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JUDICIAL REVIEW OF LABOR ARBITRATION AWARDS: PRACTICES, POLICIES AND SANCTIONS

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I. INTRODUCTION

The growth of the alternative dispute resolution movement has brought with it increased legal support for the process of arbitration. This can be seen in the widespread adoption of statutes governing the arbitration process, as well as in Supreme Court decisions upholding the validity of arbitration agreements in a variety of settings. These developments reflect the legal system’s increasing interest in providing expeditious methods for the resolution of disputes, which are both less formal and less expensive than traditional litigation. The arbitration process meets these objectives, and the legal support it receives

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1. E.g., Bellacosa Cites Growth of State Dispute Centers, 196 N.Y. L.J. 1 (1986). In the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (1990), Congress directed that advisory groups be appointed by every U.S. District Court to develop a plan for avoiding unnecessary litigation costs and delays. This has resulted in the development of an Early Assessment Program in the Western District of Missouri which creates a comprehensive alternative dispute resolution system for federal litigation within the District. See, e.g., UMKC Law School and KCMBA CLE Seminar on Early Assessment Program. (November 13, 1991).


also helps to control court caseloads by diverting disputes from federal and state court dockets.\textsuperscript{6}

Although arbitration has been used to provide a method for resolving disputes in a variety of areas, it is particularly well established in the field of labor law.\textsuperscript{7} Collective bargaining agreements between unions and employers typically provide that disagreements over the meaning or application of their labor contract are first channelled to a grievance system for negotiation or mediation of the dispute.\textsuperscript{8} If this is unsuccessful, the contract will usually provide an option to invoke arbitration and thereby secure a final and binding resolution from an outside neutral.\textsuperscript{9} Provisions for the arbitration of disputes are less common in non-unionized employment settings, but they have been recommended for wider adoption in the context of proposals for legislation to regulate at-will employment relationships.\textsuperscript{10}

However, it is within the collective bargaining system that labor arbitration has found its greatest utility. The typical labor contract is written as a very general statement of the terms governing the employer-employee relationship.\textsuperscript{11} As a result, disputes are unavoidable both because of the vague standards used in the contract\textsuperscript{12} as well as...
the inability of the parties to anticipate every eventuality over the duration of the agreement. At times the parties may even begin the contract period with a dispute over the meaning of its terms, but nevertheless execute the contract in anticipation that the disagreement will subsequently be resolved through arbitration. The need for an inexpensive and efficient mechanism to resolve such disputes is obvious, and arbitration, as the final stage of the labor contract dispute resolution process, has become widely accepted for this purpose.

Of course, there are other alternatives. After the parties attempt to settle the disagreement through negotiation, they could choose to omit any further contractual dispute resolution mechanism. This would mean that the grieving party would either have to accept the opposing position, resort to economic weapons, or institute litigation for breach of contract. However, litigation is likely to be slow and expensive, while strikes and lockouts are too disruptive. If the resulting choice is to simply drop the matter, friction and discontent may well develop. Labor arbitration is thus ideally suited to provide a final resolution of the dispute in the context of an environment in

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13. The parties are free to negotiate over the duration of their labor contract. However, pursuant to the contract-bar rule, a union which negotiates a collective bargaining agreement is protected against being forced into a NLRB-supervised election resulting from the filing of an election petition by a competing union for a period of up to three years. 1 Charles J. Morris, THE DEVELOPING LAW 362-63 (2d ed. 1983) [hereinafter THE DEVELOPING LABOR LAW].

14. ELKOURI & ELKOURI, supra note 5, at 343; see also Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 860 F.2d 1420 (7th Cir. 1988).

15. See supra note 5. For a comparison of dispute resolution techniques used in different countries, see Clyde Summers, Patterns of Dispute Resolution: Lessons from Four Countries, 12 COMP. LAB. L.J. 165 (1991).

16. The union must be careful in choosing to drop a grievance since it has a duty to fairly represent members of the bargaining unit, Vaca v. Sipes, 386 U.S. 171 (1967), although mere negligence in meeting this responsibility is insufficient to generate liability. United Steelworkers of America v. Rawson, 495 U.S. 362 (1990). Where the duty is violated, damages may be apportioned between the union, for its fair representation violation, and the company, for its contract breach. Bowen v. United States Postal Serv., 459 U.S. 212 (1983).

17. See Groves v. Ring Screw Works, 111 S. Ct. 498 (1990), where the parties, in their collective bargaining agreement, reserved the right to resort to economic weapons if they failed to resolve the dispute in their grievance procedure.

18. Id. In Groves, the Court held that a grieving party may seek judicial enforcement of a collective bargaining agreement even though the collective bargaining agreement expressly stated that the parties were free to resort to economic weapons if they failed to resolve their contract dispute. This was seen as an insufficient basis upon which to infer a waiver of the right to seek a judicial remedy for the contract breach.
which the alternatives are unsuitable.

Much of the benefit of labor arbitration, however, appears to be premised on the finality of the arbitrator's ruling. The informality of the arbitration process, and its relative speed and low cost, would not be of much help if the arbitration proceeding was routinely followed by an additional procedural step from which a final and binding ruling on the contract dispute emerged. Indeed, a labor arbitration process that did not result in a conclusive ruling would only add to the expense, delay and disruption of the dispute resolution process. In such an environment, arbitration would amount to a largely superfluous additional step which the parties would be likely to omit or not take seriously if they knew its outcome did not really matter.

In general, the legal system has recognized the need for finality in the labor arbitration process in order to take full advantage of its benefits. The controlling U.S. Supreme Court decisions, in particular, have extolled the virtues of arbitration and attempted to set guidelines designed to deter lower court interference with arbitration awards. But the standards lack precision, and the resulting vagueness has allowed lower courts to reject arbitration awards in debatable circumstances. Such decisions not only provide ammunition to those who may wish to use the judicial process to overturn labor arbitration awards, but also serve to unsettle the labor movement in general by increasing the cost of contract enforcement and making unions appear ineffective to their membership.

The dilemma courts face is that they recognize the need to support the labor arbitration process, but are concerned that their support not amount to a total abdication of judicial oversight. Arguably, legal


20. Id. In Enterprise Wheel & Car Corp., for example, the Court stated that "[w]hen an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem." 363 U.S. at 597. In Misco, the Court added that the "[c]ourts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them." 484 U.S. at 38.


standards are required which include some room to review labor arbitration awards to insure that the process is not abused, but at the same time this can provide a means for more widespread interference. It is conceivable that alternative standards could be devised which would more tightly circumscribe the grounds for overturning a labor arbitration award, but absent a rule of unreviewability any standard will offer the opportunity for lower courts to simply second-guess the decision of the arbitrator. This, in turn, only encourages additional efforts to seek reversal of labor arbitration awards, with resulting delays and expense to all concerned.

However, even if tightening the legal standard for the judicial review of labor arbitration awards is not a complete answer to the problem, one additional technique is available. To ensure that the opportunity for seeking reversal of an arbitration award is not abused, courts can invoke their authority to award sanctions against litigants and attorneys where judicial review of the labor arbitrator’s award has been unjustifiably sought. This method allows the courts to deal with those who misuse the court process after they have been unsuccessful before an arbitrator, but yet still retain judicial reviewability for cases in which the arbitrator has exceeded his or her authority. After surveying the issues and law governing the judicial review of labor arbitration awards, this article will explore the increasing use of sanctions by the courts to achieve these objectives.

II. LABOR ARBITRATION REVIEW STANDARDS

A. Judicial Review and the Merits of the Arbitration Award

A labor arbitration proceeding can involve a number of independent determinations. Initially, the parties may contest whether their disagreement is arbitrable, an issue which raises the question of whether an arbitrator or some other decisionmaker has the authority to resolve the dispute. Although the question of whether the issue is arbitrable is a matter for the courts to decide, the parties may

23. See infra notes 217-301 and accompanying text.
25. See AT&T Technologies v. Communication Workers of America, 475 U.S. 643
choose instead to have the arbitrator determine the arbitrability of the grievance. Disputes which are found to be arbitrable, as well as those in which no arbitrability challenge is raised, typically require the arbitrator to reach factual determinations which then must be related to his or her view of the meaning of the governing contract. In a number of cases the dispute will involve questions of procedure, including such matters as applicable time limits and the adequacy of notice of employer policy changes. Additionally, issues may arise which concern the applicability and meaning of statutory or common law principles.

If decisions on any one of these issues are challenged in a judicial forum there are, in theory, a variety of possible judicial review standards available. At one extreme, arbitration awards could be

26. The parties may submit the issue of arbitrability to the arbitrator and reserve the right to plenary court review. Without such a reservation the arbitrability decision will receive the same deference accorded to the arbitrator's ruling on the merits of the dispute. See, e.g., Ralph Andrews Prods., Inc. v. Writers Guild of America, 938 F.2d 128 (9th Cir. 1991); Fansteel, Inc. v. International Ass'n of Machinists & Aerospace Workers, Lodge No. 1777, 708 F. Supp. 891 (N.D. Ill. 1989); International Ass'n of Heat & Frost Insulators, Local No. 12 v. Insulation Quality Enters., Ltd., 675 F. Supp. 1398, 1405 (E.D.N.Y. 1988).


30. Commentators are in disagreement as to the role of external law in labor arbitration. The starkest dilemma arises when the labor contract calls for conduct which would violate an existing statute. Some have argued for ignoring external law and enforcing the contract as written, See Bernard D. Meltzer, Ruminations About Ideology, Law and Labor Arbitration, 34 U. Chi. L. REV. 545, 557-60 (1967), while others would deny the contract grievance in such a case. See Richard Millenthal, The Role of Law in Arbitration, 21 NAT. ACAD. ARB. PROC. 42 (1968). If the contract is interpreted in light of external law so as to avoid a conflict, however, the dilemma may be avoided and the decision regarding enforcement of the award would be evaluated under normal standards. Timothy J. Heinsz, Judicial Review of Labor Arbitration Awards: The Enterprise Wheel Goes Around and Around, 52 Mo. L. REV. 243, 264-65 (1987).

31. See infra notes 32-37 and accompanying text.
viewed as recommended solutions to the underlying dispute which the courts would be free to accept or reject. The judicial forum would then amount to an entirely de novo consideration of the contractual dispute.\(^{32}\) In contrast, at the other extreme the labor arbitration award could be treated as final and binding between the parties, and not subject to judicial review at all.\(^{33}\) On the continuum between these two alternatives lie a number of review standards, differing in the degree of deference given to the arbitrator’s award. Courts could ask whether there was sufficient evidence to support the arbitrator’s ruling,\(^{34}\) whether the record taken as a whole is adequate to justify the award,\(^{35}\) or whether the arbitrator’s conclusion is an abuse of discretion.\(^{36}\) Even more deferential is a standard which only consid-

32. This would be comparable to the relationship between the administrative law judges and the National Labor Relations Board in the enforcement of the Board’s unfair labor practice jurisdiction. Although the administrative law judges conduct the hearings on unfair labor practice complaints, and prepare decisions and awards which are final unless exceptions are filed, the ultimate authority to rule on the complaint resides with the Board. 29 C.F.R. § 101.12 (1991); 2 THE DEVELOPING LABOR LAW, at 1603, 1621-23 (1983). The Board, in turn, can and does reverse administrative law judge decisions, even on findings of fact which involve credibility determinations. E.g., St. Luke’s Hosp., 300 N.L.R.B. No. 108 (1990); General Dynamics Corp., 268 N.L.R.B. No. 220 (1984); Kelco Roofing, Inc., 268 N.L.R.B. No. 456 (1983). When this occurs, however, the courts accord the Board decisions somewhat less deference. See Universal Camera v. NLRB, 340 U.S. 474 (1951); Ewing v. NLRB, 732 F.2d 1117 (2d Cir. 1984); NLRB v. Alan Motor Lines, Inc., 937 F.2d 887 (3d Cir. 1991); 2 THE DEVELOPING LABOR LAW, at 1706.

33. Under the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1988), administrative agency decisions are not subject to judicial review if (1) there is a legislative intent which favors unreviewability or (2) there is a special reason growing out of the subject matter or circumstances which calls for unreviewability. KENNETH C. DAVIS, ADMINISTRATIVE LAW TEXT 523 (3rd ed. 1972).

34. Prior to passage of the Labor Management Relations Act in 1947, this was the standard governing judicial review of factual findings of the National Labor Relations Board. The statute provided that the “findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.” National Labor Relations Act, 49 Stat. 449, 455 (1935) (amended 1947). See NLRB v. Hearst Publications, 322 U.S. 111 (1944).

35. This is the current review standard for decisions of the National Labor Relations Board. The statute calls for affirmation of the Board if its findings of fact are supported by “substantial evidence on the record as a whole.” National Labor Relations Act, § 10(f), 29 U.S.C. § 160(f) (1988). The current standard permits a Board decision to be rejected by a court “when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view.” Universal Camera, 340 U.S. at 488. Under current standards, Board decisions on questions of law are also accorded deference if they represent “a choice made between two fairly conflicting views.” NLRB v. United Ins. Co., 390 U.S. 254, 250 (1968). Put another way, where the Board’s determination is “reasonably defensible, it should not be rejected merely because the court might prefer another view of the statute.” Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979).

36. Under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §
It is easy to reject the most extreme standards for judicial review of labor arbitration awards. If courts looked upon the labor arbitration process as advisory, and were free to give *de novo* consideration to the underlying contract dispute, there is a risk that the parties would lose much of their incentive to make use of arbitration as a dispute resolution procedure. Each side would know that the losing party would be free to ignore the arbitration award and relitigate the case in court. In such an environment they might prefer to move directly to the decisionmaker with final authority to settle the disagreement. Arbitration would still be useful for minor disputes where neither side considered it worth the delay and cost of litigation, and in cases in which the parties agreed on the proper disposition of the grievance but required the authority of an outside neutral to make the decision. In other situations, however, arbitration would often seem not to be worth the trouble.

Ultimately, however, such a system would have an adverse effect on labor-management relations as well as on the judiciary. Grievances would remain unresolved for longer periods of time and leave the parties in a continual state of uncertainty. Employee morale would suffer because of the inability of unions and management to settle worker complaints, and management authority would be undermined due to the delayed confirmation or rejection of company actions. Moreover, to the extent the parties responded by opting to utilize the court system to resolve their labor contract disputes, there would be an increase in the judicial caseload involving matters where the courts lack expertise and where they are not fully trusted.

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551 (1988), courts are given the authority to set aside the decisions of administrative agencies if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

37. This is the standard ultimately selected for the review of labor arbitration awards by the Supreme Court. See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

38. In *Enterprise Wheel*, 363 U.S. at 596, the Court stated that arbitrators "sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements." Judge Posner of the Seventh Circuit Court of Appeals noted, as a policy in favor of labor arbitration, "the sense that specialists in labor relations are more sensitive adjudicators of such disputes than generalist federal judges would be." International Ass'n of Machinists and Aerospace Workers v. General Elec. Co., 865 F.2d 902, 904 (1989). Arbitrators have been subject to criticism, however, on the grounds that their decisions are influ-
At the opposite extreme, a system in which labor arbitration awards were treated as totally immune from judicial review would create its own set of problems. Initially, the absolute finality of the arbitrator's decision might cause either unions, employers, or both, to shy away from arbitration agreements. Alternatively, they might limit them to narrow questions arising under the labor contract. In either case, the absence of an acceptable alternative dispute resolution mechanism would force the parties to resort to economic weapons or litigation to settle many of their disagreements, neither of which would serve the interest of harmonious labor-management relations. Moreover, where arbitration was pursued in such a system, the larger public-law interest could be undermined if private contract decisions by labor arbitrators ignored external law considerations, but were nevertheless excluded from any form of judicial review.

Despite recent declines in union membership, unions still repre-
sent a significant number of employees. The collective bargaining agreements they negotiate with employers govern both union and nonunion employees in the covered bargaining unit. Given the inevitability that labor contract disputes will arise, as well as their potential volume and impact, an expeditious and efficient method of dispute resolution is clearly essential. The method of choice in labor relations has turned out to be arbitration, but care must be taken to insure that the utility of the system is not undercut by inappropriate standards of judicial review. Neither the alternatives of de novo review nor absolute finality meet this objective.

After excluding the extremes of the continuum, the choices which remain involve varying levels of deference to the arbitrator's decision. That deference could be limited in character, perhaps only for fact determinations which are supported by evidence on the record as a whole, or it could extend to legal interpretations of labor contract clauses. In both cases, however, the review would involve the merits of the dispute. Yet, some of the principle benefits of the arbitration process frequently make any judicial review of the merits of the arbitrator's decision problematic.

In particular, labor arbitrations are conducted in a highly informal manner, often without attorneys representing the parties and without court reporters to prepare a transcript of the proceedings. The

44. In 1990, there were 104 million salaried and wage workers in the United States. Of these, 16% or 16,640,000 were union members. Web Bryant, Union Membership Decline, USA Today, Aug. 30, 1991, at 1B. More recent evidence suggests that the rate of decline in union membership may be slowing. See infra note 215.

45. A union which has been certified as the representative of a unit of employees following an election, or has been voluntarily recognized by the employer, has a duty to fairly represent all employees in the unit. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944). Unions are afforded substantial leeway in meeting this responsibility, Air Line Pilots Ass'n v. O'Neill, 111 S. Ct. 1127 (1991), but if they fail to do so they are subject to suit, Vaca v. Sipes, 386 U.S. 171 (1967). If the failure occurred in the context of the enforcement of rights under the labor contract, the employer is subject to suit for contract breach while the union will be liable for breach of the duty of fair representation. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976). Damages in such a case are apportionable between the union and the employer. Bowen v. United States Postal Serv., 459 U.S. 212 (1983).

46. Whitehouse & Sons Co. v. Local Union 214, Int'l Bhd. of Painters, 621 F.2d 294 (8th Cir. 1980).

47. See supra notes 32-33. A more deferential standard for the review of arbitrator factual determinations is represented by the original National Labor Relations Act which provided that Board decisions would be conclusive if supported by evidence. See supra note 32.

48. See supra note 33.

49. Id.

50. ELKOURI & ELKOURI, supra note 5, at 244, 258.
rules of evidence applicable in courts of law typically do not apply.\textsuperscript{51} To the extent factual questions are at issue, therefore, courts will often find it difficult to discover much of a record to review at all. Although contract interpretation issues might initially appear more easily subjected to judicial review, here too factual questions may prove an obstacle, especially where the parties seek to rely on evidence such as past practices or negotiating history to give meaning to ambiguous contract clauses.\textsuperscript{52} These difficulties are only heightened if the arbitrator issues an award without a written opinion.\textsuperscript{53} Unless labor arbitration is to be made more formal and costly, and thereby less attuned to the needs of the workplace, court review of the merits of the labor arbitrator’s award will often face substantial obstacles.

Nevertheless, in some situations the arbitrator’s opinion itself may disclose both the factual and legal basis of the award. An arbitrator might conclude that because of procedural flaws in the employer’s investigation,\textsuperscript{54} or because the arbitrator’s conclusion that the punishment imposed on an employee engaged in misconduct at the workplace was too harsh,\textsuperscript{55} some mitigation of the penalty or its


\textsuperscript{52} As the Court observed in \textit{United Steelworkers of America v. Warrior & Gulf Navigation Co.}, 363 U.S. 574 (1960). “The labor arbitrator’s source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.” \textit{Id.} at 581-82. This was reiterated in \textit{United Steelworkers of America v. Enterprise Wheel & Car Corp.}, 363 U.S. 593 (1960). The Court observed that arbitrators “sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.” \textit{Id.} at 596. Arbitrators frequently rely on such factors in reaching their decisions. See \textsc{Elkouri & Elkouri, supra} note 5, at 437-56.

\textsuperscript{53} As Justice Douglas stated in \textit{Enterprise Wheel}, 363 U.S. at 598, “a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement.” Nevertheless, he also observed that “[a]rbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions.” \textit{Id.} (footnote omitted); see also, \textsc{Elkouri & Elkouri, supra} note 5, at 281.

\textsuperscript{54} \textit{Delta Air Lines, Inc. v. Airline Pilots Ass’n}, 686 F. Supp. 1573 (N.D. Ga. 1987) (reinstating pilot who flew plane while drunk because employer refused to pay for alcohol rehabilitation); \textit{McCartney’s Inc. & United Food and Commercial Workers Int’l Union, Local 76, 84 Lab. Arb. (BNA) 799 (Nelson, Arb. 1985) (finding discharge improper where employer failed to give employee opportunity to explain his side of the case); \textit{Great Midwest Mining Corp. & Int’l Bhd. of Teamsters, Local 541, 82 Lab. Arb. (BNA) 52 (Mikrut, Jr., Arb. 1984) (Discharge improper where company failed to give notice of charge and possible discipline).}

total reversal is required. In a non-disciplinary matter, an arbitrator might interpret a contract clause in a manner which appears to fly directly in the face of its clear language, explaining it as a better solution to the problem.\textsuperscript{56} In such cases the arbitration award and opinion may accurately develop the facts underlying the grievance and explain the arbitrator's thinking process. In these instances a reviewing court may be able to satisfactorily isolate the 'record' behind the merits of the award and engage in an independent re-evaluation of the arbitrator's decision.

What might one expect of a system in which the merits of labor arbitrator rulings were subject to judicial review, albeit with some deference accorded to the arbitrator's conclusions? Undoubtedly, such an approach would provide at least some incentive for the losing party to challenge unfavorable arbitration awards in court, especially if the case mattered in economic or plant management terms. Inevitably, this would produce some increase in already crowded court dockets.\textsuperscript{57} In a challenge of this sort, moreover, the issue would be whether the arbitrator misinterpreted the contract or reached erroneous factual conclusions, in short a rehashing of the arbitration itself. At the very least such an effort would delay the need to implement the arbitrator's award and raise the cost to the prevailing party of securing contract compliance. It is questionable whether the obligation to accord some deference to the arbitrator's ruling would have much of an impact on these consequences.

The argument can still be made, however, that the opportunity for judicial review provides the losing party with a chance to secure the reversal of an erroneous arbitration decision. One might question whether arbitrators as a class should be immune from judicial review when district court judges can be reversed by appellate courts for error. Some arbitrators, for example, might be more prone to misapply principles of contract law while others might display undue leniency

\textsuperscript{56} Arbitrators often acknowledge that their role may involve a form of legislation or contract making as well as pure interpretation, although usually this will occur in the context of ambiguous contract clauses. See ELKOURI & ELKOURI, supra note 5, at 345-48.

\textsuperscript{57} Judge Posner recognized this consequence as one of the factors supporting the public policy favoring labor arbitration. International Ass'n of Machinists & Aerospace Workers v. Gen. Elec. Co., 865 F.2d 902, 904 (7th Cir. 1989).
in their decisions. The claim can certainly be made that correcting errors in the labor arbitration process is an objective which would further the public interest.

Ultimately, however, the case for judicial review of the merits of labor arbitration awards, regardless of the degree of deference given to the arbitrator's decision, is not a persuasive one. Even the objective which arguably supports it, namely the goal of correcting arbitrator error, is largely misleading. Part of the reason for this is that the very notion of error in the interpretation of a collective bargaining agreement fails to recognize the unique character of labor contracts. They do not fit the typical stereotype of an arms-length bargain between parties involved in a consensual arrangement designed to cover discrete events. To the contrary, the parties are compelled to negotiate by law, and the contract they develop is designed to govern the working environment of covered employees for an extended period of time. The product of labor negotiations is inevitably a very general document, often intentionally as well as unintentionally ambiguous. Defining the meaning of the labor contract may require a process which incorporates elements of the techniques of regulatory rulemaking and statutory interpretation along with traditional methods of interpretation.

58. Id. at 904.
59. Id. at 905-06.
60. A contract is defined as "an agreement enforceable [sic] at law, made between two or more persons by which rights are acquired by one or more to acts or forbearances on the part of the other or others." WILLIAM R. ANSON, ANSON'S LAW OF CONTRACTS § 3, at 11 (2d Am. ed.).
62. By virtue of a doctrine known as the contract-bar rule, no competing union may petition for an election to represent the unit of employees during the first three years of its collective bargaining agreement. The objective is to "stabilize the employer-union relationship." 1 THE DEVELOPING LABOR LAW, at 361. See generally, JULIUS G. GETMAN & BERTRAND B. POGREBIN, LABOR RELATIONS 29 (1988), (stating that the term of a collective bargaining agreement may be more or less than the three-year contract-bar period.)
64. Regulatory rulemaking, as a process, is designed to implement general standards contained in legislative authorizations. See BARNARD SCHWARTZ, ADMINISTRATIVE LAW 147-151 (1976). Statutory interpretation incorporates efforts to identify the apparent meaning and underlying purpose or intent behind legislation. See generally FRANCIS J. MCCAFFREY, STATUTORY CONSTRUCTION (1953); Richard A. Posner, Statutory Interpretation - in the Classroom and in the Courtroom, 50 U. CHI. L. REV. 800 (1983). Arbitrators may find themselves
with more traditional principles of contractual analysis. In this setting, the notion of "error" by the arbitrator in the interpretation of the contract is more in the eye of the beholder than it is an objective fact.

Moreover, even if errors could be identified as such, the determination of whether or not to provide for judicial review of the merits of labor arbitration awards must take into account the countervailing costs. As described above, these could very well include the increased formalization and expense of the arbitration process, as well as a larger judicial caseload reflecting those arbitrations for which review is sought. Ultimately, there is the risk that the parties will become disenchanted with the process and return to the use of economic weapons and traditional litigation to settle labor contract disputes.

B. Judicial Review and the Arbitrator's Performance

As an alternative to reviewing the merits of the arbitrator's award, courts may instead limit themselves to the consideration of whether the arbitrator performed the role assigned to him or her by the contract. From this perspective, the question to be asked is whether the arbitrator conducted a proceeding which resulted in the interpretation and application of the labor contract, not whether the decision is right or wrong. One aspect of this review standard is procedural in character, consisting of the obligation to conduct a fair and impartial hearing. A second aspect is more substantive, obligating the arbitrator to decide the issues presented in light of limitations on arbitral authority which may be contained in the contract. However, this review of the arbitrator's adherence to performance standards at least in theory does not involve consideration of the merits of the compelled to employ either or both techniques in the process of interpreting very general labor contract clauses. Where the intent behind the contract provision is discernable, the analysis is more likely to resemble statutory interpretation. But where the contract clause must be applied to an unforeseen event, and no mutual intent of the parties can be identified, the arbitrator is more like a regulator in attempting to give content in a particular case to the general standards of the labor contract. Id.

65. ELKOouri & ELKouri, supra note 5, at 396; SCHOONHOVEN, supra note 51, at 174-78.
66. See supra notes 5, 50-53 and accompanying text.
67. See supra note 57 and accompanying text.
68. See supra note 42 and accompanying text.
69. See infra notes 72-76 and accompanying text.
70. See infra notes 78-79 and accompanying text.
award itself.

Procedural fairness is an obvious prerequisite which must be satisfied before courts can defer to a labor arbitration award. There is no merit in immunizing from review decisions which are reached in an unacceptable fashion. This truism, however, simply shifts the focus to the question of what procedural attributes are required before judicial deference is appropriate.

The Federal Arbitration Act, although not applicable to collective bargaining agreements, suggests the kinds of principles which are controlling in the review of the procedural fairness of the labor arbitration process. Section 10 of the Act identifies circumstances warranting the vacation of an arbitration award, including cases:

(a) Where the award was procured by corruption, fraud, or undue means.
(b) Where there was evident partiality or corruption in the arbitrators, or either of them.
(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

Comparable standards appear in state versions of the Uniform Arbitration Act. And, while the specific content of such arbitral due pro-

cess may appear somewhat imprecise, the very existence of the threat of procedural review by the courts serves to insure that arbitrators are attentive to fairness requirements in performing their functions.76

The substantive aspect of the arbitrator's function can be simply stated as the obligation to interpret the collective bargaining agreement.77 Arbitration is a creature of contract,78 and it is only required in the field of labor relations to the extent the parties have expressed their willingness to have their labor contract disputes resolved in this manner.79 If they have, the arbitrator must focus on the contract dispute placed before him or her and interpret the contract in resolving it.80 Anything else represents conduct which is not part of the arbitration agreement, and, therefore, does not warrant judicial enforcement. In this setting court review is based not on the merits of the arbitrator's interpretation of the contract, but rather on the role played by the arbitrator in resolving the contract dispute.

However, stating that the obligation of the arbitrator is limited to interpreting the collective bargaining agreement is far easier than assessing whether the standard has been violated. In reviewing labor arbitration awards for this purpose courts must avoid substituting their interpretation of the contract for that of the labor arbitrator. But in

76. Procedural issues are given major attention in the prominent labor arbitration treatises. SCHOONHOVEN, supra note 51; ELKOURI & ELKOURI, supra note 5, at 222-95. They have also been the subject of legal commentary. See Laura J. Cooper, Discovery in Labor Arbitration, 72 MINN. L. REV. 1281 (1988); Laurie Eiler Downey, Pre-hearing Procedures in Labor Arbitration: A Proposal for Reform, 43 U. PITT. L. REV. 1109 (1982); Benjamin Aaron, Procedural Problems in Arbitration, 10 VAND. L. REV. 733 (1957). On occasion, procedural irregularities have led to the vacation of an arbitration award. E.g., Pacific & Arctic Ry. v. United Transp. Union, 952 F.2d 1144 (9th Cir. 1991).


78. "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). "[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." AT&T Technologies v. Communications Workers, 475 U.S. 643, 648-49 (1986) (citing Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 374 (1974)).

79. Parties may challenge whether the dispute is arbitrable under the labor contract. However, there is a strong presumption in favor of allocating the resolution of the dispute to the arbitration process if the parties have agreed to an arbitration clause which does not clearly exclude the issue from its coverage. United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960). Depending upon the circumstances, arbitration may also be required for disputes which occur after the termination of the contract. Litton Fin. Printing Div. v. NLRB, 111 S. Ct. 2215, 2222 (1991); Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 250-51 (1977).

80. Warrior & Gulf, 363 U.S. at 582.
realism, determining whether the arbitrator has stepped outside of the contract in reaching his or her award will often be difficult to separate from the substantive determination of what the contract means. Nevertheless, despite this difficulty, a performance-based standard for the review of labor arbitration awards reflects a much larger measure of deference to the labor arbitration process than the alternative tests if for no other reason than that it includes a direction that courts avoid the direct review of the merits of the award.

A review standard limited to the arbitrator's performance, in both its procedural and substantive aspects, would appear to have distinct advantages over a standard directly reviewing the merits of the arbitration award. On the one hand, it provides a failsafe mechanism for the extreme case in which an arbitrator goes beyond the contract and exercises authority not granted to him or her by the agreement. This should be sufficient to relieve the parties of any anxiety they might have that such awards would be immune from all forms of judicial scrutiny. On the other hand, a performance-based review standard would not regularly embroil courts in the merits of the underlying labor dispute. This, in turn, would help to minimize the risk that the losing party would be encouraged to regularly seek judicial review of unfavorable arbitration awards. In short, it represents an appropriate balance between reviewability to guard against arbitrator abuse and deference to the arbitration process in order to encourage compliance with the arbitration award. The balance, moreover, is placed at a point on the continuum which is unlikely to cause labor and management to discard their reliance on arbitration as a dispute resolution mechanism.

C. The Evolution of Federal Standards

The issue of labor contract enforcement was one of the matters addressed by Congress in the legislative process leading up to the enactment of the 1947 Taft-Hartley Act. One proposal was to give the National Labor Relations Board, already authorized to supervise

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81. Recent research suggests that approximately one percent of all labor arbitration awards lead to legal action to overturn them. Peter Feuille et al., Judicial Review of Arbitration Awards: Some Evidence, 41 LAB. L.J. 477, 481 (1990). However, it appears that the proportion of awards subjected to such review may have increased. Peter Feuille & Michael LeRoy, Grievance Arbitration Appeals in the Federal Courts: Facts and Figures, 45 ARB. J. 35, 40-42 (1990).

the union election process and adjudicate unfair labor practices, the additional responsibility of enforcing labor agreements. This was rejected, however, in favor of what became Section 301 of the Act which granted federal courts jurisdiction to entertain suits alleging collective bargaining agreement violations. Ultimately, the Supreme Court interpreted this to mean that federal courts were required to develop a federal common law of labor contracts, and that one of its components was to be federal court authority to enforce agreements to arbitrate labor contract disputes.

While this principle may compel the parties to arbitrate their labor contract differences, it does not directly address the issue of the enforceability of the labor arbitrator's award. That question was presented in United Steelworkers of America v. Enterprise Wheel & Car Corp. There the parties had signed a collective bargaining agreement which included a broad arbitration clause governing "any differences 'as to the meaning and application'" of the contract, and providing "that the arbitrator's decision 'shall be final and binding on

83. This would have been done by making it an unfair labor practice "to violate the terms of a collective bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration." Id. at 109-11. See, Michael I. Sovern, Section 301 and the Primary Jurisdiction of the NLRB, 76 HARV. L. REV. 529 (1963) for an argument against giving the NLRB jurisdiction over enforcing labor agreements to arbitrate.

84. The proposal was dropped in the House-Senate Conference. H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 42 (1947). In NLRB v. C & C Plywood Corp., 385 U.S. 421, 427 (1967), the Court observed that this was a reflection of national policy against government interference in the terms of a labor contract. Instead, Congress adopted language providing that "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d) (1988).

85. Section 301 provides that "[s]uits for violation of contracts between an employer and a labor organization ... 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) (1988).


87. In two 1960 decisions involving arbitration clauses in Steelworkers' Union contracts, the Court created a presumption in favor of the arbitrability of grievances, observing that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (footnote omitted); see also United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 568-69 (1960).

The company, however, had previously refused to arbitrate the grievance until it was compelled to do so by court order. Nevertheless, the company refused to comply with the arbitrator’s award in a discharge case.

The dispute arose out of a spontaneous wildcat strike precipitated by the company’s discharge of an employee. The strikers were first given permission to return to their jobs, but the permission was later rescinded and the strikers subsequently discharged. The arbitrator converted the discharge into a ten-day disciplinary suspension, and ruled that the subsequent expiration of the labor contract did not bar the reinstatement remedy. After the company refused to comply with the award, the federal district court ordered its enforcement, but the court of appeals reversed, holding that an award of reinstatement and backpay after the expiration of the contract was unenforceable.

The response of the Supreme Court was to reject the approach utilized by the court of appeals. It succinctly observed:

The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.

The Court explained that “arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process.” They are chosen for their expertise, and it is appropriate for them to apply their “knowledge of the custom and practices of a particular factory or of a particular industry” in reaching their decisions.

Under Enterprise Wheel, therefore, arbitrators have wide-ranging authority in the interpretation of collective bargaining agreements and

89. Id. at 594.
90. Id. at 595.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id. at 596.
96. Id. at 599.
97. Id. at 596.
98. Id.
99. Id.
can bring their "informed judgment to bear in order to reach a fair solution of a problem." Moreover, the merits of their conclusions are not subject to judicial review. The only limitation is that the arbitrator must interpret the contract in reaching his or her decision. As the Court observed:

[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.

Judicial review standards for labor arbitration awards were again addressed by the Supreme Court in United Paperworkers International Union v. Misco, Inc. Here the employer, who operated a paper converting plant, discharged an employee whose job involved the operation of hazardous machinery. The employee had informed the company that he had been arrested for the possession of marijuana in his home, and later investigation by the company disclosed that he had also been found in the backseat of a friend’s vehicle in the company parking lot, “with marijuana smoke in the air and a lighted marijuana cigarette in the front seat ashtray.” The company’s position was that these events violated the company’s rule against having narcotics on company property. Not until shortly before the hearing did the company become aware that the employee had also been arrested for marijuana possession based upon marijuana gleanings found by police in his own car, which had also been located in the company’s parking lot.

After the employee was discharged, he filed a grievance which the company rejected. Thereafter the dispute was taken to arbitration and the arbitrator concluded that the company lacked the just

100. Id. at 597.
101. See id. at 597.
102. Id. at 597.
104. Id. at 31-33.
105. Id. at 33.
106. In the company’s view, presence in a car with a lit marijuana cigarette amounted to having an illegal substance on company property. Id. at 33 n.4.
107. Id. at 33.
108. Id.
cause required for termination under the applicable collective bargaining agreement. He awarded the employee reinstatement with backpay and full seniority. In his ruling the arbitrator refused to consider the evidence of marijuana gleanings found in the employee’s own car because this was unknown to the company at the time of the discharge. The remaining evidence, in the arbitrator’s judgment, failed to establish that the employee was in possession of narcotics on company property in violation of company rules. Both the district court and court of appeals, however, refused to enforce the award. In particular, the court of appeals concluded that the arbitrator’s narrow focus on “procedural rights” led to an erroneous conclusion. In its judgment the employee had brought drugs onto company premises, as evidenced by his apprehension in a car filled with marijuana smoke and by the discovery of marijuana in his own vehicle.

In reversing the Court of Appeals, the Supreme Court reaffirmed that “courts are 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.” Rather, since

the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator’s interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.

109. Id. at 33-34.
110. Id. at 34.
111. Id.
112. Id.
113. Id. at 34-35.
114. Id. at 35.
115. Id.
116. Id. at 36.
117. Id. at 37-38 (referring to United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960)).
Using this standard, the Court concluded that the Court of Appeals had improperly re-evaluated the arbitrator's factual conclusions and overall interpretation of the contract.\textsuperscript{118}

In addition to reaffirming that courts are not to review the merits of labor arbitration awards, \textit{Misco} also considered whether courts are permitted to refuse to enforce the arbitrator's ruling on the basis of public policy considerations.\textsuperscript{119} The claim in \textit{Misco}, relied upon by the Court of Appeals, was that there is a public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol,"\textsuperscript{120} and therefore no award reinstating an employee violating this policy can be enforced.\textsuperscript{121} While conceding the principle that public policy can justify the rejection of an arbitration award,\textsuperscript{122} the Court found it inapplicable to the facts in \textit{Misco}. It cautioned that the public policy must be "explicit" as well as "well defined and dominant,"\textsuperscript{123} and that it "is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests'."\textsuperscript{124} The court of appeals' unsupported public policy determination failed this standard, and the available evidence was not sufficient to establish a violation of the public policy the court had identified.\textsuperscript{125}

D. Implementing \textit{Enterprise Wheel} and \textit{Misco}

Although \textit{Enterprise Wheel} and \textit{Misco} were decided by the Supreme Court over twenty-five years apart, they both are similar in their approach to the development of judicial review standards for labor arbitration awards.\textsuperscript{126} In each case the Court directed trial and appellate tribunals to limit their scrutiny of the labor arbitration process, and to specifically avoid second-guessing the arbitrator's substantive judgment.\textsuperscript{127} The parties agreed to choose an arbitrator to

\textsuperscript{118} Id. at 39-42.


\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{Id.}


\textsuperscript{123} \textit{Misco}, 484 U.S. at 43.

\textsuperscript{124} \textit{Id.}

\textsuperscript{125} \textit{Id.} at 36-42; \textit{See United Steel Workers v. Enterprise Wheel & Car Corp.}, 363 U.S. 593 (1960); \textit{Misco}, 484 U.S. 29.

\textsuperscript{126} \textit{Enterprise Wheel}, 363 U.S. 593; \textit{Misco}, 484 U.S. 29.
interpret their contract, and only if he or she fails to perform that function, or does so in a fashion which contravenes a well-defined and dominant public policy, is rejection of the award appropriate.

In many cases lower federal courts have found little difficulty in disposing of challenges to labor arbitration awards by simply repeating the admonition of the Supreme Court to avoid review of the merits of the award. The courts identify the award as drawing its essence from the labor contract and proceed to grant enforcement. Not only does this approach make disposition of the challenge straightforward, but it also sends a clear message to employer and


130. See Trevathan v. Newport News Shipbuilding & Drydock Co., 752 F. Supp. 698 (E.D. Va. 1990) (holding plaintiff is not entitled to relief because "[h]e seeks to have the Court substitute its judgment for that of the arbitrator"); International Bhd. of Teamsters, v. Pan Am World Serv., Inc., 675 F. Supp. 1319 (M.D. Fla. 1987) (holding, "[t]he scope of judicial review of arbitration awards under the RLA is 'among the narrowest known to the law';" quoting Diamond v. Terminal Ry. Ala. State Docks, 421 F.2d 228, 233 (5th Cir. 1970)). In connection with this study, student research assistants identified court of appeals and district court decisions on challenged labor arbitration awards published by the West Publishing Company between the Supreme Court's Misco ruling and February, 1992. They found a total of 96 court of appeals decisions and 67 district court decisions. The courts enforced the arbitrator's award in 72 appellate decisions and 50 district court decisions. Although multiple issues were often involved, 48 of 69 appellate cases in which it was claimed that the arbitrator exceeded his or her authority resulted in the enforcement of the award. The same was true for 33 of 44 district court cases in which the identical claim was made.
union representatives that the judiciary is not available to thwart the speed and efficiency of the labor arbitration process.

In other situations, however, courts have been willing to reject arbitration awards in circumstances which appear inconsistent with Supreme Court standards. One illustration of this approach is provided by a decision from the 1960s, Torrington Co. v. Metal Products Workers Union Local 1645. Here the company had unilaterally discontinued a twenty-year unwritten practice of providing time off with pay to allow employees to vote. In response, the union protested but did not file a contract grievance. The issue was addressed in the next round of contract negotiations which resulted in agreement by the parties to continue the old contract with specific amendments. Despite early union proposals to include voting pay in the agreement, no language covering the issue of paid voting time was incorporated. Thereafter, when the company refused to provide voting pay, the union filed a grievance and the matter was ultimately referred to arbitration.

It was the arbitrator's conclusion that the refusal to provide voting pay violated the contract. In his view, the uninterrupted twenty-year practice was part of the company's contractual obligation which could not be discontinued without union consent, and no such consent could be found in the contract negotiation process. The Second Circuit Court of Appeals, however, refused to enforce the award, ruling instead that the arbitrator's decision exceeded his authority under the contract. Based upon Enterprise Wheel, the controlling Supreme Court standard at the time, the issue in Torrington was whether the arbitrator's award drew its essence from

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131. E.g., Torrington Co. v. Metal Prods. Workers Union Local 1645, 362 F.2d 677 (2d Cir. 1966). One commentator has observed that "notwithstanding ritual invocation of the various verbal formulations of the finality principle, reviewing courts frequently do explore the merits of arbitral interpretation, either as an independent ground to sustain a determination to enforce an award, or as an indication of default justifying denial of enforcement." Lewis B. Kaden, Judges and Arbitrators: Observations on the Scope of Judicial Review, 80 COLUM. L. REV. 267, 270-71 (1980).
132. 362 F.2d 677 (2d Cir. 1966).
133. Id. at 678.
134. Id.
135. Id.
136. Id.
137. Id. at 679.
138. Id.
139. Id.
140. Id. at 680.
the labor contract. 141 Since the arbitrator was clearly interpreting the contract in Torrington, enforcement of the award should have been required. 142 Erroneous factfinding and misinterpretations of the contract are supposed to be insufficient to warrant reversal of an arbitrator's decision. The response of the court, however, was that the issue was really one of the arbitrator's jurisdiction to rule whether past practices had become part of the company's contractual obligation to its employees, 143 and courts are entitled to review an arbitrator's ruling on his or her own jurisdiction. 144 To the court this was not the review of the merits of the award, but the distinction is at best a subtle one.

The very same reasoning process can be seen in more recent cases, such as the decision of the Second Circuit Court of Appeals in Leed Architectural Products, Inc. v. United Steelworkers of America, Local 6674. 145 An arbitrator had found that the company had violated the collective bargaining agreement when it paid one employee in excess of the wage rate the parties had agreed upon, a determination the court found was entitled to judicial deference. 146 However, the court concluded that the arbitrator exceeded his authority when he ordered that the company pay other employees the same higher rate rather than rescind the single employee's pay raise. 147 The agreement provided for a defined wage rate, and by allowing the increase given to one employee to stand and raising the wage levels of equivalent employees to the same figure, the arbitrator was violating his obligation to confine himself to the interpretation of the agreement

141. Id.
142. Id. at 682.
143. "[W]e hold that the question of an arbitrator's authority is subject to judicial review, and that the arbitrator's decision that he has authority should not be accepted where the reviewing court can clearly perceive that he has derived that authority from sources outside the collective bargaining agreement at issue." Id. at 680.
144. In contrast, the Supreme Court had previously observed that the "labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960). Moreover, arbitrators frequently use past practices in resolving contract disputes. See Elkouri & Elkouri, supra note 5, at 437.
145. 916 F.2d 63 (2d Cir. 1990).
146. Id. at 65.
147. Id. at 67.
Despite the usually wide latitude given to arbitrators in framing remedies, the court concluded that the arbitrator in *Leed Architectural Products* lacked the authority to remedy the company's contract violation in the manner he chose. Once again, however, the distinction between reviewing the arbitrator's authority and reconsidering the merits of the award, in this setting the range of remedies available for wage clause violations, is barely perceptible.

For the most part, courts are presented with fewer public policy challenges to labor arbitration awards, but here too, exceptions

148. *Id.* at 66.

149. *Id.*

150. In *Enterprise Wheel*, the Court gave special attention to arbitral remedies, observing that

when an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.


151. Opinions in the litigation involving the Delta Queen Steamboat Company illustrate the contrasting views on the validity of the arbitral jurisdiction distinction. Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'r., 889 F.2d 599 (5th Cir. 1989); Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'r., 897 F.2d 746 (5th Cir. 1990). The company had discharged the captain of a riverboat excursion vessel for neglect which caused a near collision. Despite a finding of gross carelessness by the arbitrator, the captain was reinstated because of his forty-year unblemished record and the disparity in discipline imposed upon the grievant as opposed to other pilots involved in mishaps. The company, in turn, challenged the arbitrator's decision in federal district court, maintaining that the arbitrator exceeded his jurisdiction since the contract provided that discipline for proper cause was the sole responsibility of the company. The district court agreed with the company's claim and vacated the award, and its decision was upheld by a panel of the Fifth Circuit in Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'r., 889 F.2d 599 (5th Cir. 1989). The court read the contract to divest the arbitrator of jurisdiction to reverse the company's disciplinary decision once proper cause was found, a determination implicit in the arbitrator's conclusion that the captain's conduct reflected gross carelessness. Dissenting from the denial of a rehearing en banc, however, Judge Williams maintained that there was no basis in the contract to justify withdrawing the issue of discipline from the reach of the arbitration clause. Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'r., 897 F.2d 746 (5th Cir. 1990) (Williams, J., dissenting from denial of rehearing en banc). He pointed to other provisions of the collective bargaining agreement which subjected discharge cases to the grievance machinery of the contract, and concluded that the term 'case' included punishment as well as liability. This represented a construction of the contract entitled to judicial deference under the prevailing Supreme Court opinions. Finally, Judge Williams criticized the tendency to assert that an "incorrect interpretation of the contract means that the arbitrator exceeded his or her jurisdiction," 897 F.2d at 750, an approach he concluded would send the wrong signal to the losing parties in labor arbitration proceedings.

152. The student research assistant study of published arbitration challenge decisions in
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exist. Since Misco, however, those courts which have relied on public policy to reject labor arbitration awards have been careful to delineate the source of the public policy on which they rely, referring to statutes and regulations to support the claim that the public policy in fact exists. But the courts remain split as to how the public policy must relate to the arbitration award. For some, the award itself must violate public policy, a standard unlikely to be met.

federal district and appellate courts, supra note 130, revealed that of cases in which the central issue was a public policy argument, five of ten appellate decisions and six of twelve district court decisions resulted in the enforcement of the arbitrator's award. Often, however, a public policy claim will be joined with a more vigorously pursued argument that the award did not draw its essence from the collective bargaining agreement. Id.


E.g., Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840 (2d Cir. 1990); Delta Air Lines, Inc. v. Airline Pilots Ass’n, 861 F.2d 665 (11th Cir. 1988); Iowa Elec. Light & Power Co. v. Local Union No. 204, Int’l Bhd. of Elec. Workers, 834 F.2d 1424 (8th Cir. 1987).

See, e.g., Interstate Brands Corp. v. Chauffers, Local Union No. 135, 909 F.2d 885 (6th Cir. 1990); Stead Motors of Walnut Creek v. Auto. Mach. Lodge No. 1173, 886 F.2d 1200 (9th Cir. 1989) (en banc). But see Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840 (2d Cir. 1990); Delta Air Lines, Inc. v. Airline Pilots Ass’n, 861 F.2d 665 (11th Cir. 1988).

since statutes and regulations are not typically addressed to the specific issues labor arbitrators confront. Other courts, however, are satisfied if the public policy simply relates to the arbitrator's award, even if there is no direct conflict.\textsuperscript{157}

Perhaps best illustrating the contrasting positions are the panel and en banc rulings of the Ninth Circuit Court of Appeals in \textit{Stead Motors}.\textsuperscript{158} The Ninth Circuit panel had refused to enforce an arbitrator's award reinstating an auto mechanic who had failed to properly tighten the lug nuts on the wheel of a car.\textsuperscript{159} The mechanic had been involved in a prior similar incident, and had also ignored clear instructions from his supervisor on how the task was to be performed.\textsuperscript{160} The panel found the award to violate California public policies in favor of the operation of safe vehicles on the roads, as well as safety requirements implicit in state licensure of auto repair businesses.\textsuperscript{161} The Ninth Circuit sitting en banc reversed the panel, however, because it could find no specific public policy violated by the arbitrator's reinstatement award.\textsuperscript{162} Even if California had a public policy in favor of requiring that all vehicles operated on public roads be in a safe condition, the reinstatement of a mechanic who had been discharged for releasing a vehicle in an unsafe condition was not an explicit part of that policy.\textsuperscript{163}

The public policy issue has come to the forefront in a number of cases involving the reinstatement of employees who have engaged in unsafe acts.\textsuperscript{164} Some recent decisions indicate that use of the public policy theory may be expanding, as illustrated by decisions barring the reinstatement of employees found to have engaged in sexual harassment.\textsuperscript{165} These cases go beyond safety risks and appear to rely

\begin{itemize}
  \item \textsuperscript{157} E.g., \textit{Newsday, Inc. v. Long Island Typographical Union}, 915 F.2d 840 (2d Cir. 1990); \textit{Iowa Elec. Light & Power Co. v. Local Union No. 204, Int'l Bhd. of Elec. Workers}, 834 F.2d 1424 (8th Cir. 1987).
  \item \textsuperscript{158} \textit{Stead Motors of Walnut Creek v. Auto. Mach. Lodge No. 1173}, 886 F.2d 1200 (9th Cir. 1989) (en banc), \textit{cert. denied}, 110 S. Ct. 2205 (1990). (The panel decision is reported at 843 F.2d 357 (9th Cir. 1988)).
  \item \textsuperscript{159} \textit{Id.} at 1204.
  \item \textsuperscript{160} \textit{Id.} at 1202.
  \item \textsuperscript{161} \textit{Id.} at 1204.
  \item \textsuperscript{162} \textit{Id.} at 1217.
  \item \textsuperscript{163} \textit{Id.} at 1216.
  \item \textsuperscript{164} E.g., \textit{Delta Air Lines, Inc. v. Airline Pilots Ass'n}, Int'l, 861 F.2d 665 (11th Cir. 1988); \textit{Iowa Elec. Light & Power Co. v. Local 204, Int'l Bhd. of Elec. Workers}, 834 F.2d 1424 (8th Cir. 1987).
  \item \textsuperscript{165} At least two cases have extended the public policy principle to vacate awards reinstating employees who have engaged in sexual harassment. \textit{See Newsday, Inc. v. Long Island}
\end{itemize}
upon the potential economic consequences to the employer if the employee is retained.\textsuperscript{166} Even though there is no explicit legal barrier to the reinstatement of employees who have committed unsafe acts or engaged in sexual harassment, courts invoking public policy in such cases to reject arbitration awards have concluded that interference with the arbitration process is nevertheless permissible.\textsuperscript{167}

If the premises of the essence of the contract test of \textit{Enterprise Wheel} and the public policy theory approved by the Supreme Court in \textit{Misco} are accepted, the arbitrator's judgment as to the merits of the dispute between the union and the employer should remain intact. Rejection of the award might follow if the arbitrator lacked authority to deal with the dispute in a particular manner, or because external law was inconsistent with the arbitrator's ruling, but in neither case would the court review factual determinations reached by the arbitrator, nor would it reverse because the arbitrator misinterpreted the contract. However, even though this is how the Supreme Court appears to have structured the applicable review standards, it does not explain what lower courts have been doing with complete accuracy.

In many instances lower courts appear to have been directly reviewing the merits of labor arbitration awards.\textsuperscript{168} These can be characterized as situations in which the courts have concluded that an arbitrator has ignored the plain language of the contract or acted in manifest disregard of the law.\textsuperscript{169} Where these approaches are used the courts have apparently felt that the arbitrator was so obviously wrong in his or her ruling, or so totally indifferent to controlling legal principles, that the award cannot be allowed to stand.\textsuperscript{170}

In \textit{TVA v. Salary Policy Employee Panel},\textsuperscript{171} for example, the arbitrator concluded that an employee had been properly terminated for travel voucher fraud, but that the duration of her suspension without pay pending investigation was excessive.\textsuperscript{172} Her discharge was
upheld, but the arbitrator awarded her four weeks of backpay.\footnote{Id.} The TVA sought to vacate the award, and the district court observed that its authority to reject the arbitrator's judgment extended to situations in which

(1) an award conflicts with express terms of the collective bargaining agreement,
(2) an award imposes additional requirements that are not expressly provided in the agreement,
(3) an award is without rational support or cannot be rationally derived from the terms of the agreement, and
(4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement . . . \footnote{Id.}

In its view, "an arbitration award that implicitly alters plain or unambiguous contractual language does not draw its essence from the collective bargaining agreement and thus may not be judicially enforced."\footnote{Id.} Using this approach, the court concluded that the arbitrator wrongly interpreted the contractual promptness requirement to apply to suspensions pending investigation, and therefore the backpay award could not stand.\footnote{Id.}

The opinion of the Eighth Circuit Court of Appeals in George A. Hormel & Co. v. United Food & Commercial Workers, Local 9\footnote{879 F.2d 347 (8th Cir. 1989).} is illustrative of a somewhat more circumscribed approach to judicial review, but one which nevertheless asserts authority to evaluate the merits of the arbitrator's award. The dispute arose out of the decision of the company to end hog slaughtering operations at its plant in Austin, Minnesota.\footnote{Id. at 348.} It then remodeled the facility, leased part of it to another company, and proceeded to purchase slaughtered meat from the lessee for its own processing and packaging.\footnote{Id. at 348-49.} An arbitrator ultimately agreed with the union's claim that the contract required...
that any slaughtering taking place within the company’s facility had to be performed by union members, even in the context of the leasing arrangement. The company, in contrast, maintained that “the contract language pertaining to leasing and subcontracting is so clear and unambiguous” that it was “not susceptible to the construction given.”

When the company’s challenge to the arbitration award came before the Eighth Circuit Court of Appeals for review, the court cited law from the Tenth Circuit calling for deference to an award “unless it can be said with positive assurance that the contract is not susceptible to the arbitrator’s interpretation.” The court then concluded that such a standard, on its own, would not warrant interfering with the arbitrator’s judgment. Nevertheless, the court observed that

where the award’s result is one so contrary to common experience and logic that it is more likely than not that such result was not the intent of the parties, and where additional facts exist that strongly indicate that the arbitrator did not premise his award on the contract, notwithstanding his words to the contrary,

vacation of the award would be appropriate. The Eighth Circuit found this to be the proper solution in Hormel, relying upon the additional facts that the arbitrator failed to discuss contract language the court felt was relevant, and gave no explanation of how the contract was construed without such a discussion.

No doubt, when a court concludes that an arbitrator is not merely wrong, but very wrong in his or her award, there is a strong pull to correct the perceived mistake. But even though the parties have agreed to have contractual interpretations made by an arbitrator whom they have had a hand in selecting, how final and binding do they truly want the arbitrator’s award to be? And if that is not clear, which is likely to be the case, what degree of finality is it appropriate for the courts to grant to the labor arbitration process? Obviously, some courts have concluded that the merits of the labor arbitrator’s award are not immune from review and have been straining to justify

180. Id. at 349.
181. Id. at 350.
182. Id. at 350 (quoting Sterling Colo. Beef Co. v. United Food & Commercial Workers, 767 F.2d 718, 720 (10th Cir. 1985); accord NCR Corp. v. Machinists Lodge 70, 128 L.R.R.M. (BNA) 3024, 3027-28 (D. Kan. 1988)).
183. Id. (emphasis in original).
184. Id. at 351.
their actions despite the fact that Enterprise Wheel and Misco appear to discourage this approach.\textsuperscript{185}

The inevitable dilemma which arises every time a court rejects an arbitration award as inconsistent with the clear terms of the contract is that clarity is far from an objective fact. In Berklee College of Music v. Local 4412,\textsuperscript{186} for example, the contract required grievances arising from actions outside a department or division to be filed within ten days and provided that time limits were only waivable with written mutual consent.\textsuperscript{187} The union, however, was four or five days beyond the ten day limit in filing its grievance, and there had been no waiver of the deadline.\textsuperscript{188} Nevertheless, because of the absence of any specification of the legal consequences of a late filing, the arbitrator concluded that he had the authority to ignore \textit{de minimis} violations.\textsuperscript{189}

In supporting the enforcement of the award, the First Circuit observed that other provisions of the contract demonstrated that the parties knew how to specify the consequences of nonaction, but had failed to do so when dealing with the initial filing of a grievance.\textsuperscript{190} Moreover, the courts have found ways around seemingly absolute time limits, and this background could be applied to labor contract grievances as well.\textsuperscript{191} Even the mutual consent requirement could be explained as related to claims of waiver by the parties, but irrelevant to the application of tolling principles by the arbitrator.\textsuperscript{192} Whether right or wrong, these arguments are certainly interpretations of the contract which the Supreme Court appears to have directed that lower courts not review.

Yet, in a forceful dissent, Judge Acosta maintained that the award fell within the range of decisions subject to judicial intervention.\textsuperscript{193} He found the contractual requirements to be unambiguous and that the arbitrator "quite independently, decided that the words of

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\textsuperscript{185} See supra notes 88-125 and accompanying text.
\textsuperscript{186} 858 F.2d 31 (1st Cir. 1988), cert. denied, 493 U.S. 810 (1989).
\textsuperscript{187} Id. at 32.
\textsuperscript{188} Id.
\textsuperscript{189} Id. The arbitrator found the delay \textit{de minimis} because it was only a few days, did not harm anyone, and occurred during the first year of the contract with the result that the grievant could have thought she was governed by another provision with a fifteen day time limit. \textit{Id}.
\textsuperscript{190} Id. at 33.
\textsuperscript{191} Id. The court referred to waiver, estoppel, and equitable tolling. \textit{Id}.
\textsuperscript{192} Id. at 33-34.
\textsuperscript{193} See \textit{id}. at 34 (Acosta, J., dissenting).
\end{flushright}
the Agreement meant what he chose them to mean, nothing more nor less.” He cautioned that “reason must still rule the use and intent of our juridical language lest we fall prey to Lewis Carroll’s famous exposition that the question is not what a word means but which is to be master: the word or its user.” Arbitrators should not behave like Humpty Dumpty who said to Alice “‘When I use a word it means just what I choose it to mean—neither more nor less.”

If Enterprise Wheel and Misco mean what they say, the arbitrator’s award is immune from judicial reversal as long as it represents an interpretation of the contract on the merits rather than the creation of a judgment based upon external considerations. The majority in Berklee College of Music found this standard satisfied by virtue of arguments which served to support the arbitrator’s conclusion. In essence, Judge Acosta simply disagreed with the supporting arguments and concluded that the contract did not permit variance from the ten day filing limit. It was his view that “anything can be ‘arguable,’” and therefore “the test must really be did the arbitrator give a reasonable reading to the text of the contract he construed.” Obviously, however, such an approach would subject virtually every award to review based upon the court’s sense of the reasonableness of the arbitrator’s contractual interpretation.

E. Policies and Perspectives

There is much to be said in favor of according substantial deference to labor arbitration awards. As a pure docket control measure, the more support courts give to the finality of arbitration proceedings, the fewer cases they will be called upon to review since the losing parties will lack any incentive to litigate the validity of the arbitrator’s ruling. The effect goes further, however, in that a policy of deference will prevent labor and management from losing faith in the arbitration process as a result of continual court reversals. As a

194. Id. at 35.
195. Id.
196. Id. at 35, n.3 (quoting LEWIS CARROLL, THROUGH THE LOOKING GLASS 186-87 (Signet Classics 1960)).
197. Id. at 34.
198. Id. at 36-37.
199. Id. at 35.
200. See Chicago Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501 (7th Cir. 1991); Continental Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund, 921 F.2d 126 (7th Cir. 1990); Teamsters Local No. 579 v. B & M Transit, Inc., 882 F.2d 274 (7th Cir. 1989).
result, they will not be encouraged to dispense with arbitration en-
tirely as a useless additional step in the dispute resolution process, a
development which would produce an increase in labor contract litiga-
tion.\textsuperscript{201}

However, there is no serious disagreement with these principles,
and no serious interest expressed by courts in favor of engaging in
the wholesale review of the merits of labor arbitration awards. Rather,
the controversy centers around the question of the degree to which
they should be immune from judicial review. Labor and management
can continue to rely upon the substantial finality of most arbitration
awards, and need not pursue more disruptive and costly dispute reso-
lation mechanisms. Fortunately, in this respect the interests of the
parties coincide with national labor policy. In that case, what is rele-
vant in determining how closely courts should review labor arbitration
awards? The nature of collective bargaining and the labor arbitration
process is certainly an important factor. As courts have recognized,
collective bargaining agreements differ markedly from the usual com-
mercial contract. They are not the typical written manifestation of a
discrete agreement between contracting parties involved in a consensual
contractual arrangement. Rather, labor contracts are the result of
compelled negotiation between employers and unions. They involve
terms which are usually very general and incorporate a purpose of
establishing the contours of a working environment over a period of
time, for what is likely to be a shifting complement of workers.\textsuperscript{202}
Durational considerations alone are sufficient to insure disagreements
during the term of the contract, but the wide variety of events occur-
ing within the workplace along with inevitable workplace changes re-
sulting from such factors as new methods of production and changes
in the market, serve to increase the inevitable volume of such dis-
putes. In this environment, the arbitrator often is called upon to

\textsuperscript{201} In \textit{Groves v. Ring Screw Works, Ferndale Fastener Div.}, 498 U.S. 168 (1990), the
Supreme Court held that labor contract disputes can be litigated in federal court even where
there is no arbitration clause and the contract provided for a strike or lockout upon the ex-
haustion of the grievance procedure.

\textsuperscript{202} See generally \textit{United Steelworkers of America v. Warrior & Gulf Navigation Co.},
363 U.S. 574, 578-581 (1960); \textit{J.I. Case Co. v. NLRB}, 321 U.S. 332, 334-36 (1944); \textit{Harry
(1955). One author argues that the "agreement reached as a result of this [collective] bar-
ing becomes the rule governing the stated portion of the enterprise. It is not an agreement on
the terms on which union members will work but an agreement on the rules which manage-
ment will observe with respect to all employees". \textit{David E. Feller, \textit{A General Theory of the
mold the labor contract to specific events and circumstances unanticipated by the parties at the time the contract was agreed upon. Or, equally likely, the parties may expect uncertainties to arise during the term of the contract, but disagree on how the labor contract should apply. In such situations they may very well consent to the language of the agreement in order to complete negotiations and avert disruption, but in effect they have agreed to disagree on the meaning of the language used. Their expectation in such cases is that an arbitrator will ultimately have to settle the dispute, and each side will have the opportunity to convince the arbitrator that the interpretation they favor is the correct one.

Obviously, those who negotiate the agreement cannot precisely define all the terms and conditions under which the employees will work for the duration of the contract. However, the general language they settle upon, along with the negotiating history leading up to the contract and the past practices developed by the parties, can provide guidance to resolve the disagreements which subsequently arise. The arbitrator then gives meaning to the contract in a way that is comparable to the manner in which courts and administrative agencies interpret legislation. The arbitrator's reading of the contract in a sense becomes the contract as part of a process of continued collective bargaining, and to reverse for error is inconsistent with the very role that the arbitrator plays.

Although this may reflect the general character of the collective bargaining and labor arbitration processes, no doubt there are elements of the labor contract that do generate reasonable expectations by the parties, and for which courts appear less likely to tolerate

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203. The principles applied to the interpretation of collective bargaining agreements by labor arbitrators include relying upon the clear and unambiguous terms of the contract, if they meet this standard, along with evidence of bargaining history and past practices of the parties. *See* Elkouri & Elkouri, *supra* note 5, at 348-50, 357-59, 451-54.

204. *See supra* note 56 and accompanying text.


Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement . . . . The grievance procedure is, in other words, a part of the continuous collective bargaining process.

arbitrator creativity. As to such elements, judicial supervision of the arbitration process appears to assume aspects more akin to typical appellate review activity. This represents an area where one or more of the parties may not wish to allow the arbitrator to become part of the collective bargaining process through his or her interpretation of the contract. Instead, a more legalistic approach may be sought. If the arbitrator does not treat the dispute in this fashion, how should courts respond if review is sought?

Those who support the narrowest review standard often note that the parties have bargained for the binding interpretation of the arbitrator and courts should not thwart that expectation. However, this is somewhat of a fictional presumption. In fact, the parties may expect that the courts will intervene when the arbitrator's ruling is outside the range of the reasonable. If the parties have defined their contractual rights and responsibilities with precision, they may prefer that the arbitrator confine himself or herself to more traditional legal analysis in resolving the labor contract dispute. In that case the choice of review standards should rely on more general policy considerations rather than the somewhat misleading claims as to what the parties bargained for. Factors such as the expertise of the arbitrator, the nature of labor arbitration as a continuous part of the collective bargaining process, and the desirability of limiting federal court docket congestion would then become relevant.

The standard which emerged in Enterprise Wheel and which has continued since Misco reflects a direction from the Supreme Court that lower courts must limit their intervention into the labor arbitration process. They may review whether the arbitrator construed


207. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment . . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

Id.

208. See supra note 98 and accompanying text.


Judicial Review of Arbitration

the contract or violated explicit public policy in reaching his or her decision, but must avoid reconsidering the merits of the arbitrator’s award. 211 This direction appears to be followed for the most part by the lower courts, but with periodic exceptions. 212 In fact, it could be argued that the existing state of affairs reflects an appropriate balance among the competing interests.

But there is a downside. As noted above, it is not that labor and management will abandon arbitration as a dispute resolution mechanism. Rather, it is that labor and management, but in reality mostly management, will use the opportunity for judicial review to frustrate the arbitration process. 213 If the losing party in the arbitration proceeding is free to seek judicial review without risk, regardless of justification for the challenge, it can achieve several objectives. There is, of course, the opportunity to delay implementation of the award. But beyond this rather obvious consequence are other potential benefits. Most directly, there is the impact of increasing the cost of securing contract compliance by the opposing party. 214 This impact applies immediately to the case at hand in that costs will be incurred in defending the award in court. However, there is also the more indirect message that other contract breaches will be dealt with in the same fashion, and that filing and pursuing a grievance through to arbitration will be financially exhausting. Where this tactic is used against unions it can serve to weaken their prestige in the eyes of their membership, and thereby render them less effective in the collective bargaining process.

Are companies using this tactic to defeat union efforts at contract enforcement? It is well known that union membership has been on the decline for some time, 215 and that companies have been taking

211. Misco, 484 U.S. at 42-45.
212. See supra notes 131-99 and accompanying text.
213. A student research assistant study of published federal decisions reviewing labor arbitration awards, supra note 130, revealed that employers either sought to vacate the award or refused to comply, thereby requiring the union to seek court enforcement, in 92 of 96 appellate cases and 62 of 67 district court cases. The impact on the arbitration process, particularly as it affects unions, is considered in Christopher T. Hexter, Judicial Review of Labor Arbitration Awards: How the Public Policy Exception Cases Ignore the Public Policies Underlying Labor Arbitration, 34 St. Louis U. L.J. 77, 93, 103-09 (1989).
214. See id. at 103-09.
215. “Union membership in the U.S. in 1983 totalled 20% of workers; today it has fallen to 16%. In the private sector, the decline of U.S. unions is even more startling: 20 years ago, 30% of workers belonged to a union; today, that number is only 12.5%.” Ann Shortell, Labor at a Crossroads, PwC. Post, Nov. 1, 1991, at 18. There is some suggestion, however,
advantage of the structure of the federal labor law system in a manner which makes it far more difficult for unions to fulfill their functions. Resisting arbitration awards by seeking judicial review falls within the same pattern. To the extent that the courts show a willingness to reject arbitration awards they create a climate in which employers are encouraged to resist. This, at the very least, provides the parties with an opportunity to misuse their right to challenge a labor arbitrator's decision.

The current legal environment thus creates a dilemma arising out of the fact that the retention by the courts of a limited area for the judicial review of labor arbitration awards may have the consequence of fostering resistance to the labor arbitration process for unrelated tactical reasons. This may be true even though the courts have expressed a preference for avoiding the review of the merits of the arbitrator's award if at all possible. The challenge for the courts, therefore, is to find a way to insure that their judicial review activities do not have this undesired end result. And the mechanism courts are beginning to use with some frequency for this purpose is to award sanctions against those who have improperly sought review of the labor arbitrator's decision.

III. SANCTIONS AND THE REVIEW OF LABOR ARBITRATION AWARDS

If courts are prepared to utilize sanctions against those who improperly seek judicial review of an unfavorable labor arbitration award, a number of options are available. Each, however, has its own characteristics and prerequisites.

In many respects, Rule 11 of the Federal Rules of Civil Procedure allows the district court to impose sanctions in the broadest array of circumstances, although the sanctions must be tied to some specific filing in the district court. However, this qualification is that the rate of decline may be slowing. The Bureau of Labor Statistics of the U.S. Department of Labor reported that the percentage of workers who are members of unions was 16.1 percent in 1991, the same as in 1990. Total union membership declined, however, from 16.7 million to 16.6 million during the same period. 139 Lab. Rel. Rep. (BNA) 161-62 (1992).


217. Rule 11 requires that every pleading, motion, or other paper must be signed by the
not an obstacle in the context of efforts to review a labor arbitration award. Both the institution of a lawsuit to vacate an arbitration award as well as an action to enforce an award will require pleadings and responses. These will have to be signed by an attorney or the party in interest and are sufficient to constitute the basis for the imposition of sanctions if any are warranted.

The specific language of Rule 11 requires that every document filed in the district court must be signed by the attorney representing the party, or the party himself or herself if not represented. Substantively, the rule states that the signature constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

In interpreting Rule 11, the Supreme Court has held that sanctions may be applied under the same standard to both the party and attorney, even if the party's signature was not required. Moreover, if
Rule 11’s standards are violated, sanctions are mandatory\textsuperscript{223} and must be directed to the individual signer, not the law firm of which that individual, if an attorney, is a member, in order to fulfill Rule 11’s purpose of bringing home to the signer the personal and non-delegable responsibility created by the Rule.\textsuperscript{224} This is a reflection of the fact that Rule 11 has a “central goal of deterrence.”\textsuperscript{225}

The application of Rule 11 to suits seeking to review labor arbitration awards presents a setting that does not fit the typical pattern of Rule 11 cases. For example, it is unlikely that such cases would involve concerns as to the adequacy of the prefiling factual inquiry. To the contrary, the facts will generally be set out in the arbitration decision,\textsuperscript{226} and in any event are not supposed to be reconsidered by the court reviewing the award.\textsuperscript{227} Instead, in most circumstances, the issue presented will be whether the award draws its essence from the contract or violates an articulated and dominant public policy. The

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\item\textsuperscript{223} The text of Rule 11 provides that if the signer violates the rule’s requirements, “the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction.” Fed. R. Civ. P. 11 (emphasis added). However, while the imposition of a sanction is required, discretion remains in deciding what the sanction will be. While this may entail the award of costs and attorneys fees to the prevailing party, other factors may warrant only partial reimbursement or an alternative remedy, the goal being to impose the least severe sanction which will fulfill Rule 11’s purpose. Militier v. Downes, 935 F.2d 660, 665 (4th Cir. 1991); In re Kunstler, 914 F.2d 505, 522 (4th Cir. 1990), cert. denied, 111 S. Ct. 1607 (1991).
\item\textsuperscript{224} Pavelic & LeFlore v. Marvell Entertainment Group, 493 U.S. 120, 126 (1989). The recommendations of the Advisory Committee on Civil Rules include authorizing the use of sanctions against law firms. See Vairo, supra note 217, at 499-500.
\item\textsuperscript{225} Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990) (holding voluntary dismissal does not act as a jurisdictional bar to the imposition of sanctions under Rule 11; court of appeals must use an abuse of discretion standard in reviewing the decision to impose sanctions).
\item\textsuperscript{226} It would be possible for the labor arbitrator to issue an award which simply declared whether or not the contract had been violated, and concluded with a remedy order if one was required. In Enterprise Wheel Justice Douglas indicated that “[a]rbitrators have no obligation to the court to give their reasons for an award.” United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960). In fact, the American Arbitration Association cautions commercial arbitrators that “written opinions might open avenues for attack on the award by the losing party” and states that “[a]s a general rule, the award consists of a brief direction to the parties on a single sheet of paper.” AMERICAN ARBITRATION ASSOCIATION, A GUIDE FOR COMMERCIAL ARBITRATORS 24 (1991). However, labor arbitrators typically do issue opinions along with their awards in which they detail the facts and the arbitrator’s reasoning process. Both the Bureau of National Affairs and Commerce Clearing House provide extensive reporting of such decisions, selecting from among those submitted by arbitrators. The written opinions serve the purpose of “engender[ing] confidence in the integrity of the process and aid[ing] in clarifying the underlying agreement.” Enterprise Wheel, 363 U.S. at 598.
\item\textsuperscript{227} See supra note 117 and accompanying text.
\end{itemize}
“facts” in such a case are the arbitrator’s decision and award, the
evidence presented at the hearing as well as the record of the hearing
if any exists, the contract, and any sources allegedly establishing an
inconsistent public policy. So understood, there is not even a question
as to what the applicable law is. The controlling standards have been
firmly established by the Supreme Court in Enterprise Wheel and
Misco. 228
In both ruling on the validity of the challenge to the arbitration
award, and in deciding upon the appropriateness of sanctions, the
district court will have to determine whether the party contesting the
arbitration award is correct in his or her interpretation of the limits of
the contract. If so, obviously sanctions are not warranted. 229 Howev-
er, if the court affirms the award it must next consider whether the
challenger’s contractual claims warranted seeking judicial review.
Since the district courts have been enjoined to grant deference to the
arbitrator’s award, the strength of the challenger’s position must be
considered. A mere claim that the arbitrator was wrong in the sub-
stance of his or her decision, however, is obviously insufficient as a
basis for challenge since courts must avoid reviewing the merits of
the arbitration award. 230
It is apparent that the typical challenge to a labor arbitration
award will involve the claim that the reviewing court is legally pre-
cluded from enforcing the arbitrator’s ruling. 231 If the claim fails,
however, sanctions are not automatically appropriate. 232 Instead, the
court must evaluate the merit behind the challenger’s position. 233 In
performing this task, the court will be able to work with well-settled
standards of review and established facts which do not require inde-
pendent investigation. The only question is whether the facts, in this
case the arbitrator’s ruling and the record behind it, are within the
range of decisionmaking arbitrators are permitted. This analysis is to

228. See supra note 19 and accompanying text.
229. More specifically, sanctions would not be warranted for challenging the award, although other aspects of the litigant’s conduct in making the challenge might be sanctionable.
230. In Chicago Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501 (7th Cir. 1991), Judge Posner found that a union challenge to an arbitration award which appeared to be based on its unreasonableness was frivolous, partly due to the fact that it advanced a “discredited standard for evaluating arbitrators’ awards . . . .” Id. at 1506. The result was the award of sanctions against the union under Rule 38 of the Federal Rules of Appellate Procedure. Id. at 1507.
231. See id.
232. See id.
233. See id.
be made, moreover, in the context of a direction from the Supreme Court to accord arbitration rulings a wide measure of deference. In light of this, it would be appropriate to consider placing a burden upon the party challenging the award to demonstrate a persuasive basis for believing that the arbitrator exceeded his or her authority. Absent a sufficiently strong argument, sanctions should be invoked. Anything less fails to give adequate weight to the policies behind labor arbitration and to the deterrent objective of Rule 11 sanctions.

It is also appropriate to consider improper purposes which may lie behind refusals to abide by the arbitrator's ruling. Challenges to arbitration awards can serve to impede the contract enforcement process and financially disadvantage the opposing party. This can have long term implications for the viability of the collective bargaining relationship. Any evidence that the challenger had in other ways sought to undermine that relationship, or to wear down the opposing party by misuse of the legal process, either before a district court or before the National Labor Relations Board, would be especially relevant in determining the possible impropriety of the challenger's purpose. Economic self-help is available to both unions and management in the collective bargaining process, but once contractual agreement has been reached the parties should not be permitted to make enforcement of the labor agreement so costly that it must be abandoned.

Courts may also use their inherent authority to sanction a party's bad-faith conduct in litigation. Even though Rule 11's improper-

234. See Monsanto Co. v. Local Union No. 229, affiliated with Int'l Bhd. of Teamsters, 893 F.2d 1335 (6th Cir. 1990).

235. Many cases, however, treat the issue of sanctions in conclusory form, most frequently denying sanctions without providing any substantive analysis of the basis for the court's decision. See, e.g., Monsanto Co. v. Local Union No. 229, Int'l Bhd. Teamsters, 893 F.2d 1335 (6th Cir. 1990); Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631 (10th Cir. 1988).

236. For the unions this primarily means the right to strike, protected by section 13 of the National Labor Relations Act, 29 U.S.C. § 163 (1988). Even partial strikes, not otherwise barred by the Act because of such factors as their recognitional or secondary character under sections 8(b)(4) and (7), 29 U.S.C. § 151(b)(4), (7) (1988), are outside the scope of regulation by the National Labor Relations Board, although they may be subject to employer discipline. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960). For companies, the major economic weapons available include the lockout and power to permanently replace striking workers and temporarily replace locked out workers. American Shipbuilding Co. v. NLRB, 380 U.S. 300, 318 (1965); NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345 (1938); Harter Equip. Inc., 122 L.R.R.M. (BNA) 1219 (1986), enforced sub nom. Operating Eng'rs Local 825 v. NLRB, 829 F.2d 458 (3d Cir. 1987).

purpose standard may overlap the bad-faith test under the court’s inherent authority, sanctions may be applied under either theory.  

In one sense, however, the inherent power of the court extends to a wider range of conduct since it is not limited to specific filings in court. But at the same time a specific bad-faith requirement must be met, unlike the objective standard applicable under Rule 11. If bad faith is found, however, *Alyeska Pipeline* and *Roadway Express* permit the award of sanctions against either the attorney or the party, as is the case pursuant to Rule 11.

Additionally, sanctions are available under 28 U.S.C. § 1927 if an attorney “multiplies the proceedings in any case unnecessarily and vexatiously.” Sanctions involving the award of excess costs, expenses, and attorneys' fees may be imposed against an attorney representing the plaintiff or the defendant, and it is irrelevant who prevails in the litigation. On the other hand, Section 1927 applies only to attorneys and is not broad enough to reach acts which degrade the judicial system. Realistically, however, the applicability of Section 1927 to judicial challenges to labor arbitration awards is limited. The problem is not that the proceedings are multiplied, but rather that they are undertaken at all.

Independently, the federal courts of appeals have authority under Rule 38 of the Federal Rules of Appellate Procedure to impose sanctions where an appeal is frivolous. The sanctions may include “just damages and single or double costs to appellee.” The standard governing the award of sanctions is an objective one and focuses upon the merit in the appeal but, unlike Rule 11 for the

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239. Id. at 2137.
240. Id. at 2133.
244. Hilmon Co. v. Hyatt Int'l, 889 F.2d 250, 253 (3d Cir. 1990).
245. FED. R. APP. P. 38.
246. *Hilmon*, 889 F.2d at 253.
247. “An appeal is frivolous if it is wholly without merit.” Quiroga v. Hasbro, Inc., 943 F.2d 346, 347 (3d Cir. 1991) (*citing* Sauers v. Comm'r of Internal Revenue, 771 F.2d 64, 70
district courts, the decision to impose sanctions is discretionary even if frivolousness is found. Moreover, the mere fact that a district court ruling is upheld on appeal, even if it is a ruling imposing Rule 11 sanctions, is not in itself a basis for awarding sanctions for prosecuting the appeal. The controlling standard is the frivolousness of the appeal, not whether it originates out of a sanctionable filing in the district court. If, however, sanctions are appropriate, they may be awarded against the attorney, client, or both.

A series of cases from the Court of Appeals for the Seventh Circuit, as well as rulings from other courts, provides an illustration of how sanctions can be used in response to unwarranted efforts to overturn labor arbitration awards. The decisions demonstrate an evolution in the courts’ approach to the use of sanctions in such cases and reflect the clarifying of applicable standards. As a whole, the cases serve as a warning that the legal system has tools at its disposal to deal with misuse of the judicial process to avoid the results of bargained-for arbitration.

One important point recognized in the Seventh Circuit decisions is the fact that parties, particularly employers, may have an incentive to misuse the process of judicial review. This was articulated by Judge Posner:

We share with the union and the district court concern lest companies defeat the objectives of labor arbitration clauses that they have voluntarily negotiated by routinely refusing to honor arbitration awards without any valid grounds for doing so, in order to put the union to the expense of getting the award enforced in court. Weiler, Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRB, 96 Harv. L. Rev. 1769, 1787-89, 1797 (1983), presents evidence that some companies have decided tothumb their noses at the remedies that labor law provides for unions, in an

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n.9 (3d Cir. 1985), cert. denied, 476 U.S. 1162 (1986).
248. Sauer, 771 F.2d at 70 n.9.
249. Id.
252. See infra notes 255, 259-60, 263, 266, 279, 284 and accompanying text.
253. See infra notes 261, 281, 289 and accompanying text.
254. See infra notes 255, 259-61, 263, 266, 279, 281, 284, 289 and accompanying text.
255. Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1168 (7th Cir. 1984), cert. denied, 469 U.S. 1160 (1985).
effort to convince workers that unions are paper tigers.\textsuperscript{256}

Nevertheless, the Seventh Circuit has been reluctant to directly accuse either the parties or their attorneys of misusing access to the legal system for this purpose.\textsuperscript{257} An improper motivation may lie behind the effort to seek judicial review of the labor arbitrator's award, but proving it is another matter. Indeed, it was this very problem of a subjective intent requirement which prompted the amendment of Rule 11\textsuperscript{258} to allow the courts to impose sanctions for the violation of more objective standards.

The frequency of actions to overturn labor arbitration awards, however, has not escaped attention even if the courts are unwilling to directly point a finger of blame for this development. Along these lines Judge Posner has observed that "[t]his court has been plagued by groundless lawsuits seeking to overturn arbitration awards,"\textsuperscript{259} while his colleague, Judge Easterbrook, commented that "[a] depressingly large number of recent cases grows out of refusals to use or abide by the grievance-arbitration machinery of collective bargaining agreements."\textsuperscript{260} An equivalent expression of concern came from the First Circuit which commented that "we are, with exasperative frequency confronted by challenges to such decisions brought by parties who are apparently still under the delusion that, as a matter of course, the losing party is entitled to appeal to the courts any adverse ruling by an arbitrator."\textsuperscript{261}

Judge Easterbrook also expressed concern about the consequences of the flood of legal challenges to labor arbitrator awards.\textsuperscript{262} In his

\begin{footnotes}
\item[257] See supra note 256 and accompanying text. See infra notes 259-60, 263, 266, 279, 284 and accompanying text.
\item[259] Hill v. Norfolk & W. Ry., 814 F.2d 1192, 1203 (7th Cir. 1987).
\item[261] Posadas de Puerto Rico Assocs., Inc. v. Asociacion de Empleados de Casino de Puerto Rico, 821 F.2d 60, 61 (1st Cir. 1987).
\item[262] Bailey, 819 F.2d at 691.
\end{footnotes}
words,

[arbitration] will not work if legal contests are its bookends: a suit to compel or prevent arbitration, the arbitration itself, and the suit to enforce or set aside the award. Arbitration then becomes more costly than litigation, for if the parties had elected to litigate their disputes they would have had to visit court only once.\(^{263}\)

He further observed that "[t]hose who refuse to invoke the [arbitration] process or abide by the awards endanger the productivity of the work place and divert judicial time from the disputes that courts are supposed to resolve."\(^{264}\) These general concerns may help to explain Judge Posner's observation that "some courts have applied what appears to be a less demanding standard to fee requests in labor arbitration cases than in other cases."\(^{265}\) In case the message was not getting across, Judge Posner cautioned: "Lawyers practicing in the Seventh Circuit, take heed!"\(^{266}\)

In applying the sanctioning power, Seventh Circuit decisions reflect an effort to carefully analyze the claim of the party challenging the arbitration award.\(^{267}\) In Miller Brewing, for example, the employer had questioned the arbitrator's conclusion that the governing contract gave employees of one employer preferential hiring rights with respect to another employer, where both had been members of a multi-employer bargaining unit.\(^{268}\) A challenge was also raised concerning the arbitrator's choice of a remedy granting reinstatement rights to the affected employees.\(^{269}\) While the court saw no basis for the challenge to the award interpreting the scope of preference rights,\(^{270}\) it did find sufficient merit in the challenge to the

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263. Production & Maintenance Employees' Local 504 v. Roadmaster Corp., 916 F.2d 1161, 1163 (7th Cir. 1990).

264. Bailey, 819 F.2d at 691.

265. Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1168 (7th Cir. 1984). Judge Posner noted other reasons including the limited number of grounds for attacking arbitration awards as well as federal policy in favor of the labor arbitration process. Id.

266. Dreis & Krump Mfg. Co. v. International Ass'n of Machinists, 802 F.2d 247, 256 (7th Cir. 1986).

267. Bailey, 819 F.2d at 692-93; see also PaineWebber Inc. v. Farnam, 843 F.2d 1050 (7th Cir. 1988) (analyzing Plaintiff-Appellant's response to an order to show cause why sanctions should not be imposed for their appeal of the district court's order to go to arbitration).

268. Miller, 739 F.2d at 1159.

269. Id. at 1165.

270. Id. at 1161-63 (concluding that the award drew its essence from the collective bargaining agreement, and therefore was not subject to judicial reversal. The hiring preference at
arbitrator's remedy.\textsuperscript{271} Given that the company prevailed, at least in part, with respect to its challenge the court concluded that sanctions were inappropriate.\textsuperscript{272}

Since the case arose prior to the amendment to Rule 11, the Seventh Circuit evaluated the appropriateness of sanctions awarded by the district court under a bad-faith test.\textsuperscript{273} It observed that even if part of the challenge may have been inappropriate, "we doubt whether it would be worthwhile, at least as a general rule, to divide a suitor's claims (or defenses) into frivolous and non-frivolous, and award attorney's fees in respect to the frivolous claims but not the others."\textsuperscript{274} However, in another case, where the "appeal in [the] case was a complete loser, and most of the grounds of appeal were patently groundless,"\textsuperscript{275} Rule 38 sanctions for a frivolous appeal were awarded.\textsuperscript{276} Partial merit, therefore, is not in and of itself sufficient to escape the imposition of sanctions if the totality of the challenge is baseless.

Normally one would expect that sanctions would be sought by the prevailing party. However, the Seventh Circuit made it clear that it had the authority to impose sanctions on its own motion where appropriate.\textsuperscript{277} A hearing on the issue of sanctions might also be considered the norm.\textsuperscript{278} But where the circumstances of the misconduct are sufficiently clear, the Seventh Circuit approved dispensing with this procedure.\textsuperscript{279}

\textsuperscript{271} Id. at 1163-65 (finding that the arbitrator's order requiring the preferential hiring of 39 laid-off employees, without any consideration of whether they had satisfactory work records, did not have a basis in the collective bargaining agreement and was therefore unenforceable).

\textsuperscript{272} Id. at 1167-68.

\textsuperscript{273} Id. at 1162.

\textsuperscript{274} Id. at 1168.

\textsuperscript{275} Hill v. Norfolk & W. Ry., 814 F.2d 1192, 1200 (7th Cir. 1987).

\textsuperscript{276} Id. at 1200.

\textsuperscript{277} Hill v. Norfolk & W. Ry., 814 F.2d 1192 (7th Cir. 1987). This authority is now specifically provided in the amended version of Fed. R. Civ. P. 11.

\textsuperscript{278} In some circumstances a hearing on the appropriateness of sanctions may be required, as recognized by the Fourth Circuit Court of Appeals. When there are issues of credibility, disputed questions of fact, and rational explanations of purpose given, an evidentiary hearing may well be necessary to resolve the issues. This is particularly true when large sanctions are being considered on the ground of improper purpose as well as failure to comply with the first two prongs of Rule 11. \textit{In re} Kunstler, 914 F.2d 505, 520 (4th Cir. 1990).

\textsuperscript{279} Teamsters Local No. 579 v. B & M Transit, Inc., 882 F.2d 274, 279 (7th Cir.
Determining whether a challenge to an arbitration award is so devoid of merit, or has been pursued for some improper purpose, so that sanctions are appropriate, is at best a difficult proposition. However, the risks of misuse of the right to seek review of an arbitration award are substantial enough, and the goal of having the parties abide by the arbitration process clear enough, that courts should not shrink from invoking sanctions where appropriate. In cases where aspects of the law of arbitration review are unclear, as has been the case with respect to the role of public policy, challenges should not automatically lead to sanctions, at least until the law is clarified.

Elsewhere, however, the factors which support the highly deferential standard for the review of labor arbitration awards should lead courts to a greater willingness to sanction parties who resist compliance, although ultimately a rejection of sanctions by the district court can only be reversed if it constitutes an abuse of discretion.

In most circumstances, a legal challenge to an arbitration award will allege either that the award did not draw its essence from the contract or that it violated public policy requirements. In each case the standards are by now relatively well settled, and the only question will be whether the assertion that either or both of the tests were violated is sufficiently meritorious to withstand the claim that sanctions are appropriate. Given the volume of cases explicating the relevant tests, there is virtually no excuse for getting them wrong. Thus, in one recent Seventh Circuit case, Chicago Typographical Union No. 16 v. Chicago Sun-Times, where the union attorney interpreted the essence of the contract test to essentially require the

1989); Hill, 814 F.2d at 1201-02.

280. While the Supreme Court has recognized that public policy may warrant refusing to enforce an arbitration award, United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987), it has not indicated whether or not the award must directly contradict a statute or regulation before the public policy standard may be invoked. At present, the Circuits are in disagreement on this point. See supra notes 153-67 and accompanying text.

281. Brigham & Women's Hosp. v. Massachusetts Nurses Ass'n, 684 F. Supp. 1120 (D. Mass. 1988) (holding that sanctions were denied where public policy challenge to an arbitration award reinstating a nurse occurred during period of uncertainty as to the content of the public policy doctrine).

282. E.g., Walters Sheetmetal Corp. v. Sheetmetal Workers Local No. 18, 910 F.2d 1565, 1568 (7th Cir. 1990). Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990), confirmed that the abuse of discretion standard is applicable to reviewing Rule 11 sanction decisions.

283. Challenges to the procedural fairness of the arbitration are infrequent and rarely successful. But cf: Pacific & Arctic Ry. v. United Transp. Union, 952 F.2d 1144 (9th Cir. 1991) (vacating arbitration award on the grounds that arbitrator's conduct amounted to fraud).

284. 935 F.2d 1501 (7th Cir. 1991).
arbitrator's interpretation to be reasonable, rather than simply arise out of the contract, sanctions were applied. 285

Judge Posner concluded in *Chicago Typographical Union* that the union's appeal was frivolous in both identifying an inappropriate standard and in failing to deal with potentially controlling prior case law. 286 At the same time, however, he recognized that the case "... might have been made to seem close, too, if the union had followed the canonical approach, which is to argue that the arbitrator based his award on something other than his understanding of the contract." 287 Certainly, counsel made his argument worse by misconstruing the controlling standard. 288 However, merely making the case seem close by stating the standard correctly may not necessarily provide sufficient control. All attorneys would have to do to satisfy the test would be to allege that the arbitrator's award did not draw its essence from the contract or violated public policy, and the result would be that their challenge would be immune from sanctions. However, if the argument that the actual standard has been violated is without support, sanctions for instituting the legal challenge are appropriate for that reason alone.

On the other hand, where the basis for challenging the arbitration award is more substantial, sanctions should not be invoked. An illustration is provided by *Teamsters Local Union No. 760 v. United Parcel Serv., Inc.* 289 There an arbitrator had ordered reinstatement of an employee with full back pay and benefits, retaining jurisdiction for 60 days to resolve computational issues. 290 After the expiration of the 60 days, the company issued a back pay check, but the union argued that the company failed to comply with the back pay order because there was no compensation for overtime in the payment. 291 The parties agreed to submit their dispute back to the arbitrator for the resolution of two issues. 292 The first was whether the failure to raise the question of back pay computation during the 60-day period was a waiver of any union objection to the company's back pay

285. *Id.* at 1507.
286. *See id.*
287. *Id.*
288. *See id.*
289. 921 F.2d 218 (9th Cir. 1990).
290. *Id.*
291. *Id.* at 219.
292. *Id.*
calculation and, second, if not, was overtime required. The arbitrator’s ruling was that the union had waived the right to have the arbitrator clarify the award in accordance with the jurisdiction the arbitrator had retained.

Before the arbitrator and in a subsequent suit to enforce the original arbitration award, the union maintained that it had a right to file suit to enforce the original arbitration ruling, much as if the company had ignored the award entirely. The union believed that the district court in such a case would have remanded the matter back to the arbitrator for clarification. One could therefore view the direct referral to the arbitrator as simply short cutting this process. The fact that the arbitrator believed that his reservation of jurisdiction did not cover the union’s complaint would not necessarily mean that a suit to compel compliance with the award was no longer available. While the union may have effectively waived a direct referral back to the arbitrator, this need not also include a waiver of the right to seek judicial enforcement of the award.

At the district court level the union’s argument was rejected. But the district court also concluded that it was both frivolous and legally unreasonable, and therefore sanctions were awarded against the union. On appeal, the Ninth Circuit affirmed the district court’s decision and award of Rule 11 sanctions, although denying a company request for sanctions on appeal pursuant to Rule 38. In essence, both courts appeared to take the position that by directly returning to the arbitrator for a clarification of the award, the union lost the opportunity to seek enforcement of the award in district court under its original terms.

Had the union not returned directly to the arbitrator and instead filed an action to secure full compliance with the arbitrator’s award, an issue would have been raised as to whether the 60-day retention of jurisdiction by the arbitrator meant that a lawsuit filed after that point

293. Id.
294. Id.
295. Id. at 220.
296. Id. at n.1. In Cannelton Indus. v. District 17, United Mine Workers, the Fourth Circuit Court of Appeals observed that where an arbitrator’s reasons for an award are “so ambiguous as to make it impossible for a reviewing court to decide whether an award draws its essence from the agreement, the court may remand the case to the arbitrator for clarification.” 951 F.2d 591, 594 (4th Cir. 1991).
297. Teamsters Local Union No. 760, 921 F.2d at 220.
298. Id.
299. See id.
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precluded only arbitral clarification, or whether it constituted a waiver by the union of its claim for overtime in a district court enforcement action as well. Surely the arbitrator’s retention of jurisdiction for 60 days could be viewed as limited to his own jurisdiction to clarify without barring a court ruling or clarification by another arbitrator should a dispute arise after the 60-day period but within the time frame for an enforcement action in federal court. So understood, the legal issue is a subtle one raising questions as to the jurisdictional boundaries of arbitrators and courts where there is a dispute as to whether full compliance with the arbitration award has been achieved. Calling the union’s argument frivolous and legally unreasonable, and awarding sanctions for raising it, is an overreaction which suggests that the district court simply did not understand the problem.

When courts are considering the award of sanctions for attacks on labor arbitration awards it is essential that the specific claims of the challenging party be evaluated. If the claims fall within the normal pattern of allegations that the essence of the contract test and public policy standards are violated, the challenger should be forced to come up with a reasonably strong argument to justify the effort to seek judicial review. Otherwise, the arbitration award should have its final and binding character, and the delay and expense entailed in legal proceedings reviewing the award should subject the challenger to appropriate sanctions. Cases that do not fit this standard mold, such as United Parcel Service, require more refinement in the court’s analysis, and are more likely to be sufficiently meritorious and therefore ineligible for an award of sanctions.

IV. CONCLUSION

For more than thirty years the labor arbitration process has been in theory governed by the highly deferential judicial review standard established by the Supreme Court in Enterprise Wheel. During this period, however, lower courts have frequently departed from the Court’s directive to avoid reviewing the merits of the arbitrator’s award. Instead, many decisions go beyond an evaluation of the award’s adherence to contractual requirements and consistency with explicit public policy commands. These decisions typically assert

300. 921 F.2d 218 (9th Cir. 1990).
302. See supra notes 131-99 and accompanying text.
303. Id.
that the arbitrator ignored plain contract language or acted in excess of his or her jurisdiction.\textsuperscript{304}

In numerical terms, it may well be that the incidence of judicial reversal of labor arbitration awards is low.\textsuperscript{305} But this does not mean that judicial review of the merits of the arbitration award, when it occurs, is of little consequence. To the contrary, judicial opinions indicating a willingness to second-guess the arbitrator's judgment may serve to encourage resistance to the labor arbitration process generally. This can increase the cost of securing contract compliance, weaken the collective bargaining process, and perhaps even induce some abandonment of arbitration as a dispute resolution mechanism in labor-management relations.

On the other hand, it is difficult to imagine courts declining any role in the review of the labor arbitration process. At the very least, judicial supervision is required in circumstances involving public law rights which arise in the labor arbitration context,\textsuperscript{306} but further control for the rogue arbitration decision is to be expected as well. Anything less would leave labor arbitration virtually unreviewable, and might well lead the parties in the collective bargaining process to exclude important issues from the labor contract's arbitration clause.

Thus far the conflicting policies have produced a formal review standard which is highly deferential to the labor arbitrator's decision, alongside a parallel array of cases in which review of the arbitrator's award is willingly undertaken by the courts. But given the public policy in favor of respecting the finality of the arbitration process, the existence of what is supposed to be a narrow sphere for the review of labor arbitration awards should not open the door to unwarranted challenges by the parties to their arbitration losses. Since it is unlikely that the courts will respond to this problem by eliminating or even narrowing the arbitration review standard, some other mechanism is required. The more vigorous use of sanctions for unwarranted efforts to seek judicial review of an arbitration award represents an appropriate response to this dilemma.

In other areas, particularly cases involving civil rights, there has

\textsuperscript{304} See supra notes 126-51 and accompanying text. There are also varying views as to the role of public policy in the enforcement of labor arbitration awards. While the courts agree that the public policy must be explicitly reflected in statutes or regulations, there is disagreement over how directly the arbitration award and public policy must conflict before enforcement of the award may be denied. See supra notes 152-99 and accompanying text.

\textsuperscript{305} See supra note 81.

\textsuperscript{306} See supra note 153.
been criticism that sanctions imposed under the revised Rule 11 have served to deter the filing of meritorious lawsuits.\footnote{See generally Melissa L. Nelken, Sanctions Under Amended Federal Rule 11 - Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 GEO. L.J. 1313 (1986).} This concern, however, does not apply to labor arbitration since there is a strong public policy in favor of the finality of the arbitrator's award. There is also a high risk that resistance to the arbitration process may be used to achieve other goals in the collective bargaining process, such as increasing the cost of securing contract compliance and undercutting the status of the opposing collective bargaining representative. In this environment, sanctions for unwarranted litigation are clearly appropriate.

Since the standards for review of labor arbitration awards are well defined, the major issue in deciding whether to impose sanctions will most often be whether the claim that the award did not draw its essence from the contract or violated explicit public policy commands has a reasonable basis in fact. These claims should be carefully analyzed by the reviewing court to determine whether there is an adequate basis to justify the cost of the delay in complying with the arbitrator's decision. Sanctions may not be appropriate in every arbitration challenge that fails, but they should be employed where the attack on the arbitrator's award lacks sufficient merit. In the final analysis, this should serve to protect the finality of the labor arbitration process as a whole, while retaining the opportunity of judicial review in appropriate cases.