CHAPTER 4

ENFORCEABILITY OF AWARDS

I. PUBLIC POLICY POST-*MISCO*

JAN VETTER*

Paperworkers v. Misco[1] is the second case in which the Academy has filed an *amicus curiae* brief. The first was *AT&T Technologies v. Communications Workers*,[2] decided in the Supreme Court of the United States the previous year. I should acknowledge that my name appears on the *Misco* brief, as it does also on the brief in *AT&T Technologies*, since I am to comment on *Misco* this afternoon. I want to add immediately that my part in each case was hardly more than that of witness to the exercise of remarkable skills of analysis and argument by the main author of both briefs, my colleague David Feller.

This is a role I have played many times and always find instructive. The first such occasion was 20 years ago, when we joined in representing a group of students whom the University administration for some reason had accused of allegedly disruptive behavior at the site of job interviews conducted by Dow Chemical Company and the Central Intelligence Agency (CIA). Our clients were expelled. In that case, however, I played a consequential part, whereas on the two recent occasions, Dave put forward the position of the Academy with considerable success.

The Academy does not ordinarily state any view on the correct outcome of litigated cases because to do so is thought to be inconsistent with its members' position as neutral decision makers in union-management controversies over the interpretation and application of collective bargaining agreements. Exceptions were made in *AT&T Technologies* and *Misco* because in these cases there seemed to be called into question basic principles that have given structure to the law of labor arbitration for over a quarter century. Since these principles have gained wide accept-

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*Professor of Law, University of California at Berkeley.
[1]56 USLW 4011, 126 LRRM 3113 (1987).
[2]475 U.S. 643, 121 LRRM 3329 (1986).

ance in the industrial relations community, it was not a partisan act to urge that the Supreme Court reconfirm them but rather a position taken in the general interest.

The principles in question are those of the *Steelworkers Trilogy* of 1960,[3] governing the relation of the courts to labor arbitration. Briefly put, these are (1) that under a so-called standard arbitration clause (providing for arbitration of all disputes over interpretation and application of the agreement), a court is to compel arbitration whenever the party seeking it makes a claim based on the agreement; and (2) that on review of arbitral awards a court is to uphold the award whenever it is based on the arbitrator's construction of the agreement. The first principle seemed to be threatened in *AT&T Technologies*; the second, in *Misco*. In each case the Court's opinion appeared to dispel the threat and recommit the Court to the principles of the *Trilogy*.

Misco presented a further issue: the question of "when courts may set aside arbitration awards as contravening public policy."[4] The Court had dealt with this problem once before in *W.R. Grace*.[5] There the Court said, "As with any contract . . . a court may not enforce a collective bargaining agreement that is contrary to public policy," and "if the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it."[6] The Court added that "such a public policy 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.'"[7] This standard did not prevent conflict among the courts of appeals on the scope of their power to override arbitral awards as contrary to public policy.[8]

In one case the court upheld an arbitrator's award ordering immediate payment of delinquent pension contributions over the employer's objection that the award conflicted with an Internal Revenue Service waiver of a statutory minimum annual funding requirement obtained by the employer under a provi-

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[3]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[4]*Paperworkers v. Misco, Inc.*, *supra* note 1, 126 LRRM at 3116.

[5]*W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 113 LRRM 2641 (1983).

[6]*Id.* at 766.

[7]*Id.*, quoting from *Muschany v. U.S.*, 324 U.S. 49, 66 (1945).

[8]*See* the cases cited in *Paperworkers v. Misco*, *supra* note 1, 126 LRRM at 3116 n.7.

sion of the Employee Retirement Income Security Act.[9] In another case the court vacated an award upholding a food processor's rule forbidding employees from reporting unsanitary conditions directly to Department of Agriculture inspectors.[10]

However, most of the cases dealt with discharge of employees whom the arbitrator had ordered reinstated. The reader meets in these cases a somewhat disconcerting collection of part-time drug dealers, alcoholic airline pilots, embezzling postal clerks, and temporarily berserk subordinates.[11] Sometimes the courts upheld the award and sometimes they set it aside, but no clear line emerged between one set of cases and the other.

The decision in *Misco* left the controversy over public policy where it found it. The grieving employee in that case had been discharged for violating a rule against possession of drugs on plant premises. The arbitrator ordered his reinstatement, holding that the employer had failed to show by properly admissible evidence that the employee had broken the rule. The lower courts vacated the award, with the court of appeals taking the view that the award conflicted with public policy against the operation of dangerous machinery by persons under the influence of drugs or alcohol.

The Supreme Court upheld the arbitrator and reversed the lower courts. Justice Byron White's opinion resists easy summary but also fails to reward a more detailed paraphrase. For present purposes it may be enough to say that the lower courts had insufficient evidence to conclude that the employee ever had or would operate dangerous machinery under the influence of drugs or alcohol. Thus, there was no factual predicate for the conflict the court of appeals identified between the award of reinstatement and public policy.

At the time of the *Misco* decision, there were pending in the Supreme Court two other cases that involved the role of public policy in judicial review of arbitral awards. One of these, *U.S.*

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[9]*Automobile Workers v. Keystone Consol. Indus.*, 793 F.2d 810, 123 LRRM 2200 (7th Cir. 1986).

[10]*Meat Cutters Local P-1236 v. Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982).

[11]*S.D. Warren Co. v. Paperworkers*, 815 F.2d 178, 125 LRRM 2086 (1st Cir.), *vacated and remanded*, 56 USLW 3414, 126 LRRM 3360 (1987), *on remand*, 845 F.2d 3, 128 LRRM 2175 (1st Cir. 1988); *Northwest Airlines v. Air Line Pilots*, 808 F.2d 76, 124 LRRM 2300 (D.C. Cir. 1987), *cert. denied*, 128 LRRM 2296 (1988); *U.S. Postal Service v. Postal Workers*, 736 F.2d 822, 116 LRRM 2870 (1st Cir. 1984); *E.I. du Pont de Nemours & Co. v. Grasselli Indep. Employees Ass'n*, 790 F.2d 611, 122 LRRM 2217 (7th Cir.), *cert. denied*, 123 LRRM 2592 (1986).

Postal Service v. National Association of Letter Carriers,[12] was argued on April 20, 1988. On April 27 the Court dismissed certiori as improvidently granted,[13] thus deciding, for unexplained reasons, not to review the case. In the other case, *Northwest Airlines v. Air Line Pilots Association*,[14] the Court denied the employer's request for review on May 16.[15] For the time being, then, the place public policy ought to have in judicial review of arbitral awards remains unclear and controversial. Meanwhile, apparently inconsistent decisions continue to accumulate in the lower courts.[16]

Probably the simplest way of stating the issue is to ask whether public policy should justify vacating an award only when the agreement as construed or applied by the arbitrator is illegal or when the award directs an unlawful act.[17] To illlustrate: in one case the court interpreted an arbitrator's award as ordering reinstatement of an employee who had participated in a strike against the Postal Service. Under the United States Code it is unlawful for persons who have participated in strikes against the government to hold government employment, and the court overturned the award on the ground that it ordered an illegal act.[18] In another case an arbitrator directed reinstatement of a Postal Service employee guilty of embezzlement. Although there is no law barring the Postal Service from employing embezzlers, the court vacated the award as contrary to public policy.[19] In the view that restricts public policy to illegality, the first case is correct and the second case wrong.

The more restrictive view has been strongly defended by Judge Harry Edwards of the District of Columbia Circuit and

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[12]*U.S. Postal Service v. Letter Carriers*, 810 F.2d 1239, 124 LRRM 2644 (D.C. Cir.), *cert. granted* (1987).

[13]56 USLW 4362, 128 LRRM 2144 (1988).

[14]*Supra* note 11.

[15]*Id.*

[16]*Compare U.S. Postal Service v. Letter Carriers*, 839 F.2d 146, 127 LRRM 2593 (3d Cir. 1988) *with Stead Motors v. Machinists Lodge 1173*, 843 F.2d 357, 127 LRRM 3213 (9th Cir. 1988); *Iowa Elec. Light & Power Co. v. IBEW Local 204*, 834 F.2d 1424, 127 LRRM 2049 (8th Cir. 1987); *Delta Air Lines v. Air Line Pilots*, 686 F. Supp. 1573, 127 LRRM 2530 (N.D. Ga. 1987).

[17]In *Misco* the Supreme Court, in characterizing the union's position, put the issue as follows: ". . . a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." *Paperworkers v. Misco*, *supra* note 1, 126 LRRM at 3120 n.12.

[18]*Postal Workers v. U.S. Postal Service*, 682 F.2d 1280, 110 LRRM 2764 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200, 112 LRRM 2752 (1983). The statutes involved are 5 U.S.C. §7311 and 18 U.S.C. §1918.

[19]*U.S. Postal Service v. Postal Workers*, *supra* note 11.

Judge Frank Easterbrook of the Seventh Circuit. Judge Edwards has written opinions in two cases that commit his court to the narrow view of public policy, and he has recently given an extended statement of his position in a published lecture.[20] Judge Easterbrook developed his position in a forceful concurring opinion given in a case in which the majority expressed a more expansive conception of public policy.[21]

Although the two judges arrive at a common position, they come to it by different routes. Before his appointment Judge Edwards was a law professor at Michigan and Harvard and a distinguished scholar in labor law as well as an occasional arbitrator. His position reflects the views of an expert in labor arbitration who shares the norms and values of professionals in the field. The autonomy of labor arbitration from judicial oversight stands at the center of the professional view. Broad conceptions of public policy as a basis for judicial review of arbitral awards restrict that autonomy, and this leads Judge Edwards to insist on equating public policy with illegality.

To support his view, Judge Edwards developed an original and technically ingenious argument designed precisely to meet the vaguer or less restrictive conception of public policy. He points out that the effect of invalidating an award on broad public policy grounds is not to forbid the outcome the award directs but rather to protect the employer's exercise of discretion over the matter. Thus, if an employer elects not to discharge an employee who steals company property, the law leaves the employer free to act on this decision. If the employer chooses discharge instead and an arbitrator eventually awards reinstatement, a judge who vacates the award is not saying that public policy demands discharge for theft in the circumstances of the particular case, but that public policy requires that the employer have discretion to discharge or not. It is not clear, Judge Edwards says, why it is in the public interest that employers should have discretion in such cases.

Further, the subject of discipline is, under the National Labor Relations Act (NLRA),[22] included among mandatory subjects of

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[20]*Postal Workers v. U.S. Postal Service*, 789 F.2d 1, 122 LRRM 2094 (D.C. Cir. 1986); *Northwest Airlines v. Air Line Pilots, supra* note 11; Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 Chi.[-]Kent L. Rev. 3 (1988).

[21]*E.I. du Pont de Nemours & Co., supra* note 11, at 617.

[22]29 U.S.C. §151 *et. seq.*

bargaining. It follows that each party is obliged to negotiate on the subject at the request of the other, that the parties could agree either that discharge is or is not an appropriate penalty for theft under varying circumstances, and that the employer may not act unilaterally on the matter. By nullifying an award providing for an outcome that the law allows the parties to reach by agreement, as by a negotiated settlement of a grievance, the judge authorizes the employer to take unilateral action that the NLRA forbids. Thus, Judge Edwards argues that by giving effect to vague notions of public policy that outrun any provision of positive law, judges come in conflict with the clearest possible statement of public policy—the policy expressed in the command of a duly enacted, applicable statute.

Judge Easterbrook was a law professor at the University of Chicago and has been an important contributor to the law and economics movement, writing mainly about antitrust and corporation law. He has given no special attention to labor law, and his advocacy of the narrow view of public policy seems motivated by a general attachment to freedom of contract. As he says, "A power to set aside awards on grounds of public policy, as distinct from rules of law, is too sweeping. A court lacks this power for the same reason the arbitrator does—the function of arbitrator and court is to carry out a contract, and contracts bind unless made unlawful by rules of positive law."[23]

Judicial oversight of labor arbitrators' decisions is thus seen as a special case of the more general phenomenon of judicial treatment of contracts. As long as arbitrators interpret the contract in reaching their decisions, their awards are to be taken as the agreement of the parties. If the parties can lawfully agree on the outcome an award provides, there is no basis for judicial interference with the award, just as there is no warrant for judges to interfere with any lawful contract. As Judge Easterbrook points out, arbitrators are more strictly confined to the agreement than are the courts. Under decisions of the Supreme Court, it is dogma that arbitral awards may be upheld only if they can be read as interpretations of the agreement. The courts should vacate an award that the arbitrator bases on public policy rather than the agreement.[24]

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[23]*E.I. du Pont de Nemours & Co., supra* note 11, at 618.

[24]*Id.* For cases supporting the proposition in the text, *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974); *Enterprise Wheel & Car Co., supra* note 3. Judge Easterbrook also develops an argument based on the Federal Arbitration Act (9 U.S.C. §1 *et. seq.*), but it appears that the Supreme Court regards the FAA as inapplicable to collective bargaining agreements. *Cf. Paperworkers v. Misco, supra* note 1, at 372.

These views, as I have summarized them to this point, seem very strong, though I don't fully accept them, nor do I think they are as useful as they seem. I will explain my reservations, but first I will discuss an additional feature of Judge Easterbrook's position, about which I have larger doubts. He suggests that public policy, among other considerations, may help courts decide whether an arbitrator has based an award on an interpretation of the agreement or has decided the case as a matter of personal judgment, independent of the parties' agreement. Judge Easterbrook says, "If no rational firm would enter into a contract expressly excusing theft, then a court should conclude that an arbitrator who does this [under a clause providing for discharge for just cause] is indulging a personal quirk, has succumbed to the desire to give someone a 'second chance' and has abandoned his role as honest interpreter of the contract."[25]

The crucial word here is "rational." How public policy relates to the inquiry into the limits of rational business behavior is not made clear. However that may be, it seems to me that Judge Easterbrook is proposing that judges give arbitrators' decisions a closer, more skeptical reading than the Supreme Court has allowed. His test may be taken as an application of the Supreme Court's doctrine on judicial review of arbitrators' awards as stated in the leading case, *Steelworkers v. Enterprise Wheel & Car Corp.*,[26] specifically the following passage:[27]

> [A]n 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 collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Thus, the suggestion is that if a rational firm would not agree to what an award provides in the circumstances of the case in which the award is given, it must be that the arbitrator has not based his award on the agreement.

This seems to me mistaken. As a preliminary matter I should note that "rational" can be taken in different senses. It may mean simply "sane" or "capable of coherent or connected thought or

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[25]*E.I. du Pont de Nemours & Co., supra* note 11, at 620.
[26]*Enterprise Wheel & Car Co., supra* note 1.
[27]*Id.* at 597.

action." It may be granted that we have all seen arbitral decisions with which we strongly disagree and that some of us have ourselves made decisions as arbitrators about which others have used strong language. Even allowing for this, lack of rationality in the sense I have mentioned is rarely, if ever, seen in arbitrators' decisions and is not what Judge Easterbrook has in mind. His case of the arbitrator who gives a thieving employee a second chance is not an instance of irrational action in this sense, although the arbitrator errs in acting as he does.

"Rational" may also mean "reasonable" or, more stringently, "acting in a way logically consistent with, if not entailed by, some given set of standards," and by "rational" Judge Easterbrook evidently means something like this. Taking "rational" in this way presents difficulties. First, as a descriptive matter employers often act unreasonably, just like the rest of us, as I could not help observing in the course of representing them. Further, collective bargaining agreements are not formulated unilaterally by employers but are negotiated with unions under legal and economic constraints. This process regularly produces commitments by employers that they regard as irrational. This is one way of stating why many employers dislike collective bargaining.

This brings me to my second difficulty, which has to do with the point that the conception of rationality under discussion is not descriptive but rather furnishes normative criteria for judging arbitrators' decisions—that is, criteria of "reasonableness" in some sense, such as behavior consistent with the goal of maximizing profits. Taken in this way, a test of rationality seems strictly analogous to the test of conformance to correct legal principles that the Court rejected in *Enterprise Wheel & Car* in this passage of the opinion:[28]

> [The employer's] major argument seems to be that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not [provide what the arbitrator directed], and that therefore the arbitrator's decision was not based upon the contract. The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. This underlines the fundamental error which we have alluded to in *United Steelworkers v.*

[28] *Id.* at 598-599.

> *American Manufacturing Co.* . . . decided this day. As we there emphasized, the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

Testing an arbitrator's decision by a judge's view of what a rational firm would or would not agree to is probably not a promising strategy for separating arbitral decisions that rest on the agreement from decisions based on some other ground. Rather, it more likely enables judges to upset arbitrators' awards with which the judges strongly disagree. The Supreme Court should be taken in a literal way in saying that a court can override an award "when the arbitrator's words manifest an infidelity" to the duty to base the decision on the agreement.[29] That is to say, when arbitrators explain their decisions on some other ground than their interpretation of the agreement, courts are justified in vacating awards.

Enterprise Wheel & Car was a case in which, as the Court said, the arbitrator's opinion could be "read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of his submission."[30] Nevertheless, the Court held: "A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award."[31]

What all this comes to is that, on the received view of labor arbitration, a court is seldom the appropriate place for the parties to carry disagreements with arbitral decisions. That is to be done instead through deselection of the offending arbitrators and renegotiation of agreements. This is a corollary of the proposition that underlies the received view—that is, labor arbitration is not a substitute for adjudication in court but for the strike; and because arbitration is preferred over economic conflict, judicial review of arbitral awards should be extremely limited.

I said earlier that I sympathized with the view of Judge Edwards and Judge Easterbrook that public policy should be

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[29] *Id.* at 597.
[30] *Id.*
[31] *Id.* at 598.

equated with illegality. However, I don't completely subscribe to this position and have some doubts about its usefulness. Now I want to explain what I meant. In doing so, I will refer to four of the post-*Misco* cases.

In the first case, *Postal Service v. Letter Carriers*,[32] an employee with 13 years of service whose repeated efforts to gain promotion had met with disappointment expressed his frustration by firing a gun repeatedly at the postmaster's empty car, damaging the windshield, dashboard, and front seat. Discharge followed. The arbitrator, referring to the employee's "13 year deposit in the 'bank of good will'"[33] decided that, although some discipline was justified, discharge was too severe and ordered reinstatement. The Court of Appeals for the Third Circuit upheld the arbitrator on the authority of *Misco*.

In *Delta Air Lines v. Air Line Pilots Ass'n*[34] a captain reported for a scheduled flight in a highly intoxicated state, as later confirmed by a blood test, but was taken into the cockpit by the first and second officers, where he apparently flew the aircraft throughout the flight although in a condition, by his account, of blackout. His discharge was carried to a system board of adjustment. The panel's neutral chair, joined by the Air Line Pilots Association members, determined that because the carrier had not administered its alcohol rehabilitation program, or its disciplinary system uniformly or fairly, the captain should be reinstated without back pay upon regaining from the Federal Aviation Administration (FAA) the necessary medical certificate. A federal district judge in Georgia vacated the award.

In *Iowa Electric Light & Power Co. v. IBEW Local 204*[35] an employee of a public utility working at a nuclear power plant defeated an interlock system designed to allow no more than one in a series of doors to be open at once in order to maintain an air pressure system, which ensures that any leakage of radiation from the reactor core remains within the plant. An arbitrator reversed the employee's discharge as too severe, and the Court of Appeals for the Eighth Circuit vacated the award.

Finally, in *Stead Motors v. Machinists Lodge 1173*[36] a mechanic failed on two occasions over a 12-month period to tighten the lug

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[32]*U.S. Postal Service v. Letter Carriers, supra* note 16.
[33]*Id.* at 147.
[34]*Delta Air Lines, supra* note 16.
[35]*Iowa Electric Light & Power Co., supra* note 16.
[36]*Stead Motors v. Machinists, supra* note 16.

bolts properly while replacing a wheel, creating a serious risk that the wheel would come off while the car was being driven. The mechanic's discharge was reduced by an arbitrator to a suspension of 120 days. The Court of Appeals for the Ninth Circuit vacated the award, stating that if the employee was not discharged, the state Bureau of Automotive Repair would revoke the employer's registration as an automobile repair-dealer.

I don't doubt that people can take different views on these cases. My own intuition, for what it may be worth, is that the courts got the cases exactly backwards. In the *Postal Service* case, in which the court upheld the award reinstating the employee who fired a gun at his manager's car, the award might better have been vacated while in the other cases the courts should have supported the arbitrators. I am sure others will disagree, without necessarily agreeing with any judge or all of them.

For present purposes what is more important is that the test of illegality is not consistently helpful in distinguishing cases in which the award should be vacated from those in which it should be upheld. Of the four decisions, *Stead Motors* (the case of the auto mechanic) provokes the most disagreement. Yet the court in that case held that continued employment of the mechanic would have cost the employer the license state law required as a condition of doing business. The difficulty with the decision, if there is any difficulty, is not that the court had too broad a conception of public policy. It is rather that the court may have been mistaken in supposing that simultaneous retention of the mechanic and the license were incompatible. Those who disagree with the decision at least suspect that the California Bureau of Automotive Repair neither is so aggressive nor enforces such exacting standards as the court's decision implies. If such suspicions are well founded, the true objection to the court's decision is not that it adopted the broad view of public policy but that it made a mistake in the course of applying the correct, narrow view of public policy.

Although the court in *Iowa Electric* adopted a broad conception of public policy, a serious argument can be made for the same outcome under the narrow view. Nuclear power facilities are licensed by the federal government and subject to oversight by the Nuclear Regulatory Commission (NRC). The NRC promulgates very extensive regulations on safety and requires nuclear plant operators to develop their own detailed rules.

Violation of these rules are reported to the NRC, which imposes penalties on the operator.

The court in *Iowa Electric* tells us that the company made a report to the NRC of the incident that resulted in the discharge and that the agency "issued an inspection report that approved the Company's discharge [of the employee] and included a written reprimand to the Company for compromising secondary containment."[37] Of course, for the NRC to "approve" the discharge, whatever that means, is not the same thing as for the agency to require its licensee to discharge. However, suppose the court had said that the NRC would have demanded that the employer resort to discharge had it not already done so. Would this have been clearly wrong? Granted that by one means or another the agency might have been induced to tell the court what it would have done, what if the court had said that, on its interpretation of the statutes governing the NRC, the agency was in any event legally obliged to insist on discharge? Would this have been obviously wrong?

What does seem clear is that there would have been no illegality in reinstating the alcoholic pilot in *Delta Air Lines* upon his receipt of medical certification from the FAA. This agency has an established procedure for certifying as pilots recovering alcoholics,[38] and the Delta System Board of Adjustment conditioned reinstatement upon proper certification by the federal air surgeon. By the time of the hearing in the case in the district court, the grievant had obtained this certification and had secured employment as a pilot with a different airline.[39] It is possible to entertain doubts about the wisdom of FAA policy or of the system board's decision, but it is hard to find illegality in a decision conditioned upon action of the responsible government official acting under controlling law.

The legal position in the *Postal Service* case is less clear. Quite possibly diligent research would yield some provision of law susceptible to a debatable interpretation under which reinstatement could be illegal. Perhaps resort to a very general statute might supply a basis for successful attack on many awards—section 5(a) of the Occupational Safety and Health Act, the general duty clause, which provides:[40]

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[37]*Iowa Elec. Light & Power Co., supra* note 16, at 1428.
[38]*See Northwest Airlines v. Air Line Pilots, supra* note 11, at 79.
[39]*See Delta Air Lines v. Air Line Pilots, supra* note 16, at 2536 n.9.
[40]29 U.S.C. §654 (a).

> Each employer—
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> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees. . . .

But I resist resting my appraisal of the case on the answer to the question of whether the award is somehow in conflict with pre-existing law, as opposed to the law that the court makes by its decision in the case. Many legal questions can be asked in a large number of concrete situations for which there is no clear answer in pre-existing law. That the *Postal Workers* case presents such a situation is fortuitous relative to the question I want to ask about the case: that is, whether a judge should compel compliance with an arbitrator's decision that would restore a relationship capable of generating the violence that resulted in the discharge.

To ask whether an arbitral decision conflicts with public policy is often a way of putting the question of whether the decision unduly jeopardizes the interests of third persons, whose interests the decision maker may arguably have left out of account. If it can be shown that an award directs an illegal act, that is conclusive evidence that the award contravenes an authoritative declaration of the public interest. However, such cases do not necessarily mark the outer limit of a public interest sufficient to justify upsetting an arbitral award.

One of the main features of arbitration that contributes to the parties' preference for arbitration over court adjudication is that arbitration is a private process created and controlled by the parties themselves, a process in which the decision maker is a private person selected by the parties and responsible to them rather than a state appointed judge acting as an agent of the broader society. It is not out of the question that third party interests may at times fail to find full expression in arbitration, nor is it at all impossible that this risk may eventuate in situations existing law failed to anticipate. Although it seems to me, on the basis of some experience, that this rarely occurs, I would not disable the courts from responding to such a case when it does occur. We hold employers responsible, for example, for injuries inflicted on persons on the highways by drunken truck drivers and for the harm male employees cause their female co-workers by sexual harassment. If an injudicious arbitrator's decision constrains an employer's power of discipline so as to create large

risks of damage of these kinds, judicial intervention seems justified.

I agree that it makes no sense for a judge to vacate an arbitral award on a matter subject to the duty to bargain. But in the rare case in which a judge is warranted in vacating on public policy grounds an award that does not direct an act made illegal by pre-existing law, there should be no duty to bargain over the act of the employer that is at issue in the arbitration. The judge's decision should be expressed partly as an interpretation of the NLRA, holding there is no duty to bargain in the circumstance.[41]

II. A UNION VIEWPOINT

MICHAEL H. GOTTESMAN*

I am struck by the symmetry of today's program, and we owe a debt to the program committee for this. This morning arbitrators were told that their caseloads in the future are destined to be much smaller.[1] This afternoon they are told that what few decisions they will render may not be enforced by the courts. It is the latter concern that I want to address.

At present the Supreme Court is at war with the lower federal courts over the way courts are to relate to labor arbitration awards. The Supreme Court in the last five years has issued another arbitration trilogy—*W.R. Grace*,[2] *AT&T Technologies*,[3] and *Misco*[4]—marking the quarter century anniversary of the *Steelworkers Trilogy* that Dave Feller argued and won.[5] And the Court in this more recent trilogy has revalidated each and every component of the earlier one. The Court has declared that the principles established in 1960

> have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as

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[41]Note that under *Smith v. Evening News*, 371 U.S. 195, 51 LRRM 2646 (1962), the pre-emption doctrine otherwise applicable does not hold in actions based on Section 301 of the Taft-Hartley Act (9 U.S.C. §185).

*Bredhoff & Kaiser, Washington, D.C.

[1]Cross reference to speech by Mr. Miller of American Airlines, in this volume.

[2]*W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 113 LRRM 2641 (1983).

[3]*AT&T Technologies v. Communications Workers*, 475 U.S. 643, 121 LRRM 3329 (1986).

[4]*Paperworkers v. Misco*, 56 USLW 4011, 126 LRRM 3113 (1987).

[5]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).