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Setting the Standard for Overturning an Arbitrator's Award That Violates Public Policy - United Paperworkers International v. Misco, Inc.

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SETTING THE STANDARD FOR OVERTURNING AN ARBITRATOR'S AWARD THAT VIOLATES PUBLIC POLICY

United Paperworkers International v. Misco, Inc.[1]

I. INTRODUCTION

For over forty years, the United States Supreme Court has recognized the principle that great deference is to be given by the courts to the decisions of arbitrators.[2] The Court has applied this same deferential standard in reviewing arbitration awards which are challenged on the basis of being in violation of public policy.[3] The well settled rule is that a court must enforce the award unless it violates a well defined, explicit public policy that is ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interest."[4] Recently, the Supreme Court reaffirmed this longstanding rule in *United Paperworkers International v. Misco, Inc.*[5] In doing so, the Court strengthened the arbitrator's authority by laying down a tough two part analysis to be used in determining whether an award can be overturned based on public policy.[6] The Court held that not only must the policy be well defined and ascertainable from legal precedent, but the violation must be clearly shown.[7]

II. THE HISTORY OF GREAT DEFERENCE

The Court has looked to the strong federal policy favoring arbitration as the basis for giving great deference to arbitration awards. The legislature has expressed a marked preference for arbitration under collective bargain-

1. 108 S. Ct. 364 (1987).

2. *See* Muschany v. United States, 324 U.S. 49, 65-66 (1945); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960); W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983); AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649-50 (1986).

3. *See Muschany*, 324 U.S. at 65-66; *W.R. Grace*, 461 U.S. at 766.

4. *Muschany*, 324 U.S. at 66.

5. 108 S. Ct. 364 (1987).

6. *Id.* at 373-74.

7. *Id.*

ing agreements. The Labor Management Relations Act,[8] passed by Congress in 1947, expresses the clear preference for arbitration.[9] The courts promote these objectives by giving extreme deference to the arbitrator's decision. If not, the policy of fostering arbitration could be undermined by potentially intrusive judicial review.[10] This policy is so firm that courts cannot question the arbitrator's findings of fact or his award unless the award is not drawn from the bargaining agreement.[11]

The United States Supreme Court issued the standard for setting aside contracts that violate public policy more than 40 years ago. In *Muschany v. United States*,[12] the Court held that for an award to be overturned based on public policy, the policy must be stated with "[r]eference to the laws and legal precedents and not from general considerations of supposed public interest."[13] The Court reaffirmed this standard nearly forty years later in *W.R. Grace & Co. v. Local Union 759*.[14] However, the analysis was not uniformly followed.[15] In fact, the Court in *Misco* granted certiorari because the courts of appeal were divided on when an arbitrator's award violated public policy.

In *United States Postal Service v. American Postal Workers Union*,[16] the First Circuit Court of Appeals applied a rather liberal standard in reviewing an award. The court overturned an arbitrator's award that reinstated a post office employee who embezzled from the post office. The court defined

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8. 29 U.S.C. §§ 141-201 (1982). Section 173(d) states, "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

9. 29 U.S.C. § 173(e) states, "[t]o encourage and support the establishment and operation of joint labor management activities conducted by plant, area and industry wide committees designed to improve labor management relationships, job security and organizational effectiveness."

10. *See* Northwest Airlines v. Air Line Pilots Ass'n. Int'l., 808 F.2d 76, 83 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1751 (1988).

11. *See Misco*, 108 S. Ct. at 370.

12. 324 U.S. 49 (1945).

13. *Id.* at 66.

14. 461 U.S. 757 (1983).

15. Some courts have taken a strict view of the test and have favored the policy of arbitration even when it conflicts with other laws. *See* Bevles Co., Inc. v. Teamsters Local 986, 791 F.2d 1391 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 500 (1987). Other courts have taken a more modified approach and have weighed policies that might conflict with the arbitrator's award. *See* E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass'n, Inc., 790 F.2d 611 (7th Cir. 1986). Still other courts have adopted common sense approaches. *See* United States Postal Service v. American Postal Workers Union, 736 F.2d 822 (1st Cir. 1984).

16. 736 F.2d 822 (1984).

public policy with reference to law and precedents in making its decision.[17] However, the court also considered the "common sense implications" of upholding the arbitrator's decision.[18] The court reasoned that the general deterrent effect of preventing crime would be hurt if the arbitrator's ruling were upheld.[19]

Other courts have given a strict interpretation to the *W.R. Grace* analysis and have upheld the arbitrator's award even when it conflicts with other laws. In *Bevles Co., Inc. v. Teamsters Local 986*,[20] the company fired two employees because of their immigration status. The Ninth Circuit Court of Appeals held that an arbitrator's decision granting reinstatement and back pay to two undocumented aliens did not violate a clearly defined public policy and was not in manifest disregard of the law as there was no law against hiring illegal aliens.[21] The dissent criticized the majority's reasoning, stating that the arbitrator should have tried to reconcile labor law with the illegal immigration laws.[22] In the *Misco* case, the Fifth Circuit Court of Appeals held that the public policy against operating dangerous machinery by persons under the influence of drugs or alcohol warranted overruling the arbitrator's award.[23] The court so concluded based on evidence that marijuana gleanings were found in the employee's automobile, even though no evidence was presented that the employee ever operated a dangerous machine while under the influence of drugs.[24] The particular facts in *Misco* and the continued division among the circuits on when an award may be set aside as contravening public policy caused the Court to hear the case.[25]

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17. *Id.* at 825. The Court cited 39 U.S.C. § 1011 (1982), postal employee swears to uphold his duties; 18 U.S.C. § 500 (1982), statute under which Cote was convicted. In so examining these laws, the Court said that the offense in this case went to the "heart of the worker's responsibilities." *U.S. Postal Service*, 736 F.2d at 825.

18. *U.S. Postal Service*, 736 F.2d at 825.

19. *Id.* The Court noted that other postal employees may feel less reason to uphold their duties if they believed the Union could fix the problem. *Id.*

20. 791 F.2d 1391 (9th Cir. 1986).

21. *Id.* at 1392-93.

22. *Id.* at 1393.

23. Misco, Inc. v. United Paperworkers Int'l. Union, 768 F.2d 739 (1985), *rev'd*, 108 S. Ct. 364 (1987).

24. *Id.* at 740-41.

25. *Misco*, 108 S. Ct. at 367.

III. THE *MISCO* CASE

The parties to the suit entered into a collective bargaining agreement which covered the production and maintenance employees at the plant. Under the agreement, the parties were bound by the arbitrator's decision concerning any arbitrable matter.[26] Management had the right under the bargaining agreement to establish and enforce rules and regulations relating to discipline or discharge and the procedures for imposing discipline.[27] For nearly ten years, Misco's rules had listed as causes for discharge bringing intoxicants, narcotics, or controlled substances on plant premises or consuming the same on plant premises, as well as reporting for work under the influence of these substances.[28] The Court noted that the company was very concerned about drug use at the plant at the time of the events in the case (particularly on the night shift).[29]

Isaiah Cooper was employed by the company and worked on the night shift at its paper converting plant in Monroe, Louisiana. He operated a slitter-rewinder machine which uses sharp blades to cut rolling coils of paper. The machine had caused numerous injuries in recent years.[30] Cooper had been reprimanded twice within a period of only a few months for deficient performance.[31] On January 21, 1983, the day after the second reprimand, the police searched Cooper's house and found a substantial amount of marijuana.[32] On that same day, the police kept Cooper's car under observation at Misco's parking lot. During a work break later that same evening, Cooper was apprehended in the back seat of another car with marijuana smoke in the air and a lighted marijuana cigarette in the front seat ashtray.[33] The police then went and searched Cooper's car and found a plastic scales case and marijuana gleanings.[34] Cooper was arrested and charged with marijuana possession.

On January 24, 1983, Cooper informed the company that he had been arrested for marijuana possession at his home. On January 27, the company learned a few days later that Cooper had been arrested on company premises. Misco investigated and fired Cooper 11 days later for violating the

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26. *Id.*
27. *Id.*
28. *Id.* at 368 n.2.
29. *Id.* at 368.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*

rule against having drugs on the property.[35] However, when it dismissed Cooper, the company didn't know that marijuana had also been found in Cooper's car.[36] Cooper filed a grievance the same day he was discharged and the matter proceeded to arbitration.

Misco learned five days before the arbitration hearing that marijuana had been found in Cooper's car, but didn't inform the Union, which learned about the matter at the meeting.[37] The arbitrator refused to accept the evidence of marijuana found in Cooper's car because Misco didn't know this when it fired Cooper, and therefore, didn't rely on it as a basis for discharge.[38] The arbitrator then found that the company did not have just cause to fire Cooper.[39] The arbitrator also concluded that Misco failed to prove that the employee had possessed or used marijuana on company property.[40] Cooper was reinstated with back pay and full seniority.[41]

Misco filed suit in the United States District Court for the Western District of Louisiana. The district court relied on the Fifth Circuit's holding in *Amalgamated Meat Cutters v. Great Western Food Co.*[42] and found that the arbitrator's award contravened public policy and was, therefore, unenforceable.[43] The Fifth Circuit affirmed the district court's vacation of the award with one judge dissenting.[44] The court of appeals relied primarily on its holding in *Amalgamated* to sustain the district court's ruling.[45]

In *Amalgamated*, the court overturned an arbitrator's award which reinstated a truck driver who admitted he had been drinking when he was involved in an accident. The arbitrator reinstated the driver because the employer failed to disprove to his satisfaction the driver's claim that equipment failure and not his drinking had caused the wreck. The court held that the reinstatement violated the public policy of preventing people

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35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 369.

39. *Id.* at 368-69. The arbitrator based his finding that there was not just cause for the discharge on his consideration of the reasonableness of the employee's position, the notice given to the employee, the timing of the investigation undertaken, the fairness of the investigation, the evidence against the employee the possibility of discrimination, and the relation of the degree of discipline to the nature of the offense and the employee's past record. *Id.* at 368 n.5.

40. *Id.*

41. *Id.* at 369.

42. 712 F.2d 122 (1983).

43. *Misco*, 768 F.2d at 740.

44. *Id.* at 743 (Tage, J., dissenting)

45. *Id.* at 743.

from drinking and driving.[46] The court specifically held that the policy was sufficiently well defined and definite as the policy against drunk driving is "embodied in the case law, the applicable regulations, statutory law, and pure common sense."[47]

In *Misco*, the Fifth Circuit concluded that the arbitrator erred by narrowly focusing on Cooper's procedural rights, which caused him to exclude the evidence of marijuana found in Cooper's car because the company did not rely on the evidence to discharge Cooper.[48] The court concluded that considering the public policy against operating dangerous machinery by persons under the influence of drugs or alcohol should have warranted admitting the evidence.[49] The court stated, "[g]azing at the tree, and oblivious to the forest, the arbitrator has entered an award that is plainly contrary to serious and well-founded public policy."[50] The Supreme Court, in a unanimous decision, overturned the Fifth Circuit's ruling. The majority opinion, authored by Justice White, held that the reviewing court could not refuse enforcement of an arbitrator's award based on its conclusion that the arbitrator's fact-finding was improvident;[51] that the reviewing court could not overturn the arbitrator's decision to refuse to consider evidence unknown to the company at the time the employee was fired as procedural questions are for the arbitrator;[52] and that the public policy as relied on by the appellate court did not comply with the requirement that the policy be ascertained by laws and legal precedents and not from general consideration of supposed public interests and furthermore, that no violation of that policy was clearly shown.[53]

The Court looked to the strong federal policy favoring private settlement of labor disputes in reaching its first conclusion.[54] The Court reasoned that the reviewing court is limited to ascertaining whether the award draws its essence from the contract.[55] The reviewing court cannot overturn an award simply because it disagrees with the arbitrator's factual

46. *Amalgamated*, 712 F.2d at 125.
47. *Id.*
48. *Misco*, 768 F.2d at 743.
49. *Id.*
50. *Id.*
51. *Misco*, 108 S. Ct. at 371.
52. *Id.* at 371-72.
53. *Id.* at 373-74.
54. *Id.* at 370 (construing 29 U.S.C. § 173(d)(1983).
55. *Id.*

findings, contract interpretation, or choice of remedies.[56] The Court concluded that the court of appeals was not free to refuse enforcement because it believed the arbitrator's factfinding was "improvident, even silly."[57]

Secondly, the Court ruled that the arbitrator's refusal to consider the evidence of marijuana in Cooper's car was not a sufficient basis for overturning the award.[58] The Court noted the parties were free to lay down procedural rules for the arbitrator to follow.[59] The bargaining agreement left evidentiary matters largely to the arbitrator.[60] The arbitrator's decision to refuse to hear evidence not known to the company at the time of discharge was within the language of the contract and was wholly consistent with the practice of other arbitrators.[61] The Court held that "[w]hen the subject matter of a dispute is arbitrable, 'procedural questions' which grow out of the dispute and bear on its final disposition are to be left to the arbitrator."[62]

The remainder of this Note will explore the public policy aspect of the decision. The proper public policy analysis and the great deference given to an arbitrator in this situation will be explored.

IV. PUBLIC POLICY GUIDELINES

The Supreme Court laid down a two part analysis in applying the public policy argument. First, the court must find that the arbitrator's award creates an "explicit conflict" with established law or legal precedent.[63] The Court clearly held that the appellate court's opinion as to public policy based on "general considerations of supposed public interest" would not be

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56. *Id.* The Court went on to state "[a]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* at 371.

57. *Id.*

58. *Id.* at 371-72.

59. *Id.* at 371.

60. *Id.* (construing Rule II.1 of the collective bargaining agreement).

61. *Id.* The Court noted, "[l]abor arbitrators have stated that the correctness of a discharge 'must stand or fall upon the reason given at the time of discharge' . . . and arbitrators often, but not always, confine their consideration to the facts known to the employer at the time of the discharge." *Id.* at 371 n.8.

62. *Id.* at 372. The Court stated that "[u]nder the Arbitration Act, the federal courts are empowered to set aside awards only when 'the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy.'" *Id.* (quoting 9 U.S.C. § 10(c)(1982)).

63. *Id.* at 373.

sufficient.[64] Second, the violation must be "clearly shown" before an award is refused enforcement.[65]

The first part of the analysis is grounded in the general common law doctrine that any contract that violates law or public policy is unenforceable.[66] The Supreme Court applied this general doctrine to the collective bargaining agreement in *W.R. Grace*.[67] However, the Court did state that the *W.R. Grace* holding did not "sanction a broad judicial power to set aside arbitration awards as against public policy."[68] Rather, the holding in *W.R. Grace* laid down a strict standard, requiring a violation of "explicit public policy" that was based on established law or legal precedent.[69] The Court in *Misco* reaffirmed this strict standard.[70] The Court held that the court of appeals did not meet the *W.R. Grace* standard as it "[m]ade no attempt to review existing laws and legal precedents in order to demonstrate that they establish a well 'defined and dominant' policy against the operation of dangerous machinery while under the influence of drugs."[71]

The Supreme Court further stated that the Fifth Circuit failed to comply with the second part of the analysis. The Court noted that even if the public policy against operating dangerous machinery was proper, there was no showing that the policy was "clearly violated."[72] The Court stated that evidence the arbitrator refused to hear could properly be pursued under the public policy inquiry.[73] Thus, the Court ruled that the Fifth Circuit did not err in considering the established fact that traces of marijuana had been found in Cooper's car.[74] However, the Court found that the "assumed connection" between the marijuana gleanings found in Cooper's car and his actual use of drugs in the workplace was "tenuous at best" and provided an insufficient basis for concluding the public policy against operating dangerous machinery while under the influence of drugs was violated.[75] The

64. *Id.* (quoting *W.R. Grace*, 461 U.S. at 766).
65. *Id.* at 373-74.
66. *Id.* at 373.
67. 461 U.S. 757 (1983).
68. *Misco*, 108 S.Ct. at 373.
69. *Id.* (construing *W.R. Grace*, 461 U.S. at 766).
70. *Id.* at 373-74.
71. *Id.* at 374.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

Court concluded that "[a] refusal to enforce an award must rest on more than speculation."[76]

V. DEFERENCE TO THE ARBITRATOR

The Court in *Misco* reaffirmed another longstanding precedent. The Court's holding reaffirmed the great deference given to the arbitrator's decision on judicial review.[77] The courts perform a "[v]ery limited [function] when the parties have agreed to submit all questions of contract interpretation to the arbitrator."[78] The Court went on to state that the courts "[h]ave no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.[79] The reason for giving such great deference is the strong "[f]ederal policy of settling labor disputes by arbitration [which] would be undermined if courts had the final say on the merits of the awards."[80]

However, under the peculiar facts of *Misco*, this great deference could be problematic. The Court's holding gives the arbitrator authority to make decisions based on highly subjective facts that could potentially be beyond his expertise. The Court reasoned that even if the arbitrator found that Cooper had drugs in his possession on the property, he would not necessarily have to be dismissed. If the arbitrator found as a factual matter Cooper could be trusted not to use drugs on the job, the court of appeals could not upset the award because of its own view that the public policy about plant safety was threatened.[81] The Court's failure to specify what constitutes such factual trust could create problems.

The Court's opinion also permits the arbitrator to make medical determinations regarding an employee's sobriety. In *Misco*, the arbitrator recognized that operating the slitter-rewinder under the influence of drugs was dangerous.[82] Yet, in the absence of drug testing, it may be impossible to determine if an employee was using drugs, especially if the arbitrator will only allow evidence that the company relied upon to dismiss the employee. If the arbitrator could not get any medical evidence to determine if Cooper had been operating the machine under the influence, this leaves him with

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76. *Id.*
77. *Id.* at 370.
78. *Id.* (quoting Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960)).
79. *Id.* (quoting *American Mfg.*, 363 U.S. at 567-68).
80. *Id.* (quoting Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960)).
81. *Id.*
82. *Id.*

less reliable avenues of determining if Cooper was using drugs on the property, such as testimony from other employees, the employee's supervisor, or the employee's personnel records.[83] The general rule is that the arbitrator's authority derives from his knowledge of the industry.[84] However, with the Court's decision, the arbitrator is allowed to make medical decisions that go beyond industry knowledge.

Opinions in other cases following *Misco* have expressed concern over giving the arbitrator authority on matters beyond their expertise. In *Daniel Construction Co. v. Local 257,*[85] the arbitrator awarded reinstatement and backpay to employees who had been discharged for failing a psychological test, which allegedly screened employees who were security risks in a nuclear power plant.[86] The court of appeals upheld this decision.[87] In his dissent, Senior Circuit Judge Ross said "allowing an arbitrator, who has no apparent authority or expertise in the fields of nuclear safety or psychological testing, to second guess the validity of security procedures which have been approved by the Nuclear Regulatory Commission would thwart such a public policy."[88]

Arbitrators routinely consider work place safety in making their decisions.[89] Their consideration reinforces the strong public policy of a safe working environment embodied in the Occupational Safety and Health Act.[90] Congress declared its purpose to provide for the general welfare and assure every working person healthful working conditions.[91] The Act also recognizes both the human and industrial costs associated with work place accidents.[92] The Act attempts to provide for safe working conditions and to preserve human resources by placing responsibility on both the employer and employee in achieving the goal of a safe work place.[93] In addition, the Act sets out medical criteria which is to protect the workers' life and

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83. The arbitrator found that Cooper had been reprimanded twice in the past few months for deficient work performance. *Id.* at 368.

84. *See* American Postal Workers Union v. United States Postal Service, 789 F.2d 1, 5 (D.C. Cir. 1986). The Court stated that the labor agreement "[i]s a constitution of industrial self-government, in which the knowledgeable arbitrator plays an integral part." *Id.* at 5.

85. 856 F.2d 1174 (8th Cir. 1988)

86. *Id.* at 1176.

87. *Id.* at 1175.

88. *Id.* at 1182.

89. *See Misco*, 108 S. Ct. at 374 n.11.

90. 29 U.S.C. §§ 651-78 (1970).

91. *See* 29 U.S.C. § 651(b).

92. *See* 29 U.S.C. § 651(a).

93. *See* 29 U.S.C. § 651(b)(2).

health.[94] However, that goal can be undermined in instances such as those found in *Misco* when arbitrators lacking medical knowledge are allowed to determine when employee drug usage constitutes a work place danger.

VI. CONCLUSION

The Court's willingness to uphold the arbitrator's decision shows just how entrenched arbitration is under the collective bargaining process. The Court formulated a tough standard for overturning the arbitrator's decision. By laying down this standard, the Court is strongly lending its support to the policy of favoring alternative dispute resolution in labor agreements. The Court also said, in effect, that it was concerned that reviewing courts would not respect the policy of alternative dispute resolution. But by taking a stand to protect arbitration, the Court may have subordinated the public policy of safety in the workplace to the arbitrator's decision. A significant burden is placed on the arbitrator by leaving matters in his hands that are beyond his expertise. Arbitrators may be placed in the position of trying to determine if an employee is using drugs either on or off the company's premises without any way to test the employee. The arbitrator would also have to determine the effect of drugs on the employee's performance. Considering the extent of drug use in American society, the myriad of reactions to drugs, and the potential for serious accidents and injuries, the Court may have been better advised to make the arbitrator hear all the relevant evidence discovered about Cooper's use of drugs and his bringing drugs onto the company premises to fully protect the safety of the workplace.

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94. *See* 29 U.S.C. § 651(b)(7). This section provides that "[n]o employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience."