The Public Policy Exception to Arbitration Award Finality

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Over the past decade, a series of Supreme Court decisions have erected walls around the labor arbitration process. These walls both have isolated the arbitration process from a category of workplace disputes, and have protected arbitration awards from intrusive court review. In this paper we will not discuss the impact of the Court’s preemption decisions on the diaspora of workplace disputes that have a statutory point of reference. Suffice it to say this exercise in “federalism” has enmeshed the state courts, and indirectly through the doctrine of pendent jurisdiction, the federal courts, in a wide variety of employee disputes that raise issues of employee discipline ordinarily identified with the grievance-arbitration procedure. This paper, rather, will analyze the defensive walls that protect arbitration awards from judicial attack, particularly on theories of “public policy.”

1 The author thanks his colleague Amy Longenecker for her work in the preparation of this paper.
**United Paperworkers Int’l Union v. Misco** and, most recently, **Eastern Associated Coal Corp. v. United Mine Workers of America** have been occasions for the conceptual convergence of the “strict constructionists” and the adherents of a strong policy favoring collective bargaining. The former, as reflected in Justices Scalia and Thomas’ concurrence in **Eastern**, believe in the virtual sanctity of the right to contract, and the latter, most articulately presented in the writings of Judge Harry Edwards, the importance of arbitration to the arbitration process. This convergence has resulted in limiting judicial review of arbitration decisions generally, and on public policy grounds particularly. The employer and union are held to what they agreed to during the bargaining process -- an arbitration decision.

This paper will (1) briefly survey the law establishing arbitral finality; (2) discuss the pre-Eastern precedent that evolved the public policy challenge to arbitration awards; (3) analyze the Supreme Court’s recent **Eastern Associated Coal** decision; and (4) consider the practical implications of that decision for labor law practitioners, particularly those working under the Railway Labor Act.

(1) The Law Establishing Arbitral Finality

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4 See id. at 469 (Scalia, J. dissenting).

Court decisions dealing with arbitration awards agree on the fundamental concept that the parties to a contract define the terms of that contract through negotiation, and should thereafter expect to be bound by those terms. This principle of contract finality is a basic axiom of labor law. It is embodied in statutory provisions creating “the duty to bargain.”6 The contractual arbitration provisions are an offshoot of the duty to bargain. For example, the Railway Labor Act (“RLA”) requires that disputes over interpretation of a collective bargaining agreement (“minor disputes”) be resolved through arbitration. To accomplish this, the Act provides for Adjustment Boards (“Boards”) as the mandatory and exclusive forums for the resolution of minor disputes in the railway industry, and requires System Boards in the airline industry. A party seeking either enforcement or reversal of an award may file a petition in District Court. Under the RLA an award may only be set aside in cases of fraud by a Board member, an award which exceeds the scope of the Board’s jurisdiction, or an award which fails to comply with the RLA.7

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7 See 45 U.S.C. § 153, First (p) and (q) (1994).
The Supreme Court has stated that under the RLA, the scope of judicial review of arbitration awards is “among the narrowest known to the law.”

Despite the finality of arbitration awards and the narrow basis for review, from time to time employers and unions seek judicial review of these “binding” decisions. Their efforts are usually unavailing, and courts have frequently held that arbitration decisions are part and parcel of the collective-bargaining agreement. If the parties could lawfully agree to the outcome in the first place, there is no basis to invalidate an award to the same effect, unless it is tainted in a manner described in the statute. In addition to granting deference to the knowledge and skill of the arbitrators, courts are also reticent to step into the labor-management relationship and impose their values on contracting parties.

Parties unhappy with arbitration awards have sought to add new bases for review, and the courts have occasionally cooperated. The Supreme Court has recognized reviewability in cases where the award did not “draw its essence from the collective bargaining agreement.”

Lower courts have found that an NRAB award may be challenged for reasons of due process. Notwithstanding these additional bases for review, the courts have repeatedly asserted that all the exceptions are very limited. When management and labor negotiate a collective bargaining agreement, they select arbitrators or “contract readers” of their own choosing. These arbitrators almost invariably draw their awards

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10 See e.g., Elmore v. Chicago & I.M.R.G., 782 F.2d 94 (7th Cir. 1986) (Posner J.); Shafi v. PLC British Airways, 22 F. 3d 59 (2d Cir. 1994); English v. Burlington Northern RR Co., 18 F.3d 741 (9th Cir. 1994).

11 THEODORE J. ST. ANTOINE, Judicial Review of Labor Arbitration Awards: A
from the essence of the agreement, and they rarely reflect the reader’s “own notions of industrial justice.”

In employee discharge cases, employers faced with an award reinstating an employee discharged for misconduct have sought to establish a “public policy” basis for challenge. It is not surprising that this effort has met strong headwinds and has had only limited success.


First, because of the nebulous nature of the term “public policy”, the courts have been sensitive to the possibility that this exception could easily get out of hand and result in an unacceptable level of judicial second-guessing.13 Second, the courts, in reviewing an award, have focused on whether the award itself violates public policy, not whether the behavior of the employee does so. By focusing public policy review on the award, a court is ordinarily examining that proprietary of reinstatement rather than the nature of the misconduct. Is it against public policy to put the employee back to work?

For a period of time during the 1970's and early 1980's, there were a series of court decisions that were relatively hospitable to arguments that awards violated public policy.14 This trend suffered a setback in 1983 when the United States Supreme Court narrowed the standard in W.R. Grace and Co. v. Local Union 759,15 and a second setback in the 1987 Misco decision16. In both these cases the Court adopted the notion that the courts were not present at the bargaining table, and should not step in when a party is unhappy with what it agreed to, albeit through arbitration. These decisions,

13 See Misco, 484 U.S. 29, 43, quoting Muschany v. United States, 324 U.S. 49 (1945) (“As the term public policy is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy.”). Muschany, 324 U.S. at 66.


together with the Court’s recent opinion in Eastern, have delineated a public policy exception that allows review where the award or the remedy is unlawful. At the same time they close but do not shut the door on court review in cases where reinstatement does not require the employer to violate some law or regulation.

a. W.R. Grace v. Local Union 759

In W.R. Grace and Co. v. Local Union 759, the Supreme Court held that a court may not overrule an arbitrator’s decision simply because it believes its own interpretation of the collective bargaining agreement would be a better outcome.\(^{17}\) The arbitration process is a choice made by the parties, and the arbitration award is part of their agreement. With respect to public policy considerations, the court stated that “if the contract as interpreted...violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.”\(^{18}\)


\(^{17}\) 461 U.S. 757 (1983).

Several years after the *Grace* decision, the Supreme Court again dealt with the public policy exception in *United Paperworkers International Union v Misco, Inc.*19 The dispute in *Misco* arose as a result of an agreement which listed possession or use of a controlled substance on company property as a reason for discharge. An employee, Isaiah Cooper, was caught in the backseat of a colleague’s car in the company parking lot in which there was marijuana smoke and a lighted marijuana cigarette in the ashtray. The police also searched Cooper’s car and found traces of marijuana. The arbitrator concluded there was no just cause for the discharge and ordered that he be reinstated. On a petition to vacate the arbitration award, the District Court found that the award violated public policy. The Court of Appeals affirmed, ruling that Cooper’s “reinstatement would violate the public policy against the operation of dangerous machinery by persons under the influence of drugs.”20

The Supreme Court first held that the lower court’s decision to revoke the award on public policy grounds was erroneous because the policy on which such revocation relies must be “ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.” The Court will not allow a party to rely on “general considerations of supposed public interest” as a rationale for overturning an otherwise valid award. The Court of Appeals did not review existing laws and legal precedents to substantiate its common sense view that there was such a public policy. Secondly, the Court concluded that there was no basis in the arbitrator’s findings to conclude that the employee was or would be on the job while under the influence. The Court found the public policy exception inapplicable because the link between the employee’s action and the alleged public policy was too tenuous. Thus in *Misco* the Court continued to define and limit the exception it recognized in *Grace.*


20 United Paperworkers Int’l Union v. Misco, 768 F.2d 739 (5th Cir. 1987).
In his concurring opinion in *Misco*, Justice Blackmun pointed out that the holding does not reach the issue on which *certiorari* was granted: Whether a court may refuse to enforce an arbitration award rendered under a collective bargaining agreement only when the award itself violates public policy or requires that the employer participate in unlawful conduct.\(^{21}\) Thus, although the *Misco* decision walled off arbitration awards from most attacks, it left a gap in the wall without disclosing whether it was an entry way or a blind alley.

After the Supreme Court’s decision in *Misco*, the lower federal courts continued to explore the limits of the public policy exception. Was there a possibility of challenge absent a statutory violation? As is often the case, there were divergent results. The United States Court of Appeals for the Ninth Circuit interpreted the standard to mean that a court could only set aside an award on public policy grounds if “there exists an ‘explicit, well defined’ public policy that specifically *militates* against” the award.\(^{22}\) The Court’s opinion seemed to understand the public policy as rooted in the Federal Railway Administration’s drug regulations. Was the reinstatement award consistent with that regulatory scheme? The court remanded a case back to the National Railroad Adjustment Board to make a factual finding as to the employee’s guilt or innocence under the regulations after he tested positive for drug use, but claimed the drug charges were false. In another decision, the First Circuit held that an award reinstating an employee who tested positive for cocaine use violated public policy.\(^{23}\) The “public policy” was the performance of safety-sensitive jobs while under the influence

\(^{21}\) See id. at 46 (Blackmun, J., concurring).

\(^{22}\) See United Transportation Union v. Union Pacific Railroad Co., 116 F.3d 430 (9th Cir. 1997) (emphasis added).

\(^{23}\) See Exxon Corp. v. Esso Worker’s Union, Inc., 118 F.3d 841 (1997) (citing
of drugs or other intoxicants. The opinion looked to the misconduct and its relation to the public policy raised in the challenge.

See id. at 847.
(3) **THE SUPREME COURT’S *EASTERN ASSOCIATED COAL* DECISION**

In *Eastern Associated Coal Corp. v. United Mine Workers of America*, the Court decided that the public policy exception is not just reserved for arbitration awards that violate positive law. But the extra space may be mostly illusion.

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The Court approved the substance of the district court’s test that a reviewing court must find that “an explicit, well defined and dominant public policy exists and the policy is one that specifically militates against the relief ordered by the arbitrator” and that “[a] well defined and dominant public policy is one that may ascertained by reference to the laws and legal precedents.” The operative language of Supreme Court makes a subtle semantic shift and becomes “the award must run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law. This change in language – from “as ascertained by reference to laws and legal precedent” to “as ascertained by reference to positive law” narrows the exception. Under the Court’s standard, the party challenging the award must not only identify the explicit and well-defined public policy, but also show that the policy is embodied in statutes or regulations. In addition, the award must be contrary to the letter or spirit of the policy.

In Eastern, an employee was discharged after he tested positive for marijuana on two occasions over a 15 month period. The Court agreed that there is a strong public policy against drug use by drivers, but said that the award conditionally reinstating the driver does not violate the relevant

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28 Black’s Law Dictionary defines “positive law” as “law actually and specifically enacted or adopted by proper authority of the government of an organized jural society.” BLACK’S LAW DICTIONARY 1162 (6th ed. 1990). It exists in contrast to the common law that is developed by the courts on a case by case basis. See generally, Linda Meyer, “Nothing We Say Matters”, Teague and the New Rules, 61 U.Ch. L.R. 423, 460 (1994).
legislation and regulations. The underlying positive law does not preclude reinstatement of an employee in the grievant’s circumstances. In fact, rehabilitation is part of the regulatory structure.

The majority opinion declines to hold that the challenged award must violate positive law in order to be vulnerable on public policy grounds. It leaves, however, little room for a public policy challenge that does not involve a violation of positive law. Justice Scalia’s concurring opinion chides the majority for leaving this illusive opening, which will only continue to result in lower court decisions that are contrary to the holdings in Eastern and Misco.

(4) THE PRACTICAL IMPLICATIONS OF EASTERN ASSOCIATED COAL.

The Court’s decision in Misco made it more difficult to challenge an arbitration award on public policy grounds. The requirement of presenting an “explicit,” “well-defined” and “dominant” public policy doomed most public policy challenges. Eastern does not make the challenging attorney’s task any easier. The Court expressly adopts the adjectival hurdles erected in Misco, and then focuses on “positive law” rather than a larger universe of public policy. The party challenging the award must show that the award runs contrary to an explicit, well-defined, and dominant public policy as ascertained by reference to positive law.29 The addition of the “positive law” language narrows the exception by requiring courts to look to statutes and regulations. Two Justices would further narrow the zone for challenge by requiring that the award or compliance “violates” positive law.30

29 See Eastern, 121 S. Ct. at 467 (emphasis added).
30 Id. at 469 (Scalia and Thomas, JJ., concurring).
The *Eastern* decision is important because of its facts – the driver, an employee in a safety-sensitive position, was reinstated to his driving position despite the fact that he twice tested positive for marijuana use. The Court’s willingness to respect this arbitration decision even when there appears to be such a clear connection between drug use and public safety suggests that these cases will not receive special treatment based on a presumed higher level of public interest in maintaining rail or air safety. The airline and railroad industries have testing policies similar to that relied on in *Eastern*. A court is likely to look at the rationale behind the testing policy to determine whether it is rehabilitative or punitive. Unless the employer can show that the regulations reflect a policy that implicitly or explicitly precludes reinstatement, a public policy challenge to the award is unlikely to be successful.

An attorney considering a challenge to an arbitration award should explore the following approaches with descending optimism:

A. Will compliance result in employer violation of a statute or regulation?

B. Is there a statute or regulation whose provisions are incompatible with the award, even where compliance would not entail a “violation”?

C. Does the case involve a statute or regulation, the purposes of which would be incompatible with compliance?

D. Are there other sources of “quasi-positive law,” e.g., governmental reports and statements, that are at odds with compliance with the award?

E. Are there fundamental societal values offended by the award that make it antagonistic to public policy?
The Court’s analysis of the public policy exception in the Eastern case can be viewed as hostile to the public policy exception. Alternatively, it can also be viewed as respecting the grievance arbitration process as an integral part of the labor management relationship.\textsuperscript{31} The decision stands as a caution to employers and unions; they will be held to what they have written to in their collective bargaining agreement. Its most important lesson is that the parties need to protect their core values in the collective bargaining process, as difficult as that may be in the hurly-burly of negotiations. The courts will seldom honor values that are not reserved by the parties themselves in their agreement.

\textsuperscript{31} See Humphrey v. Moore, 376 U.S. 935 (1964) (Goldberg, J, concurring).