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Vacatur of Labor Arbitration Awards: Watering Down the Supreme Court's "Drawn From the Essence" Precedent May Sound the Death Knell for Labor Arbitration

*CITGO Asphalt Ref. Co. v. Paper, Allied-Indus., Chem., & Energy Workers Int'l Union Local No. 2-991*¹

I. INTRODUCTION

Despite the Supreme Court's consistent holdings that prohibit federal courts from reaching the merits of labor arbitration awards, many circuit courts have subtly refused to restrain their desire to vacate labor arbitrator's awards with which they disagree by developing tests that water down the Supreme Court's "drawn from the essence" precedent.² As a result, labor unions and employers should be aware that they may no longer rely on the finality of a labor arbitrator's award as courts show increased willingness to delve into the merits of an arbitration dispute.³

In *CITGO Asphalt Ref. Co. v. Paper, Allied-Indus., Chem., & Energy Workers Int'l Union Local No. 2-991*, the Court of Appeals for the Third Circuit, while merely giving lip service to Supreme Court precedent, further contributes to the situation where many circuit courts insidiously refuse to follow the Supreme Court's prohibition against reaching the merits of a labor arbitrator's award. It would appear that only through renewed Supreme Court vigilance and clarity can this trend be impeded.

II. FACTS AND HOLDING

In December 1998, CITGO Asphalt Refining Company (CITGO)⁴ implemented a no tolerance substance abuse policy (the Policy) at each of its more than sixty petroleum refining facilities in the United States.⁵ CITGO implemented the Policy, in part, to maintain its status as having the best safety record in the industry.⁶ The new Policy provided for random drug testing of all company employees,

1. 385 F.3d 809 (3d Cir. 2004).

2. See *infra* III.B.

3. See Anna Knull, *Am. Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Int'l: The Fifth Circuit Dispenses Its Own Brand of Justice in Reviewing a Labor Arbitration Award*, 78 TUL. L. REV. 2305 (2004).

4. CITGO Petroleum is the majority partner of the New Jersey partnership, CARCO. *CITGO*, 385 F.3d at 810.

5. *CITGO*, 385 F.3d at 810-11.

6. *Id.* at 814.

for on-duty and off-duty conduct, regardless of whether there was reason to suspect an employee had a substance abuse problem.⁷ If an employee tested positive for drug use, automatic termination would result.⁸ However, under the Policy's "self-acknowledgement" clause, an employee who came forward and admitted their drug use prior to a positive drug test would be given a second chance—an opportunity for rehabilitation without automatic termination.⁹

Upon implementation of the Policy in CITGO's Savannah, Georgia plant, Local 3-0673 of the Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE) filed a grievance challenging the new Policy, which proceeded to arbitration.¹⁰ The arbitrator ruled entirely in CITGO's favor, finding the new Policy was reasonable and valid in every respect.¹¹

The new Policy was also challenged by PACE Local 2-991 at CITGO's Paulsboro, New Jersey asphalt plant,¹² when Local 2-991 filed two grievances.¹³ In the first grievance, Local 2-991 alleged that CITGO had violated the collective bargaining agreement (CBA) through "[i]mproper implementation of a 'new' drug and alcohol policy," by not bargaining over the new policy.¹⁴ The second grievance alleged CITGO had "implemented a drug and alcohol policy that was totally unreasonable."¹⁵ The grievances ultimately proceeded to arbitration after the parties agreed to submit the following question to the arbitrator: "Did CITGO violate Article XXX of the Labor Agreement by improperly implementing its National Substance Abuse Policy at the Paulsboro facility on October 1, 1999? If not, was the policy unreasonable?"¹⁶

Article XXX, the Future Bargaining Clause, provided that each party "waives the right to further bargaining on any subject not covered or covered under this Agreement and any attachments hereto."¹⁷

7. *Id.* at 811.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. The Paulsboro facility negotiated its first labor contract in 1997, after engaging in the processing of crude oil into asphalt and other products since the late 1970s. *Id.* at 811 n1.

13. *Id.* at 811. At the time the grievances were filed, there were some 56 bargaining unit members. *Id.* at 811 n.1.

14. *Id.* at 811.

15. *Id.*

16. *Id.* at 811-12. The parties further stipulated that the Management Rights Clause (Article III) and the Future Bargaining Clause (Article XXX) in the then-current CBA were identical to those contained in every CBA implemented between the parties since 1977. *Id.* at 812.

17. *Id.* at 812-13. Article XXX provides:

The parties acknowledge that, during the negotiations which resulted in this Agreement and any attachments hereto, each had the unlimited right and opportunity to make demands and proposals with respect to any subject . . . not removed from the area of collective bargaining . . . and therefore each waives the right to further bargaining on any subject not covered or covered under this Agreement and any attachments hereto during the term hereof.

The parties also stipulated that:

(1). The Paulsboro refinery is a hazardous work environment that can explode and poses a potential threat to workers, the environment, and to the public at large.

(2). The bargaining unit positions affected by the drug testing policy are safety sensitive (as defined in [Department of Transportation] regulations).

Several provisions of the CBA were considered by the arbitrator as they related to whether Article XXX had been violated. Article III, the Management Rights Clause, provided that CITGO retained all of its rights preexisting the CBA execution to the extent not expressly abridged by a specific provision contained in the CBA, including the right to “make or enforce rules for the maintenance of discipline or safety, and to suspend, discharge, or otherwise discipline employees for just cause.”¹⁸ Article XXV, titled “Grievance Procedure and Arbitration,” provides for the arbitration process through many subsections.¹⁹ Subsection 25.1 defined “grievances” as alleged violations of express and specific provisions of the CBA, and provides that neither party may attempt to use the grievance procedures to in any way change, modify, supplement, or alter the CBA.²⁰ Subsection 25.4 provides that CITGO and Local 2-991 “both agree that the submission to the arbitrator shall be based on the original written grievance submitted in the grievance procedure.”²¹ Subsection 25.6 strictly limits the arbitrator’s powers to determining the meaning and interpretation of explicit CBA terms, prohibits the arbitrator from modifying any CBA terms, limits the arbitrator’s power to deciding whether a violation of the CBA has occurred, and prohibits the arbitrator from basing an award on any practices or oral understandings outside the CBA.²²

(3). The duties of the bargaining unit employees are such that their attempts to perform while in a state of drug impairment may pose a threat to co-workers, to the workplace, to the environment, and to the public at large.

(4). All employees (management and bargaining unit employees alike) at Paulsboro play a critical role in both preventing accidents and minimizing the effects of accidents.

(5). The speed in responding to a dangerous condition is critical to limiting potential damage and injury.

Id.

18. *Id.* at 812. Article III provides, in relevant part:

Except to the extent expressly abridged by an express and specific provision of this Agreement, the Company reserves and retains all of its Common Law or other rights to manage the business as such rights existed prior to the execution of this or any other previous Agreement with the Union or any other Union. The rights of management which are not abridged by this Agreement, shall include, but are not limited to: ...make and enforce rules for the maintenance of discipline and safety, and to suspend, discharge, or otherwise discipline employees for just cause. The listing of specific rights in this Agreement is not intended to be nor shall it be restrictive of or a waiver of any of the rights of management not listed and specifically surrendered herein, whether or not such rights have been exercised by the Company in the past.

Id.

19. *Id.*

20. Article 25.1 reads:

Grievances are defined as alleged violations of express and specific provisions of this Agreement occurring during the term of this Agreement or any renewal or extension thereof.... Neither the Union nor an employee shall use or attempt to use the grievance procedure as a means of changing, amending, modifying, supplementing or otherwise altering in any respect whatsoever this Agreement or any part thereof.

Id.

21. *Id.*

22. *Id.* Article 25.6 reads:

The power and authority of the arbitrator shall be strictly limited to determining the meaning and interpretation of the explicit terms of this Agreement as herein expressly set forth. The arbitrator shall not have authority to add or to subtract from or modify any of said terms, or to limit or impair any Common Law or other right of the Company, or to establish or change any wage or rate of pay The parties agree that the power and jurisdiction of any arbitrator chosen hereunder shall be limited to deciding whether there has been a violation of the provision of this Agreement. The arbitrator shall not substitute his judgment for that of the Company in the absence of a clear

The arbitrator, after listening to several witnesses testify for each side, found that CITGO had not breached the CBA with respect to unilaterally adopting a substance abuse program, and that the random testing procedure was both proper and reasonable.²³ However, the arbitrator ruled for Local 2-991 in finding part of the zero tolerance policy was unreasonable.²⁴ In his written award, the arbitrator acknowledged that CITGO certainly has the right to address safety concerns adequately and that he wished not to disturb CITGO's best record for safety in the industry.²⁵ However, the arbitrator stated that since testimony revealed two other refineries in the industry gave second chances after a positive drug test, that "it has not been shown to my satisfaction that permitting an employee to have a 'second chance' would be inconsistent with this goal [of maintaining the best safety record in the industry]."²⁶ The arbitrator then declared, "the Policy, without giving a second chance for rehabilitation, is unreasonable. . . . I therefore find that the Policy should be modified in that regard."²⁷

In response to the arbitrator's ruling, CITGO filed a complaint in the district court of New Jersey seeking vacatur of the arbitration award alleging that the arbitrator (1) exceeded his power and authority, (2) failed to render an award drawn from the essence of the CBA, (3) ignored limitations on his authority contained in the CBA, (4) rendered an award unsupported by the record, and (5) failed to apply the CBA's standard of review.²⁸ Local 2-991 counterclaimed, and each party filed motions for summary judgment to which the district court responded by entering an order granting summary judgment for Local 2-991 by affirming the arbitrator's award in its entirety.²⁹

On appeal, the Court of Appeals for the Third Circuit reversed, vacating the arbitration award by holding that (1) the arbitrator acted outside the scope of his delegated authority by rendering an award that did not draw its essence from the CBA,³⁰ and (2) the arbitrator's decision that the zero tolerance policy was unreasonable is not supported by the record.³¹

III. LEGAL BACKGROUND

Before 1925, it was a common law rule that executory agreements to arbitrate were not enforceable in federal courts.³² In 1925, however, Congress enacted the Federal Arbitration Act,³³ which specifically rejected the common law rule by

abuse of discretion. The arbitrator shall not be empowered, and shall have no jurisdiction, to base his Award on any alleged practices or oral understandings which are not incorporated in writing in this Agreement. . . .

Id.

23. *Id.* at 814.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 815.

29. *Id.*

30. *Id.* at 816.

31. *Id.* at 818.

32. Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time has Come*, 52 BAYLOR L. REV. 781, 784 (2000).

33. Federal Arbitration Act, 9 U.S.C. §§ 1-14 (2004).

making future agreements to arbitrate explicitly enforceable.³⁴ Although judicial hostility toward agreements to arbitrate persisted for some time, beginning in 1957, the Supreme Court began to respond to this hostility when it interpreted section 301(a) of the Labor Managers Relations Act³⁵ (LMRA) as encompassing labor agreements to arbitrate, even though the LMRA failed to explicitly reference arbitration.³⁶ In so doing, the Supreme Court implicitly recognized that the FAA does not govern labor arbitration, and that standards governing labor arbitration must be defined as a matter of federal common law rather than the FAA.³⁷

A. Developing a Supreme Standard

In *Textile Workers Union of America v. Lincoln Mills*, Justice Douglas declared that LMRA § 301(a) “expresses a federal policy that federal courts should enforce these [arbitration] agreements on behalf of or against labor organizations” and further explained that this was the best way to maintain industrial peace.³⁸ Arbitration provisions were included in around ninety-five percent of all CBAs in the United States at the time *Lincoln Mills* was decided,³⁹ yet this decision marked a substantial policy shift in favor of upholding labor arbitration awards.

A trilogy of cases in 1960 reinforced the *Lincoln Mills* holding, and further delineated the role federal courts are to play in reviewing labor arbitration awards.⁴⁰ One of these three decisions, *Enterprise Wheel*, specifically addressed vacatur of arbitration awards.⁴¹ Justice Douglas, writing again for the majority,

34. Hayford, *supra* note 32, at 784. Section 2 of the FAA reads:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2004).

35. 29 U.S.C. §§ 141-87 (2005). Originally enacted in 1947, § 301(a) of the LMRA currently exists as 29 U.S.C. § 185(a) and reads:

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (2005).

36. Hayford, *supra* note 32, at 786.

37. STEPHEN J. WARE, *ALTERNATIVE DISPUTE RESOLUTION*, 105 (2001). None of the post-1957 Supreme Court decisions addressed the FAA with regard to labor arbitration until the Supreme Court decided *United Paperworkers Int’l Union v. MISCO, Inc.*, 484 U.S. 29 (1987), in which it recognized the FAA does not govern labor arbitration. *Id.*

38. 353 U.S. 448, 455 (1957).

39. Hayford, *supra* note 32, at 786.

40. *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

41. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). In *Enterprise Wheel*, the Supreme Court reversed the Court of Appeals for the Fourth Circuit’s vacatur of a labor arbitration award because it found the appellate court refused to enforce the reinstatement and

declared that refusing to review the merits of an arbitrator's award pursuant to a CBA is the "proper approach" for the federal courts.⁴² To hold otherwise, he stated, would prevent the arbitrator's decision from being final, as the parties had agreed for it to be in their CBA.⁴³ The Court therefore reasoned that it had no business allowing the lower court to overrule the arbitrator simply because that court's interpretation of the contract was different from that of the arbitrator. In the Court's view, the question of interpretation is solely a question for the arbitrator.⁴⁴

The Court explained, however, that the arbitrator is confined by the CBA, and that "he does not sit to dispense his own brand of industrial justice."⁴⁵ Furthermore, while the arbitrator may look to many sources of guidance in making his decision, the "award is legitimate only so long as it draws its essence from the collective bargaining agreement."⁴⁶ Thus, the primary standard for determining vacatur of an arbitration award pursuant to a CBA is whether the arbitrator's decision is "drawn from the essence" of the CBA, and vacatur is only possible when the arbitrator's words "manifest an infidelity to this obligation,"⁴⁷ allowing the court to vacate the award. The Court cautioned though that a mere ambiguity in the arbitrator's opinion will not permit the inference that his authority has been exceeded, since arbitrators have no obligation to the court to provide reasons for an award.⁴⁸

Only four times since the Supreme Court's 1960 Trilogy has the Court revisited the issue of vacatur in labor arbitration.⁴⁹ In 1983, the Court in *W.R. Grace & Co. v. Local Union 759*⁵⁰ reaffirmed the principles of *Enterprise Wheel*,⁵¹ but also formulated a new vacatur exception: "a court may not enforce a [CBA] that is against public policy."⁵² The Court reasoned that such a public policy, however,

partial back pay portions of the award merely because it disagreed with the arbitrator's construction of the contract. *Id.* at 598.

42. *Id.* at 596.

43. *Id.* at 599.

44. *Id.*

45. *Id.* at 597.

46. *Id.*

47. *Id.*

48. *Enterprise Wheel*, 363 U.S. at 598. Ostensibly, it would appear that since an arbitrator has no obligation to a court to provide reasons for an award, a court would have almost no ability to vacate an arbitrator's award where the award simply rendered judgment without any explanation of the rationale used to reach its determination.

49. See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001); *E. Associated Coal Corp. v. United Mine Workers of Am. Dist. 17*, 531 U.S. 57 (2000); *United Paperworkers Int'l Union v. MISCO, Inc.*, 484 U.S. 29 (1987); *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757 (1983).

50. *W.R. Grace*, 461 U.S. 757. *Grace & Co.* had entered into a conciliation agreement with the EEOC which conflicted with their CBA so that complying with the EEOC agreement subjected *Grace & Co.* to liability through the CBA's mandated arbitrator. *Id.* at 760. The Court held that it was *Grace & Co.* who willfully entered into both agreements, and thus it violated no public policy to hold *Grace & Co.* to the bargain it struck. *Id.* at 771-72.

51. The Court reaffirmed the central holdings of *Enterprise Wheel* that a federal court may not overrule an arbitrator's award simply because he would have reached a different result; that an arbitrator must draw the essence of his award from the CBA; and that the parties were entitled to the bargain they struck in choosing the arbitrator's determination to be final, such that "[a] federal court may not second-guess it." *W.R. Grace*, 461 U.S. at 765 (citing *Enterprise Wheel*, 363 U.S. at 599).

52. *W.R. Grace*, 461 U.S. at 766.

must be “well defined and dominant,” ascertainable by reference to legal precedent and laws rather than merely a public interest.⁵³

In 1987, the Supreme Court in *United Paperworkers International Union v. MISCO, Inc.*, reversed the Court of Appeals for the Fifth Circuit by holding that courts have “no business weighing the merits of [a] 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.”⁵⁴ The Court further held that “a court should not reject an award on the ground that the arbitrator misread the contract.”⁵⁵ In finding that no public policy exception warranted vacatur in this case, the Court warned that its holdings do not “sanction a broad judicial power to set aside arbitration awards as against public policy.”⁵⁶

One of two most recent Supreme Court decisions to address labor arbitration vacatur is *Eastern Associated Coal Corp. v. United Mine Workers of America, District 17*, decided in 2000.⁵⁷ There, the CBA provided that in order to discharge an employee, Eastern needed to prove just cause for the termination.⁵⁸ When a labor arbitrator ordered Eastern to reinstate an employee truck driver who had tested positive for marijuana use on two separate occasions, Eastern filed suit to vacate the award.⁵⁹ Both the district court, and the Court of Appeals for the Fourth Circuit held vacatur was not warranted because the award did not violate a public policy against allowing dangerous machinery to be used by employees who tested positive for drugs.⁶⁰

On appeal, the Supreme Court affirmed, stating that its precedent made clear that the public policy exception may not be invoked unless the award “runs contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests.”⁶¹ Having found no specific provision of any law or regulation, the Court affirmed, but not without some dicta that caused a concurrence: “[w]e agree, in principle, that the courts’ authority to invoke the public policy exception is not limited solely to instances of positive law.”⁶²

The most recent Supreme Court decision illustrates the Court’s intolerance for lower federal courts reaching the merits of a labor arbitration award. In *Major League Baseball Players Ass’n v. Garvey*, decided in 2001, the Court, in a *per curiam* decision, reversed the Ninth Circuit for delving into the merits of an arbi-

53. *Id.*

54. *United Paperworkers Int’l Union v. MISCO, Inc.*, 484 U.S. 29, 37 (1987) (quoting *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567-68 (1960) (emphasis omitted; footnote omitted)). In *MISCO*, the Supreme Court reversed the Court of Appeals for the Fifth Circuit, which had affirmed the district court’s vacatur of a labor arbitration award that reinstated an employee because the court found reinstatement would violate public policy against operation of dangerous machinery by persons under the influence of drugs. *Id.* at 31. The Court held that the public policy exception was not satisfied because such policy must be ascertained by reference to laws and legal precedence and not from general considerations of supposed public interests. *Id.* at 43.

55. *Id.* at 38.

56. *Id.* at 43.

57. *E. Associated Coal Corp. v. United Mine Workers of Am., District 17*, 531 U.S. 57 (2000).

58. *Id.* at 60.

59. *Id.* at 60-61.

60. *Id.* at 61.

61. *Id.* at 63.

62. *Id.* at 67-68.

trator's award, vacating that award, and then remanding the case to the arbitrator with instructions to enter an award for a specific party.⁶³ The Court reiterated that even if a court is convinced the arbitrator committed "serious error," this is not enough to overturn the arbitrator's decision.⁶⁴ Furthermore, the Court explained, it is not a basis to overturn an award if there is "improvident, even silly, factfinding."⁶⁵ The Court noted "[t]o be sure, the Court of Appeals here recited these [Supreme Court] principles, but its application of them is nothing short of baffling." The Court also held that had vacatur been warranted, the proper remedy would have been to remand the case for further arbitration proceedings—not to order the arbitrator to decide the issues a certain way.⁶⁶

B. The Divided Circuit Courts

Despite the Supreme Court's attempt to provide bright-line rules concerning when a court may vacate a labor arbitration award, in recent years a majority of the circuit courts have diluted the "drawn from the essence" test by creating new standards for determining vacatur of a labor arbitration award which require some judicial consideration of the underlying merits of the arbitrator's award and the propriety of the arbitrator's rationale.⁶⁷

The First Circuit, for instance, has developed its own test that permits vacatur of a labor arbitral award if the decision was "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact."⁶⁸

The Second Circuit has stated that "[a]n arbitrator's authority to settle disputes under a collective bargaining agreement is contractual in nature, and is limited to the powers that the agreement confers."⁶⁹ Therefore, it concluded, arbitrators "may not shield an 'outlandish disposition of a grievance' from judicial review 'simply by making the right noises—noises of contractual interpretation.'"⁷⁰

The Third Circuit, on the other hand, holds that a labor arbitration award may be vacated where there is a "manifest disregard" of the agreement, wholly unsus-

63. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001).

64. *Id.* at 509.

65. *Id.* (citing *MISCO*, 484 U.S. at 39).

66. *Garvey*, 532 U.S. at 511.

67. Hayford, *supra* note 32, at 816.

68. *Teamsters Local Union No. 42 v. Supervalu, Inc.* 212 F.3d 59, 66 (1st Cir. 2000) (citing *Local 1445, United Food & Commercial Workers Int'l Union v. Stop & Shop Cos.*, 776 F.2d 19, 21 (1st Cir. 1985)). The court cited to its 1985 opinion which further explained that the court developed this test in light of its interpretation of Supreme Court precedent that the parties bargained only for the arbitrator's decision and "are not entitled to judicial review unless it can be shown that the arbitrator acted in a way for which neither party could have bargained." *Stop & Shop Cos.*, 776 F.2d at 21. Even following *Garvey*, the First Circuit in *New England Health Care Employees Union, District 1199 v. Rhode Island Legal Services*, 273 F.3d 425 (1st Cir. 2001), affirmed this tri-part test. 273 F.3d at 427.

69. *Leed Architectural Prods., Inc. v. United Steelworkers of Am., Local 6674*, 916 F.2d 63, 65 (2d Cir. 1990) (citing *Torrington Co. v. Metal Prods. Workers Union Local 1645*, 362 F.2d 677, 680 (2d Cir. 1966)).

70. *Id.* (quoting *In re Marine Pollution Serv. Inc.*, 857 F.2d 91, 94 (2d Cir. 1988)).

ported by the principles of contract construction and the “law of the shop.”⁷¹ The Third Circuit has also concluded that the arbitrator only has authority to decide the issues actually submitted, therefore allowing courts “province to review an arbitrator’s interpretation.”⁷²

The Fourth Circuit has held that an arbitrator is required to provide a rational basis for his award, so that where the arbitrator “fails to discuss critical contract terminology, which terminology might reasonably require an opposite result, the award cannot be considered to draw its essence from the contract.”⁷³

In the Fifth Circuit, “if the award is arbitrary, capricious or not adequately grounded in the basic collective bargaining contract, it will not be enforced by the courts.”⁷⁴ The Fifth circuit has also concluded that “[i]n applying the ‘essence’ test, we have stated that an arbitration award ‘must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. . . . [T]he award must, in some logical way, be derived from the wording or purpose of the contract.’”⁷⁵ Even following *Garvey*, the Fifth Circuit has stated that “[o]ur cases have recognized that a district court may vacate as arbitrary and capricious an arbitration award that arises from the terms of a collective bargaining agreement.”⁷⁶

The Sixth Circuit similarly holds that vacatur is warranted whenever the award (1) conflicts with an express term of the CBA; (2) imposes additional requirements not expressly provided for in the CBA; (3) is not “rationally supported or derived from” the CBA; or (4) is based on “general fairness or equality rather than exact terms” of the CBA.⁷⁷

71. *CITGO*, 385 F.3d at 816 (citing *Exxon Shipping Co. v. Exxon Seamen’s Union*, 73 F.3d 1287, 1295 (3d Cir. 1996)).

72. *Id.* (quoting *Matteson v. Ryder System Inc.*, 99 F.3d 108, 113 (3d Cir. 1996)).

73. *Clinchfield Coal Co. v. District 28, United Mine Workers of Am. & Local Union No. 1452*, 720 F.2d 1365, 1369 (4th Cir. 1983). The court justified this conclusion by stating that it would be “wholly unsatisfactory” to allow an arbitrator to avoid review of his award “simply by the ruse of stating an issue without discussing it.” *Id.*

74. *Safeway Stores v. Am. Bakery and Confectionery Workers Int’l Union, Local 111*, 390 F.2d 79, 81 (5th Cir. 1968) (quoting *Int’l Ass’n of Machinists v. Hayes Corp.*, 296 F.2d 238, 242-43 (5th Cir. 1961)).

75. *Bruce Hardwood Floors v. UBC, S. Council of Indus. Workers, Local Union No. 2713*, 103 F.3d 449, 451-52 (5th Cir. 1997) (quoting *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1325 (5th Cir. 1994) (citation omitted)). In *Bruce Hardwood Floors*, an employee was terminated after she lied to her supervisor by requesting time off work to take her daughter to the doctor when she actually needed to pay an electric bill. *Id.* at 450. A grievance was filed, and the arbitrator found outright termination to be unreasonable, and reinstated the employee with a ten-day suspension. *Id.* at 450-51. The Fifth Circuit vacated the arbitrator’s award, holding that the arbitrator exceeded his authority because it “conclude[d] that the award is not ‘derived from the wording or purpose of the contract.’” *Id.* at 452 (quoting *Executone*, 26 F.3d at 1325). The court, relying on Black’s Law Dictionary, reasoned that “lying” is by definition “immoral conduct” and that the CBA specifically allowed immediate discharge of an employee for engaging in immoral conduct. *Id.* at 452.

Circuit Judge Benavides, in a vigorous dissent, chastised the majority for substituting its own interpretation of the CBA for that of the arbitrator. *Id.* at 453 (Benavides, C.J., dissenting). The dissent explained that since immoral conduct was not defined in the CBA, the majority reached the merits when it interpreted “immoral conduct” as lying, which is not the court’s proper role. *Id.* at 454 (Benavides, C.J., dissenting).

76. *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 383 (5th Cir. 2004) (citations omitted).

77. *Dallas & Mavis Forwarding Co. v. General Drivers, Local Union No. 89*, 972 F.2d 129, 134 (6th Cir. 1992) (citing *Nat’l Gypsum Co. v. United Steelworkers of Am.*, 793 F.2d 759, 766 (6th Cir. 1986)).

The Seventh Circuit mirrors the approach taken by the Second Circuit in that it has held it will not affirm a labor arbitration award when it cannot find express language in the CBA to sanction the remedy declared in the award.⁷⁸ While the court may not vacate simply because it disagrees with the arbitrator's interpretation, "[i]f the misinterpretation is 'irrational,' however, the court may reverse."⁷⁹ Furthermore, the Seventh Circuit agrees with the Second Circuit that an arbitrator may not shield an "outlandish disposition of a grievance" from judicial correction "simply by making the right noises--noises of contract interpretation."⁸⁰

The Eighth Circuit has held that, absent reference to a probative contract term in the decision, a strong presumption exists that the arbitrator's award was not based on the contract.⁸¹ In so holding, it appears to construe the "drawn from the essence" standard as requiring the arbitrator to interpret "explicit provisions of the contract" to support its award.⁸²

The Ninth Circuit, before its reversal by the Supreme Court in *Major League Baseball Players Ass'n v. Garvey*, held that an arbitrator's award "must be a 'plausible interpretation' of the CBA."⁸³ Following *Garvey* however, to what extent this standard will continue to be followed is questionable.⁸⁴

The Tenth Circuit takes a more conservative approach, affirming labor arbitration awards "unless it can be said with positive assurance that the contract is not susceptible to the arbitrator's interpretation."⁸⁵ Indeed, the Tenth Circuit has referred to its permissible review of arbitral awards employing the "drawn from the essence" test as being "among the narrowest known to the law."⁸⁶

The Eleventh Circuit takes the far more liberal approach used by the Fifth Circuit. It will vacate awards it deems "arbitrary and capricious".⁸⁷ The Eleventh Circuit, like the Seventh Circuit, has also held it may vacate a labor arbitrator's award that it finds to be "irrational."⁸⁸

78. *Young Radiator Co. v. Int'l Union, United Auto Workers*, 734 F.2d 321, 325 (7th Cir. 1984).

79. *Indep. Employees' Union of Hillshire Farm Co. v. Hillshire Farm Co., Inc.*, 826 F.2d 530, 533 (7th Cir. 1987) (citing *Gringoleit Co. v. United Rubber Workers, Local No. 270*, 769 F.2d 434, 439 (7th Cir. 1985)).

80. *Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 187 (7th Cir. 1985) *cert. denied*; *Ethyl Corp. v. United Steelworkers of Am.*, 475 U.S. 1010 (1986).

81. *George A. Hormel & Co. v. United Food & Commercial Workers Int'l Union, Local 9*, 879 F.2d 347, 351 (8th Cir. 1989).

82. *Id.* at 352.

83. *Ass'n of W. Pulp & Paper Workers, Local 78 v. Rexam Graphic, Inc.*, 221 F.3d 1085, 1090 (9th Cir. 2000).

84. *See S. Cal. Gas Co. v. Utility Workers Union of Am., Local 132*, 265 F.3d 787 (9th Cir. 2001). Only the dissenting opinion applied the "plausible interpretation" standard, while the majority was silent. *Id.* at 800 (Alarcón, J., dissenting). *See also Smurfit Newsprint Corp. v. Ass'n of W. Pulp & Paper Workers, Local 60*, 59 Fed. Appx. 207 (9th Cir. 2003).

85. *Sterling Colo. Beef Co. v. United Food and Commercial Workers, Local Union No. 7*, 767 F.2d 718, 720 (10th Cir. 1985) (citing *Int'l Bhd. of Elec. Workers v. Prof'l Hole Drilling, Inc.*, 574 F.2d 497, 503 (10th Cir. 1978)).

86. *Litvak Packing Co. v. United Food and Commercial Workers, Local Union No. 7*, 886 F.2d 275, 276 (10th Cir. 1989).

87. *United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 847 F.2d 775, 778 (11th Cir. 1988) (citations omitted).

88. *IMC-Agrico Co. v. Int'l Chem. Workers Council of United Food and Commercial Workers Union*, 171 F.3d 1322, 1325 (11th Cir. 1999).

In discussing its standard of review, practically every circuit court's opinions reference major Supreme Court holdings like *MISCO* and *Enterprise Wheel*. As the foregoing illustrates however, the divergence of the circuit courts from Supreme Court precedent is readily apparent.

IV. INSTANT DECISION

In *CITGO Asphalt Refining Co. v. Paper, Allied-Industrial, Chemical., & Energy Workers International Union Local No. 2-991*, the Court of Appeals for the Third Circuit framed the issue on appeal as "the propriety of the arbitrator's determination that CITGO's zero tolerance policy is unreasonable."⁸⁹ In customary fashion, the court addressed the relevant standard of review before discussing whether this case warranted vacature.⁹⁰

Citing Supreme Court precedent, the court acknowledged it has a very limited role, by stating it was "not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract."⁹¹ Quoting *MISCO*, the court reiterated that, so long as the arbitrator's award "draws its essence from the [CBA]" rather than merely the arbitrator's "own brand of industrial justice," the award should be affirmed.⁹² The court further acknowledged that it must defer all factual findings to the arbitrator, because it is not the court's role to draw inferences that the fact finder did not.⁹³

The court then relied on Third Circuit precedent to further clarify the standard to be applied. The court declared, "we do not review an arbitrator's award for legal error,"⁹⁴ and only where there is a "manifest disregard" of the agreement, wholly unsupported by the principles of contract construction and the "law of the shop," may a reviewing court vacate an award.⁹⁵ The court explained this to mean that even if it were to find the basis for the award to be ambiguous or disagreeable under the law, the court should affirm the award.⁹⁶ Furthermore, the court said it may not vacate an award unless it is totally unsupported by the record, and that such a decision need not be wise or even internally consistent to be upheld but is subject only to a standard of minimal rationality.⁹⁷ Again, citing Third Circuit precedent, the court concluded that the arbitrator only has authority to decide the issues actually submitted,⁹⁸ therefore allowing courts "province to review an arbitrator's interpretation."⁹⁹

The court first addressed whether the Arbitrator acted outside the scope of his delegated authority by rendering an award that failed to "draw its essence" from

89. *CITGO*, 385 F.3d at 813.

90. *Id.* at 815-16.

91. *Id.* at 815 (citing *MISCO*, 484 U.S. at 36).

92. *Id.* at 816 (citing *MISCO*, 484 U.S. at 36).

93. *Id.*

94. *CITGO*, 385 F.3d at 815 (citing *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1295 (3d Cir. 1996)).

95. *Id.* at 816 (citing *Exxon*, 73 F.3d at 1295).

96. *Id.* (citing *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1441 (3d Cir. 1992)).

97. *Id.* (citing *Exxon*, 73 F.3d at 1291, 1297).

98. *Id.* (citing *Matteson v. Ryder Sys. Inc.*, 99 F.3d 108, 112 (3d Cir. 1996)).

99. *Id.* (citing *Matteson*, 99 F.3d at 113).

the CBA.¹⁰⁰ The court recited three findings of the arbitrator: (1) CITGO had the right to make certain that safety concerns are paramount and adequately addressed, (2) CITGO had the best safety record in the industry and that the arbitrator wants to keep it that way, and (3) this safety record is a legitimate objective for any company.¹⁰¹ Based on these facts, the court concluded that the arbitrator ignored parameters of the CBA when he wrote “[i]t has not been shown to my satisfaction that permitting an employee to have a ‘second chance’ would be inconsistent with [having the best safety record in the industry],”¹⁰² and that “the policy, without giving a second chance for rehabilitation is unreasonable.”¹⁰³

In support of this contention, the court cited portions of the CBA that stated the arbitrator “shall not substitute his judgment for that of the Company in the absence of a clear abuse of discretion.”¹⁰⁴ The court contended that the arbitrator did not find a clear abuse of discretion and that “this record supports none.”¹⁰⁵ Therefore, held the court, the arbitrator substituted his own judgment for that of the company and hence failed to base his opinion and award from the essence of the CBA.¹⁰⁶

Local 2-991 defended the arbitrator’s decision by arguing that the parties’ submission to the arbitrator allowed the arbitrator to use a reasonableness standard rather than the abuse of discretion standard.¹⁰⁷ In response, the court stated that assuming “*arguendo*” that the submission trumped the abuse of discretion standard, and that only a reasonableness standard applied, the court would still vacate the award because the arbitrator’s decision that the zero tolerance policy is unreasonable is not supported by the record.¹⁰⁸

In support of the court’s conclusion that the award was unsupported by the record, the court stated that the arbitrator relied on only two facts to support his conclusion: (1) that two other companies with inferior safety records do not have zero tolerance policies, and (2) that provisions of the Omnibus Transportation Employee Testing Act of 1991,¹⁰⁹ and the DOT regulations under it,¹¹⁰ allow employees a second chance for rehabilitation.¹¹¹ The court declared each of these facts was “not sufficient to support a finding that CITGO’s zero tolerance policy is unreasonable.”¹¹² The court explained that the former fact does not establish that CITGO acted unreasonably in adopting a no tolerance policy, and that the latter fact is distinguishable because of the “hazardous nature of CITGO’s facilities, the need for prompt and unimpaired action in the event of an emergency,” and the policy provision excepting employees who step forward from termination.¹¹³

100. *Id.*

101. *Id.*

102. *Id.* at 816-17.

103. *Id.* at 817.

104. *Id.* (citing Article XXV, § 25.6 of the CBA).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 819 (citing 49 U.S.C. § 31306 *et seq.* 2005).

110. *Id.* (citing 49 C.F.R. § 382.101 *et seq.* 2005.).

111. *Id.*

112. *Id.*

113. *Id.*

The court concluded its arguments by stating that the CBA expressly gave CITGO the right to make and enforce rules for the maintenance of discipline and safety, and that the CBA precluded the CBA from being amended in the grievance process.¹¹⁴ The court thus reversed the district court's order enforcing the arbitrator's award.¹¹⁵

V. COMMENT

In *CITGO Asphalt Refining Co. v. Paper, Allied-Industrial, Chemical, & Energy Workers International Union Local No. 2-991*, the Court of Appeals for the Third Circuit failed to restrain itself from reaching the merits of the labor arbitrator's award. This case squarely falls into the ambit of the maxim stating that "a bad case makes bad law,"¹¹⁶ as the court clearly disagreed with the arbitrator's interpretation of the CBA. The Third Circuit is not alone in failing to resist reaching the merits of a dispute. When an arbitrator's decision seems patently unfair, or the merits wrongly decided, courts often bend over backwards to vacate an award, all the while denying that they are reaching the merits of the dispute. Despite giving customary lip service to Supreme Court precedent, in *CITGO*, the Third Circuit reached the merits of the dispute and substituted its judgment for that of the arbitrators.

Rather than frame the issue on appeal as whether the arbitrator drew his award from the essence of the CBA or otherwise violated public policy, it is revealing that the Third Circuit declared the issue presented to be "the propriety of the arbitrator's determination that CITGO's zero tolerance policy is unreasonable."¹¹⁷ The propriety of the arbitrator's decision on the reasonableness of the Policy is not a proper consideration on appeal because it is not the place of the court to consider the merits of the arbitration.¹¹⁸ The *CITGO* court, by recognizing it was prohibited from reconsidering the merits of the arbitrator's award,¹¹⁹ and yet doing so in its decision, further obscured the standards enunciated by the Supreme Court.

The *CITGO* court cited Third Circuit precedent that apparently recognizes a "manifest disregard" standard that allows a court to vacate an award if it determines the arbitrator manifestly disregarded the agreement and no support for its award can be found with principles of contract construction and "law of the shop."¹²⁰ Further, the Third Circuit confers on itself "province to review an arbi-

114. *Id.*

115. *Id.*

116. *Kendall v. Stokes*, 44 U.S. 87 (1845) (pointing to *Stewart v. Cooley*, 23 Minn. 347; S. C., 23 Am. Rep., 690 (1877), as an example of the maxim that a bad case makes bad law because *Stewart* represented an exception to the rule).

117. *CITGO*, 385 F.3d at 816.

118. *MISCO*, 484 U.S. at 37 (holding that courts have "no business weighing the merits of [a] 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" (quoting *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567-68 (1960) (emphasis omitted; footnote omitted))).

119. *CITGO*, 385 F.3d at 815 (stating that the court was "not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract" (citing *MISCO*, 484 U.S. at 36)).

120. *Id.* at 816 (citing *Exxon*, 73 F.3d at 1295).

trator's interpretation"¹²¹ because the arbitrator only has authority to decide the issues actually submitted.¹²² How is it that the Third Circuit does not violate the Supreme Court's prohibition on reaching the merits of an arbitrator's dispute when it permits itself to "review an arbitrator's interpretation" and vacate an award that "manifestly disregards" an agreement by failing to provide adequate reasoning for its decision linked to the CBA? The answer may be hidden back in the court's decision in *Ludwig Honold Manufacturing Company v. Fletcher*, where the standard was first recognized.¹²³

The *Ludwig* court, in developing this manifest disregard law of the shop standard, cited a 1968 Supreme Court decision that did not involve labor arbitration.¹²⁴ This is particularly significant since labor arbitration is considered separate from mainstream arbitration, especially because it does not fall within the scope of the FAA.¹²⁵ In fact, since the seminal case of *Lincoln Mills* in 1957,¹²⁶ labor arbitration has been governed by federal common law rather than the FAA.¹²⁷ Since *Ludwig* did not involve labor arbitration, it was improperly relied upon as authority to develop the manifest disregard law of the shop standard relied upon by the *Ludwig* court, and subsequently, the *CITGO* court.

Even if one were to accept the standard of review cited by the *CITGO* court, the decision clearly reached the merits of the arbitrator's award in an impermissible way. After scrutinizing some of the stated reasons for the arbitrator's findings, the *CITGO* court determined that the arbitrator did not find a "clear abuse of discretion" and that "*this record supports none.*"¹²⁸ Here, the court substituted its own judgment for that of the arbitrator by determining that the arbitrator could not have found a clear abuse of discretion. It is indeed ironic that the court declares the arbitrator did not draw his award from the essence of the agreement because he "simply substituted his judgment for CITGO's and declared CITGO's zero tolerance provision unreasonable."¹²⁹

While the court succinctly points out that the arbitrator did not use the words "abuse of discretion" in his written award, this does not lead to a justifiable conclusion that the arbitrator did base his award on such a finding. As the Supreme Court amply stated in *Enterprise Wheel*, "[a]rbitrators have no obligation to the court to give their reasons for an award."¹³⁰ Furthermore, 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."¹³¹

121. *Id.* (citing *Matteson*, 99 F.3d at 113).

122. *Id.* (citing *Matteson*, 99 F.3d at 112).

123. 405 F.2d 1123, 1128 (3d Cir. 1969) (holding that "only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award"). The authority cited by the *Ludwig* court for this determination was *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 (1968), a non-labor case falling under the purview of the FAA.

124. *Ludwig*, 405 F.2d at 1128.

125. *WARE*, *supra* note 37, at 105.

126. 353 U.S. 448 (1957).

127. *WARE*, *supra* note 37, at 106.

128. *CITGO*, 385 F.3d at 817 (emphasis added).

129. *Id.*

130. *Enterprise Wheel*, 363 U.S. at 598.

131. *Id.*

Not only did the *CITGO* court find that an abuse of discretion standard was not satisfied by the arbitrator, it also contended that the record did not support his award with a mere reasonableness standard either.¹³² In support of its contention, the court posited that the arbitrator based his award on only two facts; first, that two other companies with inferior safety records do not have zero tolerance policies, and second, that provisions of the Omnibus Transportation Employee Testing Act of 1991,¹³³ and the DOT regulations under it,¹³⁴ allow employees a second chance for rehabilitation.¹³⁵ There can be no doubt that the court reached the merits here when it determined that it would be unreasonable to conclude, based on these facts, that the company was acting unreasonable in implementing its no tolerance policy.

The Supreme Court in *MISCO* held that courts have “no business weighing the merits of [a] 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.”¹³⁶ Here, the *CITGO* court appears to hold that absent “particular language in the written instrument to support the claim,” the arbitrator’s award fails to draw its essence from the CBA. In so doing, the Third Circuit has refused the clear mandates of the Supreme Court and further undermines the effectiveness of labor organization’s agreement to arbitrate.

Since the quintessential element of arbitration is the removal of the judiciary from the decision making process, each time a court reaches the merits of a dispute and vacates an award more liberally than what the Supreme Court has proscribed, it undermines the purpose for which arbitration was developed. By implicitly refusing to apply Supreme Court precedent, not only did the *CITGO* court undermine the party’s agreement to arbitrate, it further contributed to the confusion and misapplication of precedent by circuit courts that must interpret their permissible role of arbitral review.¹³⁷

While the Supreme Court has never sustained vacatur of a labor arbitration award because it failed to draw its essence from the governing CBA, it has reversed circuit courts on many occasions for misapplying this standard, most recently resorting to a *per curiam* opinion to do so.¹³⁸ Despite strong language and consistent rhetoric from the Supreme Court, the circuit courts, like the Third Circuit in the instant case, have essentially ignored precedent and consistently refused to let arbitrators have the final say in resolving disputes. If the Supreme Court hopes to silence this dissent, it will need to increase its willingness to grant certiorari and summarily reverse courts that misapply the “drawn from the essence” standard. Just as the Ninth Circuit seems to have gotten the message only after the reversal of lower courts in *Garvey*, so too may other circuits, including the Third

132. *CITGO*, 385 F.3d at 818.

133. *Id.* at 819 (citing 49 U.S.C. § 31306 *et seq.* 2005).

134. *Id.* (citing 49 C.F.R. § 382.101 *et seq.* 2005).

135. *Id.*

136. *MISCO*, 484 U.S. at 37 (quoting *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567-68 (1960) (emphasis omitted; footnote omitted)). Furthermore, the *MISCO* court held that “a court should not reject an award on the ground that the arbitrator misread the contract.” *Id.* at 38.

137. Jamie Byrnes and Allison Prout, *Major League Baseball Players Association v. Garvey: Revisiting the Standard for Arbitral Review*, 7 HARV. NEGOT. L. REV. 389, 402 (2002).

138. *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504 (2001).

Circuit, need to be individually reversed before they properly apply the Court's precedent.

VI. CONCLUSION

The *CITGO* court helps illustrate just how far the circuit courts have strayed from Supreme Court precedent as it relates to labor arbitration. Although these courts routinely give lip service to decisions such as *MISCO* and *Enterprise Wheel*, they often, as here, fail to take the Court's precedent seriously. Lower courts are often asked to enforce awards made by arbitrators who may not even be legal professionals, and whose decisions could not be supported had they been rendered by a court and subject to de novo review.¹³⁹ Rather than exercise judicial restraint by simply affirming the bargain (and risk associated with it) to which the parties to a CBA agreed, courts often fail to restrain themselves in reaching the merits and vacating the award, and in the process create new tests that water down the Supreme Court's essence test.

While the Third Circuit in *CITGO* obviously disagreed with the standard and reasoning used by the arbitrator in rendering his award, the Supreme Court is clear in holding that this is not a ground for vacatur. Part of the Third Circuit's misapplication may stem from earlier decisions confusing standards applicable to non-labor arbitration, which falls under the FAA, and labor arbitration, which is subject to federal common law developed around the LMRA. Although the Supreme Court has reversed several courts of appeals for their willingness to reach the merits of a labor arbitration dispute, the Court now needs to increase its willingness to grant certiorari to reverse circuit decisions that misapply the standard. If the Court fails to maintain a strict standard of review, it may sound the death knell for labor arbitration by removing its quintessential element—the finality that is meant to exist far removed from the judicial process.¹⁴⁰

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139. Byrnes & Prout, *supra* note 137, at 402.

140. *Id.*