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The Public Policy Exception to Judicial Deferral of Labor Arbitration Awards--How Far Should Expansion Go

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NOTE

THE PUBLIC POLICY EXCEPTION TO JUDICIAL DEFERRAL OF LABOR ARBITRATION AWARDS—HOW FAR SHOULD EXPANSION GO?

I. INTRODUCTION

Over the past few years there has been a trend at the federal circuit court level to give an expansive reading to the public policy exception to judicial deferral to labor arbitration awards. Simply put, this exception provides that if an arbitrator's award violates a well-defined public policy then the federal courts have a duty not to enforce that award. The circuit courts of appeals have been split over when a public policy has been violated for the purposes of this exception. The traditional view is that public policy is violated only by an award which requires or condones a violation of law.[1] In this decade, and in particular since 1983, however, some courts have embraced the view that, if any public policy has been violated by an arbitration award, the courts have a right to refuse to enforce that award regardless of whether the award violates or condones violation of a specific law.[2] This latter view has come to be known as the expanded version of the public policy exception.

This Note traces the roots of the public policy exception

1. *See, e.g.*, American Postal Workers Union v. United States Postal Serv., 789 F.2d 1 (D.C. Cir. 1986); Kane Gas Light & Heating Co. v. International Bhd. of Firemen & Oilers, Local 112, 687 F.2d 673 (3rd Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983); Note, United States Postal Service v. American Postal Workers: *The Incredible Expanding Public Policy Exception to Arbitration Finality*, 21 WILLAMETTE L. REV. 631 (1985).

2. *See, e.g.*, Amalgamated Meat Cutters & Butcher Workmen v. Great W. Food Co., 712 F.2d 122 (5th Cir. 1983); Local No. P-1236, Amalgamated Meat Cutters & Butcher Workmen v. Jones Dairy Farm, 680 F.2d 1142 (7th Cir. 1982).

and follows its development to the present. It explores the pros and cons of both the traditional and expanded versions of the exception and points out the pitfalls inherent in an ill-defined expanded version of the exception. Further, this Note looks at the Supreme Court's recent decision on this matter in *United Paperworkers International Union v. Misco*[3] and assesses the effect this decision may have on lower courts' application of the public policy exception.

II. HISTORY OF JUDICIAL ENFORCEMENT OF ARBITRATION AWARDS

A. Pre-Trilogy Arbitration and Judicial Intervention

Throughout the history of judicial review of labor arbitration awards courts have shown an ingrained reluctance to defer to awards they felt to be unfair or wrong. Prior to the Supreme Court's decisions in *Textile Workers Union v. Lincoln Mills*[4] and the *Steelworkers Trilogy*,[5] state appellate courts expressed this reluctance primarily in the refusal to enforce arbitration awards with which they disagreed.

The state courts used common-law principals in determining whether to enforce arbitration awards. Under the common-law tradition, courts were to reach a decision on the enforcement of an arbitration award without reviewing the merits of the case.[6] Despite requiring this apparent deferral to the judgment of the arbitrator, the common law did provide several exceptions under which courts could deny enforcement of the award. A court could deny enforcement if it found fraud, partiality, or misconduct on the part of the arbitrator.[7] These grounds are relatively uncontroversial and are still valid today.[8] Another

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3. United Paperworkers Int'l Union v. Misco, Inc., ___U.S. ___, 108 S. Ct. 364 (1987).

4. 353 U.S. 448 (1957); *see infra* text accompanying notes 18-21.

5. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); *see infra* text accompanying notes 22-27.

6. *See* Morris, *Twenty Years of Trilogy: A Celebration*, 33 NAT'L ACAD. OF ARBS. 331, 337 (1981).

7. *Id.* at 336.

8. *See* R. GORMAN, BASIC TEXT ON LABOR LAW 580-603 (1976).

ground commonly used by state courts to deny enforcement of an award was want of jurisdiction. Courts often used this ground as a means to reverse an arbitrator's determination on the merits.[9]

The common-law ground most used and abused in setting aside arbitration awards probably was a finding that an arbitrator had made a "gross mistake." As some commentators have noted, this finding was "an open invitation for a court to substitute its judgment for that of the arbitrator."[10] *Rice v. Southwestern Greyhound Lines, Inc.*[11] provides an illustration of such judicial intervention. In *Rice* a Texas appellate court set aside three arbitration awards in which an arbitrator had reviewed the evidence and construed a collective bargaining agreement clause requiring "sufficient cause" for discharge. The arbitrator had determined that, based upon his reading of the "sufficient cause" clause, the evidence was insufficient to support the discharges. The court found this determination to be in error and, therefore, did not enforce the awards.[12] *Rice* is illustrative of the reluctance of courts to defer to arbitration awards which appear to them to be in error.

"Gross mistake" was a generally accepted common-law ground for overturning awards prior to the *Steelworkers Trilogy*. After the *Trilogy*, however, courts often found that "gross mistake" was no longer a valid ground for refusing to enforce an award in federal labor law cases. But the reluctance to defer has persisted even after the mandates of the *Trilogy*.[13] As Professor Kaden of Columbia University has stated, "[p]erhaps it is foolhardly [sic] to expect judges who daily interpret and apply standards codified in contracts, regulations, and statutes to stand aside and enforce interpretations of collective bargaining agreements that seem to them excessively far off the mark."[14] As "gross mistake" has lost validity as a ground for refusal to enforce arbitral awards, federal courts recently have devised a new vehicle by which they overturn what they view as erroneous

9. Morris, *supra* note 6, at 336.
10. *Id.*
11. 244 S.W.2d 245 (Tex. Civ. App. 1951).
12. *See* Morris, *supra* note 6, at 336-37.
13. *See* Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 272-74 (1980).
14. *Id.* at 274.

awards. This new vehicle is the expanded view of the "public policy" exception.

The labor arbitration "public policy" exception, as some courts now apply it, arose early in *Black v. Cutter Laboratories*.[15] In this pre-*Trilogy* state-law case, an arbitrator found that an employee, discharged ostensibly because she was a member of the Communist Party and had falsified her employment application, was actually discharged because of her union activity. This violated the employee's union's labor contract with Cutter Laboratories. The California Supreme Court refused to enforce the arbitrator's award of reinstatement because forcing a company that produced drugs for civilian and military use to reinstate a member of the Communist Party violated "public policy," as embodied in federal and state law. *Black* thus went beyond a traditional line of cases that allowed vacation of arbitral awards that compelled or condoned the commission of an unlawful act.[16] This controversial decision[17] laid the groundwork for the modern day expansion of the "public policy" exception.

B. Steelworkers Trilogy *and the Finality of Arbitration Awards*

In 1957 the United States Supreme Court decided in *Textile Workers Union v. Lincoln Mills*[18] that a federal common law of collective bargaining agreements should be developed by the federal courts. This federal common law would apply in most collective bargaining cases[19] and would provide a continuity in the collective bargaining arena. In *Lincoln Mills* the Court declared that promises to arbitrate were to be specifically enforced.[20] Since the *Lincoln Mills* ruling that federal law governs the review of arbitration awards, decisions such as *Black*, which relied on state common-law principles, were relegated to

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15. 43 Cal. 2d 788, 278 P.2d 905, *cert. granted*, 350 U.S. 816 (1955), *cert. dismissed*, 351 U.S. 292 (1956).

16. R. GORMAN, *supra* note 8, at 597.

17. *See, e.g.*, Kane Gas Light & Heating v. International Bhd. of Firemen & Oilers, Local 112, 687 F.2d 673, 681 n.11 (3rd Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983).

18. 353 U.S. 448 (1957).

19. The federal common law does not apply to those few cases in which only state-law issues are present.

20. *See* Kaden, *supra* note 13, at 268.

the position of having little, if any, precedential value.[21]

The Supreme Court fleshed out the federal common law dealing with collective bargaining arbitration agreements in the *Steelworkers Trilogy*.[22] For purposes of this Note, the most important of these cases is *United Steelworkers v. Enterprise Wheel & Car Corp.*,[23] in which the Court enjoined federal courts from reviewing the merits of an arbitrator's performance. Justice Douglas wrote that in a collective bargaining agreement containing an arbitration clause it is the "arbitrator's construction which was bargained for"[24] and not that of a judge. Justice Douglas saw the limits placed on an arbitrator's contract interpretation as follows:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[25]

This decision, which articulated the limits of judicial review of arbitration awards, has been criticized as being too "cryptic" to provide much guidance to lower courts in deciding when an arbitration award should not be enforced.[26] Nevertheless, after *Enterprise Wheel* the courts generally did defer to an arbitrator's decision and only refused to enforce their awards when one of a small number of exceptions applied. The exceptions generally recited included arbiter misconduct, lack of arbiter jurisdiction, and "repugnancy" to superior law or public policy.[27] It is the expansion of this last exception based on "repugnancy" to public policy which has posed the recent threat to the finality of

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21. *See* 687 F.2d at 681 n.11.

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

23. 363 U.S. 593 (1960).

24. *Id.* at 599.

25. *Id.* at 597.

26. *See, e.g.*, Kaden, *supra* note 13, at 270.

27. Sea-Land Serv., Inc. v. International Longshoremen's Ass'n, 625 F.2d 38, 42 (5th Cir. 1980).

arbitration awards.

III. The Public Policy Exception

Since the decisions in *Lincoln Mills* and the *Steelworkers Trilogy*, several courts have recognized and applied, with varying degrees of fervor, the public policy exception to judicial deferral to arbitration awards. This exception clearly existed under federal law,[28] but the reach of the exception has been hotly debated, particularly in the past few years.

The first case to take an in-depth look at the public policy exception after the *Steelworkers Trilogy* was *Local 453, International Union of Electrical Workers v. Otis Elevator Co.*,[29] which was decided in 1963. *Otis Elevator* dealt with whether an employee had been discharged for just cause under a collective bargaining agreement after he had been convicted of gambling on the company premises.[30] The company claimed that the discharge was for violating its rule against gambling. The union filed a grievance on the employee's behalf and the case was submitted to arbitration. The arbitrator concluded that, under all of the circumstances, while the employee had been guilty of serious misconduct warranting substantial disciplinary action, the company lacked "just cause" for his dismissal.[31] The arbitrator reinstated the employee, finding that he had already been punished for his crime, both by the state and by a seven month layoff without pay. The arbitrator also found that four other employees, who were guilty of violating the same rule against gambling, had not been disciplined by the company.[32]

On appeal the district court determined that the award should not be enforced because of its repugnancy to public policy.[33] The district court stressed that the employee's action not

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28. Any question about whether a public policy exception was applicable to judicial deferral of arbitration awards was settled by the U.S. Supreme Court in W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber Workers, 461 U.S. 757 (1983); *see infra* text accompanying notes 69-75.

29. 314 F.2d 25, *cert. denied*, 373 U.S. 949 (1963).

30. The employee, Joseph Calise, was convicted of knowingly possessing policy slips in the Otis plant in Yonkers, New York, in violation of New York Penal Law. He was fined $250. *Id.* at 26.

31. *Id.*

32. *Id.* at 27.

33. 206 F. Supp. 853 (S.D.N.Y. 1962).

only violated company rules but also violated state laws and could have exposed the owner of the premises where the violations took place to criminal prosecution.[34]

The union appealed the district court's decision to the Second Circuit Court of Appeals which found the district court's analysis of the public policy issue to be inadequate.[35] The Second Circuit "assumed that arbitral awards contrary to public policy are properly to be vacated by a court,"[36] and recognized that there "is a public policy which condemns gambling by an employee on the premises of his employer."[37] But the court found that the policy had been vindicated by criminal conviction and punishment plus the seven month layoff without compensation. The court stated that the federal policy against gambling is not so "[d]raconian"[38] as to require greater vindication than had already been visited upon the guilty employee. Further, the court stated:

> [I]n light of the important role which employment plays in implementing the public policy of rehabilitating those convicted of crime, there can hardly be a public policy that a man who has been convicted, fined, and subjected to serious disciplinary measures, can never be ordered reinstated to his former employment, particularly when the conviction was for his first offense and when the arbitrator found no indication that reinstatement would result in repetition of the illegal activity.[39]

The Second Circuit also dismissed the district court's concern that reinstatement would subject the company to prosecution under New York law. The court noted that " '[i]t is hard to imagine that an employer who had specifically indicated his disapproval of gambling on the premises, had penalized the employee found guilty, and had warned the employee against any such conduct in the future could be found guilty of violating the statute.' "[40] Based on this analysis, the Second Circuit held that

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34. *Id.* at 855.

35. 314 F.2d at 28.

36. R. GORMAN, *supra* note 8, at 597. The Supreme Court took this same position twenty years later in *W.R. Grace. See supra* note 28.

37. 314 F.2d at 29.

38. *Id.*

39. *Id.*

40. *Id.* (quoting Fleming, *Arbitrators and the Remedy Power*, 48 VA. L. REV. 1199, 1209 (1962)).

under the circumstances there was "no substantive principle of federal labor law which authorize[d] denial of enforcement" of the award of reinstatement for reasons of public policy.[41]

What did *Otis Elevator*, as the first case to address the issue after the *Steelworkers Trilogy*, tell us about the public policy exception? First, it recognized that such an exception did exist in federal labor law. Second, the court implied that, if the public policy which allegedly was violated by the award had already been vindicated through other sanctions imposed by either penal or employer action, then federal law did not authorize denial of enforcement on public policy grounds. This was especially the case when competing public policy considerations existed. At least one court has interpreted *Otis Elevator* as supporting the position that "only if upholding an award would amount to 'judicial condonation' of illegal acts, should the award be vacated on grounds of inconsistency with public policy."[42] Such an interpretation would have the public policy exception closely parallel the uncontroversial exception that a court cannot enforce an award which would require illegal conduct. This interpretation is considered the traditional (and in some cases proper) interpretation of the public policy exception.[43] Other courts have not read the case so narrowly. These courts often cite *Otis Elevator* for the proposition that a public policy exception exists and then refuse to enforce an award that would not meet the traditional test.[44] *Otis Elevator* clearly did not provide a complete guideline to the limits of the public policy exception.

In the twenty years following *Otis Elevator*, several courts affirmed the existence of the public policy exception without doing much to clarify its limits. One often cited case, *Banyard v. NLRB*,[45] appears to support the traditional interpretation of the exception. *Banyard* dealt with the public policy exception as it

41. 314 F.2d at 29.

42. Kane Gas Light & Heating Co. v. International Bhd. of Firemen, Local 112, 687 F.2d 673, 682 (3rd Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983).

43. Note, *supra* note 1, at 635; *see also* American Postal Workers Union v. United States Postal Serv., 789 F.2d 1, 8 (D.C. Cir. 1986).

44. *See, e.g.*, Amalgamated Meat Cutters & Butcher Workmen v. Great W. Food Co., 712 F.2d 122 (5th Cir. 1983). Some cases factually similar to *Otis Elevator* have found courts unwilling to enforce awards on public policy grounds. *E.g.*, United States Postal Serv. v. American Postal Workers Union, 736 F.2d 822 (1st Cir. 1984).

45. 505 F.2d 342 (D.C. Cir. 1974).

related to the National Labor Relations Board's (NLRB) deferral to arbitration awards.[46] James Banyard, a truck driver and union steward, was fired by his employer of twenty-two years when he refused to obey a dispatcher's instruction to drive a truck that was admittedly overloaded in violation of Ohio law.[47] The case proceeded through the grievance procedure provided by the collective bargaining agreement between Banyard's union and the employer. The issue reached an arbitration committee which, in a tersely worded award,[48] denied the union's claims that the company had violated sections of the National Labor Relations Act and that Banyard should be reinstated. Meanwhile, the NLRB dismissed the union's unfair labor practice complaint, which had been filed prior to the arbitration committee's award, and deferred to the committee under the *Spielberg* doctrine.[49] Subsequently, the District of Columbia Circuit Court of Appeals remanded the case to the NLRB with instructions to consider the unfair labor practice issues.[50] The court stated that "for this or any other company to require its employees to act in violation [of the law] can never be upheld by the Board or this court."[51] The court adopted the dissenting NLRB members' view that " '[n]o contract provision or arbitration award can permit an employer to require his employees to violate state laws or to create safety hazards for themselves or others.' "[52] The court then concluded that, "[l]eft standing, the arbitral award below grants the Company a license to violate state law and as such is void as against public policy and repugnant to the purposes of

46. The National Labor Relations Board (NLRB) has expressed its policy of deference to arbitration awards in its *Spielberg* Doctrine. This doctrine, enunciated in Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1090 (1955), states that the NLRB will accept the results of an arbitration award as conclusive on legal issues as long as (1) the proceedings were fair and regular; (2) both the company and union had agreed to be bound by the arbitrator's award; and (3) the award was not repugnant to the Labor Management Relations Act.

47. The trial examiner found that the shipment in question was in excess of the lawful weight under Ohio law. 505 F.2d at 343 n.6.

48. The award in its entirity stated: "Please be advised that the National Grievance Committee on December 2, 1971, adopted a motion that based on the transcript, the claim of the Union be denied." *Id.* at 347.

49. 112 N.L.R.B. 1080 (1955); *see supra* note 46.

50. 505 F.2d at 349.

51. *Id.* at 347.

52. *Id.* (quoting McLean Trucking Co., 202 N.L.R.B. 710, 712 (1973) (Fanning and Jenkins, Members, dissenting)).

the National Labor Relations Act."[53] Though *Banyard* dealt with NLRB rather than court deferral to arbitration awards, it shows that the District of Columbia Circuit seemingly equated the public policy exception with the sanctioning of illegal conduct.

Other courts, in cases decided in the early eighties, also tended to show support for the traditional interpretation of the public policy exception. In *Perma-Line Corp. v. Sign Pictorial & Display Union, Local 230*[54] the Second Circuit Court of Appeals stated that "we will vacate an award as contrary to public policy if it seeks to enforce a collective bargaining agreement provision that is illegal under the National Labor Relations Act."[55] In *Kane Gas Light & Heating v. International Brotherhood of Firemen & Oilers, Local 112*[56] the Third Circuit Court of Appeals stated that "only if upholding an award would amount to 'judicial condonation' of illegal acts, should the award be vacated on grounds of inconsistency with public policy."[57] That court noted that "decisions of other circuits suggest that absent such a finding that an award condones a violation of federal or state law, the strong federal policy of encouraging labor arbitration dictates the enforcement of arbitration awards."[58] Thus, it appears that prior to 1983 the predominant view of the public policy exception held by the federal courts was the traditional view.

This analysis does not indicate that prior to 1983 some courts were not considering an application of a broader public policy exception. Still, in 1980 the Fifth Circuit noted only three decisions which rejected "an award because it conflict[ed] with the court's view of policy rather than with a specific statute or regulation."[59] Two of those were state-law cases[60] which the

53. 505 F.2d at 347.

54. 639 F.2d 890 (2nd Cir. 1981).

55. *Id.* at 895. The court remanded the case to give the union a chance to show that a clause under consideration was not illegal and stated that if the union was unable to prove its legality, "then the arbitrator's award cannot be confirmed." *Id.* at 896.

56. 687 F.2d 673 (3rd Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983).

57. *Id.* at 682.

58. *Id. Kane* cited as examples *Otis Elevator* and International Ass'n of Machinists, Dist. No. 8 v. Campbell Soup Co., 406 F.2d 1223 (7th Cir.), *cert. denied*, 396 U.S. 820 (1969). *Campbell Soup* was factually indistinguishable from *Otis Elevator* and came to a similar result; *see supra* notes 29-41 and accompanying text.

59. Johns-Manville Sales Corp. v. International Ass'n of Machinists, 621 F.2d 756,

Fifth Circuit found to be closely akin "to the traditional exception" for awards requiring or sanctioning violations of law.[61] In the third case, *World Airways, Inc. v. International Brotherhood of Teamsters*,[62] the Fifth Circuit noted that the relevant public policy concerned the safety of air travel.[63] Even in *World Airways* the Ninth Circuit found that the reinstatement of a pilot to the position of Pilot-in-Command, after he had been demoted for several incidents that threatened the lives of passengers, would violate federal regulations which made it "the duty of the carrier to determine the competency of its pilots in the interests of public safety taking into account such things as 'personal characteristics that could adversely affect safety.' "[64] Thus, any expansion of the public policy exception prior to 1980 was minimal. In *Johns-Manville Sales Corp. v. International Association of Machinists*,[65] however, the Fifth Circuit Court of Appeals considered whether an award that struck down a company rule prohibiting all smoking on the property of a company that manufactured asbestos products violated public policy. The arbitrator found that the collective bargaining agreement denied the company the power to enact such a rule if it could ultimately lead to the discharge of offending workers. The court upheld the arbitrator's award, since in this case the danger was primarily to the smoker, but intimated that when the danger was to third persons, such as aircraft passengers in *World Airways*, overturning the award on public policy grounds may be justified.

Two years later, in *Local No. P-1236, Amalgamated Meat Cutters & Butchers Workmen v. Jones Dairy Farm*,[66] a federal court vacated an arbitrator's award on public policy grounds, although its enforcement would not have violated any law. In *Jones Dairy Farm* the arbitrator upheld a meat processing com-

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759 (5th Cir. 1980).

60. Board of Trustees v. Cook County College Teachers Union, Local 1600, 74 Ill. 2d 412, 386 N.E.2d 47 (1979) (the award would have benefited teachers engaging in unlawful strike at the expense of those not engaging in it); Goodyear Tire & Rubber Co. v. Sanford, 540 S.W.2d 478 (Tex. Civ. App. 1976) (the award hindered the reporting and prosecution of violations of the criminal law).

61. 621 F.2d at 759.

62. 578 F.2d 800 (9th Cir. 1978).

63. 621 F.2d at 759.

64. 578 F.2d at 803 (quoting 14 C.F.R. § 121.413(4)(ii) (1978)).

65. 621 F.2d at 756.

66. 680 F.2d 1142 (7th Cir. 1982).

pany's rule requiring employees to report deficiencies, violations, or problems to company officials, rather than directly to federal Department of Agriculture Inspectors. In upholding the district court's vacation of the rule, the Seventh Circuit Court of Appeals found the rule facially defective because it was overly broad and failed to allow for exigent circumstances, and thus violated public policy.[67]

IV. Expansion of the Public Policy Exception

In 1983 the federal courts began their expansion of the public policy exception in earnest. Though such expansion had been presaged in *Johns-Manville* and *Jones Dairy Farm*,[68] the impetus for the wholesale expansion can be found in dicta of the United States Supreme Court case *W.R. Grace & Company v. Local Union 759, International Union of the United Rubber Workers*.[69]

W.R. Grace presented the issue of federal court enforcement of an arbitration award which provided backpay damages against W.R. Grace & Company under a collective bargaining agreement for layoffs the company had made pursuant to a court ordered conciliation agreement. The conciliation agreement had been made with the Equal Employment Opportunity Commission (EEOC) after that agency's district director had found reasonable cause to believe that W. R. Grace & Company had violated Title VII of the Civil Rights Act of 1964.[70] The ar-

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67. *Id.* at 1145. The court wrote:

> [T]he public policy involved here dictates that: (1) it is essential that the health and welfare of consumers be protected by assuring that meat and meat food products are unadulterated; (2) meat and meat food products be inspected to prevent traffic in diseased and unwholesome meats; (3) standards of sanitation be enforced throughout the plant; and (4) USDA inspectors and the Company be encouraged to join forces to maintain such standards of sanitation.

Id. (citations omitted).

68. In *Jones Dairy Farm* the Seventh Circuit appears to have used an expanded version of the public policy exception.

69. 461 U.S. 757 (1983).

70. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981). The EEOC district director found that there had been discrimination in the hiring of negroes and women at W.R. Grace's Corinth, Mississippi plant. He also found that the company's departmental and plant-wide seniority systems, as mandated by the company's collective bargaining agreement, were unlawful because they perpetuated the effects of the company's past

bitrator found that the collective bargaining agreement did not extinguish the company's liability for its breach of the seniority provisions of that agreement, even though a federal district court order, coupled with the company's desire to lay off workers, mandated the breach.[71] The company instituted an action to overturn the award but the Fifth Circuit ultimately upheld the arbitrator's decision.[72] The Supreme Court granted certiorari.[73]

One of the issues that the Supreme Court addressed was the public policy exception. The court in three sentences outlined the exception.

> As with any contract . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy. . . . If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'[74]

The Supreme Court then found that enforcement of the arbitrator's award would not violate public policy essentially because the "Company was cornered by its own actions."[75]

The Court's brief exposition of the public policy exception added little, if any, to earlier discussions of the exception.[76] Still, these words seem to have had an important effect on later courts considering the exception. The first circuit court case to address the issue after *W.R. Grace* was *Amalgamated Meat Cutters & Butcher Workmen v. Great Western Food Co.*,[77] which examined an arbitration award in favor of a company truck driver who was discharged after a traffic accident. The truck driver admitted to a highway patrol officer at the scene of the accident

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discrimination. 461 U.S. at 759.

71. 461 U.S. at 763.

72. 652 F.2d 1248 (5th Cir. 1981).

73. 458 U.S. 1105 (1982).

74. 461 U.S. at 766 (citations omitted) (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).

75. *Id.* at 770.

76. The court derived all of its statements about the exception from long settled cases, in particular Hurd v. Hodge, 334 U.S. 24 (1948), which had provided the same support to the Second Circuit in *Otis Elevator*.

77. 712 F.2d 122 (5th Cir. 1983).

that he had taken a drink at the last truck stop before the accident. The driver's union took the case to arbitration, claiming that Great Western lacked the necessary just cause required by the collective bargaining agreement to discharge him. The arbitrator agreed and found that the company had failed to conduct a thorough investigation of the accident, particularly the driver's claim that a steering mechanism failure had caused the accident. The arbitrator, however, refused to award backpay since the driver admitted drinking prior to the accident.

The Fifth Circuit concluded from the above facts that the driver's reinstatement would violate the "public policy of preventing people from drinking and driving."[78] The court used most of its opinion to list cases, regulations, and statutes which showed that the public policy against drinking and driving was " 'well defined and definite,' " and, thus, met the requirements of *W.R. Grace*.[79] The court took no note of the traditional view that the public policy exception applies only if an award would require or condone an illegal act. Evidently, the court felt that if it could find a violation of a public policy "embodied in the case law, the applicable regulations, statutory law, and pure common sense,"[80] then no further analysis was needed. The court did not attempt to make an *Otis Elevator* analysis to balance the public policy allegedly violated with the public policy in support of rehabilitation through re-employment. Thus, the Fifth Circuit, in finding what it considered to be a well-defined public policy that could have been violated by the reinstatement of the truck driver, vacated the arbitration award on public policy grounds.

The next year, the First Circuit joined the Fifth Circuit in its adoption of an expanded view of the public policy exception. In *United States Postal Service v. American Postal Workers Union*,[81] the First Circuit tackled a dispute factually similar to *Otis Elevator*. *Postal Service* concerned a post office window

78. *Id.* at 125.

79. *Id.* (quoting *W.R. Grace*, 461 U.S. at 766). Most of the cases cited by the court were pre-*Trilogy* cases. These cases include: NLRB v. Dixie Motor Coach Corp., 128 F.2d 201 (5th Cir. 1942); NLRB v. United States Truck Co., 124 F.2d 887 (6th Cir. 1942); Texas Co. v. NLRB, 120 F.2d 186 (9th Cir. 1941). The one post-*Trilogy* case cited was *World Airways*. *See supra* notes 62-64 and accompanying text.

80. 712 F.2d at 125.

81. 736 F.2d 822 (1st Cir. 1984). For a detailed analysis of this case, see Note, *supra* note 1.

clerk whose duties included handling money orders. The worker was indicted and pleaded guilty to a charge of embezzling postal funds. The Postal Service discharged the convicted worker and his case was submitted to arbitration. The arbitrator ordered that the employee be reinstated without backpay. He found that the Postal Service did not have just cause for the discharge because the employee had showed an intention to pay back the embezzled funds as evidenced by his prior repayments, his retention of records of fraudulent money orders issued, and his seven years of service to the Postal Service without disciplinary problems.[82]

On appeal to the First Circuit, the Union argued in favor of a traditional view of the public policy exception. "The heart of the Union's argument is that although there may be a public policy against embezzling Postal Service funds, there is no public policy against the Postal Service employing convicted embezzlers. You have to have something more—a direct legal prohibition."[83] The union presented two cases[84] which the court admitted exhibited "a particularly precise fit between the facts of the case and the public policy vindicated,"[85] but the court dismissed these cases because "an examination of the case law reveals that such a close fit is not required."[86] The First Circuit then discussed two cases it saw as appropriate precedents, *Great Western*[87] and *Jones Dairy Farm*.[88]

Thus, the First Circuit adopted the position of the only two post-*Trilogy* cases that had overturned an arbitration award under the expanded view of the public policy exception. The First Circuit went further than *Great Western* in its analysis by

82. 736 F.2d at 823.

83. *Id.* at 824.

84. American Postal Workers Union v. United States Postal Serv., 682 F.2d 1280 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983) (arbitrator's award reinstating employee who had participated in strike vacated because of statute prohibiting employment of individuals who had participated in strikes); General Teamsters Local Union 249 v. Consolidated Freightways, 464 F. Supp. 346 (W.D. Pa. 1979) (arbitrator's award upholding employer discharges of truck drivers who refused to drive trucks lacking mud flaps, despite state law requiring such flaps, vacated because award compelled drivers to violate state law).

85. 736 F.2d at 824.

86. *Id.*

87. *See* cases cited *supra* notes 77-80 and accompanying text.

88. *See* cases cited *supra* notes 66-67 and accompanying text.

trying to distinguish *Postal Service* from *Otis Elevator*: the court noted that the offense in *Otis Elevator* (gambling) was tangential to the employee's factory job, whereas in *Postal Workers* embezzlement of funds from money orders "went to the heart of the worker's responsibilities."[89] The court rejected the notion that the employee could be rehired and put in a position where he would not be allowed to handle stamps and money orders, and it noted instead that the employee could still violate the public trust by handling mail that contained valuables. The court also observed that the supervision of the employee which would be required in such a reassignment could be too costly to be practical.[90]

Though the court in *Postal Workers* recognized well-defined positive law supporting a public policy, and noted that this positive law could be violated if the employee was reinstated,[91] it spent an inordinate amount of time justifying its decision with the "common sense implications" of the case, a notion evidently borrowed from *Great Western*.[92]

> [W]e cannot avoid the common sense implications that requiring the rehiring of [the employee] would have on other postal employees and on the public in general. Other postal employees may feel there is less reason for them to be honest than they believed—the Union could always fix it if they were caught. Moreover, the public trust in the Postal Service, and in the entire federal government, could be diminished by the idea that graft is condoned.[93]

Thus, by 1984 the expanded version of the public policy exception had taken root in three circuits, and in two of those circuits, "common sense" had played a major, if not pivotal, role in determining that a public policy would be violated if an arbitrator's award were enforced. The courts rejected deferral in these

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89. 736 F.2d at 825.

90. *Id.*

91. The public policy that would be violated by reinstatement was not clearly stated by the court, but it would appear that the policy would be that a postal employee must be honest and reliable. Positive law cited by the court included the requirement that a postal employee must swear that he "will well and faithfully discharge the duties of the office on which [he is] about to enter." 736 F.2d at 825 (quoting 39 U.S.C. § 1011 (1980)) (brackets in original).

92. 712 F.2d at 125.

93. 736 F.2d at 825.

cases despite the Supreme Court's directive that the public policy violated must be ascertained only through positive law "and not from general considerations of supposed public interests."[94]

Since *Postal Workers*, no other circuits have explicitly embraced this expansive view of the public policy exception. Three more cases, however, have been decided in the Fifth and Seventh Circuits. The Seventh Circuit, which gave us *Jones Dairy Farm*, decided two of those cases. Both *International Union, United Automobile Workers v. Keystone Consolidated Industries, Inc.*[95] and *E. I. DuPont de Nemours & Co. v. Grasselli Employees Independent Association of East Chicago, Inc.*,[96] had minority opinions rejecting the way the new expanded exception was being used.

Keystone assessed an arbitrator's refusal to apply a waiver provision of the Employee Retirement Income Security Act of 1974 (ERISA)[97] when interpreting the annual funding requirement of a pension agreement. The Seventh Circuit found that this refusal violated the clearly defined public policy behind the enactment of ERISA.[98] The majority cited *W.R. Grace*, *Great Western*, and *Jones Dairy Farm* for the proposition that an arbitrator's award can be overturned if it violates public policy, but limited the discussion of the limits of this exception to a bare recitation of the wording found in *W.R. Grace*.[99] As noted by the dissent, the majority concluded that the award jeopardized the continued existence of the pension plan by refusing to allow Keystone to rely on the ERISA waiver provision and thus violated the public policy behind the Act.[100] The dissent noted that the Supreme Court had addressed a similar issue in *W.R. Grace*, in which it stated that, absent a judicial determination,

94. W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber Workers, 461 U.S. 757, 766 (1983) (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).

95. 782 F.2d 1400 (7th Cir. 1986).

96. 790 F.2d 611 (7th Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 186 (1986).

97. 29 U.S.C. § 1083 (1982).

98. 782 F.2d at 1403. "[T]he Supreme Court has held that one of Congress's central purposes in enacting ERISA . . . was to prevent the loss of all retirement savings by employees whose vested benefits in a pension plan are not paid when their employer terminates the plan." *Id.* (Citing Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 374 (1980)).

99. 782 F.2d at 1403.

100. *Id.* at 1413 (Coffey, J., dissenting).

neither a company nor a government agency (in *Grace*, the EEOC; in *Keystone*, the IRS) could alter a collective bargaining agreement without the union's consent.[101] "Permitting such a result would undermine the federal labor policy that parties to a collective bargaining agreement must have reasonable assurance that their contract will be honored."[102] Thus, the dissent, while not directly attacking the expanded view of the public policy exception, would have been much more conservative in finding a violation of an acknowledged public policy when that policy came into conflict with the federal policy that favors deference to the terms of a collective bargaining agreement as interpreted by an arbitrator.

The other Seventh Circuit case, *DuPont*,[103] became a battle ground between jurists divided over application of either the expanded or traditional views of the exception. *DuPont* concerned an arbitration award that reinstated an employee who had been discharged after he experienced a mental breakdown that led him to attack physically his supervisor. The arbitrator concluded that the employee could not be at fault for his actions caused by the breakdown and, thus, his dismissal was without just cause. The arbitrator ordered the employee's reinstatement, noting that there was little likelihood that he would have another breakdown.

In discussing the application of the public policy exception, the majority expressly adopted the expanded view and cited with approval all of the cases which had used this view.[104] They flatly rejected the traditional view of the exception, noting that "the courts have never construed the public policy exception so narrowly."[105] In particular, the court observed that in its earlier decision in *Jones Dairy Farm*, "we never said that the work rule violated any rule of positive law," and, thus, *Jones Dairy Farm* was "in complete harmony with the public policy exception as

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101. *Id.*

102. *Id.* (quoting W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber Workers, 461 U.S. 757 (1983)).

103. 790 F.2d 611 (7th Cir. 1986).

104. 790 F.2d at 615-16.

105. *Id.* at 616. The court made this statement even though some courts, notably the Third Circuit in *Kane Gas* and the D.C. Circuit in *American Postal Workers Union*, had already adopted such a "restricted" view.

stated today."[106] The court repeated the well-established principle that in reviewing an arbitration award the court should not question the factual findings of the arbitrator, but rather should determine whether, "assuming all of the facts found [by the arbitrator] are true, the enforcement of the award will violate a public policy."[107] The court then modified this well-established rule by reasoning that the court's duty to make sure that an arbitrator's award did not violate public policy "would be impaired if a court had to defer to clearly erroneous factual findings made by the arbitrator."[108] The court suggested that deferral to arbitrators' factual findings, a deference considered virtually sacrosanct since *Enterprise Wheel*,[109] should be revised to a "clearly erroneous" standard.[110] The court enforced the arbitrator's award because it found that even under the "clearly erroneous" standard the arbitrator's finding, that there was little likelihood of a repeat breakdown, must be accepted.[111]

Judge Easterbrook, while concurring in the result, strongly dissented from the majority's adoption of the expanded version of the exception. He argued that the court merely decided whether the award cut at cross purposes with a policy it thought valuable,[112] and asserted that the majority's view gave the court too much power. He noted that courts lack this power for the same reason as do arbitrators—because "the function of arbitrator and court is to carry out a contract, and contracts bind unless made unlawful by rules of positive law."[113] Judge Easterbrook found that the majority's "loose" use of the public policy exception violated a "real" public policy expressed in positive law—the deference afforded to arbitration awards.[114] Thus,

106. 790 F.2d at 616.

107. *Id.* at 615.

108. *Id.* at 617.

109. 790 F.2d at 617.

110. *Id.*

111. 790 F.2d at 618 (Easterbrook, J., concurring).

112. *Id.*

113. *Id.* Judge Easterbrook cited 9 U.S.C. § 9 (1982) which states that a court "'*must grant* [an order enforcing an award] unless the award is vacated, modified, or corrected'" because the arbitrator exceeded his authority. 790 F.2d at 618 (Easterbrook, J., concurring) (quoting 9 U.S.C. § 9 (1982)) (emphasis in original). "This makes enforcement of the award turn on the meaning of the contract, not on equitable notions about public policy." *Id.* (Easterbrook, J., concurring).

114. *Id.*

Judge Easterbrook would have overturned the arbitrator's award only in those cases in which the contract, as interpreted by the arbitrator, violated a rule of law or when the arbitrator based his award on public policy considerations and, thus, overstepped his authority.[115] In effect, he adopted the traditional view of the public policy exception.

The Fifth Circuit, in its latest journey into the public policy exception debate, handed down what may be the most far reaching and controversial decision yet rendered in this area. In *Misco, Inc. v. United Paperworkers International Union*[116] the court refused to enforce an award which it held contravened the public policy against the "introduction of drugs into the workplace and consequent operation of dangerous machinery by persons under their influence."[117] In *Misco* an employee, Isiah Cooper, and two companions went to Cooper's car momentarily and then went to another car and entered it. These actions were under surveillance by police officers. A short time later Cooper's two companions left the second car and returned to the plant. Cooper remained in the back seat of the second car. The police apprehended Cooper and found marijuana smoke in the car with a lighted joint in the front seat ashtray. Cooper denied smoking the marijuana, but (as the arbitrator found) testified falsely under oath that he was standing outside the second car when apprehended. A search of Cooper's own car produced some marijuana residue, but the company was unaware of this fact at the time of Cooper's discharge. Upon these facts the arbitrator concluded that the company had not proved that Cooper violated the company rule against bringing or using controlled substances on company premises when it discharged him. The arbitrator ordered reinstatement with full backpay and seniority.

In its opinion refusing to enforce this award, the Fifth Circuit majority relied heavily on *Great Western.*[118] Since Cooper was employed as an operator of dangerous machinery, the court found striking factual similarities between Cooper's case and the reinstatement of the truck driver who had admitted taking a drink in *Great Western.* Two factual differences, however, could

115. *Id.* at 620.
116. 768 F.2d 739 (5th Cir. 1985), *rev'd*, ___ U.S. ___, 108 S.Ct. 364 (1987).
117. *Id.* at 741.
118. 712 F.2d 122 (5th Cir. 1983).

have been used to distinguish *Misco* from *Great Western* and would have supported enforcement of the award, even under the expanded view of the public policy exception. In *Great Western* the truck driver admitted drinking on duty and a police officer issued him a citation to that effect.[119] In *Misco* Cooper did not admit using marijuana and the arbitrator specifically found that the company had not proven Cooper violated company rules by bringing marijuana on the premises or by being intoxicated there. If there had been no admission or evidence that the truck driver had been drinking in *Great Western,* it is doubtful that the Fifth Circuit would have overturned the arbitrator's award. But in *Misco,* two years later, the Fifth Circuit did not even pay lip service to the rule that the court should not "review the factual findings or merit determinations made in an arbitration award."[120] The Fifth Circuit *Misco* majority[121] launched a bitter diatribe against the arbitrator's opinion, variously describing his views as "whimsical,"[122] "curious,"[123] and "baffling,"[124] and then seemingly laying the blame for the arbitrator's lack of ability on the fact that his formal training "was as an engineer and not as a lawyer."[125] The court then put its own slant on the case by noting that the evidence presented would "have sustained a civil verdict and probably a criminal conviction."[126] The court derided the arbitrator's conclusion that at the time of discharge the company had proven only that Cooper was sitting in the back seat of a car in which there was a lighted marijuana cigarette in the front seat ashtray.[127] Apparently to bolster its case that Cooper violated company rules, the court noted in passing that it thought

> it common knowledge that the narcotic effect of marijuana can be obtained by simply sitting in a small enclosure where smoke

119. 712 F.2d at 123.

120. *Id.* (citing Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563 (1976); Local No. 370, Baker Workers Int'l Union v. Cotton Bros. Baking Co., 672 F.2d 562, 564 (5th Cir. 1982)).

121. The majority was composed of Circuit Court Judges Gee and Higgenbotham, neither of whom took part in the *Great Western* decision.

122. 768 F.2d at 740.

123. *Id.* n.1.

124. *Id.* at 741 n.2.

125. *Id.*

126. *Id.*

127. *Id.*

> from it is present. It is not clear from the record whether or not the car windows were closed, but—given that the incident occurred on an evening in late January—it is reasonable inference that they were.[128]

Here again we find a court bringing in the specter of "common sense."

Last, the Fifth Circuit majority attacked the arbitrator's conception of "industrial due process" by suggesting that he was wrong not to consider laboratory tests conducted after Cooper's discharge which discovered minute traces of marijuana on articles found in Cooper's car trunk.[129] The court stated that bringing "any" amount of the drug onto the company premises violated the law and company rules, and it suggested that the arbitrator ignored this violation "in the name of safeguarding Cooper's abstract procedural rights."[130] The court concluded that these rights should not override a determination by the employer "that Cooper *did* bring marijuana onto his employer's premises."[131] Thus, the majority overturned the award on public policy grounds.

Judge Tate, dissenting, could not go along with the majority's views even though he agreed with *Great Western's* expanded view of the public policy exception.[132] Judge Tate noted that "[i]n their zeal to correct what the majority feels is a mistaken and misreasoned arbitration decision . . . [t]he majority errs in refusing to accept the facts of non-violation found by the arbitrator, simply because it disagrees with the arbitrator's reasoning."[133]

Misco points out the real possibility of abuse that can arise from a public policy exception that has ill-defined limits. Courts, using the exception as their rationale, may feel less compulsion to defer to arbitrators' factual findings and, in effect, may return to the days when arbitral awards were overturned for "gross mistake"—or in the terminology of the majority in *Dupont*—when the factual findings are clearly erroneous. It is in

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128. *Id.*
129. *Id.* at 743.
130. *Id.*
131. *Id.*
132. *Id.* at 744-45 (Tate, J., dissenting).
133. *Id.* at 743, 746 (Tate, J. dissenting).

this case that the United States Supreme Court decided to address once again the public policy exception.

V. THE SUPREME COURT TACKLES MISCO: WHAT ARE THE GUIDELINES?

At the time the Supreme Court decided *Misco*, the expansive view of the public policy exception had been embraced by three circuit courts. Since the *Great Western* case in 1983, only one circuit[134] had openly refused to adopt the expanded view. The attraction of this view to the courts is obvious.

The limitation that the *Steelworkers Trilogy* put on judicial review of arbitration awards is an unnatural constraint when compared with the greater latitude courts have in reviewing legal and factual determinations made by lower courts. As Professor Kaden has noted,[135] it is perhaps too much to ask judges to defer to awards they see as clearly erroneous when they are accustomed to greater power in reviewing court decisions. But as long as that award is derived from the "essence of the contract," the courts are required by *Enterprise Wheel* to enforce it unless the award violates public policy. Using a vague, expanded public policy exception, the courts have the power to overturn awards they find misguided as long as it appears that a "well-defined" public policy has been violated. The courts using the expanded version of this exception appear to have recaptured, at least in a limited fashion, the old common-law power to overturn an arbitration award because of a gross mistake.

It is an attractive idea that courts should be able to overturn awards which violate public policy. This is especially so when public safety is concerned. In practically every case[136] in which the expanded version of the public policy exception has been used to deny enforcement of an arbitral award, public safety has been lurking in the background. Why should a company not be allowed to fire an employee who admittedly drank

134. The D.C. Circuit refused to adopt an expansive view of the exception in both American Postal Workers Union v. United States Postal Serv., 789 F.2d 1 (D.C. Cir. 1986) and Northwest Airlines, Inc. v. Airline Pilots Ass'n, Int'l, 808 F.2d 76 (D.C. Cir. 1987).

135. Kaden, *supra* note 13, at 274.

136. One exception is the *Postal Workers* case, *see supra* note 91, in which the emphasis was on the public's right to have honest employees handle their mail.

while driving a truck, or to discharge an employee who brought marijuana onto the premises of a company where he operated heavy equipment, or to demote a pilot who repeatedly had shown he lacked the proper judgment to be entrusted with the lives of passengers? Why should a court not be allowed to overturn an award that upheld a company rule which could adversely affect the quality of meat sold to the public? It is just "common sense" that courts should right the mistakes made by arbitrators in these decisions.

Maybe it does make sense for courts to correct these mistakes by using the public policy exception. One commentator has suggested that the expansion of this exception be limited to "the public policy interest in the protection of human life."[137] Even such a limited expansion of the exception, however, would suffer problems if it lacked clear guidelines for implementation. If the public policy exception is to be expanded beyond its traditional bounds, the United States Supreme Court must clarify the exact parameters of the expansion and must give clear guidelines to the lower courts regarding factors they may consider when applying the exception.

The Supreme Court had the chance to delineate these guidelines in *Misco*.[138] In arguments before the Court, the union took the traditional position that the award could not be set aside unless it ordered conduct that violates the positive law. The company, of course, took the expanded view. The Supreme Court had a clear opportunity to settle the matter.

The Court could have taken one of at least three routes in the case. First, it could have affirmed the Fifth Circuit's decision with little or no comment. This approach would have been the least satisfying of the possible outcomes because it would have provided Court approval for the expanded version of the exception without providing proper guidelines for its application. A decision of this sort could have precipitated the flood of cases traditionalists have warned could endanger the viability of judicial deference to arbitral awards.

Second, the Supreme Court could have specifically adopted either the traditional or the expanded version of the exception.

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137. Note, *supra* note 1, at 643.

138. United Paperworkers Int'l Union v. Misco, Inc., ___U.S. ___, 108 S. Ct. 364 (1987).

Adoption of the traditional version would have had the advantage of not requiring elucidation of the parameters of the exception, for they are already well-known. On the other hand, adoption of an expanded version would have required a clear and precise delineation of the exception's boundaries. Promulgating useful guidelines would have been difficult because any court wishing to overturn an arbitral award on public policy grounds must balance the violated public policy against the explicit federal policy in favor of judicial deferral. Balancing tests rarely give clear and precise guidelines.

The Court, however, took another route. It avoided the direct question of whether public policy can be used to overturn an arbitral award only when a positive law is broken or its violation condoned[139] and made alternative findings on why this particular case should be overruled. The Court started by reviewing the *Steelworkers Trilogy* guidelines of judicial deferral to arbitrators' awards. In doing so the Court gave an indication that it embraced the traditionalist view of the exception. At least one circuit court had noted that the expanded version of the exception is in blatant "disregard of the teachings of *Enterprise Wheel* and *W.R. Grace*."[140] The Supreme Court in *Misco* reaffirmed the concept of judicial deference to arbitral awards as set out in the *Steelworkers Trilogy*.

Further, the Court took up the traditionalist argument that the parties to a collective bargaining contract with an arbitration clause have contracted to have their disputes settled by an arbitrator rather than a judge. Under this view, the arbitrator is a creature of the collective bargaining contract. He is selected by the parties to settle disputes over issues that have been agreed upon as proper subjects for arbitration. Thus, courts reviewing the arbitrator's award are bound by the arbitrator's finding of facts and interpretation of the contract. The Supreme Court clearly endorsed this view in *Misco*.[141] Although these notions are traceable back to the *Steelworkers Trilogy*, the Court breathed new life into these precepts in *Misco*. The Supreme

139. *Id.* at ___, 108 S. Ct. at 374-75 n.12.

140. 789 F.2d at 9.

141. ___ U.S. at ___, 108 S. Ct. at 372. The award, however, must draw its essence from the contract and the arbitrator should not issue his own brand of industrial justice. *Id.* at ___, 108 S. Ct. at 371.

Court also repeated the notion that a court cannot overturn an arbitrator's award simply because it disagrees with the facts as the arbitrator found them or even if it finds that an arbitrator made a serious error in his interpretation of a contract.[142] Of course, a court can overturn an award procured by fraud or through the arbitrator's dishonesty.[143]

In applying these precepts to the facts in *Misco* the Supreme Court essentially held that the Fifth Circuit could not overturn the award either because it found that the arbitrator's fact finding was faulty or because it disagreed with the arbitrator's choice of procedural rules.[144] The Court implied that, for a procedural mistake by an arbitrator to be grounds for overturning an award, the mistake must be in bad faith or so gross as to amount to affirmative misconduct.[145]

The Supreme Court further noted that, even if Cooper had violated company rules against the use of marijuana on the company's premises, an arbitrator normally has the discretion to disagree with and modify a sanction imposed for employee misconduct.[146] Of course, the collective bargaining contract could modify or limit the arbitrator's discretion in imposing sanctions, but the contract is interpreted by the arbitrator and if he interprets it to give him the right to modify the sanction, he has that right.

Last, the Court addressed whether the public policy " 'against the operation of dangerous machinery by persons under the influence of drugs or alcohol' "[147] is the type of public policy which, if violated, merits setting aside an arbitral award. The Court recounted the public policy exception's roots in the common-law concept that a court will not enforce a contract that violates the law or public policy.[148] The Court recited the *W.R. Grace* guidelines for overturning an arbitral award[149] and gleaned what it considered to be two important points: (1) a court may refuse to enforce a collective bargaining agreement

142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at ___, 108 S. Ct. at 372.
146. *Id.*
147. *Id.* at ___, 108 S. Ct. at 373 (quoting 768 F.2d at 743).
148. *Id.*
149. *Id.*

when the specific terms of that agreement violate public policy; and (2) the *W.R. Grace* decision does not sanction a broad judicial power to set aside arbitral awards on public policy grounds.

The Court found that, although the public policy embraced by the Fifth Circuit in *Misco* was "firmly rooted in common sense,"[150] it was not supported by the kind of analysis which would demonstrate it was "well defined and dominant"[151] as required in *W.R. Grace*. Thus, the Court did not hold directly that the public policy against using drugs in the workplace where dangerous machinery was in operation could not be used to overturn an arbitral award. Its direct holding only found that the Fifth Circuit had not proved that the policy was "well defined and definite" under the *W.R. Grace* approach.

VI. CONCLUSION

What did the Supreme Court's holding in *Misco* do to clarify the limits of the public policy exception? It did not finally settle the matter. The Court did not address "the issue upon which certiorari was granted: whether a court may refuse to enforce an arbitration award rendered under a collective-bargaining agreement on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer."[152] A decision on that question could have cleared up the whole situation.

Even absent a ruling on the above question, however, the Court indicated that it favors a traditionalist view of the exception. The Court provided some guidelines for determining when a violation of a public policy justifies overturning an arbitration award. First, the Court reiterated that courts cannot reconsider the merits of an arbitral award even if the award rests on an error of fact or an arbitrator's misinterpretation of a contract. This limitation in itself is enough to prevent decisions like the Fifth Circuit's *Misco* ruling in which the court simply disagreed with the arbitrator's findings and procedural methodology.

Second, it established that compliance with the requirements of *W.R. Grace* is a prerequisite to overturning an arbitral

150. *Id.* at ___, 108 S. Ct. at 374.
151. *Id.*
152. *Id.* at ___, 108 S. Ct. at 375 (Blackmun, J., concurring).

award on public policy grounds. The reviewing court must "[a]t the very least"[153] show that the public policy is "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' "[154] The Court made clear that "common sense" falls into the latter, rather than the former, category. Further, the *Misco* ruling set a minimum requirement and, as Justice Blackmun implied, more may be needed.

A court reviewing an arbitration award after *Misco*, therefore, cannot be confident in the limits of its power to alter the award. What if the Fifth Circuit had not ignored the facts as found by the arbitrator and had cited the "laws and legal precedents" necessary to comply with the *W.R. Grace* requirements for showing that the policy was "well defined and definite"? Could a court then overturn the award? In *Misco* the Supreme Court stated that to alter an award a reviewing court must show clearly that the policy will be violated if the award is enforced.[155] Considering that the Supreme Court found no violation of public policy in *W.R. Grace*,[156] the last requirement clearly is not easily met.

Thus, while the Supreme Court did not address directly whether the traditional view of the public policy exception is the correct view, the guidelines that it set forth for overturning an award on public policy grounds do give an indication of the limits that may eventually emerge. If the traditional view is not ultimately adopted, then at least the expansion will not be allowed to exceed greatly the limits of that view. The Supreme Court may not have endorsed openly the traditional view in *Misco*, but the tone and strictures of the case may chill the tendency of federal courts to stray far from the traditional view when faced with public policy arguments in the future. The expansion of that exception has been stopped and is being contracted. The question now is how far the contraction will go.

James Michael Magee

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153. *Id.* at ___, 108 S. Ct. at 373.

154. W.R. Grace & Co. v. Local Union 759, International Union of the Rubber Workers, 461 U.S. 759, 766 (1983) (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).

155. ___ U.S. at ___, 108 S. Ct. at 374.

156. *See supra* text accompanying notes 69-76.