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## Hey Counselor, Can You Spare a Dime - The Seventh Circuit's High-Water Mark in Curbing Meritless Challenges of Arbitration Awards - Hill v. Norfolk & (and) Western Railway

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# HEY COUNSELOR, CAN YOU SPARE A DIME? THE SEVENTH CIRCUIT'S HIGH-WATER MARK IN CURBING MERITLESS CHALLENGES OF ARBITRATION AWARDS

*Hill v. Norfolk & Western Railway*<sup>1</sup>

## I. INTRODUCTION

On August 1, 1983, Rule 11 of the Federal Rules of Civil Procedure took on a new face and a new scope in an attempt to slow down the ever increasing abuses of the judicial system by attorneys.<sup>2</sup> By highlighting the attorney's responsibilities as an officer of the court, rather than as a zealous advocate of his or her client's interests, the new Rule 11 mandated increased attention by attorneys to investigating the law and facts submitted in all papers, to abstaining from litigating for improper purposes, and to

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1. . 814 F.2d 1192 (7th Cir. 1987).

2. The amended Rule 11 requires that "every pleading, motion, and other paper" be signed by an attorney of record "whose address shall be stated" and specifies:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the [violation], including a reasonable attorney's fee.

FED. R. CIV. P. 11.

displaying candor toward the court.<sup>3</sup> If any of these responsibilities are not met, "an appropriate sanction" shall be imposed.<sup>4</sup>

Now in its sixth year, the "new" Rule 11 has become a tool for district courts to use in preventing what the Seventh Circuit has termed "a shameful waste of judicial manpower."<sup>5</sup> Particularly in the area of arbitration, district courts are turning to Rule 11 in an effort to turn the tide on the "depressingly large number of recent cases grow[ing] out of refusals to use or abide by the grievance-arbitration machinery of collective bargaining agreements."<sup>6</sup> A collective bargaining agreement's arbitration clause "is supposed to insure speedy resolution of disputes;" hence, those who reject the arbitration process or its awards "endanger the productivity of the workplace and divert judicial time from the disputes that courts are supposed to resolve."<sup>7</sup>

In an attempt to discourage such "refusals to say die (or even to say try)" in arbitration-related cases, district courts have begun awarding attorneys' fees against parties making meritless challenges to arbitration awards.<sup>8</sup> Even though very few circuits have made use of Rule 11 in this capacity, the Seventh Circuit has paved the way to do so.<sup>9</sup> This Note traces the history of the Seventh Circuit's recent use of Rule 11 in actions involving the circumvention of the arbitration process to that circuit's high-water mark decision in *Hill v. Norfolk & Western Railway*.<sup>10</sup> This history serves to illuminate the imperative delivered by Judge Posner, not only to

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3. In addition to the new Rule 11, Rule 16(f) was amended and 26(g) was added at this time. Sanctions for delay caused by lack of preparedness at scheduling and pretrial conferences were authorized under the new Rule 16. Fed. R. Civ. P. 16(f). A certification procedure analogous to the Rule 11 procedure was authorized by the new Rule 26(g) for delay and expense caused by excessive discovery requests. Fed. R. Civ. P. 26(g). See also *Sanctioning Attorneys for Discovery Abuse--The Recent Amendments to the Federal Rules of Civil Procedure: Views from the Bench and Bar*, 57 ST. JOHN'S L. REV. 671 (1983).

4. FED. R. CIV. P. 11. See also Note, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300, 301 (1986).

5. See Int'l Ass'n of Machinists & Aerospace Workers, District No. 8 v. Clearing, Inc., 807 F.2d 618, 623 (7th Cir. 1986) (quoting *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860, 865 (7th Cir.1974), cert. denied, 419 U.S. 870 (1974)).

6. See *Bailey v. Bicknell Minerals, Inc.*, 819 F.2d 690, 691 (7th Cir. 1987). The court cited as recent examples, *Hill v. Norfolk & W. Ry.*, 814 F.2d 1192 (7th Cir. 1987); *Clearing*, 807 F.2d at 618; *Dreis & Krump Mfg. Co. v. International Ass'n of Machinists & Aerospace Workers*, Dist. No. 8, 802 F.2d 247 (7th Cir. 1986); *International Union of Elevator Constrs. Union v. Home Elevator Co.*, 798 F.2d 222 (7th Cir. 1986).

7. *Bailey*, 819 F.2d at 691.

8. *Id.*

9. See *Dreis & Krump*, 802 F.2d at 247; *Clearing*, 807 F.2d at 618; *Hill*, 814 F.2d at 1192; *Bailey*, 819 F.2d at 690; *Classic Components Supply v. Mitsubishi Electronics of Am.*, 841 F.2d 163 (7th Cir. 1988).

10. 814 F.2d 1192 (7th Cir. 1987).

members of the bar in the Seventh Circuit but to officers of the court nationwide: "Lawyers practicing in the Seventh Circuit, take heed!"<sup>11</sup>

## II. SEVENTH CIRCUIT COURTS UNDER THE "OLD" RULE 11

The first indication that an award of attorneys' fees would be levied by the Seventh Circuit against parties making meritless challenges to arbitration awards appeared in *Miller Brewing Co. v. Brewery Workers Local Union No. 9*.<sup>12</sup> The employer in *Miller Brewing* filed an action to set aside an arbitrator's award with respect to a collective bargaining agreement's hiring preference for employees laid off by another employer in a multi-employer bargaining unit.<sup>13</sup> The union filed a counter claim for its enforcement, and the district court gave summary judgment in favor of the union, awarding the union its attorneys' fees.<sup>14</sup> The employer appealed, and the court of appeals, after ordering a revision of the arbitrator's remedy, held that the district court abused its discretion in awarding the union its attorneys' fees.<sup>15</sup>

*Miller Brewing* was filed before the amended Rule 11 became effective. Thus, the district court was bound by the "American Rule,"<sup>16</sup> which stated that when no statute allowed for awarding attorneys' fees in a particular class of cases, the successful party was entitled to attorneys' fees only if his opponent's suit or defense was frivolous.<sup>17</sup> Neither section 301 of the Taft Hartley Act<sup>18</sup> nor section 9 of the Uniform Arbitration Act<sup>19</sup> authorizes an award of attorneys' fees in this class of cases.<sup>20</sup> Moreover, the Seventh Circuit had come to define "frivolous" as meaning "brought in bad faith--brought to harass rather than to win."<sup>21</sup> Here, the court held that the company's suit, although partially frivolous, was not frivolous as a whole.<sup>22</sup>

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11. *Dreis & Krump*, 802 F.2d at 256.

12. 739 F.2d 1159 (7th Cir. 1984).

13. *Id.* at 1167.

14. *Id.*

15. *Id.* at 1168.

16. *See, Clearing*, 807 F.2d at 622; *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

17. *Miller Brewing*, 739 F.2d at 1167.

18. 29 U.S.C. § 185 (1982).

19. 9 U.S.C. § 9 (1982).

20. *Miller Brewing*, 739 F.2d at 1167.

21. *Id.* *See also* *McCandless v. Great Atlantic & Pacific Tea Co.*, 697 F.2d 198, 200 (7th Cir. 1983).

22. *Miller Brewing*, 739 F.2d at 1168.

Before reversing the district court's award of attorneys' fees, however, the court of appeals embarked on a visionary discussion of the merits of awarding attorneys' fees to the party successfully defending an arbitration award. The court pointed out that it would award attorneys' fees against parties attempting to thwart arbitration awards without justification, and it observed that such fees had been awarded more generously in those cases than in other cases of frivolous litigation.<sup>23</sup> By relying on evidence that some employers ignore the process "in an effort to convince workers that unions are paper tigers,"<sup>24</sup> that federal policy favors arbitration in general and labor arbitration in particular, and that the lack of grounds for attacking arbitration awards makes it "easy to pronounce most such attacks utterly groundless," the court justified the "seemingly more liberal standard" used by courts in frivolous arbitration-related actions.<sup>25</sup>

### III. THE SEVENTH CIRCUIT'S TRANSITION TO THE NEW RULE 11

Following on the heels of *Miller Brewing* was *Dreis & Krump Manufacturing v. International Association of Machinists & Aerospace Workers*, District No. 8<sup>26</sup> which was filed after the amended Rule 11 became effective.<sup>27</sup> In *Dreis & Krump*, an employer filed an action to set aside an arbitrator's award which ordered the employer to cancel specified subcontracting and to recall an employee.<sup>28</sup> The district court dismissed the case and denied attorneys' fees to the union.<sup>29</sup> Both parties appealed, and the court of appeals held that the arbitrator's award was valid and that because "[n]o competent attorney who made a reasonable inquiry into the state of the law when this suit was filed . . . could have thought the suit had any possible merit,"<sup>30</sup> the union deserved to have its attorneys' fees paid by the employer for both the district court and the appellate court proceedings.<sup>31</sup>

After noting their stance on frivolous arbitration-related actions prior to the 1983 amendment of Rule 11 (as voiced in *Miller Brewing*),<sup>32</sup> the court

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23. *Id.*

24. *Id.* See Weiler, *Promises to Keep: Securing Workers Rights to Self Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787-89, 1797 (1983).

25. *Miller Brewing*, 739 F.2d at 1168.

26. 802 F.2d 247 (7th Cir. 1986).

27. *Id.* at 255.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 256.

32. *Id.* at 254.

of appeals emphasized the new rule's provision for sanctions on the basis of "[p]leadings that do not reflect the signing attorney's 'belief formed after reasonable inquiry [that the pleading] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.'"<sup>33</sup> According to the court, the district court's denial of the union's motion for attorneys' fees under Rule 11 without explanation was an abuse of discretion.<sup>34</sup> The court remarked that the employer's attorney should have known the claim was time-barred and failed to classify as one of the limited number of suits eligible for having a labor arbitrator's award set aside.<sup>35</sup> The court acceded the employer did not act in bad faith, but stressed that the test under the new Rule 11 was an objective test, which was wholly failed in this instance.<sup>36</sup> Moreover, the court premised an award of attorneys' fees at the appellate level on Federal Rule of Appellate Procedure 38,<sup>37</sup> which entitles an award of "just damages and single or double costs" for a frivolous appeal to the appellee.<sup>38</sup>

Prior to affirming the judgment dismissing the employer's action and reversing the dismissal of the union's motion for attorneys' fees, the court of appeals took the time, as Judge Posner put it, "to make clear that the [employer's] attack on the [arbitration] award was frivolous."<sup>39</sup> Noting the employer's deep conviction that the subcontracting did not violate the collective bargaining agreement, the court nevertheless maintained that the amended Rule 11 made it "clear that he who seeks vindication in such circumstances and fails to get it must pay his opponent's reasonable

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33. *Id.* at 255.

34. *Id.*

35. *Id.*

36. *Id.* See also *Brown v. National Board of Medical Examiners*, 800 F.2d 168, 171-72 (7th Cir. 1986); *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986), *cert denied*, 479 U.S. 851 (1986); *Indianapolis Colts v. Mayor of Baltimore*, 775 F.2d 177, 181 (7th Cir. 1985); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985); Schwarzer, *Sanctions Under the New Federal Rule 11--A Closer Look*, 104 F.R.D. 181, 191 (1985).

37. *Dreis & Krump*, 802 F.2d at 255.

38. *Id.* See FED. R. APP. P. 38. As the court asserts, Rule 38 has been interpreted to allow an award of attorneys' fees. *Dreis & Krump*, 802 F.2d at 255. See also Note of Advisory Committee on Rule 38; *Indianapolis Colts*, 775 F.2d at 184. The court bolsters this interpretation by maintaining that such fees "are normally and here the principal item of damage to the appellee." *Dreis & Krump*, 802 F.2d at 255.

39. *Dreis & Krump*, 802 F.2d at 254.

attorneys' fees."<sup>40</sup> Finally, the court drove home the message that the "new" Rule 11 had arrived in the Seventh Circuit's arsenal to combat "mounting federal case loads" and "growing public dissatisfaction with the costs and delays of litigation" by proclaiming that the rules designed to hinder meritless litigation "will continue to be enforced in this circuit *to the hilt*."<sup>41</sup> The echoes of this proclamation, combined with Judge Posner's closing admonition, "Lawyers practicing in the Seventh Circuit, take heed!"<sup>42</sup> are still reverberating in the Seventh Circuit's district courts today.

#### IV. THE SEVENTH CIRCUIT'S USE OF RULES 11 AND 38 TODAY

Barely two months after Judge Posner's castigation of Dreis & Krump's attorneys, *International Association of Machinists & Aerospace Workers, District No. 8 v. Clearing, Inc.*<sup>43</sup> was decided. In *Clearing*, the union filed an action under the Labor Management Relations Act<sup>44</sup> to enforce two arbitration awards rendered in its favor against the employer. The district court entered judgment for the union and assessed attorneys' fees against the employer.<sup>45</sup> On the employer's appeal, the court of appeals held that the district court abused its discretion in awarding the union attorneys' fees because the employer's trial position was not unreasonable,<sup>46</sup> but then held that the employer's appeal regarding the district court's credibility findings on the issue of contract formation was frivolous.<sup>47</sup> Hence, the court awarded the union its costs and reasonable attorneys' fees on appeal which

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40. *Id.* at 255. The court added that "[i]t is human nature to crave vindication of a passionately held position even if the position lacks an objectively reasonable basis in law." *Id.* Yet, the court observed:

[a] company dissatisfied with the decisions of labor arbitrators need not include an arbitration clause in its collective bargaining contracts, but having agreed to include such a clause it will not be permitted to nullify the advantages to the union by spinning out the arbitral process unconscionably through the filing of meritless suits and appeals. For such conduct the law authorizes sanctions that this court will not hesitate to impose.

*Id.*

41. *Id.* (emphasis added).

42. *Id.* at 256.

43. 807 F.2d 618 (7th Cir. 1986).

44. 29 U.S.C. § 185 (1978).

45. *Clearing*, 807 F.2d at 622.

46. *Id.*

47. *Id.* at 623. The court went on to expound in a footnote that "an appeal is frivolous where the result is obvious or when the appellant's argument is wholly without merit." *Id.* (quoting *Spiegel v. Continental Illinois Nat'l Bank*, 790 F.2d 638, 650 (7th Cir. 1986), *cert. denied*, 479 U.S. 987 (1986)).

were attributable to the litigation of the contract formation issue, one-half to be paid by the employer and one-half to be paid by its counsel.<sup>48</sup>

If *Dreis & Krump* failed to send a loud enough message regarding the effect of Rule 11 on the pursuit of groundless arbitration-related claims, *Clearing* turned up the volume noticeably. Asserting that the employer's arguments on appeal were "nothing more than a restatement of its position rejected by the district court and an attempt to plead that the district court should have credited its witnesses rather than the testimony presented by the [union],"<sup>49</sup> the court of appeals decided sanctions were appropriate under Rule 38 of the Federal Rules of Appellate Procedure.<sup>50</sup> Simply put, "[t]his case 'has caused a shameful waste of judicial manpower'"<sup>51</sup> and "has caused this court to spend valuable time and energy on a completely meritless matter while the serious concerns of other litigants have had to wait for resolution."<sup>52</sup>

## V. THE HIGH-WATER MARK IN THE SEVENTH CIRCUIT'S MODERN USE OF RULES 11 AND 38

### A. *Facts and Procedural Posture*

Three months later, *Hill v. Norfolk and Western Railway*<sup>53</sup> was decided and further accentuated the dangers of pursuing meritless arbitration-related causes in the Seventh Circuit Court of Appeals. In *Hill*, a railroad brakeman filed an action seeking to set aside a public law board's decision rejecting his claim that he had been fired in violation of a collective bargaining agreement between the railroad and his union. The district court ruled in favor of the railroad, and the brakeman appealed.<sup>54</sup> The court of appeals found the employee's appeal frivolous and required his attorney to bear personally the expenses incurred by the railroad in defending the appeal.<sup>55</sup>

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48. *Clearing*, 807 F.2d at 623. See also *Thornton*, 787 F.2d at 1154.

49. *Clearing*, 807 F.2d at 623.

50. *Id.*

51. *Id.* (quoting *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860, 865 (7th Cir. 1974)).

52. *Id.* at 623. See also *Ruderer v. Fines*, 614 F.2d 1128, 1132 (7th Cir. 1980).

53. 814 F.2d 1192 (7th Cir. 1987).

54. *Id.* at 1194.

55. *Id.* at 1203.



**B. The Court's Analysis: A High-Water Mark Reached**

After distinguishing *Miller Brewing*<sup>56</sup>, the grandfather of this line of Rule 11 cases, the court acknowledged that Rule 11 had not been incorporated into the court's rules and that it did not directly apply to proceedings in that court.<sup>57</sup> However, the court asserted that Rule 11 provided guidance in interpreting the rules that did control.<sup>58</sup> The court further submitted that Rule 11 sanctions may be imposed even though the railroad did not request attorneys' fees<sup>59</sup> and that because this "railroad brakeman" was not responsible "for frivolous legal arguments," the brakeman's counsel must "bear personally the expenses incurred by the railroad in briefing the issues" that the court found were frivolously raised by the brakeman's opening brief.<sup>60</sup>

The court brought the opinion to its completion with a discussion of the court's power to notch this high-water mark by ordering attorneys to bear personally Rule 11/Rule 38 sanctions and the appropriate procedures followed in doing so.<sup>61</sup> After analogizing Rule 38 sanctions to disciplinary sanctions under Rule 46(c)<sup>62</sup> and after urging the applicability of 28 U.S.C. section 1927 to cases meriting Rule 38 sanctions,<sup>63</sup> the court announced that the requirements of due process are applicable to proceedings requiring

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56. *Id.* at 1200.

57. *Id.*

58. *Id.* The court lists Fed. R. App. Proc. 38 & 46, and 28 U.S.C. §§ 1912 & 1927 as the rules that do control. *Id.* at 1201. See also *Thornton*, 787 F.2d at 1151; *In re Kelly*, 808 F.2d 549 (7th Cir. 1986).

59. *Hill*, 814 F.2d at 1200. See also *Weinstein v. University of Illinois*, 811 F.2d 1091, 1098 (7th Cir. 1987).

60. *Hill*, 814 F.2d at 1201. The Court further remarks that it has "[o]n several occasions in recent years ordered counsel to bear personally the expense of sanctions under Rule 38." *Id.* See *Westinghouse Elec. Corp. v. NLRB*, 809 F.2d 419, 425 (7th Cir. 1987); *Thornton*, 787 F.2d at 1154; *Lepucki v. Van Wormer*, 765 F.2d 86, 88-89 (7th Cir. 1985)(per curiam); *Reid v. United States*, 715 F.2d 1148, 1155 (7th Cir. 1983).

61. *Hill*, 814 F.2d at 1201-03.

62. *Id.* at 1201. Federal Rule of Appellate Procedure 46(c) provides:

A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of court."

63. *Hill*, 814 F.2d at 1201. 28 U.S.C. § 1927 (1982) states: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."

section 1927 sanctions,<sup>64</sup> necessitating notice and an opportunity to be heard "if a factual question concerning the propriety of sanctions is raised."<sup>65</sup> The court further noted that a hearing may only be had in cases where it will assist the court in its decision<sup>66</sup> and insisted that in most Rule 38, cases "the conduct that is sought to be sanctioned consists of making objectively groundless legal arguments in briefs filed in this court [such that] there are no issues that a hearing could illuminate."<sup>67</sup>

Before disposing of the case, the court observed that intentional or even negligent misconduct was not required for Rule 38 sanctions.<sup>68</sup> The standard is merely "objectively groundless legal arguments" with monetary sanctions warranted "[t]o protect this court's ability to serve litigants with meritorious cases and in order to make lawyers give thoughtful consideration to whether there are grounds for an appeal before filing an appeal."<sup>69</sup> Furthermore, the court maintained that the text of Rule 38 and their previous decisions applying it provided sufficient notice to the attorney that sanctions may be imposed without a hearing if there were no contested factual questions.<sup>70</sup> Judge Posner, ever so attentive to the attorneys practicing in the Seventh Circuit, closes the opinion as follows:

[a]gain we remind the bar that whether the suit is brought by the company or the union or, as here, by an individual employee, if it is frivolous in whole or in part this court will impose sanctions . . . . We are in a transitional period, and some members of the bar still do not

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64. *Hill*, 814 F.2d at 1201. See, *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980); *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 570-71 (3d Cir. 1985)(*en banc*).

65. *Hill*, 814 F.2d at 1201. See *In re Kelly*, 808 F.2d at 552. See also *Shrock v. Altru Nurses Registry*, 810 F.2d 658, 661-62 (7th Cir. 1987) (wherein the court ordered a hearing before imposing the sanctions to determine whether the factual investigation by the plaintiff's attorney before filing the action was sufficient).

66. *Hill*, 814 F.2d at 1201. Cf. *Lepucki*, 765 F.2d at 87-88; *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983).

67. *Hill*, 814 F.2d at 1201. The court goes on to say "[a]ll the relevant 'conduct' is laid out in the briefs themselves; neither the mental state of the attorney nor any other factual issue is pertinent to the imposition of sanctions for such conduct. Where a hearing would be pointless it is not required." *Id.* at 1201-02.

68. *Id.* at 1202.

69. *Id.* The court further remarked "[t]his is not a new principle. The filing of an appeal should never be a conditioned reflex." *Id.* The court cited 1 *Jessup, Elihu Root* 133 (1938) for the proposition that "[a]bout half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop." *Id.*

70. *Id.*

realize that the judicial attitude toward attorney misconduct has stiffened. They had better realize it." (emphasis supplied).<sup>71</sup>

## VI. THE SEVENTH CIRCUIT'S MOST RECENT USE OF RULES 11 AND 38

The most recent addition to this Rule 11/Rule 38 family of cases in the Seventh Circuit came to life one month after *Hill* in the form of *Bailey v. Bicknell Minerals, Inc.*<sup>72</sup> In *Bailey*, a union president filed an action against the employer following the employer's rejection of a grievance over the implementation of a collective bargaining agreement addendum approved by telephonic votes of the union's "pit committee."<sup>73</sup> The action was filed before a demand for arbitration. The employer moved for dismissal, and the district court granted the dismissal because the union failed to exhaust the contractual grievance resolution machinery.<sup>74</sup> On appeal, the court affirmed the district court's decision, found the appeal frivolous, and awarded attorneys' fees to the employer to be paid in whole by the union's counsel.<sup>75</sup>

Building on the wisdom of *Dreis & Krump, Clearing*, and *Hill*, the court continued to send a loud message to the lawyers in the Seventh Circuit. Citing the "plaintiff's obduracy" and "the obtuseness of their lawyer," the court eagerly consented to the employer's plea for an award of attorneys' fees.<sup>76</sup> The court observed that the arguments on appeal were "neither preserved in the District Court nor plausible as original matters;" that the union failed to file a reply brief stating why their claims had merit or why an award of attorneys' fees was inappropriate for some other reason; and that because the same attorney represented the union from start to finish, he or she had an obligation to tell the union that the law was against

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71. *Id.* at 1203. Bolstering his warning, Judge Posner adds:

The promise of arbitration is spoiled if parties disappointed by its results can delay the conclusion of the proceeding by groundless litigation in the district court followed by groundless appeal to this court; we have said repeatedly that we would punish such tactics, and we mean it. . . . The reasons are systemic. As the federal courts become more and more overloaded, the costs imposed on ethical and responsible litigants when judicial resources are diverted to the processing of frivolous claims and defenses mount higher and higher. Moreover, as the bar and the judiciary both expand, the incentive for self-regulation by lawyers that comes from appearing regularly before the same judges diminishes, making judicial regulation by sanctions increasingly necessary.

*Id.*

72. 819 F.2d 690 (7th Cir. 1987).

73. *Id.* at 691.

74. *Id.*

75. *Id.* at 693.

76. *Id.*

them.<sup>77</sup> Accordingly, the court invoked Rule 38 and ordered "counsel for the [union] to pay, out of his own pocket, the attorneys' fees reasonably incurred by [the employer] in defending against the appeal."<sup>78</sup>

Since *Bailey*, the Seventh Circuit has had to blow its horn only once more in the case of *Classic Components v. Mitsubishi*.<sup>79</sup> In *Mitsubishi*, a distributor filed an action in a state court seeking an injunction to compel a manufacturer to continue using it as a distributor. The manufacturer removed the case to federal court under diversity jurisdiction and moved for arbitration.<sup>80</sup> The district court ordered arbitration and denied the request for a preliminary injunction.<sup>81</sup> On appeal, the distributor asked for an injunction pending appeal. The court of appeals denied this request, finding that the distributor had satisfied none of the criteria for an injunction pending appeal, and ordered the distributor to reimburse the manufacturer for its expenses in defending the claim.<sup>82</sup>

## VII. CONCLUSION

The Seventh Circuit Court of Appeals has sent a resounding admonition to the attorneys of the Seventh Circuit and beyond. From the "old" Rule 11 days of *Miller Brewing* to the modern conglomeration of the "new" Rule 11, Rule 38, and U.S.C. section 1927,<sup>83</sup> the message has remained consistent: attorneys' fees will be awarded against parties challenging arbitration awards without basis--often more freely than in other instances

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77. *Id.*

78. *Id.* The Court went on to allow the employer 15 days to file with the Clerk of the Court of Appeals an itemized statement of their fees. *Id.*

79. 841 F.2d 163 (7th Cir. 1988).

80. *Id.* at 164.

81. *Id.*

82. *Id.* at 165-66. The court justified the award under Rule 38 by adding: Shallow claims may require costly replies. [The distributor's] motions papers did not cite or discuss any of the relevant cases; [the manufacturer] had to dig them up itself, incurring costs that the American Rule supposes fall on the movant. When a party files papers that can yield only one outcome, the time and money spent resisting the claim is wasted at best, a potential source of bargaining leverage for the movant at worst. The need to pay one's lawyer adds injury to the insult of the frivolous motion. The American Rule is not supposed to enable a litigant to impose self-help penalties on its rival by filing pointless motions that are costly to defend. A moving party that bears its adversary's fees and costs will think twice about making motions, as it should; the party in the right will be relieved of the burden that should not have been created in the first place.

*Id.* at 166.

83. See *supra* text accompanying notes 60-66.

of frivolous litigation.<sup>84</sup> While such a message manifested itself in the form of a general award of attorneys' fees in the beginning,<sup>85</sup> the harbinger has grown over the last couple years into *Hill's* deafening blow to lawyers' own pocketbooks.<sup>86</sup>

Will it work? It seems to be. The Seventh Circuit Court of Appeals has not had to blow its horn in the arbitration arena for several months now, and the loud and clear message from these five cases is in all likelihood the reason.

ROBERT K. ANGSTEAD

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84. See *Dreis & Krump*, 802 F.2d at 254-55.

85. See *Id.* at 256.

86. See *Clearing*, 807 F.2d at 623; *Hill*, 814 F.2d at 1201; *Bailey*, 819 F.2d at 693.