

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

⁴¹Note 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.

¹Cross 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).

the preferred method of resolving disputes arising during the term of a collective bargaining agreement. We see no reason either to question their continuing validity, or to eviscerate their meaning by creating an exception to their general applicability.⁶

The recent decisions are the more remarkable for the fact that all were unanimous.

Misco went one step beyond the *Steelworkers Trilogy* in its zeal to sanctify the arbitral process. The Court in *Misco* declared that courts are obliged to enforce arbitrators' awards even when they think the awards are "silly."⁷ Now, that's a standard we lawyers can work with. We need simply to convince a court that an arbitration award is silly, and we have a Supreme Court decision squarely in point.

Seriously, the central theme that comes through in all three of these recent decisions is that the labor arbitration process works well, it's the process the parties have chosen, and when the parties say that an arbitrator's award is to be final and binding, the courts should honor that choice. In short, the Supreme Court has made it clear that the lower courts are to keep their hands off the arbitration process. Yet in the wake of this reaffirmation of the *Steelworkers Trilogy* we have a veritable explosion of decisions from the lower federal courts setting aside arbitration awards.

Some circuit courts are worse than others. In the past couple of years the Sixth Circuit has set aside roughly half the arbitration awards brought to it. The First Circuit is not much better, as its double-dip in *S.D. Warren* reflects.⁸ But, as I'll explain, no federal circuit has accepted unqualifiedly the principles the Supreme Court has announced. Despite the Supreme Court's pronouncements suggesting that these awards are virtually inviolate, the courts of appeals and district courts are setting them aside at quite an extraordinary clip.

Why this is happening—why the number of judicial set-asides is increasing—is unclear. Two possibilities occur to me. One is that a heavy percentage of our federal judges have been

⁶*AT&T Technologies*, *supra* note 3, 121 LRRM at 3331.

⁷*Misco*, *supra* note 4, 126 LRRM at 3117.

⁸The court first set aside an arbitration award reinstating a marijuana smoker as against public policy; when that decision was vacated by the Supreme Court in light of *Misco*, the court on remand again set the award aside, this time on the ground that it did not draw its essence from the contract. *S.D. Warren Co. v. Paperworkers Local 1069*, 815 F.2d 178, 125 LRRM 2086 (1st Cir. 1987), *vacated and remanded*, 56 USLW 3414, 126 LRRM 3360 (1987), *on remand*, 845 F.2d 3, 128 LRRM 2175 (1st Cir. 1988).

appointed within the last few years, and really have had little exposure to arbitration; perhaps these judges will settle down once they discover that this is the way arbitration awards are supposed to look. The other possibility is that we are seeing the manifestation of an impulse on the part of some judges not to accept that any one person's decision is unreviewable. It is, indeed, quite unusual in our society that there can be decisions affecting people in important ways and yet virtually proof against review, no matter how arbitrary, illogical, or inequitable.

Whatever the reason, there is undeniably a resistance in the lower federal courts to accept the principles that the Supreme Court has laid down. That resistance, not surprisingly, finds its expression in expansive applications of the very limited exceptions that the Supreme Court acknowledged to the automatic enforceability of arbitration awards.

The Supreme Court has identified two exceptions to automatic enforcement of arbitration awards: the award must have drawn its essence from the contract (rather than being the imposition of the arbitrator's own brand of industrial justice lacking root in the contract),⁹ and the award must not violate public policy.¹⁰ The Supreme Court has regarded those exceptions as very narrow and rarely applicable.

However, in the lower courts these exceptions have become loopholes that have been stretched and stretched until they threaten to tear apart the fabric of labor arbitration. It's not merely the growing number of cases in which the awards are being set aside that grates; it's that for every one a court sets aside, ten employers are emboldened to resist the enforcement of awards they think improvident in the hope that they, too, will be the beneficiaries of judicial activism. They may lose, but meanwhile awards are not implemented and litigation costs mount. The core values that keep parties bound to the labor arbitration process—speed and economy—begin to break down. It is thus vitally important to examine the two exceptions and their dimensions, and exactly what they were designed to do.

I want to talk first about the "draw its essence from the contract" exception. If there's one thing that is clear from the Supreme Court's opinions, that exception was not intended to give the federal courts any role in reviewing the wisdom or the

⁹*Enterprise Wheel & Car*, *supra* note 5; *Misco*, *supra* note 4.

¹⁰*W.R. Grace*, *supra* note 2; *Misco*, *supra* note 4.

correctness of an arbitrator's interpretation of the contract. No matter how awful—as the Court put it in *Misco*, no matter how silly—a judge may think the arbitrator's construction of the contract, if the arbitrator indeed is construing the contract, then the decision is what the parties bargained for and is not to be set aside. “[T]hat a court is convinced [the arbitrator] committed serious error does not suffice to overturn his decision.”¹¹

Though the Supreme Court is absolutely clear on this, there isn't a single federal court of appeals that will acknowledge the doctrine unvarnished. Every one of them has a little quibble in its formulation of the rule—arbitrators' decisions are to be enforced unless they're really off the wall, or irrational, or unless no human being sincerely trying to construe the agreement could conceivably have reached that result. Those quibbles are designed to allow the courts room to overturn what they regard as uniquely outrageous arbitrators' constructions of contracts.

Those courts are off the reservation in doing that. The target of the “drawing its essence” exception is not the inept contract reader, but the rogue elephant, the arbitrator who says “I don't care what that contract says or means, I've got my own notions about how this case should be decided, my own sense of industrial justice, and that's what I'm going to bring to bear.” That's the case the exception was designed for. But that case almost never arises. That's not the case that is being set aside by courts of appeals and district courts in this country. Instead, courts are setting aside arbitrators' awards that are conscientious efforts to construe the contract, but that are (or at least are thought by judges to be) especially erroneous interpretations of the contract.

I submit that the time has come to discard the “draw its essence” exception. It isn't accomplishing what it was designed to do—separate out personal adventures from contract constructions. (Indeed, the true arbitrator-adventurer, bent upon imposing his or her personal value judgments, is unlikely to announce in the opinion that that is what is happening, so that the true arbitral excess is unlikely to be caught by the exception.) Instead, the exception has become a loophole that lower courts are abusing to set aside awards they find unpalatable on their merits.

There is, it seems to me, a totally principled justification for discarding the “draw its essence” exception. The parties have

¹¹*Misco*, *supra* note 4, 126 LRRM at 3117.

agreed, after all, that the arbitrator's decision is to be final and binding. In most cases, they have put no limitation on their commitment that the arbitrator's decision is to be final and binding. If the arbitrator in a particular case is a rogue elephant, he or she is the parties' rogue elephant. They chose the arbitrator. They said, "Here's the case, and whatever you decide is going to be final and binding." In the face of that agreement, it is inappropriate to give a court authority to set aside an arbitrator's award out of distrust that the arbitrator was faithful to the mandate to be a contract reader. We have an award rendered by someone that the parties jointly selected, someone who is, in most instances, fairly knowledgeable about labor law and industrial relations (that's why the parties selected the arbitrator). Now a judge is being asked to set it aside. The parties didn't pick that judge. That judge is probably not expert in industrial relations, and for that judge to set aside that arbitration award, no matter what ground is asserted for it, is to unsettle the parties' expectations when they said that the arbitrator's award was to be final and binding. It is not very likely that the parties who agreed that arbitrators' awards would be "final and binding" wanted courts to play this interventionist role.

While I would discard the "draw its essence" exception, I acknowledge that there must be an exception where one of the parties has bribed the arbitrator. The parties contracted to be bound by rogue elephants, but elephants whose upkeep was paid equally by both (or at least in a manner mutually agreed upon). As the Court stated in *Misco*, "decisions procured by the parties through fraud or the arbitrator's dishonesty need not be enforced."¹²

Turning to the second exception, the public policy exception, unquestionably there's at least some room for judicial intervention here. No matter what the parties may have agreed to in their collective bargaining agreement, they don't have the right to violate the law. And, since the arbitrator is merely a contract reader—stating what the parties have agreed to—it is at least theoretically possible for an arbitrator to render an award that is illegal, one that orders the company to do something that would violate the law. A simple example: if the parties had written a contract that said that all white persons would be promoted ahead of all black persons regardless of seniority, an arbitrator

¹²*Id.*

who said, "Well, that's what the contract says; I was hired to interpret the contract: therefore, the company is ordered to promote all white persons ahead of all blacks," would be faithfully rendering his or her assignment.¹³ But that award could not be enforced. The award would require the employer to violate the law. In that category of cases, at least, the courts must have the ability to set aside, as the Supreme Court recognized in *W.R. Grace and Misco*.

The area remaining open to debate after *Misco* is whether the public policy exception is limited to cases where the award orders a violation of the law, or whether the exception is broader and gives the federal courts some discretion to set aside arbitration awards, even though the employer could lawfully comply with the award. I think the narrower view is the correct one. Let me briefly explain why.

We're dealing with a situation in which, by hypothesis, the award is lawful. The employer can do what the arbitrator has directed. Let's take the *Iowa Electric* case, where the employee breached the radiation protection device in the nuclear power plant.¹⁴ When that employee did that terrible thing, the employer was under no legal obligation to fire the employee. The employer could have chosen in the first instance to say, "Well, he's been a good employee; I'll keep him despite this aberrational transgression." No public policy would have interfered with the employer's choice. Alternatively, after the employer fired the employee, when the employee filed a grievance and the parties were discussing this case in the grievance procedure, the employer could have settled the grievance by reinstating the employee and no public policy would have undone the settlement. Yet, when the employer resisted and the case went to arbitration, and the arbitrator ordered that the employee be reinstated, the Eighth Circuit held that it would violate public policy for a court to enforce the arbitrator's award.

Now what message is being given to the union and the employees in that case? "You can get this person back to work if you persuade the employer to put him back—it's perfectly lawful for the employer to do so—but you can't get the person back

¹³Gottesman, *How the Courts and the NLRB View Arbitrators' Awards*, in *Arbitration 1985: Law and Practice*, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1985), 168, 173-175.

¹⁴*Iowa Elec. Light & Power Co. v. Electrical Workers Local 204*, 834 F.2d 1424, 127 LRRM 2049 (8th Cir. 1987).

through the arbitration process.” We all learned from the *Steelworkers Trilogy* that arbitration is the substitute for the strike.¹⁵ If we tell unions and employees that they can’t use arbitration to get that person back, what is the public policy we’re vindicating? The public policy is that in a nuclear regulatory facility, when an employee breaches the radiation safety requirements, the question of whether that person should continue to work should be decided by a strike and not by an arbitrator. That is the effect of the court’s saying that it is not going to enforce the award.

Now you say, “Wait a minute, times have changed. Many unions can’t conduct effective strikes anymore. Decisions like *Iowa Electric* will not produce strikes in those workplaces.” Let’s assume we’ve got a situation where, as a practical matter, the union can’t strike. Then what are we saying when we refuse to enforce the award? We’re saying that public policy prefers that the employer alone decide whether this employee goes back, rather than having the employer and the union jointly develop a set of standards and procedures that govern that decision. But that flies squarely in the face of our national labor policy, which says that when employees have opted for collective bargaining, we prefer a regime in which employers and unions jointly negotiate how these things are to be resolved.

Thus, either way—whether the union’s going to strike or not strike over the employer’s failure to reinstate the employee—if the employer can lawfully reinstate the employee, and an arbitrator orders reinstatement, our national labor policy says that the award ought to be enforced. A court that declines to do so is violating public policy, not effectuating it.

We get, finally, to Jan Vetter’s conundrum. Even if you buy the proposition that only the award that orders illegal action is not to be enforced, Jan says, we are going to have a devil of a time figuring out whether awards are ordering illegal action. So, he suggests, this legal yardstick will not be workable in practice. I disagree. We simply need to distinguish between two different types of cases.

There are, in fact, some laws that say certain people cannot be employed on certain jobs. For example, the Landrum-Griffin Act says that unions cannot employ persons who have been convicted of certain crimes.¹⁶ Obviously, if an arbitrator

¹⁵*Warrior & Gulf*, *supra* note 5. See also *AT&T Technologies*, *supra* note 3.
¹⁶29 U.S.C. §504.

ordered a union to reinstate an employee who had been convicted of such a crime, that's an easy case. The court can say, "We can't enforce that; the union would violate the law to put that person back." But those aren't the cases that have come up; arbitrators know enough not to order reinstatement in those cases.

The cases that have come up are cases like *Stead Motors*,¹⁷ where the auto mechanic didn't tighten the lug bolts on the tires. Here the employer is saying, not that there is some law that expressly says it can't employ such a person, but rather that there is some amorphous law of general applicability that might be construed to make reinstatement improper. In the mechanic case the law pointed to by the employer and embraced by the court was one declaring that the proprietor's license to operate the auto repair shop was dependent on maintaining acceptable standards of safety. Similarly, the general duty clause of the Occupational Safety and Health Act (OSHA) says that it's the duty of every employer to maintain a safe place to work. When employers invoke those types of laws as proof that the arbitrator has ordered something unlawful, I submit that courts ought not to respond favorably, but instead should enforce the award.

To begin with, it will almost always be the case that the employer cannot demonstrate that any employer was ever held to violate that law by keeping an employee who was unsafe; these laws have not been construed that way. To my knowledge, for example, there has never been an OSHA case in which an employer was held to violate the general duty clause simply by employing someone who was thought to be dangerous. When federal courts invoke such laws, as the *Stead Motors* court did, they are being disingenuous. As Jan in his elegant way has suggested, it is doubtful that the Ninth Circuit really believed that this auto repair shop would lose its license if it reinstated this person. That was the cover for a result the court wanted to reach—setting aside an award that it did not agree with.

In any event, courts that are truly concerned that the employer might be bitten by an amorphous law need not deny enforcement of a reinstatement award. They can, instead, qualify their enforcement of the award in a way that vindicates all interests. They can say, "we are going to enforce this arbitrator's award." Of course, if it develops, down the road, that

¹⁷*Stead Motors v. Machinists Lodge 1173*, 843 F.2d 357, 127 LRRM 3213 (9th Cir. 1988).

some state agency or OSHRC tells the employer "you are not allowed to continue the employment of this person," then the arbitration award at that point will have to yield to that strict command. But we, the federal courts, don't have to sit here and shouldn't sit here denying reinstatement out of fear that the employer might encounter problems following reinstatement.

The bottom line of all this is that exceptions to enforcement of arbitration awards have become loopholes and should be made as narrow as possible. Only bribery of the arbitrator and illegality should be grounds for refusing to enforce an arbitration award.

III. A MANAGEMENT VIEWPOINT

JOHN S. IRVING*

As a representative of management on this distinguished panel, I have several brief observations to make about *Paperworkers v. Misco*,¹ some of which are more philosophical than technical. When Professor Vetter forwarded his paper to me, he omitted his case citations and footnotes so I do not feel confined to a discussion of all of the post-*Misco* cases he has highlighted.

First, the management community was neither surprised nor horrified by the result in *Misco*, or for that matter, in *AT&T Technologies*.² I represented the Chamber of Commerce in *AT&T Technologies* and argued that the Seventh Circuit had erred by refusing to consider the threshold issue of arbitrability. I doubt that anyone was surprised when the Supreme Court reiterated that it is the duty of the courts to determine arbitrability in the first instance.

Neither the Chamber of Commerce nor the National Association of Manufacturers filed an *amicus* brief in *Misco*. This was due in large measure to differences of opinion within the business community on the fundamental issue in *Misco*, that is, the extent to which arbitrators should take public policy into account in making their awards. Some business representatives favored the Fifth Circuit's expansive approach, while others believed that arbitrators should confine themselves to interpreting the collective bargaining agreement. The business community was not at

*Kirkland & Ellis, Washington, D.C.

¹56 USLW 4011, 126 LRRM 3113 (1987).

²*AT&T Technologies v. Communications Workers*, 475 U.S. 643, 121 LRRM 3329 (1986).

all surprised at the court's narrow view of the role public policy should play in the arbitral process.

The practical effect of the court's holding is that arbitration awards stand little chance of being set aside on general public policy grounds except when awards conflict with a policy which can be "ascertained by reference to the law and legal precedents and not from general considerations of supposed public interest." In this regard, the court's holding was hardly shocking to employers. Few employers, as a practical matter, believe that they have a chance of getting arbitration awards set aside except in the narrowest of circumstances. Employers are well aware of this reality at the time they agree to arbitrate contractual disputes. Therefore, court review of arbitral awards plays only a minor role in the strategies of management.

The second observation I wish to make is that arbitrators seem overly preoccupied with the finality of their awards. More attention should be paid to the substance and quality of the awards themselves.

My own experience has been that management has little faith in arbitrators as a group (present company excepted, of course) or, for that matter, that management will be treated fairly in the arbitral process. Management goes along with arbitration reluctantly with the expectation that it will have an uphill battle to fight in almost any arbitration. Arbitrators as a group are viewed with suspicion, ready to second-guess management whenever they can and all too anxious to substitute their own concepts of fairness. Arbitration often is looked upon as a necessary evil to ensure the availability of injunctions against strikes during the term of an agreement, rather than as a constructive personnel practice.

When management seeks to overturn an arbitration award, it does so reluctantly and with the realization that its chances for success are slim at best. Nevertheless, when management elects to challenge, it is generally because something about the award evokes a sincere sense of outrage.

Rather than being preoccupied with enforceability of arbitration awards, arbitrators should be more concerned about those awards which evoke such a strong sense of injustice. In fact, in cases where courts have set aside arbitration awards, often there is something about the awards which flies in the face of common sense: employees are reinstated after participating in pot smoking on company premises, after admittedly flying a company

plane in a drunken stupor, after defeating a safety interlock system at a nuclear power plant, after repeatedly creating a serious hazard by failing to tighten wheel lug bolts, after damaging an employer's car with multiple gun shots.

If arbitrators are sincerely interested in the integrity of the arbitral process, they should be concerned when an unsuccessful party is so outraged by an award that, against all odds, it seeks to challenge the award in court. I sincerely doubt that court reversal of the arbitration awards I mentioned would have any long-term detrimental impact upon arbitration as an institution. In fact, management might consider instituting its own annual "Golden Fleece" award for the arbitrator's decision which most defies common sense.

A third observation about *Misco* and the public policy limitations imposed by the Supreme Court is that *Misco* is likely to lead to management strategies which may dampen union enthusiasm for the decision. The effect of *Misco* is that contractual grievance-arbitration provisions will receive much closer scrutiny from management negotiators. In the negotiation process management will formulate new bargaining positions designed to minimize the impact of *Misco*.

For instance, management may demand limitations on the issues arbitrators may decide. Arbitrators could be limited, for example, to determining whether a company rule has been violated with no power to second-guess the penalties meted out. Management may insist that its actions, particularly disciplinary actions, be accorded a contractual presumption of regularity or may insist upon specific contractual provisions placing the burden of persuasion on the grievant. Management may demand standards permitting reversal of management actions only when a grievance is supported by clear and convincing, or a preponderance of, evidence. It is possible that management may insist that agreed-upon standards of court review be written into the agreement.

We know that labor relations is never static. When a problem for management develops, management devises alternative strategies to counter that problem. *Misco* may lead to such strategies with the result that negotiations become more protracted and collective bargaining agreements even more particular, technical, and legalistic. As management strategies develop, the implications may not be happy developments for unions or the bargaining process.

Another predictable effect which unions are unlikely to applaud is that the Court's *AT&T Technologies* and *Misco* decisions lend considerable support for the NLRB "Collyer" deferral doctrine.³ With the Court's emphasis on arbitration as an instrument of national labor policy, the desirability of private dispute resolution, the broad scope of arbitrability, and the finality of arbitration awards, how can the Board's current deferral policy be seriously questioned?

Before unions or arbitrators become too gleeful about *Misco*, they should remember that the Court left some public policy issues unanswered and, therefore, its opinion should not be overread. For instance, as is evident from the Court's final footnote (and with all due respect for the D.C. Circuit and Judge Edwards), the Court did not address the union position that 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.

Courts, like employers, are adaptable too. When confronted with arbitration awards which make no sense, courts will find ways consistent with *Misco* to set those awards aside. The Eighth Circuit has done so in *Iowa Electric Light & Power*.⁴ It set aside an award reinstating an employee who defeated the safety interlock system at a nuclear facility. The Eighth Circuit found a significant contrary public policy (that is, public safety) and rejected the argument that an award can be set aside only when the award itself is illegal.

Other courts will deal with awards that defy common sense by determining that arbitrators exceeded their contractual authority. This is what the First Circuit did in *S.D. Warren Co. v. Paperworkers Local 1069*,⁵ another post-*Misco* decision. There the court determined that the arbitrator exceeded her authority by overturning the discharges of employees who violated an employer rule against possession of marijuana on company property. In reviewing awards which offend their sensibilities, courts can be expected to more closely scrutinize arbitrators' contractual interpretations to ensure that they are not impermissibly dispensing their own "brand of industrial justice."

³*United Technologies Corp.*, 268 NLRB 557, 115 LRRM 1049 (1984).

⁴*Iowa Elec. Light & Power Co. v. Electrical Workers Local 204*, 834 F.2d 1424, 127 LRRM 2049 (1987).

⁵845 F.2d 3, 128 LRRM 2175 (1988).

Like Professor Bernard Meltzer, I have difficulty accepting the proposition that the foundations of collective bargaining and the arbitral process will be shaken unless courts uniformly apply strict and inflexible standards for enforcement of arbitration awards. There are some awards which do not deserve enforcement, and the possible, though limited, threat of reversal is a healthy check on an arbitrator who believes an award is immune to reversal no matter how illogical it may be.