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Last Chance Agreements: How Many Chances Is an Employee Entitled To

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NOTES

Last Chance Agreements: How Many Chances is an Employee Entitled To?

Continental Airlines, Inc. v. International Brotherhood of Teamsters[1]

I. INTRODUCTION

Over the years, a large number of cases involving labor issues have gone to arbitration. Of these labor cases, a distinct sub-category are those governed by the Railway Labor Act (RLA).[2] In labor cases, including those governed by the RLA, the Supreme Court has repeatedly reaffirmed the strong federal policy in favor of arbitration. Furthermore, courts have consistently held that great deference must be shown toward the arbitrator when reviewing an arbitration award. However, there are still issues that arise as to just how much deference should be afforded to an arbitrator's decision and when a court can overturn an arbitration award. In *Continental*, the Fifth Circuit addresses both of these issues.[3]

II. FACTS AND HOLDING

In March 2003, Continental Airlines, Inc. (Continental) brought action against the International Brotherhood of Teamsters (IBT) in the Southern District of Texas.[4] Continental sought to vacate an arbitration award under the RLA, which reinstated an employee who was terminated for violating a last chance agreement (LCA) after testing positive for alcohol.[5] The district court granted summary judgment in favor of IBT and Continental in turn appealed to the U.S. Court of Appeals for the Fifth Circuit.[6] On appeal, Continental sought to have the arbitration award vacated based on the following three reasons:

> (1) the district court applied the wrong standard of review under the RLA; (2) the district court erred in upholding the award because the Board exceeded its authority, by ignoring the plain language of the agreements and by substituting its judgment for that of the EAP director; and, (3) even if the award were otherwise proper, the district court should have vacated it as violative of public policy.[7]

1. 391 F.3d 613 (5th Cir. 2004).
2. *See* Railway Labor Act (RLA), 45 U.S.C. § 151 (2000).
3. *Continental*, 391 F.3d at 613.
4. *Id.*
5. *Id.* at 614-16. *See* RLA, 45 U.S.C. § 151.
6. *Continental*, 391 F.3d at 613.
7. *Id.* at 616.

In this case, aircraft mechanic Mark Johnson worked at Continental.[8] In August 2000, Johnson was selected for a random alcohol test.[9] Following the test, he was fired from Continental because he had more than the legal limit of alcohol in his system.[10] Johnson subsequently filed a grievance contesting his discharge.[11] With the assistance of IBT, Johnson entered into an LCA with Continental.[12] Johnson was permitted to return to work at Continental provided he satisfied the terms of the LCA.[13] Per the terms of the agreement, Johnson would be terminated for any use of alcohol.[14] The agreement specifically included mouthwash and any other medications or substances which might contain alcohol.[15] The only exception was for physician-prescribed medication.[16] If a physician prescribed medication for Johnson, he was required to inform the Employee Assistance Program (EAP) staff.[17] On March 20, 2001, Johnson left a voice mail message for Continental's EAP director, stating that he was taking over-the-counter cough medicine.[18] Two days later Johnson was selected for another random alcohol test and again tested positive.[19] Once again Continental terminated Johnson and once again he filed a grievance protesting his termination.[20] The arbitrators, known as the System Board (Board), held an evidentiary hearing on Johnson's grievance.[21] The Board found that Johnson had not violated the LCA agreement and ordered Continental to reinstate Johnson.[22] Following the Board's findings, Continental filed suit in district court, seeking to have the arbitration award vacated.[23]

On appeal, Continental put forth three arguments.[24] First, Continental contended that the district court applied the wrong standard of review under the RLA.[25] Second, Continental argued that the district court erred in upholding the award because the Board exceeded its authority.[26] Finally, Continental alleged

8. *Id.* at 615.

9. *Id.* The test indicated that Johnson had a blood alcohol content of .115. *Id.* The legal limit was .04. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* The LCA required that Johnson do the following: (1) be evaluated by Continental's EAP director; (2) complete rehabilitation, if deemed necessary by the EAP director; (3) submit a resignation letter to the EAP director to be used if he did not satisfy the terms of the LCA; (4) agree to be terminated if he failed a drug or alcohol test; (5) agree to random drug and alcohol testing; and (6) complete an alcohol test prior to returning to work, after release by the EAP director. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 616. The EAP director received the message, but he never contacted Johnson about it. *Id.*

19. *Id.* Johnson's BAC was .04 at 12:40 p.m. *Id.* His confirmation test at 1:05 p.m. showed a BAC of .029. *Id.*

20. *Id.* at 616.

21. *Id.* The Board consisted of representatives of IBT, Continental, and a neutral chairperson. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* Continental claims that the Board ignored the plain language of the agreements and substituted its judgment for that of the EAP director. *Id.*

that even if the award were otherwise proper, the district court should have vacated it as violative of public policy.[27]

The Fifth Circuit rejected Continental's first argument that the court was not to give deference to the arbitrator's award.[28] Instead, the court held the standard of review to be used was that of deference to the arbitrator, thus upholding the district court's decision.[29] However, as to the second point of argument, the court found that the Board's interpretation of the agreement was not "an arguable construction of the agreement."[30] Therefore, the court found that the Board had exceeded the scope of its jurisdiction and vacated the award.[31] Based on its findings, the court determined it was unnecessary to further address other points which Continental had argued.[32] The court reversed the district court, rendered summary judgment in favor of Continental, vacated the arbitration award and reinstated Continental's discharge of Mark Johnson.[33]

III. LEGAL BACKGROUND

The Supreme Court has long championed arbitration as the preferred method of resolving labor disputes.[34] In the 1960 Steelworkers Trilogy, the Court held that, as an arbitrator's award 'draws its essence' from the collective bargaining agreement, courts should not review the merits of the award.[35] Additionally, since the 1980s, it has been well established that questions of arbitrability should be resolved with a healthy regard for the federal policy which favors arbitration.[36] In 1985, the Supreme Court in *Mitsubishi* stated that, as with any other contract, the parties' intentions control.[37] Those intentions, however, are generously construed as to issues of arbitrability.[38] Two years later, in *Perry*,[39] the Supreme Court went on to say that due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself should be resolved in favor of arbitration.[40] In *Volt*,[41] the Supreme Court further clarified the federal

27. *Id.* at 616. The appellate court found it unnecessary to address this argument. *Id.* at 620.
28. *Id.* at 619.
29. *Id.* The RLA governs disputes between airline carriers and their employees. *Id.* at 616. RLA establishes mandatory procedures for the resolution of disputes. *Id.* Minor disputes are to be resolved through binding arbitration before a board established by the union and the employer. *Id.* at 617.
30. *Id.* at 620.
31. *Id.*
32. *Id.*
33. *Id.*
34. Richard A. Bales, *The Arbitrability of Side and Settlement Agreements in the Collective Bargaining Context*, 105 W. VA. L. REV. 575 (2003).
35. *Id. See also* United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).
36. Volt Info. Scis., Inc., v. Bd. of Trs. of the Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989); Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).
37. *Mitsubishi*, 473 U.S. at 626.
38. *Id.*
39. *Perry*, 482 U.S. at 483.
40. *Id.* at 492 n.9.
41. *Volt*, 489 U.S. at 468.

policy with regard to private arbitration agreements.[42] In that case, the court held that there is "no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."[43]

In determining whether claims may be arbitrated, the Court asks whether the parties agreed to submit the claims to arbitration.[44] The Court has made clear that throughout any analysis of whether a particular claim is subject to arbitration, it should be kept in mind that federal policy strongly favors arbitration.[45] Absent some ambiguity in the agreement, it is the language of the contract that defines the scope of disputes subject to arbitration.[46] Even so, the pro-arbitration policy does not operate without regard to the wishes of the contracting parties.[47] While courts are to place arbitration agreements on equal footing with other contracts, they should "not require parties to arbitrate when they have not agreed to do so."[48] Because federal policy guarantees the enforcement of private contractual arrangements, courts look first to whether the parties agreed to arbitrate a dispute to determine the scope of the agreement, rather than looking at general policy goals.[49]

Clear contractual language governs a court's interpretation of arbitration agreements.[50] *Volt* and *Mastrobuono* both direct courts to respect the terms of the agreement without regard to the federal policy favoring arbitration. Because there is a liberal federal policy favoring arbitration,[51] the parties will be bound by their agreement to arbitrate.[52] In *Mitsubishi,* the court states that if the parties have made the bargain to arbitrate, then they should be held to that bargain.[53]

The Supreme Court has found employment contracts, except for those covering workers engaged in transportation, to be covered by the FAA.[54] The Supreme Court also makes clear that the Section 1 exemption is confined to transportation workers.[55] These workers are covered by the provisions of the Railway Labor Act (RLA) of 1934.[56] The RLA was enacted by Congress to promote the stability in labor-management relations by providing a comprehensive framework for resolving labor disputes.[57] According to the Supreme Court, the purpose of the RLA is to provide a framework for peaceful settlements of labor disputes between carriers

42. *Id.*
43. *Id.* at 476.
44. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).
45. *Moses H. Cone*, 460 U.S. at 24; *Gilmer*, 500 U.S. at 26; Painewebber Inc. v. Chase Manhattan Private Bank (Switzerland), 260 F.3d 453, 462 (5th Cir. 2001). The court stated that in determining whether parties have agreed to submit a particular dispute to arbitration, the courts must keep in mind the strong federal policy favoring arbitration and resolve all ambiguities in favor of arbitration. *Id.*
46. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995).
47. EEOC v. Waffle House, 534 U.S. 279, 289 (2002).
48. *Volt*, 489 U.S. at 478. The purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so. *Id.*
49. *Mitsubishi*, 473 U.S. at 625-26.
50. *Mastrobuono*, 514 U.S. at 62.
51. *Moses H. Cone*, 460 U.S. at 24.
52. *Gilmer*, 500 U.S. at 20.
53. *Mitsubishi*, 473 U.S. at 628.
54. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); 9 U.S.C. § 1 (2000).
55. *Circuit City*, 532 U.S. at 105; 9 U.S.C. § 1.
56. 45 U.S.C. § 151 (2000).
57. Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994).

and their employees.[58] Even though the RLA governs disputes in the transportation industry, the federal courts have often looked to the FAA for guidance even in labor arbitration cases.[59]

In the Steelworkers Trilogy, the Supreme Court stated that the function of the courts was limited in cases where the parties had agreed to submit questions of contract interpretation to an arbitrator.[60] The Supreme Court went on to state that whether the moving party was right or wrong was a question of contract interpretation for the arbitrator.[61] It has long been held by the Supreme Court that a labor arbitrator's award is final if it "draws its essence from the collective bargaining agreement."[62] Furthermore, the Supreme Court stated that a mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award.[63] The Supreme Court reasoned that since arbitration is a creature of contract, the parties should receive the arbitral decision for which they bargained.[64] In other words, because arbitration is purely a product of contract, the arbitrator's authority is derived exclusively from the terms of the collective bargaining agreement negotiated by the parties.[65]

Courts have consistently held that the standard of review which a court must apply when reviewing an arbitration award is that of deference to the arbitrator. As the Eighth Circuit stated in *Coca-Cola Bottling Co. of St. Louis*, a court's "review of arbitration awards is exceptionally narrow."[66] Where parties have an agreement to resolve disputes via arbitration, courts must defer to the resolution reached by the arbitrator who typically has special knowledge of the arena in which the dispute arose.[67] Even if a court is convinced that an arbitrator has committed serious error, it cannot overturn his decision if he even arguably construes or applies the contract and acts within the scope of his authority.[68] It is not for the courts to decide whether the arbitrator properly interpreted the contract. The arbitrator must look to the "essence" of the agreement.[69] The "essence" test is

58. Union Pacific R.R. Co. v. Price, 360 U.S. 601, 609 (1959).

59. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 41 n.9 (1987). Although the Arbitration Act does not apply to "contracts of employment of . . . workers engaged in foreign or interstate commerce," federal courts often look to the Act for guidance in labor arbitration cases. *Id. See* 9 U.S.C. § 1. This has been especially true after the Supreme Court held that the Labor Management Act of 1947 empowers the federal courts to fashion rules of federal common law to govern "[s]uits for violation of contracts between an employer and a labor organization" under the federal labor laws. *Id. See* Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

60. *Am. Mfg. Co.*, 363 U.S. at 567-68.

61. *Id.* at 568.

62. Bales, *supra* note 34, at 581.

63. *Id.* (quoting *Enter. Wheel*, 363 U.S. at 598).

64. *Id.*

65. *Id.* at 584. *See also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974) (stating that an arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties"); Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. CHI. L. REV. 545, 557-59 (1967) (stating that "parties typically call on an arbitrator to construe and not to destroy their agreement").

66. Coca-Cola Bottling Co. of St. Louis v. Teamsters Local Union No. 688, 959 F.2d 1438, 1440 (8th Cir. 1992).

67. *Id.*

68. *Id. See also Misco*, 484 U.S. at 38.

69. Amy Evans Roman, *Labor Relations – Review of Arbitration Awards – Fifth Circuit Holds That Since an Arbitrator Implicitly Found Just Cause for Termination a Remedy Other Than Termination*

met when the award has "a basis that is at least rationally inferable . . . from the letter or purpose" of the collective bargaining agreement.[70] The "essence" standard is interpreted expansively, rather than restrictively, to uphold awards.[71]

Although the scope of review of an arbitrator's award is sharply limited, there are some circumstances where a court can overturn an arbitration decision.[72] These limited circumstances include: (1) when the arbitrator ignores the plain language of the contract, and (2) when the arbitrator dispenses his own brand of justice.[73] When the arbitrator's words manifest an infidelity to these obligations, a court should refuse to enforce the award.[74] Judicial review of a labor-arbitration decision by a court is extremely limited.[75] The Supreme Court has afforded great deference to labor arbitration because of the long-standing federal policy favoring resolution of labor disputes through the arbitration process.[76] If the arbitrator is "even arguably construing or applying the contract and acting within the scope of his authority the fact that a court is convinced that he committed serious error does not suffice to overturn that decision."[77]

Returning to the Steelworkers Trilogy, the Supreme Court not only established the presumption of arbitrability and the limited judicial review of arbitral awards, it also created a broad definition of what was meant by a collective bargaining agreement.[78] The Supreme Court stated that the collective bargaining agreement encompasses the whole employment relationship.[79] Consistent with this view of collective bargaining agreements, courts and arbitrators have found "that custom, past practice, and oral understandings may . . . constitute an enforceable part of the collective bargaining agreement itself."[80]

Side agreements are also enforceable as part of a collective bargaining agreement. Side agreements include a settlement agreement, a last chance agreement, a second chance agreement, a waiver agreement, a supplemental agreement, and an addendum. The side agreement serves to clarify, add to, or change the collective bargaining agreement in some manner.[81] Thus, the side agreement becomes a part of the original collective bargaining agreement.[82]

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was Beyond the Scope of the Power Given to the Arbitrator by the Collective Bargaining Agreement: Am. Eagle Airlines, Inc. v. Air Line Pilots Ass'n , Int'l, 69 J. AIR L. & COM. 501, 503 (2004).

70. Houston Lighting & Power Co. v. Int'l Bhd. of Elec. Workers, Local Union No. 66, 71 F.3d 179, 183 (5th Cir. 1995).

71. Int'l Ass'n of Machinists & Aerospace Workers, Dist. 776 v. Texas Steel Co., 538 F.2d 1116, 1121 (5th Cir. 1976).

72. *Coca-Cola Bottling Co. of St. Louis*, 959 F.2d at 1440.

73. *Id. See also Enter. Wheel*, 363 U.S. at 597.

74. *Id.*

75. Am. Eagle Airlines, Inc., v. Airline Pilots Ass'n, Int'l, 343 F.3d 401, 405 (5th Cir. 2003).

76. Pan Am. Airways Corp. v. Air Line Pilots Ass'n, Int'l, 206 F. Supp. 2d 12, 18 (D.D.C. 2002). *See also Misco*, 484 U.S. 29 (1987) "[T]he court made clear almost 30 years ago that the courts play only a limited role when asked to review the decision of an arbitrator...The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Id.* at 36.

77. *Misco*, 484 U.S. at 38.

78. Bales, *supra* note 34, at 586.

79. *Warrior & Gulf*, 363 U.S. at 578.

80. Bales, *supra* note 34, at 586. *See also* Elkouri & Elkouri, *How Arbitration Works* 630 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997).

81. Bales, *supra* note 34, at 587.

82. *Id.*

The LCA should be regarded as a side agreement to the collective bargaining agreement.[83] LCAs constitute formal contractual agreements of labor disputes, and so the standard of review is no different from that of any other contract. In fact, because the LCA is created after the collective bargaining agreement, it may supersede the collective bargaining agreement in whole or in part.[84] The Eighth Circuit, in *Coca-Cola Bottling Co. of St. Louis*, determined that the arbitrator was required to view the express provisions of the LCA as representing the parties' actual intentions with respect to that individual employee.[85] The Sixth Circuit, in *Ohio Edison*, ruled that an arbitrator does not have the authority to disregard the explicit terms of an LCA.[86] The Fifth Circuit, in *Cooper Natural Resources*, stated that an LCA is considered to form a firm contract between the employer and the employee.[87] It functions as a supplement to the collective bargaining agreement and is binding upon the arbitrator.[88] When an arbitration panel ignores the explicit terms of an LCA, its decision is owed no deference and must be closely scrutinized.[89] The Supreme Court has stated that the arbitrator "does not sit to dispense his own brand of industrial justice."[90] This does not mean however, that an arbitrator's decision interpreting an LCA is entitled to any less deference than one which is interpreting a collective bargaining agreement.[91] In fact, an arbitrator's interpretation of both a collective bargaining agreement and an LCA are entitled to the same high standard of deference.[92]

IV. INSTANT DECISION

In the instant case, the court addresses two issues: (1) determining the appropriate standard of review to be used when reviewing the Board's award;[93] and (2) determining whether the district court erred in upholding the arbitration award.[94]

In determining the appropriate standard of review, the court first distinguished between when an arbitration panel interprets an LCA and when it actually ignores the existence of an LCA.[95] The court then determined that a deferential standard of review which applies when an arbitration panel interprets a provision of a collective bargaining agreement, also applies when an arbitration panel interprets a provision of the LCA.[96] However, Continental argued that the court should use a "no deference" standard of review based on the *Cooper Natural Resources* decision.[97] Nevertheless, the court went on to find that there was nothing in the

83. Int'l Union of Operating Eng'rs, Local 351 v. Cooper Nat. Resources, Inc., 163 F.3d 916, 919 (5th Cir. 1999).
84. *Id.*
85. *Coca-Cola Bottling Co. of St. Louis*, 959 F.2d at 1440.
86. Ohio Edison Co. v. Ohio Edison Joint Council, 947 F.2d 786, 787 (6th Cir. 1991).
87. *Cooper Nat. Resources*, 163 F.3d at 919.
88. *Id.*
89. *Id.*
90. *Enter. Wheel*, 363 U.S. at 597.
91. *Continental*, 391 F.3d at 618.
92. *Id.*
93. *Id.* at 616.
94. *Id.*
95. *Id.* at 618-19.
96. *Id.* at 619.
97. *Id.* at 617.

Cooper Natural Resources decision which supported a more searching review of an arbitrator's interpretation of an LCA.[98]

In this case, the court looked at the Board's interpretation of the LCA, whereas in the *Cooper Natural Resources* case, the arbitrator did not even attempt to interpret the LCA, but had simply ignored it.[99] The court determined that the standard used to review the arbitrator's interpretation of the LCA was the same standard used for collective bargaining agreements.[100] Therefore, the court held that the standard of review which was applicable in this case was that of deference to the Board's decision.[101] The court adopted the same standard of review the Supreme Court applied in *Misco*.[102] Based on this holding, the court concluded the deference which the lower court gave to the Board's award was proper.[103]

In determining whether the district court erred in upholding the arbitration award, this court looked at whether the Board exceeded the scope of its jurisdiction.[104] The court found the Board ignored the plain terms of the LCA.[105] Even though the employee did not adhere to the terms of the LCA, the Board granted him yet another "last chance."[106] The court determined the Board's interpretation was not even an arguable construction of the LCA and therefore, the Board had exceeded the scope of its jurisdiction.[107]

V. COMMENT

In this case, Johnson simply did not follow the terms of the LCA which he signed. The name of the agreement, 'last chance agreement,' indicated that it was Johnson's last chance. The LCA stated that if Johnson did not adhere to the conditions of the LCA, he would be immediately terminated without further proceedings.[108] The LCA Johnson signed had specific requirements which Johnson was required to follow in order to continue working at Continental.[109]

Johnson was initially discharged after he tested positive for alcohol in August 2000.[110] However, Continental was willing to give him one more chance, if he agreed to certain specific terms set forth in the LCA.[111] Johnson agreed to abide by those terms and, on that basis, Continental allowed him to retain his position as a mechanic.[112] Continuing to work for Continental was a privilege for Johnson, not a right. Continental could have refused to permit him to return to work after

98. *Id.* at 618.
99. *Id.*; *Cooper Nat. Resources.*, 163 F.3d at 919.
100. *Continental*, 391 F.3d at 619.
101. *Id.* The court held that the standard of review applicable in this case was the deferential standard used by the Supreme Court in *Misco*. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 620.
106. *Id.*
107. *Id.*
108. *Id.* at 615.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 615-16.

he tested positive for alcohol. The company elected to give him an opportunity to continue working, albeit under the restrictive terms specified in the LCA.[113]

By its nature, an LCA is more restrictive than a collective bargaining agreement. LCAs typically come into existence when an employee could be fired under the terms of the collective bargaining agreement, but the company agrees to give the employee one more chance. This opportunity is normally based on the employee's agreement to heightened restrictions on their activities.

In this particular case, because Johnson had tested positive for alcohol during a random alcohol test, Continental was concerned about having a drunk mechanic working on its airplanes.[114] In his position as an aircraft mechanic, Johnson's improper actions could potentially affect the lives of hundreds of people through poor maintenance on Continental airplanes. This surely was a factor when Continental drafted an LCA with zero tolerance for alcohol consumption.[115] There were numerous reasons Continental could not have Johnson intoxicated while at work again. Because Johnson was an aircraft mechanic, Continental likely had to worry about improper maintenance, public perception, and the chance of receiving a violation from the Federal Aviation Administration for knowingly having an intoxicated mechanic working on its airplanes. Continental had much to lose if Johnson was ever drunk again at work. Continental drew a clear line that Johnson would be terminated if he tested positive again for alcohol, no matter what his excuse was.[116] Per the terms of the LCA, the only time Johnson could take an alcohol-based medication was if the medication was prescribed by a doctor.[117] Because the LCA was so specific about this, it was obviously an important element in Continental's decision to allow Johnson to continue working at Continental. In the LCA, it specifically stated that Johnson could only take alcohol-based medications if they were prescribed by a physician.[118] The language in the LCA was very explicit; it was simple, straightforward and unambiguous.

Some people may feel sorry for Johnson because the LCA is more harsh than the collective bargaining agreement, but those were the terms agreed to by the parties. It did not matter whether Johnson really was sick and taking the cough syrup or if he was taking it just for the alcohol content.[119] Johnson was well aware of the terms of the LCA, he agreed to be bound by those terms, and it was his responsibility to adhere to those terms. Johnson knew the consequences of not being faithful to the terms of the LCA. He made the decision to take the medicine, knowing that he risked losing his job. If Continental had wanted to continue to adhere to the terms of the collective bargaining agreement only, then they would not have had Johnson sign the LCA. Continental demanded the additional constraints on his activities or they would not have permitted him to return to work.[120]

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113. *Id.* at 615.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. It is not unusual for an alcoholic to take alcohol-based medicines in an attempt to 'get a buzz.'
120. *Continental*, 391 F.3d at 615.

A. *Court's standard of review of the arbitration award*

The first issue the appellate court addressed in this case was to determine the proper standard of review when reviewing an award set by the Board.[121] The collective bargaining agreement (CBA) between an airline carrier and its employees is governed by the RLA.[122] The RLA establishes mandatory procedures for the resolution of both major and minor disputes.[123] A minor dispute includes the interpretation or application of agreements covering rules or working conditions.[124] A dispute arising out of the enforcement of an existing CBA is an example of a minor dispute.[125] In this case both Continental and IBT explicitly agreed that this dispute constituted a minor dispute under the RLA.[126] Pursuant to the RLA, because this was a minor dispute it must be resolved through binding arbitration before a board established by the union and the employer.[127] In fact, the RLA expressly mandates that the Board has exclusive jurisdiction to adjudicate these claims in order to achieve the prompt settlement of minor disputes.[128] The RLA provides that judicial review of Board decisions be narrow and highly deferential because of the strong public policy interest in achieving finality in an arbitration proceeding. Furthermore, the Supreme Court has stated in numerous cases that review under the RLA is 'among the narrowest known to the law.'[129] Thus, the Supreme Court affords the utmost deference to the Board's decision.[130]

However, in this case, Continental argued for a "no deference" standard.[131] Continental alleged that the no deference standard was appropriate because this dispute involved an LCA and because the Board ignored an express term of the agreement.[132] The appellate court found the no deference standard to be inappropriate because the issue in this case was still the arbitrator's interpretation of the LCA.[133] Even though the Board appeared to have ignored some of the provisions of the LCA, it did not ignore the LCA itself.[134] The way the Board chose to interpret the LCA was to ignore certain express terms written in it.[135] Even though the Board may have used an incorrect method to interpret the LCA, it was *an inter-*

121. *Id.* at 616.

122. *Id.* The purpose of having the RLA govern disputes between airline carriers and their employees, is to avoid interruptions to commerce that might arise from such disputes. 45 U.S.C. § 152 (2000).

123. *Continental*, 391 F.3d at 616.

124. Consol. Rail Corp. v. Ry. Lab. Exec. Ass'n, 491 U.S. 299, 303 (1989).

125. *Continental*, 391 F.3d at 617.

126. *Id.*

127. *Id.*

128. *Id.*

129. Slader v. Northwest Airlines, Inc., 2001 WL 1640054 at *3 (D. Minn. Sept. 21, 2001).

130. *See Pan Am. Airways*, 206 F. Supp. 2d at 12.

> Given the long-standing federal policy favoring resolution of labor disputes through the arbitration process, the Supreme Court has afforded deference to labor arbitration. As a result, a district court's authority to review labor arbitration awards is extremely limited under the Railway Labor Act, yielding to the parties' intent to be bound by the arbitrator's interpretation and construction of their collective bargaining agreement.

Id. at 18.

131. *Continental*, 391 F.3d at 617-18.

132. *Id.* at 617.

133. *Id.* at 619.

134. *Id.*

135. *Id.* at 617.

pretation nevertheless. Therefore, because it was an interpretation, the appellate court held that the standard of review to be applied was that of great deference to the decision of the Board.[136]

The practice of affording a high level of deference to the decisions of the Board normally works well in the transportation industry. The transportation industry in general, and the airline industry in particular, is quite different from most other industries. Many of the issues and problems are unique to the transportation or airline industry. For example, an airline is constantly trying to strike the balance between making money, treating employees fairly, adhering to Federal Aviation Administration regulations, and, most importantly, running a safe airline. Needless to say, there are several public policy issues at play in a case such as this one. Primarily, how are the needs for public safety balanced with the Supreme Court mandate of great deference to the Board?

The complex system that is in place to resolve disputes in the airline industry is encompassed in the RLA.[137] This system has been in place for decades, encompassing all of the different subsets of the transportation industry. The members of the Board which arbitrate disputes within the airline industry have typically been involved in the industry for many years and therefore, are intimately familiar with the various competing public policy issues at play. Because the Board members tend to have a high level of expertise in this complex industry, affording a high degree of deference to the Board when reviewing an arbitration award makes sense. Courts simply do not have the background and expertise that the Board members typically have. Additionally, the system has been in place for a long period of time, so both sides know what to expect to a certain extent.

Because of the complex system of regulations that must be adhered to, numerous public policy issues, collective bargaining agreements between the company and several unions, the general uncertainty and upheaval in the airline industry at this time, and even public perception; in most cases, the best decisions will come from those who truly understand the complexities of the industry, rather than from a judge who only has a general knowledge of the industry. However, because public safety is involved, the Board's decision should be subject to some level of review. The standard of deference to the Board's decision should be high, but the deference to the Board should not be so high that an airline is unable to set parameters with regards to how to best run it's company safely.

B. Did the district court err in upholding the arbitration award?

The next issue the court addressed was whether the district court erred in upholding the arbitration award.[138] Courts will uphold arbitration awards, even if "wrong" or "questionable" as long as it's the arbitrator's interpretation of the con-

136. *Id.* at 619.
137. *See* RLA, 45 U.S.C. § 152 (2000).
138. *Continental*, 391 F.3d at 619.

tract.[139] Seldom does a court overturn an arbitration award, but this was that rare case.[140]

The arbitrator's responsibility is to uphold the bargain that the two parties agreed to, not to decide what is just or unjust. It does not matter whether the LCA is fair or unfair to the parties involved. It was the bargain that the parties struck. In this particular LCA, the terms were explicitly spelled out.[141] The Board completely disregarded those explicit terms in its interpretation.[142] When the Board chose to disregard clear, unambiguous language in the LCA, it seemed to be applying its "own brand of justice."

Continental contends that the Board exceeded its authority.[143] "In order to be within the Board's authority, the award must 'draw its essence' from the LCA."[144] In the LCA, it specifically states that Johnson was not to use anything that contained alcohol, including medications.[145] The ONLY exception was if a doctor prescribed the medication.[146] In that event, Johnson was required to inform the EAP staff of the medication he was taking.[147] Contrary to these unambiguous terms in the LCA, the Board found that a person on the doctor's staff authorizing Johnson to take the over-the-counter cough syrup, "met the letter and spirit" of the agreement.[148] Additionally, the Board found that the EAP director should have called Johnson back and warned him that the use of the cough medicine could potentially violate the agreement.[149]

Johnson was an adult with a responsible job. If he had any questions about the terms of the LCA, he was perfectly capable of asking someone himself. More importantly, there was nothing in the LCA that made it Continental's responsibility to give Johnson yet another warning.[150] Johnson had already been put on notice as to what his responsibilities were when he signed the LCA. The Board "added a 'last chance warning' requirement to . . . the LCA by determining that the EAP director should have contacted Johnson regarding his voicemail."[151] In *Misco*, the Supreme Court held that "an arbitrator's award is to be upheld as long as the arbitrator 'is even arguably construing or applying the contract.'"[152] The Board determined that Johnson was in compliance with the LCA because he had talked to someone on the doctor's staff and had left a message on the EAP director's voicemail.[153] However, it is uncontested that Johnson's doctor did not approve the use of the cough medicine, as required by the LCA.[154] Because the

139. *See E. Assoc. Coal*, 531 U.S. at 62 ("courts will set aside the arbitrator's interpretation of what their agreement means only in rare instances").
140. *Id.*
141. *Continental*, 391 F.3d at 615.
142. *Id.* at 620.
143. *Id.* at 619.
144. *Id. See also Misco*, 484 U.S. at 38.
145. *Continental*, 391 F.3d at 615.
146. *Id.*
147. *Id.*
148. *Id.* at 619.
149. *Id.*
150. *Id.* at 620.
151. *Id.*
152. *Id.* (quoting *Misco*, 484 U.S. at 38).
153. *Id.*
154. *Id.*

Board did not require proof of a doctor's order, the appellate court found that the Board's interpretation effectively read the word 'doctor' out of the agreement.[155] The court found the Board's interpretation was "not an arguable construction of the agreement."[156] Even though the standard of review is one of extreme deference to the Board, the Board cannot read explicit terms out of the agreement.[157] Because the Board's interpretation failed to arguably construe the agreement, the court held the Board had exceeded the scope of its jurisdiction in fashioning its award.[158]

The appellate court was correct in overturning the district court's decision. The Board erred in not upholding the terms of the LCA. Airlines have to balance helping employees who have alcohol problems with other issues such as following Federal Aviation Administration regulations and keeping the public safe when they are flying on their airplanes. The airlines do this by drafting stringent LCAs which retain tight control over the activities of that particular employee. The LCA normally includes such requirements as mandatory rehabilitation programs and random alcohol testing. The employee must comply with these terms, not just to keep the employer happy, but to ensure the safety of those flying on the company's airplanes. The employee knows when he signs the LCA that he will be fired immediately for non-compliance with the terms of the agreement. An airline needs to be able to control the conduct of an employee who has exhibited signs of alcohol problems. An LCA helps an airline do this.

A person has additional responsibilities when he chooses to work in the transportation industry, specifically in the capacity of an aircraft mechanic at a major airline. When an aircraft mechanic accepts a job at a major airline, he knows that there are certain restrictions put on his life, especially with regards to alcohol and drugs. Even without an LCA, there are numerous drugs, both over-the-counter and prescription, that a mechanic is not permitted to take while he is at work. Among some of the most common are cold and allergy medications. In this particular case, it is likely that pursuant to Federal Aviation Administration regulations, Johnson should not have taken the cough medicine and went to work anyway, even without the LCA agreement between himself and Continental.[159] Additionally, the LCA was very specific about what Johnson needed to do in order to take medications and still come to work.[160] Those were the terms that Johnson and Continental agreed to in order to allow him to continue working at Continental.[161]

The airline industry must be confident that the terms of its LCA agreements will be upheld. This encourages an airline to strive to work with an employee and give him one more chance, rather than simply firing him. Additionally, employees will be more apt to follow the terms of the LCA, if they know that the LCA will be upheld. Therefore, adhering to the terms of LCAs benefits both employees

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. Not knowing exactly which medication he took, this cannot be said for sure. Per the Federal Aviation Regulations (FARs), both airline mechanics and airline pilots are required to ensure that any medication they are taking is approved by the FAA prior to reporting to work.
160. *Continental*, 391 F.3d at 615-16.
161. *Id.*

and employers. If the terms of LCAs are not upheld, companies are less likely to use LCAs and more likely to just fire the employee. When an employee in the airline industry has done something that would permit a company to fire him, the terms that the company agrees to bring him back under must be followed. This is critically important because of the many public policy issues at play, the first and foremost of which is the safety of the public. An airline agrees to LCA terms because it feels public safety will not be compromised by allowing the employee to continue to work for the company, as long as the terms of the LCA are followed. Second guessing an airline on this issue could seriously compromise public safety. Therefore, the terms of an LCA must be followed and the LCA should be exactly that for an employee—his "last chance." The LCA is the bargain the two parties struck which both felt they could live with and should be upheld. Airlines should not be forced to compromise safety by being ordered to give an employee yet another chance, an employee who has not been willing to follow the terms which the company felt were necessary in order to keep from compromising public safety.

VI. CONCLUSION

In this case, the Fifth Circuit looked at two issues.[162] The first issue the court addressed was what the appropriate standard of review was for reviewing arbitration awards, specifically in cases governed by the RLA. The court held that the standard of review was one of deference to the interpretation of the arbitrator.[163] Additionally, the court looked at whether the district court erred in upholding the award of the arbitrator. The court held that the district court did err.[164] The court found this particular case was a rare example of an appropriate time for a court to overturn the decision of an arbitrator.[165] The court stated that the Board's interpretation of the LCA was not an arguable construction of it and therefore, the Board had exceeded the scope of it jurisdiction when it determined the award.[166]

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162. *Id.*
163. *Id.* at 619.
164. *Id.*
165. *Id.* at 620.
166. *Id.*