CHAPTER 5

ARBITRATION, CONTRACT, AND PUBLIC POLICY

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I have come to talk to you about lunatics and madmen. Let me describe some:

- A chemical worker arranges with a fellow employee for a ride home. He strips to the buff and attacks the driver with a piece of iron. Still naked, he dashes through the plant. He tries to start a dangerous chemical reaction, but other workers intervene. The employer fires him as a dangerous nut; an arbitrator reinstates him after finding that the psychotic episode is unlikely to recur; a district judge sets aside that award; the court of appeals reverses, enforcing the arbitrator's decision.[1]
- An auto mechanic fails to tighten the lug nuts of a wheel, which almost falls off in traffic. When the supervisor complains, the mechanic defends his methods. Presently the mechanic releases a car with *two* improperly secured wheels—almost all of the nuts are loose or missing. This time the employer fires him, as a menace to the public; an arbitrator reinstates him because he thinks discharge too severe; a panel of the court of appeals concludes that the reinstatement violates public policy; the court *en banc* stands by the arbitrator.[2]
- The captain of an airliner becomes drunk during a stopover. The copilot and navigator help him into the cabin, turn off the voice recorder, and try to hush up a concerned

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[1]E.I. DuPont de Nemours & Co. v. Grasselli Independent Employees Ass'n, 790 F.2d 611, 122 LRRM 2217 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986).

[2]Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200, 132 LRRM 2689 (9th Cir. 1989).

flight attendant. The airline fires the captain; an arbitrator reinstates him after the FAA relicenses him to fly, concluding that the lush has dried out; the court of appeals finds this absurd and vacates the award.[3] A different court of appeals sustains a similar reinstatement, reasoning that if the FAA believes the pilot fit, it would be churlish of the court to keep him grounded.[4]

- An employee of a nuclear power plant defeats a safety interlock so that he can get to lunch faster. The firm fires him; an arbitrator thinks the penalty too severe and reinstates him; the court of appeals finds that repulsive and sets aside the award.[5] The same court has held, however, that it is OK for an arbitrator to reinstate a construction employee fired for falsifying safety test results.[6]
- A postal worker steals from the mails. He is caught and fired. The arbitrator reinstates him; the court sets the award aside.[7] Another postal worker is sacked for shooting at his supervisor's car. Again the arbitrator reinstates; this time the court of appeals enforces the award.[8]
- A printer sexually harasses a co-worker and is canned, by a firm doubtless trying to protect both the co-worker and its own interest in avoiding liability for sex discrimination. The arbitrator reinstates, finding the penalty excessive, but the court of appeals vacates the award, observing that sexual harassment is illegal.[9] But an employee who sexually harasses a customer in her home fares better. He too was reinstated, and the court of appeals enforced this award.[10]

I began by saying that I would talk about lunatics and madmen. But who are the crackpots?

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[3]Delta Air Lines, Inc. v. Air Line Pilots Ass'n, 861 F.2d 665, 130 LRRM 2014 (11th Cir. 1988).

[4]Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 808 F.2d 76, 124 LRRM 2300 (D.C. Cir. 1987) Edward, J.

[5]Iowa Electric Light & Power Co. v. Local 204, 834 F.2d 1424, 127 LRRM 2049 (8th Cir. 1987).

[6]Osceola County Rural Water System v. Subsurfco, 914 F.2d 1072 (8th Cir. 1990).

[7]United States Postal Service v. Letter Carriers, 847 F.2d 775, 128 LRRM 2842 (11th Cir. 1988). *Accord*, United States Postal Service v. American Postal Workers Union, 736 F.2d 822, 116 LRRM 2870 (1st Cir. 1984).

[8]United States Postal Service v. Letter Carriers, 839 F.2d 146, 127 LRRM 2593 (3rd Cir. 1989).

[9]Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840, 135 LRRM 2659 (2d Cir. 1990).

[10]Communications Workers v. Southeastern Electric Cooperative, 882 F.2d 467, 132 LRRM 2381 (10th Cir. 1989).

- *The workers?* Probably. Drunken pilots, naked raving chemical handlers, and nuclear bureaucrats who turn off safety systems deserve that moniker.
- *The arbitrators?* Arguably. Employers are entitled to protect themselves from liability, and to be commended when they protect other workers and the public. A lineman who sexually harasses a customer may have some ability to engage in gainful employment, but I should think in a different job. Too often arbitrators disregard the benefits of optimal placement, treating the question as a choice between employment and starvation for the grievant, as if society contained no other jobs.
- *The judges?* Most likely. We are all for safety. But what is the right way to achieve it? How much risk is too much? Managers make these decisions. Arbitration clauses commit to arbitrators all contentions that they erred. We expect chemical and nuclear workers to do their jobs well and to follow orders. We expect the mechanic to tighten the nuts as directed. Well, judges have been told to leave reinstatement decisions to arbitrators, and we should expect judges, no less than mechanics, to follow instructions—even if they (like the mechanics) think they know a "better" way. Yet *United Paperworkers v. Misco,*[11] which issued these instructions to judges, seems to have had about as much effect on the way judges do their work as the supervisor's instructions had on the auto mechanic's method of tightening lug nuts.

The topic of this panel is the interaction of arbitration and public policy. Both before *Misco* and since, judges have concluded that reinstatement of workers who did "really" bad things is forbidden by public policy—the same policy that banned these awful deeds.

Whether judges should expunge awards on safety grounds is hardly a new topic to this group. Arbitrators must consider the question frequently. Four years ago Professor Bernard Meltzer, at whose knee I learned labor law, spoke to you about this subject.[12] Judge Harry Edwards, Professor William Gould, and

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[11]484 U.S. 29, 126 LRRM 3113 (1987). *See also* W.R. Grace & Co. v. Rubber Workers Local 759, 461 U.S. 757 (1983).

[12]Meltzer, *After the Arbitration Award: The Public Policy Defense*, in Arbitration 1987: The Academy at Forty, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1988), 39; *see also* Meltzer, *After the Labor Arbitration Award: The Public Policy Defense*, 10 INDUS. REL. L.J. 241 (1988).

others who know the topic better than I weighed in shortly after *Misco.*[13] Why, then, are we here? Why am *I* here? Perhaps it is because the theme is like the monster in a science fiction movie: it can't be killed, and if nonetheless slain it won't stay dead!

Everyone is against drunken pilots and the other loonies of my tale. Drinking and flying is against public policy in two senses: the strict one (there's a law against it) and the loose one of the common law. It would help to distinguish senses of the term, for the common law aspect of public policy is one explanation for the enduring and inconclusive nature of the debate. For centuries lawyers, scholars, and judges have mooted the question whether it is proper to annul contracts on so ambulatory a ground as the "public policy" that courts invent. "Public policy" is cousin to arguments about unequal bargaining power, contracts of adhesion, and other reasons courts give for not enforcing private bargains.[14] Are such concepts too vague to justify upsetting private bargains; are they perhaps altogether empty? If they have content, what is the warrant for invoking them, when the legislature has been silent? How *are* powers in our republic distributed among private parties, legislatures, and courts? People have written endlessly about this subject, which I shall sidestep lest we find ourselves in quicksand. I shall assume that both statutory and common law are "law," and that a federal court may develop common law doctrines about safety. Still, the question remains; what use may be made of these doctrines?

A court that sets aside an arbitrator's award on grounds of public policy could mean: Whether or not the award carries out the contract, there is a rule against this *outcome*. If the parties contracted for such a result explicitly, the court would refuse to enforce their pact; the court refuses to enforce an award that can be justified only by the arbitrator's role as the interpreter of the contract.[15] An arbitrator's reinstatement of white employees in preference to identically situated black employees would violate

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[13]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); Gould, *Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworkers Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464 (1989). *See also, e.g.*, Ray, *Protecting the Parties' Bargain After Misco: Court Review of Labor Arbitration Awards*, 64 IND. L.J. 1 (1988–89).

[14]*Cf.* Carnival Cruise Lines, Inc. v. Shute, 111 S.Ct. 1522, 59 USLW 4320 (1991).

[15]Meat Cutters Local P-1236 v. Jones Dairy Farm, 680 F.2d 1142, 110 LRRM 2805 (7th Cir. 1982), is one example, holding that an arbitrator could not enforce a work rule forbidding employees to report deficiencies in the plant to the Department of Agriculture. The court treated the award the same way it would have treated an express provision in the contract barring reporting.

public policy in this sense. So too would reinstatement of a pilot who lacked a license to fly.

Public policy is pertinent to an arbitrator's award in a second way. When an arbitrator invokes public policy to trump the contract he is supposed to implement, he has overstepped his authority and the court may set aside the award. An arbitrator's authority flows from contract and is limited to applying the contract.[16] This is the norm from the *Steelworkers Trilogy*:[17] the arbitrator can't make up his own rules.[18]

Although public policy may be off-limits as a basis of arbitral decision, it is suggestive for courts. Suppose the contract says only that employees may be fired for "just cause," and the employer, a bank, fires a teller for theft. It is exceptionally unlikely that any (sane) bank would agree to keep embezzlers on the payroll. Theft is hard to detect. A teller caught in the act may have stolen before and might do so again. If no rational bank would enter into a contract excusing embezzlement, then a court might properly conclude that an arbitrator who excuses this crime 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.[19] Similarly, if because of potential liability to its workers for having an unsafe working environment no firm would adopt a clause giving a psychotic worker a second chance, an arbitrator who provides a second chance is expressing sympathy, administering home brewed justice rather than the contract. "The zanier the award, the less plausible it becomes to ascribe it to a mere error in interpretation rather than a willful disregard of the contract."[20] Public policy

[16]Something the Court forcefully reiterated in Litton Financial Printing Division v. NLRB, 111 S.Ct. 2215, 59 USLW 4641 (1991).

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

[18]"[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." *Enterprise Wheel & Car, supra* note 17, at 597.

[19]Arbitrators occasionally confess to this sin. Reinstating a worker who had vandalized company property, the arbitrator announced that the discharge "did not violate the terms of the Agreement"—but that he was reinstating the employee anyway! Not surprisingly, the court refused to enforce the award. Buckeye Cellulose Corp. v. UAW, 689 F.2d 629, 111 LRRM 2502 (6th Cir. 1982).

[20]Typographical Union #16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505–06 (7th Cir. 1991). I made much the same point concurring in *Grasselli, supra* note 1, at 620.

helps us identify some provisions that will not appear in contracts. An arbitrator's announcement of a rule that no one would write into a contract stands revealed as invention rather than interpretation. Public policy thus informs the court's application of the *Steelworkers Trilogy*.

Public policy appears in a third guise when a court claims the right to do what the arbitrator may not, to decide whether an award cuts at cross purposes with a policy the court thinks valuable. This is what happened in *Misco*, in which the employee was caught using drugs, was reinstated, and the Supreme Court held that judicial disapprobation of smoking pot could not override the choice of the arbitrator, as the parties' agent, to allow the smoker to keep working.

In considering the propriety of using public policy in this way it helps to return to the case of the explicit contractual term. Suppose a collective bargaining agreement expressly excuses a single psychotic tantrum, provided the problem is unlikely to recur, or suppose a contract excuses a single episode of larceny. If the firm, honestly implementing its contract with the employees, kept the berserker or thief on the payroll, no public policy would stand in the way. If the person's immediate supervisor fired him, and someone higher in the line of command reversed that decision as a result of a grievance, there would be no greater reason for judicial action. (A state might bar employment of such persons, but if it does courts do not need a "public policy" doctrine; they need only point to the rule making the employment unlawful.) A contract of arbitration transfers the power of the manager to the arbitrator. If the arbitrator acts within the scope of his authority, the decision should be treated the same as the management's own. Firms may place decisionmaking authority where they please, may transfer power from supervisors to arbitrators if they wish.

This supplies an answer to the question that has vexed the courts of appeals—whether the applicable "public policy" is the one governing the employee's conduct or the one governing the employer's reaction to that conduct. Courts' answers to this question determine their views of arbitral authority. Courts that stress the policy against drunken flying (and the like) invariably annul the reinstatement; courts that inquire whether there is some policy against employing a person who has been caught violating a safety rule almost always allow the arbitrator's decision to stand. The latter view is the right one. Once we conclude

that a firm could employ a person consistent with legal norms, then the only issue is *who* speaks for the firm in making this decision. No rule of law says that a supervisor may retain a pothead, but that a corporate vice president may not overrule a supervisor's decision to discharge the smoker. The identity of the actor within the firm is irrelevant. It must, then, be irrelevant that the decision is made by an arbitrator rather than a vice president. For the arbitrator is the parties' jointly designated decider.

Arbitrators no less than supervisors serve a vital role in translating dry and vague language ("just cause" and like phrases) to the workplace, in making a written agreement live. A collective bargaining agreement is a relational contract, too complex to commit to words. Even if the employer and the union could agree on the right way to respond to every kind of misconduct by employees, they could not imagine all of the possibilities—and to try to write down their solutions to the subset they can imagine would make the agreement read like a bond indenture. Parties deliberately leave terms open-ended, knowing that others will fill them in. Supervisors and managers take the lead in completing the contract and usually have the last word; the arbitration clause gives the union an option to call on a different decider, one who, because of disinterest in the outcome, may be more faithful to the original plan.[21] Changing the person with the final say does not diminish the parties' joint authority to specify an outcome.

Many become jittery at this point. So far I have treated the employee, the union, and the firm as if they were the only parties in interest. They are the parties to the agreement, but they are not the only ones who care about the outcome. Passengers on a plane six miles in the air, pedestrians in the path of a car whose wheels have just fallen off, and people who live downwind from nuclear power plants may be the biggest losers if an arbitrator requires the firm to retain an employee who scoffs at safety. Employers look out for their customers and even for strangers; tort law plus the private costs of accidents give them every reason to do so. Arbitrators do not pay damages for reinstating risk-

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[21]The affinity between my approach and Professor St. Antoine's arbitrator-as-reader should be obvious. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1160 (1977). *Cf.* Nolan & Abrams, *The Labor Arbitrator's Several Roles*, 44 MD. L. REV. 873, 890–95 (1985).

taking workers and so may give too little attention to the public's interest.

Third-party effects would supply a potent argument along the lines of my second sense of public policy of wacky decisions as clues that the arbitrator is off on a lark rather than trying to implement the parties' bargain—*if* firms always opted for safety when deciding whom to employ or retain. They don't.

Consider two famous cases. Exxon has a problem drinker as a captain of one of its tankers. It requires the captain to obtain treatment and, after satisfying itself that the treatment succeeded, reinstates him to his former position. Japan Air Lines (JAL) has a manic-depressive as a captain of one of its jetliners. It requires the captain to obtain psychiatric treatment and, after satisfying itself that the treatment succeeded, reinstates him to his former position. No one supposes that a court could invalidate these reinstatements. Firms are entitled to take risks with their employees, and we see them do so all the time.

In the event, things turned out badly. Exxon's captain relapsed into drinking and was under the influence when his ship, the EXXON VALDEZ, put out of port fully loaded and ran aground.[22] JAL's captain had more episodes of depression, including one during final approach to landing at Tokyo. He decided to commit suicide by ditching the plane in Tokyo Bay. Unfortunately he took the passengers with him.

Doubtless many equivalent episodes of retaining or reinstating troubled employees were successful, which is why the details have not come to us on the evening news. Vivid examples like these, and the more common but pallid examples of successful reinstatements, show that firms take the same sort of risks we see arbitrators taking, which makes the arbitrators' decisions look less like frolics.

Why do employers take risks with their customers' (and the environment's) safety? Sometimes they do so because there is a shortage of skilled workers. All too few people can manage a supertanker—and make no mistake, masters of huge ships are managers more than they are navigators. Gone are the days of captains with sextants and secret charts. Exxon needs someone to coordinate the tasks of a crew and assume many of them

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[22] Needless to say, I stand aside from the pending litigation about this calamity. Whether Captain Hazlewood's imbibing had anything to do with the spill—and, if so, what to do about it—is a question for another forum.

himself if need be. Such people are in short supply. Sometimes firms retain problematic employees because the promise of redemption helps induce workers with problems to 'fess up and get help. Few drinkers would admit their problems if that meant discharge; many will do so if the firm is willing to take them back after treatment. To induce more employees to step forward—and thus reduce risks in the aggregate—the firm must be willing to take some risks with individual employees. If cost-sensitive corporations make such calculations, it cannot be whimsical for arbitrators to do so when called on to render final decisions.

True, one could say that in discharging a person the firm determined that his skills were *not* in short supply, or that the gains from inducing other workers to admit their problems were less than the hazards created by any particular employee. Yet discharge decisions are made by supervisors who may see the "big picture" no more perfectly than the arbitrator—anyway, the contract committing a decision to arbitration is the firm's assent to give the arbitrator the last word. A collective bargaining agreement *could* exclude from arbitration any discharge on grounds that the employee creates safety risks for fellow workers and the public. When the arbitration clause is general, an employer cannot readily say that the risk-benefit calculus behind its own decisions is off-limits to the arbitrator.

A different path takes us to the same destination. As Judge Edwards observed, on-the-job safety is a mandatory subject of collective bargaining.[23] Even operators of nuclear power plants must bargain with their unions about safety and discipline. It makes no sense to say that the employer must bargain with the union about, say, a proposal for progressive discipline barring discharge for a first offense, and then to turn around and invoke "public policy" to allow the firm to discharge an employee for a first offense despite the collective bargaining agreement. The Nuclear Regulatory Commission (NRC) might require discharge but has not done so. As long as the NRC is silent, the *real* public policy at hand is the one requiring employers to bargain with unions *and to live up to the agreements they reach.* Those agreements may curtail the employers' use of discharge, may transfer final authority to an arbitrator, and so on. If considerations of safety give employers a unilateral power to discharge workers, then we have negated the duty to bargain. Yet that duty

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[23]Edwards, *supra* note 13, at 23–29.

is established by positive law, and the "public policies" of federal common law cannot negate federal statutory law.

One variant of the public policy question has escaped discussion in the cases and secondary literature. It is this: May an arbitrator decide the public policy question and thereby put it off-limits to reconsideration by courts? This is different from the question whether an arbitrator may use public policy to do something other than what the contract requires. I have in mind instead an arbitrator's resolution something like: "I have decided that the employer lacked 'just cause' to dismiss [the drunken pilot, the sexually obnoxious lineman, etc.]. The employer maintains that the public policy [favoring sober flying, opposing sexual harassment, etc.] prevents reinstatement of the grievant. I disagree with that submission, believing that discharge is not the only option public policy leaves open to an employer." If the arbitrator says something of the kind, may a court nonetheless consider the employer's public policy objection to enforcement of the award?

Until recently the answer would have been a resounding "yes." Courts repeatedly said that arbitrators were confined to interpreting and applying the contract; questions of law, the refrain went, always could be presented to a court.[24] Yet parties may compromise disputes under most statutes. If they may settle all legal differences themselves, why may they not appoint a neutral to do so in their stead? Giving its answer to this question, the Supreme Court has held that arbitrators may resolve disputes under the antitrust laws, the securities laws, the Racketeer Influenced and Corrupt Organizations Act (RICO), and the Age Discrimination in Employment Act (ADEA).[25] If arbitrators may resolve disputes under these statutes, why not disputes under the less focused common law doctrines we call "public policy"?

One short and sufficient answer would be that the contract denies the arbitrator this authority. Let us suppose, however, that the clause is sufficiently broad to allow the arbitrator to address the question. Is there then any way to distinguish the

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[24]*E.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 7 FEP Cases 81 (1974); McDonald v. City of West Branch, 466 U.S. 284, 115 LRRM 3646 (1984).

[25]Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (antitrust); Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987) (Securities Exchange Act of 1934); Rodrigues de Quijas v. Shearson/American Express Inc., 490 U.S. 477 (1989) (Securities Act of 1933 and RICO); Gilmer v. Interstate/Johnson Lane Corp., 111 S.Ct. 1647 59 USLW 4407 (1991) (ADEA).

antitrust and age discrimination laws? Public policy is amorphous, a branch of the common law, but so is antitrust. An employer might point to the third-party effects of unsafe or sexually insensitive employees, but for reasons I have already covered this is an insufficient answer. Unless third-party effects disable the employer from deciding to retain an employee, they do not disable the arbitrator. Federal agencies may protect strangers to that bargain. Antitrust enforcers, the Securities and Exchange Commission, criminal prosecutors, and the Equal Employment Opportunity Commission protect the public interest when contracts allow arbitrators to decide private antitrust, securities, RICO, and ADEA disputes. So, too, the NRC and a bevy of other agencies can protect the public from unsafe workers.

Perhaps the antitrust and similar decisions all depend on the Federal Arbitration Act, which does not apply to the enforcement of collective bargaining agreements.[26] Many of the recent cases emphasize the Act. Yet that statute does not promote arbitration; its function "is to place arbitration agreements upon the same footing as other contracts."[27] Whether to arbitrate remains a matter of private choice. No reader of the *Steelworkers Trilogy* and *Misco* could think that arbitration of disputes arising under collective bargaining agreements is disfavored compared with arbitration of disputes under the antitrust and securities laws.

Arbitration expedites the resolution of disputes. Unless awards are final, arbitration will be neither faster than litigation nor cheaper. If arbitration is routinely followed by litigation to address the "public policy" aspects of the award, the parties might as well have provided for litigation in the first place.[28] Public policy, an ambulatory set of interests and considerations, does not compel claim splitting, with some issues resolved by arbitrators and others by judges. I should think that the federal interest lies in encouraging one full resolution of any dispute—whether before an arbitrator or a judge—and then closing the books. Finality is one of the principal benefits of arbitration, and

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[26]9 U.S.C. §1.

[27]*Gilmer, supra* note 25, at 1651. *See also* 9 U.S.C. §2, providing that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Arbitration under the FAA is therefore not a favorite of the law; the FAA is designed only to eliminate judicial hostility and equate arbitration contracts with other contracts.

[28]*Cf.* Prod. & Maintenance Employees Local 504 v. Roadmaster Corp., 916 F.2d 1161, 1163, 135 LRRM 2831 (7th Cir. 1990).

courts should be most reluctant to interfere with its achievement in the name of public policy.

I close by returning to my initial question: Who *is* cuckoo in this script? I have been damning judges for misunderstanding and overstepping their roles. Life tenure emboldens me to spread the blame.

Why in the world should arbitrators reinstate the characters in this play? The mechanic who would not tighten lug nuts endangered the lives of customers and strangers. The auto dealer did not fire the mechanic for the first offense but acted only after the mechanic not only refused to change his methods but also released a second car in even worse shape. The printer who harassed his co-worker had a long track record. He was fired in 1983 after repeatedly making life hard for female employees. An arbitrator reinstated him in 1984 but issued an award stating that the slightest recurrence would justify discharge. Well, the printer returned to his habits and was sacked a second time. Jaws must have dropped all over town when a second arbitrator reinstated him despite concluding that his renewed conduct "was quite offensive to the women involved, and clearly constitutes harassment."[29] The second arbitrator concluded that the discharge was inconsistent with progressive discipline—concluding with a warning essentially identical to the first arbitrator's! You are left with the impression that an employer trying to make life tolerable for its female employees had been rendered powerless to do so.

Most "public policy" cases come from awards that strain credulity. Even when arbitrators make an effort to justify their decisions and ameliorate the risks—as did the arbitrator who reinstated the drunken pilot, insisting that the pilot abstain from alcohol for two years and obtain a new license to fly—courts cannot help asking why this is a sensible match of person to job. Society is not grievously short of pilots. Captains who drink on the job may have a relapse, and even one incident can be fatal. Employers (and the rest of us) want to match people to jobs. Incidents such as trying to take command of a jetliner after imbibing show such a horrible deficiency in judgment that we must fear a repetition. However kind to his mother the pilot may be, however long he worked for the airline, he belongs on the ground.

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[29]Arbitrator Adelman's opinion, quoted in *Newsday, supra* note 9, at 843.

Arbitrators frequently write as if the choice were between reinstatement to the original job and starvation for the worker and his family. Given such a terrible choice, the arbitrator prefers to give the person another chance. It is easy to express sympathy, to downplay the risk to a third party and the financial exposure of the employer. But reinstatement versus the bread line is not the real choice. If the arbitrator sustains the discharge, the person will catch on somewhere else. The new job is apt to pay less, or be dirtier or otherwise less attractive. Why else did the grievant complain? Such losses are from society's perspective no loss at all—someone else obtains the vacated job and moves up the ladder, and society benefits from a more efficient matching of person to job.

My druthers are at the last irrelevant. A capitalist economy depends on courts to be faithful agents of private bargains. What intelligent adults agree by contract to do, courts must implement. Arbitrators are not intermeddlers. They hold office by virtue of contract. What an employer surrenders at the bargaining table, a judge must not restore under the banner of public policy.

I. A MANAGEMENT VIEWPOINT

RICHARD GEAR*

The U.S. Supreme Court has made it abundantly clear that, as with any other contract, a collective bargaining agreement that is contrary to public policy may not be judicially enforced. The public policy exception to the enforcement of arbitral awards, articulated in *W.R. Grace*,[1] is that the 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." The Supreme Court also discussed the public policy exception in *Misco*.[2] In a unanimous decision the Court upheld an arbitrator's decision reinstating a discharged employee, and laid down three distinct rulings. First,

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[1]W.R. Grace & Co. v. Rubber Workers, Local 759, 461 U.S. 757, 766; 113 LRRM 2641 (1983) (quoting Muschany v. United States, 324 U.S. 49, 66, 113 (1945)).

[2]Paperworkers v. Misco, Inc., 484 U.S. 29, 126 LRRM 3113 (1987).

the Court reaffirmed the principles of the *Steelworkers Trilogy*,[3] severely limiting the role of courts in reviewing an arbitrator's award and granting great deference to an arbitrator's choice of remedies. Second, the Court stated that it would not allow broad judicial discretion to be used to set aside arbitration awards. Third, the Court rejected the application of a public policy defense to the enforcement of the arbitration award, and stated "[a]t the very least, an alleged public policy must be properly framed under the approach set out in *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced."[4]

However, the Supreme Court stopped short of deciding the issue on which certiorari was granted, namely, whether a court may vacate an arbitration award on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer. As a result, the Court's holding in *Misco* has not prevented the U.S. Circuit Courts of Appeal from using the public policy exception more broadly than the positive law usage; therefore, litigation on this issue has flourished and conflict remains in the circuits on precisely how broad the public policy exception extends.

Stanford Law School Professor William Gould attributes the rise in litigation over arbitration awards to three factors. The first is the increase in civil rights legislation, the arbitration of which would not be accorded the same degree of deference under *Gardner-Denver*[5] as in *Enterprise Wheel*.[6] The second factor is the rise of new problems in the workplace in the 1980s and 1990s, most notably health and safety, toxic substances, and drug and alcohol abuse. The third factor is the decrease in the number of employees covered by collective bargaining agreements and the arguable decline of unions in the United States. This development has had the effect of encouraging employers to challenge arbitration decisions that favor labor unions, which are in retreat. It is estimated that merely 16.5 percent of the work force is presently affected by contractual labor arbitration decisions.[7]

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

[4]*Misco, supra* note 2, at 302.

[5]Alexander v. Gardner-Denver Company, 415 U.S. 36, 7 FEP Cases 81 (1974).

[6]*Enterprise Wheel, supra* note 3.

[7]Gould, *Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworkers' Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464 (1989).

In the interpretation thought to be held by labor unions, the public policy exception is so narrow as to mean a court may overturn an arbitrator's award only when the award itself violates positive law or requires unlawful conduct by the employer. A violation of positive law requires that there exists a federal or state law prohibiting the hiring or reinstatement of employees who have engaged in certain types of offenses, such as (1) marijuana smokers or those suspected of smoking marijuana when such employees are required to operate hazardous equipment in industry, (2) employees who drink on duty, or (3) employees who engage in unsafe practices in a nuclear power plant. Obviously, few such laws, if any, exist. If the labor union view of a narrow positive law interpretation is correct, the public policy exception means very little to today's practitioners.

On the other hand, the interpretation of the public policy exception, endorsed by management, encompasses a broader standard. In this viewpoint the violation of public policy sufficient to vacate an arbitrator's award is not limited to violations of specific federal or state law. This viewpoint argues that the courts should utilize good common sense, as well as explicit federal or state law, in determining public policy.

Several U.S. Circuit Courts of Appeal have clearly adopted the narrow, limiting definition of public policy that is sufficient to vacate an arbitration award. These circuits would upset an arbitration award only on the showing that an award would violate positive law. For instance, even before the *Misco* decision, the D.C. Circuit adopted the narrow interpretation in *U.S. Postal Serv. v. Letter Carriers.*[8] This court honored an arbitrator's award reinstating a postal employee who had been discharged from the Postal Service after being arrested and charged with unlawful delay of the mail. The arbitrator ordered that the postal employee be reinstated without back pay upon fulfilling certain conditions, among them the successful completion of a rehabilitation program for compulsive gambling. In reversing the district court's decision to vacate the arbitration award on the public policy ground of maintaining an efficient and reliable postal service, the court stated:

> There is surely no doubt that the instant case does not pose a situation requiring the invocation of a public policy exception. The arbitrator's award was not itself unlawful, for there is no legal

[8] 810 F.2d 1239, 124 LRRM 2644 (D.C. Cir. 1987), *cert. dismissed*, 485 U.S. 680 (1988).

> proscription against the reinstatement of a person such as the grievant. And the award did not otherwise have the effect of mandating any illegal conduct.[9]

The court was compelled to uphold an arbitrator's award reinstating an employee in the absence of explicit rules against reinstatement of such an employee.

The First Circuit followed suit in their *Warren I*[10] and *Warren II*[11] decisions. In these companion cases an arbitrator determined that suspension was the appropriate penalty, rather than discharge, for a papermill employee who had been arrested and charged with possession of marijuana. The First Circuit had previously vacated the arbitrator's award on public policy grounds, but on remand after the *Misco* decision, the court abandoned the public policy basis for setting aside the arbitrator's decision and held that the arbitrator had exceeded his contractual authority by instituting a remedy not available under the circumstances. The collective bargaining agreement contained predetermined remedies for violations of this type, and a mere suspension was not one of them.

Moreover, the Third Circuit affirmed an arbitrator's award reinstating a postal employee who had fired gunshots at the postmaster's unoccupied car. The arbitrator found that the postal worker did not have a proclivity for any future aggression and deserved to be reinstated. The court rejected the postal service's argument that "there is an indisputable public policy against permitting an employee to direct physical violence at a superior, and an equally compelling policy against forcing that superior to again employ the man,"[12] and thus upheld the arbitration award reinstating the postal employee. It is apparent from this decision that an arbitrator's specific finding concerning the employee's future job conduct is of high value if such evidence is offered.

In a Fifth Circuit case, *Oil Workers Local 4-228 v. Union Oil Co. of Cal.*,[13] an arbitrator had reinstated an oil refinery employee

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[9]*U.S. Postal Serv.*, 810 F.2d at 1241, 124 LRRM at 2645 (quoting American Postal Workers v. U.S. Postal Serv., 789 F.2d 1, 8, 122 LRRM 2094 (D.C. Cir. 1986)).

[10]S.D. Warren Co. v. Paperworkers Local 1069, 845 F.2d 3, 128 LRRM 2175 (1st Cir. 1988), *cert. denied*, 488 U.S. 992 (1988).

[11]S.D. Warren Co. v. Paperworkers Local 1069, 846 F.2d 827 (1st Cir. 1988), *cert. denied*, 488 U.S. 992 (1988).

[12]U.S. Postal Serv. v. National Ass'n of Letter Carriers, 839 F.2d 146, 148, 127 LRRM 2593 (3d Cir. 1988) (quoting U.S. Postal Serv. v. Letter Carriers, 663 F. Supp. 118, 119–20, 125 LRRM 3190 (W.D.Pa. 1987), *rev'd*, 839 F.2d 146, 127 LRRM 2593 (3rd Cir. 1988)).

[13]818 F.2d 437, 125 LRRM 2630 (5th Cir. 1987).

after discharge for the use and sale of cocaine. Noting the low probability of the employee's future sale and use of drugs, the arbitrator concluded that the employee would not present a safety risk in the future. The Fifth Circuit upheld the arbitrator's decision, since at that time enforcement of the arbitrator's award would not have violated the strong public policy against the operation of dangerous equipment by persons using drugs or alcohol. However, the court ordered the arbitrator to reexamine his decision in light of recent evidence that the employee continued to use drugs contrary to the arbitrator's prediction.

In *Delta Queen Steamboat Co. v. District 2 Marine Engineer,*[14] an arbitrator entered an award reinstating a riverboat captain after the captain was terminated for his carelessness that led to a near collision between two vessels on the Mississippi River. The court declined to address the public policy issue, and instead vacated the arbitrator's award on the ground the arbitrator was prevented from reinstating the captain by a finding of gross carelessness. The court refused to respect arbitral action that was contrary to express provisions in the collective bargaining agreement.

In *United Food & Commercial Workers v. National Tea,*[15] the Fifth Circuit enforced an arbitrator's award interpreting a contractual provision, stating:

> Because we find that the clarification award was based upon interpretation of the contract and because there are no allegations that the award stemmed from fraud or partiality, or concerned a matter not subject under the contract to arbitration, or violated public policy, we reinstate the portion of the award vacated by the district court.[16]

The Sixth Circuit has also adopted the doctrine, limiting use of the public policy exception to cases involving violation of positive law. In *Dixie Warehouse and Cartage v. General Drivers,*[17] the court affirmed an award reinstating a forklift operator who had consumed alcohol on duty. Despite Dixie Warehouse's established policy of discharging employees who used alcohol while on duty thereby ensuring that employees who use dangerous equipment and handle costly materials are unimpaired by alcohol, the court followed *Misco* and afforded the arbitrator's

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[14]889 F.2d 599, 133 LRRM 2077 (5th Cir. 1989), *cert. denied,* 112 L. Ed. 2d 114 (1990).
[15]899 F.2d 386, 134 LRRM 2193 (5th Cir. 1990).
[16]United Food & Commercial Workers, 899 F.2d at 389.
[17]898 F.2d 507, 133 LRRM 2942 (5th Cir. 1990).

award great deference. Additionally, in *Interstate Brands v. Teamsters Local 135*,[18] the Sixth Circuit honored an arbitrator's award reinstating a driver-salesman after he had been arrested for possession of cocaine, marijuana, and drug paraphernalia. The court rejected the district court's purported public policy justification for reversing the arbitrator's award, noting that no review of existing law and legal precedents had taken place to determine whether a well-defined and dominant public policy had been violated by the reinstatement.[19] The court noted that the district court mischaracterized the public policy issue by evaluating the employee's behavior instead of the arbitrator's award, stating:

> The issue is not whether grievant's conduct for which [grievant] was disciplined violated some public policy or law, but rather whether the award requiring the reinstatement of a grievant . . . violated some explicit public policy.
>
> The district court failed to identify any law or legal precedent with which an arbitrator's reinstatement order would conflict. While it is indisputable that allowing intoxicated persons to drive motor vehicles violates public policy, it does not follow, however, that any arbitration award reinstating an employee discharged for being intoxicated while off-duty, or arrested for off-duty possession of controlled substances may never be enforced without violating the public policy exception of arbitration awards.[20]

In two unpublished opinions the Sixth Circuit also upheld arbitration awards reinstating employees.[21]

The Seventh Circuit also follows the narrow positive law standard. In *E.I. DuPont v. Grasselli Emp. Ass'n*,[22] the court held an arbitrator's determination that a discharged employee should be reinstated not violative of the public policy of providing a safe working environment. In this case an employee had been discharged after he experienced a mental breakdown that led him to attack his supervisor and operator, and attempted to do further damage. In upholding the arbitrator's award, the court

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[18]909 F.2d 885, 135 LRRM 2006 (6th Cir. 1990), *petition for cert. filed.*

[19]Interstate Brands, 909 F.2d at 893.

[20]*Id.*

[21]Premium Building Products Co. v. Steel Workers Local 8869, 798 F.2d 1415 (Table) (6th Cir. 1986) (text in WESTLAW) (an employee was reinstated after marijuana use due to the absence of a clearly defined public policy requiring that anyone caught smoking marijuana in the workplace be subject to discharge in all cases); Joseph & Feiss Co. v. Clothing & Textile Workers, 861 F.2d 720 (Table) (6th Cir. 1988) (text in WESTLAW) (while an employee's conduct may have implicated a state statute prohibiting fraudulent misrepresentations in an application for unemployment compensation benefits, an arbitrator's award reinstating the employee itself does not violate this policy).

[22]790 F.2d 611, 122 LRRM 2217 (7th Cir. 1986), *cert. denied*, 479 U.S. 853 (1986).

respected the arbitrator's factfinding that the chance of a recurrence of violent acts by the employee was extremely remote, and that this remote chance of harm to others did not mandate an award against the employee.

The Ninth Circuit has also adhered to this narrow viewpoint. In *Pullman Power Products Corp. v. Local 403*,[23] the court enforced an arbitrator's award ordering back pay, but not reinstatement, over public policy objections. In that case, nuclear power plant employees were banished from a construction site by a contractor after a drug investigation had taken place. In *Stead Motors v. Machinists Lodge 1173*,[24] the entire Ninth Circuit *en banc* affirmed an arbitrator's award reinstating a mechanic who was fired for repeatedly and negligently failing to tighten wheel lug bolts on Mercedes-Benz automobiles. California laws made it unlawful to operate a vehicle in an unsafe condition and established a state inspection bureau that could require auto repair shops to shut down for violations of the safety codes. Although a three-judge panel had relied on these laws to find a public policy exception to upset the arbitration award, the entire court found instead that these laws show only a broad public interest in having safe cars and trucks (a general policy only). Therefore, no explicit, well-defined, prominent public policy existed in California to bar reinstatement of a mechanic who commits a reckless or grossly negligent act in the course of employment. All that existed were "general considerations of supposed public interest."[25] In *Van Waters & Rodgers, Inc. v. Local Union 70*,[26] the Ninth Circuit affirmed an arbitrator's award of damages for an employer's failure to integrate seniority rights. The award's assumption that terms and conditions of a former owner's collective bargaining agreement were part of the purchase of the former owner's facility did not violate the National Labor Relations Act; therefore, the award was not invalid as against public policy. In two unpublished opinions the Ninth Circuit also upheld arbitration decisions.[27]

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[23]856 F.2d 1211, 129 LRRM 2500 (9th Cir. 1988).

[24]886 F.2d 1200, 132 LRRM 2689 (9th Cir. 1989), *cert. denied*, 58 USLW 3739 (1990).

[25]*W.R. Grace*, 461 U.S. at 766.

[26]913 F.2d 736, 135 LRRM 2471 (9th Cir. 1990).

[27]Columbia Lighting, Inc. v. Local Union 73, IBEW, 884 F.2d 1394 (Table) (9th Cir. 1989) (text in WESTLAW) (an arbitral award was upheld in the absence of explicit Supreme Court law or an explicit, well-defined, and dominant public policy that evidence of past practice is always admissible in labor context; any award that involves contractual interpretation must be given complete deference); American Poultry Co. v. Local 85, 895 F.2d 1416 (Table) (9th Cir. 1990) (text in WESTLAW) (an arbitration award cannot be vacated as being contrary to public policy simply because the award conflicts with NLRB precedent).

The Tenth Circuit has joined the ranks of those U.S. Circuit Courts of Appeal that have adopted the narrow, limiting positive law violation definition of the public policy exception to enforcement of arbitral awards. In *Communications Workers v. Southeast Elec. Co-op.*,[28] public policy concern over protecting women from sexual assault was not sufficient to vacate an arbitrator's decision to suspend, rather than discharge an employee. Although the employee, a district lineman, had sexually assaulted a customer in her home, the court deferred to the arbitrator's informed judgment and took notice of the employee's otherwise excellent work record. In *United Food & Commission Workers Local 7R v. Safeway*,[29] the court enforced an arbitration award that assessed back pay, in part, against the labor union on the ground of delay in seeking arbitration. In doing so, the court rejected the union's contention that the award should not be enforced because it would go against the public policy of favoring arbitration as a dispute-resolution mechanism, stating the following:

> In the context of this case, the Union failed to show clearly a public policy violation. We fail to see how the enforcement of the arbitrator's award in this case has any significant tendency towards undermining the policy favoring the arbitration of labor disputes.[30]

In some U.S. Circuit Courts of Appeal, an arbitrator's award runs some risk of reversal on public policy grounds even after *Misco*. The Second Circuit is one of these jurisdictions. In *Newsday v. Long Island Typographical Union*,[31] the court vacated an arbitrator's award ordering reinstatement of an employee who had been discharged for sexually harassing female co-workers as violative of explicit, well-defined, and dominant public policy against sexual harassment in the workplace. In so holding, the court noted that sexual harassment is prohibited by Title VII of the Civil Rights Act of 1964; the Equal Employment Opportunity Commission Guidelines require the employer to take steps to eliminate harassment from the workplace; and case law under Title VII establishes violations for a hostile work environment. These references established "an explicit, well-defined, and dominant public policy against sexual harassment in the

[28]882 F.2d 467, 132 LRRM 2381 (10th Cir. 1989).
[29]889 F.2d 940, 132 LRRM 3090 (10th Cir. 1989).
[30]*Id.*, at 948.
[31]915 F.2d 840, 135 LRRM 2659 (2d Cir. 1990), *petition for cert. filed.*

workplace"[32] which the arbitrator disregarded and effectively condoned. In addition the court stated the following:

> [The arbitrator's] award of reinstatement completely disregarded the public policy against sexual harassment in the workplace. . . . Instead, [the arbitrator's] award condones [the employee's] latest conduct; it tends to perpetuate a hostile, intimidating and offensive work environment. . . . Above all, the award prevents [the employer] from carrying out its legal duty to eliminate sexual harassment in the work place.[33]

In *Iowa Elec. Light & Power v. Local Union 204*,[34] the Eighth Circuit reversed an arbitrator's award reinstating a nuclear power plant employee who had purposely defeated a safety interlock system so that he could leave his job early. The court concluded that there existed a "well-defined and dominant national policy requiring strict adherence to nuclear safety rules."[35] The *Misco* limitations are not applicable in this case because public safety was involved rather than mere employee safety. In a later case, *Daniel Constr. Co. v. Local 257, IBEW*,[36] the court affirmed an arbitrator's order of back pay (reinstatement was not ordered) to 157 employees discharged because they failed a psychological test that allegedly screened out those who might be a security risk at a nuclear power plant. The arbitrator had taken expert testimony concerning the validity of the test and had made specific findings concluding that the test failed to do what it was designed to do—it lacked predictive validity. In holding that the arbitrator's decision was not against public policy, the court stated that the use of a faulty psychological test did not advance the public policy of nuclear safety. The court distinguished *Iowa Elec. Light & Power* by noting that no public safety concerns are implicated by the arbitrator's award of back pay, as opposed to an order returning a potentially dangerous employee to the workplace. It is apparent that had the arbitrator attempted to reinstate the employees in the *Daniel Constr. Co.* case, the court would have vacated the order.

However, the Eighth Circuit refused to set aside an arbitrator's award in *Osceola County Rural Water System v. Subsurfco*.[37] In that case, an arbitration award in favor of a contrac-

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[32] *Id.* at 845.
[33] *Id.*
[34] 834 F.2d 1424, 127 LRRM 2049 (8th Cir. 1987).
[35] *Id.* at 1427.
[36] 856 F.2d 1174 (8th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989).
[37] 914 F.2d 1072 (8th Cir. 1990).

tor whose former employees testified that they had been ordered to falsify test results was upheld because there was no reason to believe that the arbitrators accepted as true this testimony; thus there was no basis for finding that the arbitration award would violate public policy by rewarding the contractor for falsifying test results.

Additionally, the Eleventh Circuit has overturned arbitration awards on public policy grounds based on less than explicit positive law. In *U.S. Postal Serv. v. Letter Carriers*,[38] an arbitrator reinstated a letter carrier who had been discharged after it was discovered he had been stealing from the mail. Although the court explored the public policy grounds for vacating the arbitrator's decision, the court backed away from deciding the case on those grounds due to the unsettled nature of the law on this issue, and struck down the arbitrator's award because it was arbitrary and capricious. In *Airline Pilots Ass'n v. Delta Airlines*,[39] the court vacated an arbitrator's order that reinstated a commercial airline pilot who had unquestionably and admittedly flown his plane while intoxicated. The Federal Aviation Administration (FAA) had suspended his license and medical certification. In reaching this decision, the court stated:

> *Misco* requires the finding of a well-defined public policy and an award that conflicts with that policy. The public policy of which the Supreme Court speaks in *Misco* seems to be a public policy not addressing the disfavored conduct, in the abstract, but disfavored conduct which is *integral to the performance of employment duties.* The question we are instructed, by *Misco*, to ask is not, "Is there a public policy against the employee's conduct?" but, rather, "Does an established public policy condemn the performance of employment activities in the manner engaged in by the employee?" Such a policy does exist in this case; the arbitrator's finding of no just cause explicitly conflicts with that policy.[40]

In support of the holding, the court listed all the state statutes outlawing flying while intoxicated, as well as the FAA regulations forbidding such conduct, and found these to be an adequate reference to laws and legal precedents; therefore, the court applied the public policy exception to vacate the arbitrator's award.

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[38] 847 F.2d 775, 128 LRRM 2842 (11th Cir. 1988).

[39] 861 F.2d 665, 130 LRRM 2014 (11th Cir. 1988), *cert. denied*, 110 S. Ct. 201, 132 LRRM 2623 (1989).

[40] *Id.*, at 671.

However, in *Florida Power Corp. v. Electrical Workers*,[41] the court refused to overturn an arbitrator's finding on public policy grounds. In that case, a coal yard fuel equipment operator was discharged for violating a recently adopted company drug policy after his arrest for cocaine possession and driving under the influence of alcohol off company property and outside of company time. The court expressed no enthusiasm for the arbitrator's finding that the employee's arrest on drug charges did not provide a sufficient and reasonable cause for the employee's discharge, but noted that the arbitrator had performed the very role contemplated by the parties in the collective bargaining agreement—the arbitrator interpreted the contract to decide whether the employee had been discharged for just cause. It is significant that the employee's arrest resulted from conduct unrelated to his employment duties, there being no public policy against employing someone who sells drugs away from the employment premises.

One commentator has noted, and I agree, that in the absence of positive law the public policy exception defense to the affirmation of an arbitrator's award is less likely to be effective in the following situations: (1) the arbitrator made specific findings of fact in order to establish that the employee was not guilty of the misconduct alleged; (2) the arbitrator made specific findings of fact in order to establish that the employee had no proclivity to commit future misconduct; (3) the alleged misconduct occurred off the job; (4) the arbitrator awarded the discharged employee back pay but not reinstatement; or (5) the employee was reinstated to a position he was qualified for, but not necessarily a safety-sensitive one.

The public policy exception defense is likely to be successful (even after *Misco*) in the following situations: (1) the case involves public safety, as distinct from private or employee safety (examples include nuclear power plant and commercial airline cases), especially those in which the arbitrator has set aside the employee's discharge on procedural grounds, such as lack of due process or disparate enforcement of the employer's policy of discipline; (2) the arbitrator has not made specific findings of fact, such as the employee's proclivity to future misconduct or rehabilitation, and has not explored the public policy issue; or

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[41]847 F.2d 680, 128 LRRM 2762 (11th Cir. 1988).

(3) the arbitrator's reasoning and factfinding is "silly" and below standard so as to be found repugnant by the courts.[42]

Courts will usually find some justification to set aside an award that they find repugnant. Such grounds include public policy, an abuse of the arbitrator's authority, or the contention that the arbitrator's award did not draw its essence from the collective bargaining agreement.

It is within the power of both arbitrators and employers to decrease the number of court challenges to arbitration awards. Arbitrators are respectfully encouraged to strive toward a high standard of reasoning and analysis in their decision writing, to specifically tackle the public policy issues in their decisions, and to make detailed and thoughtful findings of fact to support their decisions. Such attention to detail could substantially diminish the number of instances an arbitration award is attacked by an employer or vacated by a court. On the other hand, employers could require that the collective bargaining agreement contain a provision that the employer's discipline decision cannot be questioned even if an arbitrator finds the employee engaged in the misconduct alleged.[43] Such language would preclude a reinstatement of the employee, since the arbitrator derives all power from the contract language. An employer could require that employer discipline decisions involving safety be exempt from the arbitration process. However, the negotiation of such provisions is easier said than done, and while employers are upset by arbitral awards that offend their conception of public policy, few employers would risk a strike to obtain such provisions in their labor agreement.

In closing, the next time members of the National Academy of Arbitrators travel by air, ask yourselves whether you would rather be flying to Atlanta, where the Eleventh Circuit upset the reinstatement of an intoxicated pilot, or to a destination under the jurisdiction of the Ninth Circuit, which has yet to vacate on public policy grounds an arbitrator's award reinstating an employee discharged for unsafe behavior. Common sense dictates that your choice would be travel within the Eleventh Circuit, and I submit the same use of common sense by the judiciary will keep the public policy exception alive and well.

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[42]Nowikowski, *Public Policy Exception to the Enforcement of Labor Arbitration Awards*, 68 MICH. BUS. L.J. 626 (1989).

[43]*See* Warren I, 845 F.2d 3, 128 LRRM 2175 (1st Cir. 1988); Warren II, 846 F.2d 827, 128 LRRM 2432 (1st Cir. 1988).

II. A UNION VIEWPOINT

DAVID M. SILBERMAN*

It's a great honor for me to be here this morning both because of the distinguished audience that I'm addressing and because of the opportunity to respond to and discuss the paper of a distinguished judge. As you know, I am a mere lawyer. (One of the first lessons we learn in law school is if you put the word "mere" in front of any noun you can diminish it. The second lesson we learn is not to put the word "mere" in front of the noun "judge.") As a mere lawyer, I have many opportunities to respond to judges, but usually my responses begin with the phrase, "yes, your honor," or occasionally, "but, your honor." Thus being asked to respond to Judge Easterbrook's paper is a rare opportunity and a great privilege.

Having been offered this opportunity, I find it particularly frustrating—and as one in the process of trying to teach a six-year-old how to ride a bike, I consider myself an expert in frustration—that I am in substantial agreement with Judge Easterbrook. To be most useful, therefore, I propose to make several observations to put this in its real world context, and then respond to some of the issues Judge Easterbrook has raised.

My first point is that although the title of this session, "Public Policy and the Finality of Arbitration Awards," sounds like a very broad and general topic, in real world terms we're talking about, as Judge Easterbrook's paper makes clear, discharge cases and reinstatement awards. At issue here is how far judges can go in overturning reinstatement awards. That question arises when judges are troubled by the outcomes reached by arbitrators and look for ways to come out with different results. That's really what this dispute is all about.

Therefore you, as arbitrators, can do a great deal to take the "juice" and emotion out of the public policy debate by the nature of the opinions you write. The Academy's brief in the *Misco* case, which Dave Feller principally authored, does a brilliant job of demonstrating that what goes into a just-cause determination is a consideration of the very same factors that judges are looking at when they start applying this public policy exception. The brief argues the following:

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*President, Union Privilege, Washington, D.C.

> Unless constrained by other provisions of the collective agreement an arbitrator who is directed by the parties to consider whether the discipline imposed by the employer is "just," or "proper" or "sufficient" necessarily must take into account any public policy relating to the justice of the discipline. As another past president of the Academy, Professor Edgar A. Jones, Jr., put it in an address to the Academy, considerations of justice create a "necessity for an arbitrator to assess 'the common stock of legal ideas' about what is tolerable in our society." This is particularly true of the public policy issue presented in this case: safety.

Indeed, I dare say that few if any arbitrators would order reinstatement of an employee whom the arbitrator believed was going to go out and crash a plane.

To the extent that your arbitral awards make clear the decision-making process you've gone through, public policy challenges will be easier to defeat. We (lawyers) all know that you give careful consideration to these cases; we get your bills and we see how many hours you devote to this. But judges don't have the benefit of that information. They need some other manifestation of the thoughtfulness of your processes from the opinions you write. We know, to answer Judge Easterbrook's question, that you're not mad, you're not lunatic. If we got the labor and management bar together I'm sure—albeit by a closely divided vote with a lot of abstentions—we could carry the proposition: "Resolved, arbitrators are not mad or lunatic."

Let me try to make the point more concrete. Take the drunk pilot case, to which Judge Easterbrook referred. Judge Easterbrook asked, "Why in God's name should an alcoholic pilot who drinks be reinstated?" The answer the arbitrator gave was that the pilot had 16 years of service with an unblemished record. He suffered from a disease called alcoholism; he went to treatment and was certified as recovered. The airline had a policy of reinstating recovered alcoholics. And the arbitrator ordered reinstatement if, but only if, the Federal Air Surgeon certified the grievant had recovered from the effects of alcoholism and had totally abstained from drinking for a two-year period of time.[1]

That's not a mad result. That's not a lunatic result. It may not be the result one would reach if the contract permitted the employer to discharge any employee who is not optimally fit for

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[1]*See* Northwest Airlines v. Pilots Association, 808 F.2d 76, 124 LRRM 2300 (D.C. Cir. 1987), *cert. denied*, 56 USLW 3790, 128 LRRM 2296 (1988). Much the same is true of the second drunk pilot's case, Delta Airlines v. ALPA, 861 F.2d 665 (11th Cir. 1988).

a job. But when a contract permits discharge only where it is just to do so, it is neither irrational nor unjust to reinstate a recovered alcoholic to a pilot position. But again, the award has to make that clear—has to persuade the judge—that the arbitrator has weighed the relevant considerations, including safety.

That brings me to my next point. To the extent you clearly articulate the bases for your decisions in these cases, not only will you take away much of the emotional force from the public policy argument, but you will make it much more difficult as a strictly legal matter under *Misco*[2] to challenge your awards on public policy grounds.

When Professor Jan Vetter spoke to the Academy about the *Misco* case, he said, "The *Misco* decision resists easy summary, but also fails to reward a more detailed paraphrase."[3] I think that's a fair characterization of the decision. But the one lesson I think is quite clear from *Misco* is that, in making public policy determinations, judges must take the facts as found by the arbitrator; judges may not add to or elaborate on those facts, including facts as to amenability to rehabilitation.[4] Thus to the extent that your awards make the relevant factual findings and make clear the reasoning that led you there, it is going to be a lot harder to challenge awards under the *Misco* decision.

Having said all that, I want to quickly add that clearly there will be cases in which public policy questions arise. I agree with Judge Easterbrook's basic thesis that the question that should be asked in these cases is whether an award requires an employer to do something the employer is not legally free to do.

In urging this rule I should clarify that it was not our position in the Supreme Court, and is not my position here, that the only relevant legal prohibitions are statutory ones. In our brief in *Misco* we stated the following:

> We do not deny—indeed, we readily acknowledge—that the courts are not to enforce an arbitral award where the award interprets the contract to obligate the employer to commit a legal wrong as defined by the laws and legal precedents of the relevant jurisdiction where compliance with the remedial order would constitute such a wrong. This is true regardless of whether the wrong is a statutory violation or a tort or other common law wrong. Similarly, we agree an arbitral

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[2]Paperworkers v. Misco, 484 U.S. 29, 126 LRRM 3113 (1988).
[3]Vetter, *Public Policy Post-Misco*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1989), at 77.
[4]*See Misco*, *supra* note 2, at 44–45.

> award should not be enforced if there is a legal proscription on making an agreement of the type the arbitrator found the parties had made. Again, this is true regardless of whether the proscription is found in statute or in precedent.

What we argued in *Misco* was simply that the relevant public policy question is whether an award compels a result prohibited by the law as thus defined.

Now I've got to be candid and acknowledge that the rule we are arguing for here is quite different from that which applies in contract law generally. Let me give you an example from outside the labor relations field, an example which has received some public attention: surrogate-mother contracts.

It is my understanding that private parties are entirely free to enter into a contract under which A agrees to bear a baby and give that baby to B. Nothing illegal about making that contract; you can't arrest anybody, you can't sue anybody for making the contract. The parties are likewise entirely free to execute that contract, to carry out their bargain without committing any legal wrong. Nobody can stop them from doing that. But, if one of the parties to the contract says, "I've changed my mind, I don't want to go through with that bargain," the courts will not lend their coercive power to enforce the contract even though it is a lawful agreement and the result requested is a lawful result.

Contract law thus holds that there are certain situations in which the law won't bind people to their agreements because, in the eyes of the law, in these situations it is better to leave each party free to decide in the party's discretion how to act rather than to hold the parties to some promise made at a prior point in time. That's true about a variety of contracts such as promises to marry and contracts to insure intentional wrongs.[5]

What's different about collective bargaining agreements, I submit, is that as Judge Harry Edwards has forcefully argued, *labor* policy says that, within the realm of mandatory bargaining, employer discretion is never to be preferred over contractual obligations.[6] The entire point of the collective bargaining system is to displace a regime of employer discretion with a regime of mutually agreed upon rules. And it would be anathema to national labor policy to say that although the parties agreed to a

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[5]*See generally* 6A of Corbin on Contracts (1962), 14 S. Williston, A Treatis on the Law of Contracts (3d ed. 1977).

[6]Edwards, *Judicial Review of Labor Arbitration Awards*, 64 CHI.-KENT L. REV. 3 (1988).

particular result to which the parties were free to agree, the courts prefer to restore employer discretion.

In the drunk pilot case, for example, if—as the arbitrator determined—the employer made a promise to give alcoholic pilots the opportunity to recover and if that was a lawful promise, that should be the end of the matter. The courts are not free in the labor context to decide that they prefer to leave employers free to make these employment decisions in their discretion rather than allowing these matters to be resolved through collective bargaining.

There will still be hard cases, cases posing disputes as to whether an award orders a result that is contrary to law. In the mechanic case that Judge Easterbrook discussed, for example, a forceful argument was made that the California state licensing scheme prohibited a service station from operating with mechanics who had committed the kinds of wrongs involved there, and therefore the employer was not free to retain this person in its employ.[7] The court ultimately decided that California law did not go so far, but that was a case in which there was a significant debate. Similarly, in a postal service case in which an arbitrator ordered the reinstatement of a letter carrier who had failed to deliver mail, the Postal Service argued that because it is legally obligated to deliver the mail, the Postal Service is not free to retain in its employ an individual who refused to deliver mail or who has a tendency to fail to deliver mail.[8] Again, that is at least a colorable argument.

I suspect that in the regulatory state in which we live—in which so many trades and industries are regulated—there are going to be a number of close and interesting cases as to whether an employer is or is not free to retain somebody in its employ. But I fully agree with Judge Easterbrook that in the labor law context, that's the question and the only question the courts should be asking in deciding whether an arbitral reinstatement award violates public policy.

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[7]Stead Motors v. Machinists Lodge 1173, 886 F.2d 1200, 132 LRRM 2689 (9th Cir. 1989).
[8]U.S. Postal Service v. Letter Carriers, 810 F.2d 1239, 124 LRRM 2644 (D.C. Cir. 1987).