n.1.
141. Bell Aerospace, 500 F.2d at 923; see also Local Union No. 251 v. Narragansett Improvement Co., 503 F.2d 309, 311-13 (1st Cir. 1974). In Narragansett, the company was aware of the insufficiency of its records regarding the employee’s conduct. The company also presented no evidence that witnesses were unavailable to appear at the arbitration hearing. In this instance the arbitrator’s refusal to delay the hearing did not deprive the company of a fundamentally fair hearing. Id.
142. Bell Aerospace, 500 F.2d at 923.
143. Id. The arbitrator’s duty is to disclose any dealing that might create an impression of possible bias. See Commonwealth Coatings Corp., 393 U.S. at 149. Once the arbitrator has complied with this requirement, a court’s role in determining partiality is significantly reduced since the parties have the opportunity to reject the arbitrator prior to the hearing. See In re Sanko S.S. Co. & Cook Indus. Inc., 495 F.2d 1260, 1264 (2d Cir. 1973).
144. Bell Aerospace, 500 F.2d at 923.
The court held that the award was ambiguous on its face and remanded the case to the district court for selection of a new arbitrator, since the previous arbitrator was unable to render a definite award after two attempts. If the parties could not agree on a new arbitrator, the district court was to appoint one.

The Eighth Circuit Court of Appeals applied both the Enterprise Wheel standard and the section 10 standard in Grahams Service Inc. v. Teamsters Local 975. In Grahams, an employee was discharged for committing a major violation of the collective bargaining agreement. The employee filed a grievance against Grahams. The arbitrator ruled that the company failed to prove that the employee was guilty of a major violation warranting immediate discharge. Since the employee was not guilty of a major violation, he could not be discharged without a prior written warning. By discharging the employee without giving the required warning, the company violated the collective bargaining agreement.

The company alleged that the arbitrator's refusal to consider evidence of the employee's work record constituted misconduct by the arbitrator. The arbitrator had excluded notarized letters pertinent-

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145. See id. To determine if the award is definite, the court is required to read and analyze the award. In this respect it resembles the Enterprise Wheel test. The difference between Bell Aerospace and Enterprise Wheel is that under Bell Aerospace, a court does not have to determine if the award draws its essence from the collective bargaining agreement. In other words, the entire award does not have to be free of ambiguity, but a court must be able to find that the award is clear regarding the heart of the dispute.

146. Id. at 924-25.

147. Id. at 925.

148. 700 F.2d 420 (8th Cir. 1982). Although the court stated that its review was limited to determining whether the award drew its essence from the collective bargaining agreement, id. at 422, the court did not analyze how the misconduct fit into the Enterprise Wheel standard.

149. Id. at 421. The clause provided:

The Employer shall not discharge any employee without just cause and shall give at least one warning notice to the employee in writing of the complaint. A copy of the warning notice must also be sent to the Union, except that no warning notice need be given to the employee before he is discharged if the cause of such discharge is dishonesty, major violation of the company rules that do not conflict with this Agreement, or drinking while on duty. Any employee may request an investigation as to his discharge and should the investigation prove that an injustice has been done an employee, he shall be reinstated and compensated at his usual rate of pay while he has been out of work.

Id.

150. Id. at 422.

151. See id.

152. Id.; see also supra note 149 (pertinent text of collective bargaining agreement).

153. 700 F.2d at 422; see also supra note 149 (pertinent text of collective bargaining agreement).

154. 700 F.2d at 422.
ing to the employee's work record, which were offered by the company in lieu of testimony, and also refused to delay the hearing to allow the company to produce witnesses in lieu of the letters.\textsuperscript{155} Company representatives did, however, testify regarding the specific violation considered by the arbitrator.\textsuperscript{156}

On review, the court held that the arbitrator properly considered two issues: whether the employee committed a major violation justifying immediate discharge, and if not, whether the company gave a prior written warning.\textsuperscript{157} Considering these narrow issues, the court stated that the employee's general work record was not crucial to the arbitration proceeding.\textsuperscript{158} Thus, the arbitrator's refusal to consider the employee's work record did not deprive the company of a fundamentally fair hearing.\textsuperscript{159}

The court concluded that the arbitrator's award was enforceable.\textsuperscript{160} According to the court, Grahams may have had proper cause to discharge the employee.\textsuperscript{161} The propriety of the discharge, however, was left to the arbitrator.\textsuperscript{162} The court stated that it would be improper to interfere with the arbitrator's determination.\textsuperscript{163} 

Bell Aerospace and Grahams demonstrate how the section 10 standard of review may be applied to review of labor arbitration awards. Both decisions analyze the arbitration proceedings to assure that they were conducted fairly.\textsuperscript{164} This analysis varies from the Enterprise Wheel standard which focuses solely on the arbitrator's award.\textsuperscript{165}

III. THE ADOPTION OF SECTION 10 AS THE STANDARD OF REVIEW IN LABOR ARBITRATION

A. Limitations of the Enterprise Wheel Standard

The primary problem in applying the Enterprise Wheel standard is the type of analysis it requires. First, the court must review the col-

\textsuperscript{155} Id. at 422-23.
\textsuperscript{156} Id.
\textsuperscript{157} See id. at 422.
\textsuperscript{158} Id. at 423.
\textsuperscript{159} Id. (footnote omitted). Not all members of the court endorsed the application of the Arbitration Act. The concurring opinion stated, "I would make it 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 (John Gibson, J., concurring).
\textsuperscript{160} Id. at 423.
\textsuperscript{161} Id.
\textsuperscript{162} See id.
\textsuperscript{163} Id.
\textsuperscript{164} See id.; Bell Aerospace, 500 F.2d at 923.
\textsuperscript{165} Compare Grahams, 700 F.2d at 422-23, and Bell Aerospace, 500 F.2d at 923, with Lackawanna Leather Co., 706 F.2d at 230-32 and Litton, 704 F.2d at 395-99; see also supra notes 21-29 and accompanying text.
lective bargaining agreement. Second, the court must review the arbitrator's opinion and award. Finally, the court must compare the collective bargaining agreement to the arbitrator's decision and award to determine whether the award draws its essence from the agreement.

The difficulty with the Enterprise Wheel analysis is that courts might use the same analysis if they were allowed to review the arbitrator's interpretation of the collective bargaining agreement. The logical method for such a review would be for the court to read the collective bargaining agreement and the arbitrator's award. The court would then compare the arbitrator's interpretation of the agreement with its own interpretation. If the court concluded that the arbitrator incorrectly interpreted the agreement, the court would not enforce the award.

The comparison of these two analytical processes reveals that the Enterprise Wheel analysis is nearly identical to an impermissible review of the merits. Both analyses require the court to compare the collective bargaining agreement and the award. The factor which separates the two is that in applying the Enterprise Wheel standard, the reviewing court may not substitute its interpretation of the agreement for the arbitrator's. Nevertheless, this subtle distinction may inadvertently lead to a review of the merits of the award.

166. See Enterprise Wheel, 363 U.S. at 594-95.
167. See id. at 597-98.
168. Id. at 597; see also Daniel Constr. Co., 738 F.2d at 300-01; Riceland Foods, 737 F.2d at 759-60; Sho-Me Power Corp., 715 F.2d at 1325-28; St. Louis Theatrical Co., 715 F.2d at 407-09; Lackawanna Leather, 706 F.2d at 230-32; Litton, 704 F.2d at 395-99; Vulcan-Hart Corp., 671 F.2d at 1184-85.
169. The Enterprise Wheel Court seemed to recognize this similarity and cautioned courts not to review the merits of the arbitrator's award. See 363 U.S. at 596, 599.
170. See infra note 173.
171. Kaden, supra note 2, at 270-71 (courts frequently review the merits).
172. See Enterprise Wheel, 363 U.S. at 599.
173. Professor Kaden recognized this possibility in his comment on the Eighth Circuit case, Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964):

[T]he Eighth Circuit concluded that an arbitrator lacked authority to measure the degree of discipline warranted by an infraction. The agreement provided that the employer's disciplinary action could be reversed only if it were found that the complaint was 'not supported by the facts, and that the management ha[d] acted arbitrarily and in bad faith or in violation of the express terms of this [a]greement.' Curiously, although the arbitrator had accepted the factual basis advanced by the company for its action, the court itself examined the reasons given for discharge. If the arbitrator was not authorized to determine whether the discharge was arbitrary when the facts showed an infraction, it is difficult to see why the court found a need to explore the company's reason. On the other hand, if the court was testing the arbitrator's determination of 'arbitrariness' in the manner of discipline, its inquiry seems to have gone more to the merits of his award than to his power to reach it.
The language of *Enterprise Wheel* poses additional problems in applying the *Enterprise Wheel* standard. In several Eighth Circuit decisions the court uses other language from *Enterprise Wheel* in an attempt to clarify the standard.\(^{174}\) This language, however, adds nothing to the *Enterprise Wheel* analysis.\(^{175}\) To say that an arbitrator may not “dispense his own brand of industrial justice” is to describe an award that does not draw its essence from the collective bargaining agreement.\(^{176}\)

**B. Benefits of Section 10**

The *Enterprise Wheel* standard makes no explicit provision for review based on misconduct of the parties or the arbitrator. Yet an award based on misconduct or fraud should not be allowed if the integrity of arbitration is to be preserved.\(^{177}\) In contrast, the Arbitration Act provides a basis for vacating an arbitration award if misconduct is present.\(^{178}\) These standards are available and workable, as the Eighth Circuit discovered in *Grahams*.\(^{179}\)

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\(^{174}\) See Daniel Constr. Co., 738 F.2d at 301 (“The arbitrator stayed within the areas marked out for his consideration”); St. Louis Theatrical Co., 715 F.2d at 407 (“When the arbitrator’s words manifest an infidelity to his obligation, courts have no choice but to refuse enforcement of the award”).

\(^{175}\) By using the language of *Enterprise Wheel*, a court may state that “refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.” 363 U.S. at 596. At the same time, “When the arbitrator’s words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.” *Id.* at 597. Yet, “so far as the arbitrator’s decision concerns construction of the contract, the courts have no business overruling [the arbitrator] because their interpretation of the contract is different.” *Id.* at 599.

According to the Court, the role of the arbitrator is to “settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in the particular agreements.” *Id.* at 596. Another case in the Steelworkers Trilogy comments: “The labor arbitrator’s source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.” *Warrior & Gulf Navigation*, 363 U.S. at 581-82. Yet at the same time, “an arbitrator . . . does not sit to dispense his own brand of industrial justice.” *Enterprise Wheel*, 363 U.S. at 597. Thus, depending on its philosophy regarding labor arbitration, a court may use the language of the Steelworkers Trilogy to support a variety of results. This problem is exacerbated by the endless variety of provisions in collective bargaining agreements.

\(^{176}\) This language is part of the section that defines the parameters of the arbitrator’s power. See *Enterprise Wheel*, 363 U.S. at 597. The entire section emphasizes that the arbitrator must interpret and apply the collective bargaining agreement. See *id.*

\(^{177}\) See *infra* note 194.

\(^{178}\) 9 U.S.C. § 10(a)-(c).

\(^{179}\) *Grahams*, 700 F.2d at 422-23; see, e.g., *Merit Ins. Co.*, 714 F.2d 673; *Middlesex*
Under section 10 of the Arbitration Act, the union or the company may appeal if it believes it was denied a fundamentally fair hearing because of fraud, partiality, or evidentiary error. The aggrieved party may claim that some specific behavior of the arbitrator was improper and prejudiced its rights. The appellate court may focus on the section 10 standard, relevant case law, and the arbitrator's conduct in considering the appeal.

In contrast, the Enterprise Wheel standard does not provide a procedural basis for appeal. Instead of stating the procedural basis directly, a party is forced to argue that the award does not draw its essence from the collective bargaining agreement. The alleged defect, however, may not appear on the face of the award. The award may appear to be firmly based on the collective bargaining agreement, yet the arbitrator may have had some business dealings with one of the parties. If the relationship creates the appearance of partiality the award should be vacated. Enterprise Wheel, however, fails to expressly provide for this defect.

Mut. Ins. Co., 675 F.2d 1197; Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc., 607 F.2d 649, 651 (5th Cir. 1979); Narragansett, 503 F.2d at 311-12; Bell Aerospace, 500 F.2d at 923.

But see Kaden, supra note 2, at 297.

Narragansett, 503 F.2d at 311-12.

9 U.S.C. § 10(a)-(c).

See, e.g., Grahams, 700 F.2d at 422-23; Bell Aerospace, 500 F.2d at 922-23.

But see Kaden, supra note 2, at 297.

See Commonwealth Coatings Corp., 393 U.S. at 147-50 (appearance of impropriety established by failure to disclose business relationship justifies vacating the arbitrator's award).

9 U.S.C. § 10(b).

While the spirit of Enterprise Wheel seems to indicate that misconduct should not be tolerated, the cases do not formulate any helpful standards for reviewing misconduct. Professor Kaden finds a "mandate acknowledged in Enterprise Wheel to protect the procedural integrity of the process by refusing enforcement of awards tainted by partiality or corruption." Kaden, supra note 2, at 297.


Defendant's final point is that this case cannot be sent to arbitration because no arbitrator has been named . . . . But this defect can be and should be cured by this Court adopting as a guiding analogy the practice under § 5 of the Federal Arbitration Act . . . . If the parties are unable within ten days to agree upon an arbitrator, this Court will appoint one. Plaintiff is directed to prepare a suitable decree adopting, whenever practical, the forms and procedures which would be used if this case fell within the scope of the Federal Arbitration Act.

American Thread, 113 F. Supp. at 142.

One commentator stated that the Court's approval of the reasoning in American Thread authorizes the use of the Arbitration Act as a "guiding analogy." O. Fair-
The section 10 standard of review is also consistent with the public policy of arbitration. Arbitration, which provides a grievance procedure, is crucial to the policy of preserving economic peace. In order to encourage arbitration, the procedure must be fair. Otherwise, parties would use economic warfare as a means of asserting their claims. Thus, the section 10 review standard promotes the public policy of arbitration by assuring a fundamentally fair hearing.

Section 10 of the Arbitration Act encompasses the concerns of the Enterprise Wheel Court. Section 10(d) mandates vacating an award when the arbitrators exceed their powers, or when the award is ambiguous. These are the identical concerns addressed by the Enterprise Wheel Court. In addition, when the Enterprise Wheel Court concluded that the arbitrator's award was ambiguous, the Court remanded the award for clarification by the arbitrator. Section 10(e) provides for further arbitration when directed by the court. Thus, a comparison between the Court's actions in Enterprise Wheel and section 10(d) and (e) shows that the Arbitration Act could have been the basis for the Enterprise Wheel decision.

Weather, supra note 2, at 3-4. This argument is supported by the Court's grant of broad discretion to lower courts in creating substantive labor law. See Lincoln Mills, 353 U.S. at 456-57. Lower courts should be guided by the Labor Management Relations Act and other express statutory mandates in creating federal labor law. Id. at 457. Absent express statutory guidance, courts should look to the policy of relevant legislation and fashion an appropriate remedy. Id. Finally, the Court encouraged "judicial inventiveness" in solving labor problems. Id.
C. Adoption of Section 10

The Eighth Circuit Court of Appeals should adopt the section 10 standard of review for application to appeals of labor arbitration awards. Section 10 can be applied consistently with the Enterprise Wheel standard and provides procedural protections lacking in the Enterprise Wheel standard. By adopting section 10, the public policy favoring arbitration as the means for resolving labor disputes is served by enhancing the integrity of the arbitration process.

Lincoln Mills provides the requisite authority to adopt the section 10 standard of review. Lincoln Mills encouraged courts to shape substantive labor law by looking to analogous federal labor laws. The limitations of the Enterprise Wheel standard, together with the benefits of section 10, justify reliance on the standard of review provided by section 10.

By adopting section 10, the court’s inquiry becomes specific: Was there substantial misconduct or evidentiary error which deprived a party of a fundamentally fair hearing? Is the award final and definite? Did the arbitrators exceed their powers? This last question is difficult because it requires a comparison of the collective bargaining agreement and the award, similar to the Enterprise Wheel analysis. This problem can be overcome by applying the section 10 standard progressively. If an award meets the procedural requirements of section 10(a)-(c) and is definite, the award should be presumed valid. Power to settle the grievance is vested with the arbitrator, not the courts. Thus, the award should be vacated because the arbitrator exceeded his or her power only if the award manifests complete disregard for the agreement.

193. See 9 U.S.C. § 10 (a)-(c). For cases demonstrating how the procedural protections of § 10 can be applied to labor arbitration, see Grahams, 700 F.2d at 422-23; Narrangansett, 503 F.2d at 312; Bell Aerospace, 500 F.2d at 923.

194. Even though arbitrators are selected because of their knowledge of the industry rather than procedure, they may err. By providing grounds for vacating an award, Congress recognized that although the parties have chosen arbitration, the procedures must not be entirely unchecked.

195. See F. ELKOURI & E. ELKOURI, supra note 2, at 28; Pirsig, supra note 20, at 371-72.


197. See F. ELKOURI & E. ELKOURI, supra note 2, at 28; Pirsig, supra note 20, at 371-72.

198. Markham, supra note 6, at 643.

199. See id. § 10(a)-(c).

200. See id. § 10(d).

201. Id.

202. See supra notes 166-68 and accompanying text.

203. The Supreme Court stated that an arbitrator’s decision in arbitrating a dispute under the Securities Act of 1933 would not be subject to judicial review for error unless the award was in manifest disregard of the law. Wilko v. Swan, 346 U.S.
By adopting section 10, the Eighth Circuit stands to gain several benefits. Applying section 10 properly defines the role of the court and the arbitrator. The essential elements of *Enterprise Wheel* will be preserved and enhanced by providing procedural protections. The procedural emphasis of section 10 provides specific grounds for appeal, which will benefit both the arbitration process and the courts.

**Conclusion**

Arbitration is the preferred method of resolving labor disputes. The *Enterprise Wheel* standard, however, does not adequately serve the public's interest in proper arbitration procedures. The standard invites judicial intervention in the arbitration process and diminishes the autonomy granted arbitration.

The section 10 standard of review provides for procedural review of arbitrators' awards. By adopting this standard, the Eighth Circuit Court of Appeals would uphold the precedent of *Enterprise Wheel* and further the public policy of arbitration. The standard of judicial review provided by section 10 would enhance the focus in reviewing arbitration awards and ultimately simplify the judicial task.

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427, 436-37 (1953). The primary source of law in labor arbitration is the collective bargaining agreement. Thus, manifest disregard of the collective bargaining agreement would be an instance of the arbitrator exceeding his or her power. Due to the public policy favoring arbitration, manifest disregard of the agreement should be the only grounds for finding that the arbitrator exceeded his or her power.

204. *See supra* notes 190-91 and accompanying text.

205. *See supra* notes 198-201 and accompanying text.