Protecting the Parties' Bargain After Misco: Court Review of Labor Arbitration Awards

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ARTICLES

Protecting the Parties’ Bargain After Misco: Court Review of Labor Arbitration Awards†

DOUGLAS E. RAY*

INTRODUCTION

In a typical collective bargaining agreement, a union and an employer agree to a dispute resolution procedure culminating in final and binding resolution of grievances arising under the agreement.¹ This article discusses the degree to which the benefit of that bargain, final and binding arbitration of disputes² as to the meaning and application of the agreement, can be

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1. It is estimated that 99% of collective bargaining agreements provide for binding arbitration of contract disputes. 2 Collective Bargaining Negot. & Cont. (BNA) 51.5 (1986).

2. Labor arbitration is a stage of dispute resolution usually reached only after a number of preliminary steps have been taken to resolve the dispute. The process begins with an employee filing a grievance with the employer. If the dispute is not resolved, the union and employer discuss the matter verbally or in writing in accordance with the various steps of the contractual grievance procedure. If the dispute is not resolved by these means, as most are, the union must decide whether to process the grievance to the final step—arbitration. If the union demands arbitration, most agreements require the parties to select a neutral arbitrator and agree on a time and place for a hearing. If the matter is not settled before the hearing, as many are, the parties proceed to a hearing, which may involve legal representation and the
eroded by a federal court asked to review the award of a labor arbitrator.

On the face of things, it might appear that intense judicial scrutiny of labor arbitrators' awards would be a good thing. Such awards deal with compensation, discharge, plant relocation, subcontracting and many other issues that affect the rights of employers, unions and the millions of employees covered under collective bargaining agreements. When parties negotiate a collective bargaining agreement, they expect their bargain to be protected. Because federal judges are legally trained, are chosen through a careful and public selection process and deal regularly with a broad range of contract interpretation issues, their scrutiny would seem welcome. The more intense the scrutiny, it would seem, the more likely the parties' bargain will be protected from possible misreading by a labor arbitrator who may not be legally trained.

Such appearances are misleading. Although some judicial review is necessary to protect the sanctity of labor arbitration, more review is not necessarily better than some review. Indeed, the opposite is true for a number of reasons unique to labor arbitration. Labor arbitrators, unlike judges, are selected by the parties themselves. They deal with, and are presumed to be expert in, the narrow range of issues involved in interpreting labor contracts. Federal judges, by contrast, are responsible for a broad range of legal areas and cannot quickly become expert in the "law of the shop." In addition, the transaction costs of frequent judicial review are substantial. Whatever its outcome, the review process undercuts the speed and finality that make labor arbitration a linchpin of national labor policy.\(^3\)

The cost of court review is substantial delay which undercuts the real bargain of the parties—rapid resolution of industrial disputes.\(^4\) Finally, the subject raises questions with regard to the proper role of a federal judge asked to review the product of a mechanism for alternate dispute resolution. It is not easy for a judge, immersed in notions of federal judicial precedent, to stop "judging" when he or she believes a different result was warranted.

production of a hearing transcript. While the format is admittedly adversarial, arbitration procedures are less formal than those required in a court of law. The arbitrator determines his or her resolution of the issues, most often through a written award and opinion. Most collective bargaining agreements provide that such determination by the arbitrator shall be "final and binding." For an overview of the labor arbitration process, see F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS (4th ed. 1985).

3. In United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960), the Court recognized that:

In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

4. For a discussion of the long delays that occur when a court reviews an arbitration award, see infra note 75 and accompanying text.
than that reached by the labor arbitrator. A failure to curb this natural instinct will result in "judicializing" the labor arbitration process, thereby robbing it of its unique value to the working men and women of this country.

The tension resulting from the strong national labor policies favoring finality of labor arbitration awards and the perception by courts that some review is necessary has resulted in conflicting decisions and standards in the lower courts over the past number of years. While all courts purported to defer to arbitrators' awards and to apply the standards set forth in the Supreme Court's 1960 decision in United Steelworkers v. Enterprise Wheel & Car Corp., in fact they reached different results in cases evaluating their authority to review for error arbitrators' interpretations of contracts, the extent of their authority to overrule arbitrators who vary from explicit contract language, the extent of arbitrators' authority to consider law or public policy, and the finality of arbitration awards when tested against various public policy concerns. It is against this background that, on December 1, 1987, the Supreme Court issued its decision in United Paperworkers International Union v. Misco, Inc., in which it broadly reaffirmed the federal policy of settling labor disputes by arbitration without court intervention and insulating arbitral decisions from judicial review. The opinion fails, however, to explicitly deal with a broad range of problems on which the courts of appeals are split. Some courts have asserted an authority to overturn arbitration awards for certain mistakes of fact. Others have inquired into the arbitrator's interpretation and application of the contract, asking whether the arbitration award is "completely irrational," "an egregious deviation from the norm" or a "plausible interpretation." While the Misco opinion includes broad language that courts are not to overturn arbitration awards either for errors of fact or interpretation, the Court's failure to even acknowledge the existence of the substantial and

5. 363 U.S. 593 (1960). In that case, the Court set forth the test for review of labor arbitration awards, stating that as long as the arbitrator's award "draws its essence" from the collective bargaining agreement, it must be enforced. Id. at 597. The Supreme Court recently reaffirmed this deferential standard of review in W. R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers, 461 U.S. 757, 764 (1983):

When the parties include an arbitration clause in their collective bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "draw its essence from the collective bargaining agreement," a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous.

7. See infra notes 83-84 and accompanying text.
8. See infra notes 87-89 and accompanying text.
9. See infra note 91 and accompanying text.
10. See infra note 90 and accompanying text.
conflicting lower court precedent and academic commentary in the area make the opinion incomplete and a less effective guidepost than it could have been.

This article will analyze the proper role of a post-\textit{Misco} court asked to vacate or enforce the award of a labor arbitrator under Section 301 of the Labor Management Relations Act. After discussing the \textit{Misco} decision and other Supreme Court cases establishing the role of labor arbitration in the context of national labor policy, the article will first set forth the strong reasons why courts should generally defer to the rulings of labor arbitrators.

\textbf{12.} See \textit{infra} notes 60-68.


The \textit{Misco} Court seems to have resolved the question by holding, first, that the Act does not apply to enforcement of collective bargaining agreements and, second, that courts may look to the Act for guidance. The Court did not, however, explicitly make note of the split in circuits or the extent of the controversy. Rather, it dealt with the issue by footnote, stating:

\begin{quote}
The Arbitration Act does not apply to "contracts of employment of . . . workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, but the federal courts have often looked to the Act for guidance in labor arbitration cases, especially in the wake of the holding that § 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, empowers the federal courts to fashion rules of federal common law to govern "[s]uits for violation of contracts between an employer and a labor organization" under the federal labor laws (citations omitted).
\end{quote}

108 S. Ct. at 372 n.9. The Court then went on to make reference to Section 10(c) of the Act, 9 U.S.C. § 10(c), in analyzing the arbitrator's refusal to consider evidence. \textit{Id.} Section 10 of the Act provides that a district court may vacate an arbitration award:

(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.
(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.


\textbf{14.} See \textit{infra} notes 22-59 and accompanying text.

\textbf{15.} See \textit{infra} notes 60-75 and accompanying text.
and examine the extent and impact of delay created by court review. Second, the standards under which courts have purported to overturn arbitration awards for "gross error" or "irrational" results will be examined in light of Misco and a change in analysis suggested. If courts insist on exercising some review power over labor arbitration awards, they should give parties the benefit of their bargain and ask whether an arbitrator could have reached such a result rather than, as many have asked, whether a judge could have reached the result in question. Reference by a court to the extensive arbitral precedent available rather than to the comparatively limited judicial precedent would have changed the outcome in many cases to one more consistent with national labor policy favoring arbitration.

Third, the article will discuss the enforcement of limits on the arbitrator's authority. Because one of the most powerful reasons to defer to awards is that parties can, when they wish, clearly and explicitly limit the arbitrator, these bargains must be enforced. As will be discussed, however, what is clear and explicit to one may not be to another and it is the arbitrator who must first interpret the scope of the limit. This section will also discuss the much debated issue of whether an arbitrator may use external law in interpreting the contract or whether such use goes outside his or her authority. Finally, the article will review standards under which courts have overturned arbitration awards on the basis of public policy and discuss the dangers of and necessary limits to such review.

While this is the sole issue on which the Court granted certiorari in Misco, the opinion did not ultimately reach the question.

I. BACKGROUND

Labor arbitration as a means of resolving industrial disputes is of relatively recent origin. While the garment trades, the printing industry and some railroads had earlier arrangements for voluntary labor arbitration, the real growth of labor arbitration for final resolution of contract grievances occurred only after World War II. For this reason, the law in the area is of recent origin as well. It was not until its 1957 decision in Textile Workers v. Lincoln Mills and the three 1960 decisions comprising the Steelworkers...
Trilogy\textsuperscript{25} that the Supreme Court first analyzed the importance of labor arbitration to national labor policy. In \textit{Lincoln Mills}, the Court held that Section 301(a) of the Labor Management Relations Act\textsuperscript{26} authorized federal courts to fashion a body of federal law for the enforcement of agreements to arbitrate grievance disputes.\textsuperscript{27}

Subsequently, in 1960, the Court limited the role courts are to play in interpreting a collective bargaining agreement and explained the importance of the arbitrator's role in relation to the collective bargaining process. In the first Trilogy case, \textit{United Steelworkers v. American Manufacturing Co.},\textsuperscript{28} the Court stated that courts "have no business weighing the merits of the grievance" before enforcing the parties' collective bargaining promise to submit a grievance to an arbitrator.\textsuperscript{29} In \textit{United Steelworkers v. Warrior & Gulf Navigation Co.},\textsuperscript{30} the second case of the Trilogy, the Court framed a rule of presumption of arbitrability in a collective bargaining agreement containing an arbitration clause.\textsuperscript{31} The Court noted: "An 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." Writing the opinion of the Court, Justice Douglas recognized the significance of arbitration to a collective bargaining agreement. Justice Douglas noted:

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 are given to the collective bargaining agreement.\textsuperscript{32}

In the final Trilogy case, \textit{United Steelworkers v. Enterprise Wheel & Car Corp.},\textsuperscript{34} the Court set forth the standard for review of an arbitration award:

\textsuperscript{26} 29 U.S.C. § 185 (1982).
\textsuperscript{27} 353 U.S. at 451.
\textsuperscript{28} 363 U.S. 564.
\textsuperscript{29} \textit{Id.} at 567-68.
\textsuperscript{30} 363 U.S. 574.
\textsuperscript{31} \textit{Id.} at 582-83.
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.} at 581.
\textsuperscript{34} 363 U.S. 593.
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. . . . Nevertheless, an 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.35

The Court went on to note that "[a] mere ambiguity in the [arbitrator's] opinion accompanying the award . . . is not a reason" to refuse enforcement.36 Rather, concluded the Court, parties bargain for the arbitrator's construction of the contract; therefore, a court cannot overrule an arbitrator's decision merely because its interpretation of the contract differs from that of the arbitrator.37

In its 1983 *W. R. Grace & Co. v. Local Union 759, International Union of Rubber Workers*38 decision, the Court emphasized the highly deferential standard of review contemplated by *Enterprise Wheel* stating:

When the parties include an arbitration clause in their collective-bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "dra[w] its essence from the collective bargaining agreement," a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous.39

The issue of whether an award "draws its essence" from the contract, however, continued to be a substantial source of litigation. All seemed to agree that courts are to exercise discretion and show deference to the awards of labor arbitrators. As the following sections demonstrate, however, there was disagreement and confusion over the limits of such deference. Finally, in 1987, the Court again attempted to set forth the standards for court review in *United Paperworkers International Union v. Misco, Inc.*40 *Misco* involved the discharge of an employee, Cooper, allegedly for marijuana use. The employee had been found in the back seat of an otherwise unoccupied automobile belonging to another person with a lighted marijuana cigarette in the front-seat ashtray. Two other employees had left the car. The employer investigated and discharged Cooper on the basis that his

35. Id. at 597.
36. Id. at 598.
37. Id.
39. Id. at 764 (quoting *Enterprise Wheel*, 363 U.S. at 597) (citations omitted).
presence in the car violated its rule against marijuana use on plant premises.\textsuperscript{41}

Cooper's grievance was processed to arbitration. Shortly before the arbitration hearing, the employer became aware that the police searched Cooper's car on the same day Cooper had been found in the car with the marijuana cigarette and found gleanings of marijuana.\textsuperscript{42}

After a hearing, the arbitrator upheld the grievance and directed the employer to reinstate Cooper with backpay and full seniority. The arbitrator found that the employer had failed to prove that Cooper had used or possessed marijuana on company property and that finding Cooper in the back seat of a car with a burning cigarette in the front-seat ashtray was insufficient proof.\textsuperscript{43}

The arbitrator refused to accept as evidence the fact that marijuana had been found in Cooper's car on company property because the employer did not base its decision to discharge on this fact, not knowing it at the time.\textsuperscript{44}

The employer filed suit, asking the district court to vacate the award. The district court set aside the award as contrary to a public policy against operation of dangerous machinery while under the influence of drugs as well as state criminal laws.\textsuperscript{45} The Court of Appeals for the Fifth Circuit affirmed,\textsuperscript{46} Judge Tate dissenting.\textsuperscript{47} The court determined that reinstatement would violate the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol."\textsuperscript{48}

The Supreme Court granted certiorari on the question of whether a court may refuse to enforce an arbitration award rendered under a collective bargaining agreement on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer.\textsuperscript{49} In its opinion, however, the Court took no position on this exact issue but, rather, reversed the judgment of the court of appeals on other grounds. The Court ruled that the court of appeals erred and exceeded its limited authority to review arbitration awards. The court was not free to disregard and overrule the arbitrator's factfinding and find for itself that the cigarette incident violated the employer's rule nor could that court overrule the arbitrator on the evidentiary matter of whether to consider the evidence of marijuana found in grievant's car which evidence was not available to the company at the time of discharge.\textsuperscript{50} Further, the court lacked the power to set aside the arbitrator's remedy.\textsuperscript{51}

\begin{itemize}
\item \textsuperscript{41} Id. at 368.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id. at 368-69.
\item \textsuperscript{44} Id. at 369.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} United Paperworkers Int'l Union v. Misco, Inc., 768 F.2d 739 (5th Cir. 1985).
\item \textsuperscript{47} Id. at 743-46.
\item \textsuperscript{48} Id. at 743.
\item \textsuperscript{49} Misco, 108 S. Ct. 364.
\item \textsuperscript{50} Id. at 371.
\item \textsuperscript{51} Id. at 372-73.
\end{itemize}
Finally, the Court held that the court of appeals erred in setting aside the award on public policy grounds. The lower court set aside the award on the basis of "general considerations of supposed public interests" as required by *W. R. Grace*. In any event, the lower court inappropriately drew an inference between the existence of marijuana gleanings in grievant's car and his actual use of drugs in the workplace. The arbitrator did not make such a finding of fact.

In reaching this decision, the Court set forth standards for judicial review of arbitration awards that may further clarify the standards of *Enterprise Wheel*. As will be discussed below, these standards are of particular importance when considering whether a court may overturn an arbitrator's award for alleged errors in fact-finding or contract interpretation or for violation of public policy. The Court did not discuss the differing standards that have arisen in the courts of appeals on these issues nor the academic commentary in the field.

II. WHY COURTS SHOULD DEFER

The reasons that a court should defer to a labor arbitrator's reading of the contract have been well stated. First, the parties have bargained for the interpretation of the arbitrator and only the arbitrator. The collective bar-

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52. Id. at 373 (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).
53. Id.
54. Id. at 374.
55. See infra notes 83-86 and accompanying text.
56. See infra notes 87-127 and accompanying text.
57. See infra notes 173-208 and accompanying text.
58. See infra notes 85-208 and accompanying text.
59. See infra notes 60-68 and accompanying text.
60. A number of distinguished commentators have written on the need for narrowing the scope of judicial review of labor arbitration awards. See Feller, *The Coming End of Arbitration's Golden Age*, 29 Nat'l Acad. Arb. 97, 107 (1976) (deference to arbitral awards is result of "recognition that arbitration is not a substitute for judicial adjudication, but a part of a system of industrial self-government"); Heinsz, *Judicial Review of Labor Arbitration Awards: The Enterprise Wheel Goes Around and Around*, 52 Mo. L. Rev. 243 (1987); Jones, *His Own Brand of Industrial Justice: The Stalking Horse of Judicial Review of Labor Arbitration*, 30 UCLA L. Rev. 881 (1983); Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 Colum. L. Rev. 267, 297-98 (1980) ("It is hoped to be that judges will learn to temper their activist instincts with an appreciation that the agreement before them is a unique type of contract, and that an apparently erroneous award may in fact just reflect the creative search for special rules that the parties need from their private judge, and for which they have negotiated."); St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L. Rev. 1137, 1160-61 (1977) (arbitrator is "reader" of parties' contract, his award becomes part of their contract, and therefore courts defer to arbitrator whose award should stand, absent procedural violations or illegality of resulting contract); Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 Buff. L. Rev. 1, 27 (1953) (considering role of courts in reviewing merits of grievance, author finds that "courts have a function, but it is the limited one of exercising only enough supervision to prevent labor arbitration from destroying itself").
gaining agreement generally provides that the arbitrator's ruling shall be "final and binding." Thus, it is the arbitrator's ruling that fully provides the benefit of this bargain.61

Second, the system contains safeguards that should ensure at least as much reliability in outcome as would a de novo ruling by a judge. Unlike judges, whose jurisdiction encompasses a broad range of legal issues, labor arbitrators are presumed expert only in the comparatively narrow area of collective bargaining and the "law of the shop." 62 Unlike a judge, an arbitrator is selected for a case by the parties, and that only after the parties have had substantial opportunity to review the background, qualifications and prior decisions of such arbitrator. 63 Thus, the choice of arbitrator himself or herself is part of the "bargain" struck, making it even less improper for a party to be "stuck" with his or her interpretation.64 As Professor Jones has pointed out: "The brand of industrial justice dispensed in that award is the precise brand the party assessed and agreed to purchase, eyes open, for better or for worse, for richer or for poorer."65 Whatever the award, it is the result of a knowing and purposeful choice of forum and judge by both parties.

Third, labor arbitration is more than a substitute for court litigation because it involves the continuing collective bargaining process of which the arbitrator is a part.66 Labor agreements are often drafted by non-lawyers and often contain ambiguities which the parties realize may have to be resolved by a labor arbitrator. Further, even as a dispute settlement mechanism, labor arbitration is but a small part of the grievance resolution scheme. Grievances over application of the collective bargaining agreement reach arbitration only after being processed through the numerous steps of the grievance procedure.67

61. See St. Antoine, supra note 60, at 1140-41. As the Misco Court stated, "[I]t is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 370 (1987).
62. "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 v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).
63. See Jones, supra note 60, at 887-93 (discussing sources of information parties can use to appraise arbitrators before selection).
64. See Kaden, supra note 60.
65. See Jones, supra note 60, at 893.
66. See, e.g., Warrior & Gulf Navigation, 363 U.S. 574. The Court recognized that different policy considerations apply to labor arbitration cases than apply to commercial arbitration cases, stating:

In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

Id. at 578.
67. See F. ELKOURI & E. ELKOURI, supra note 2, at 153-211.
Most are settled, in part because the possibility of final and binding arbitration serves as an incentive for the parties to resolve the dispute collectively. If arbitration is seen as merely another step in this bargaining process rather than the final step, its value to the process is undercut.

Fourth, unlike the parties in typical court litigation, the parties to a collective bargaining agreement have a continuing relationship. This relationship can be harmed by encouraging a party to renge on its word to honor final and binding awards and seek court review.

Fifth, it is through this continuing relationship that a party can "cure" what it perceives to be a "wrong" result. While the ruling of the arbitrator under a contract is to be final as to the dispute before him or her, the parties are free to bargain changes in the next agreement to correct or modify what either party might view as a "wrong" result with which it cannot live. Most agreements are for one, two or three years. Thus, even if such thing as a "wrong" award existed, much of its impact can be negotiated away. In a sense, the arbitration process is part of the clarification and evolution of the labor contract.

Finally, and related to all of the above points, a product of judicial review is delay, and delay destroys all of the positive values implicit in the process. As the Misco Court noted after discussing grounds on which courts should not overturn awards, "If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined." Judge Posner of the Seventh Circuit recently stated: "The most important reason for deference to labor arbitrators is that labor disputes ought to be resolved rapidly; and, to be fast, arbitration must be final."

The Supreme Court has also recognized this need for finality in labor arbitration in the related area of fair representation suits. In United Parcel Service v. Mitchell, a suit against the employer and union by an employee claiming that the union had violated its duty of fair representation and that the employer had violated the collective bargaining agreement, the Court reversed a lower court ruling that a six year statute of limitations applied. As the Court stated:

This system, with its heavy emphasis on grievance, arbitration, and the "law of the shop," could easily become unworkable if a decision which has given "meaning and content" to the terms of an agreement, and even

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68. See Jones, supra note 60, at 896.
69. 108 S. Ct. at 371.
70. Jones Dairy Farm v. Local P-1236, United Food & Commercial Workers Int'l Union, 755 F.2d 583, 586 (7th Cir.) (Posner, J., dissenting), rev'd, 760 F.2d 173 (7th Cir.) (idea contained in the quotation becomes the majority position), cert. denied, 474 U.S. 845 (1985).
affected subsequent modifications of the agreement, could suddenly be
called into question as much as six years later.\textsuperscript{72}

Delay caused by judicial review can cause uncertainty, interfere with the
bargaining process and undermine the union. While a grievance is pending,
the parties are uncertain as to how to govern themselves under the agreement.
If a party losing at arbitration is falsely encouraged to seek judicial review
by court decisions seeming to promise reversal, the labor relations process
can be substantially harmed. The matter that was the subject of the grievance
will not be as easily resolved through bargaining for the next contract if each
party is still asserting the correctness of its position in court. The credibility
of the union in enforcing the contractual rights of bargaining unit members
can be impaired and the bargaining process which keeps the relationship
healthy destroyed.\textsuperscript{73} Further, the ultimate result will be so delayed as to be
meaningless in some cases.

The problem of delay cannot be overstated. Labor arbitration occupies a
favored position in the law, in part because it is perceived to be quick and
efficient. In recent years, it has been less speedy. Figures provided by the
Federal Mediation and Conciliation Service (FMCS) demonstrate that the
average number of days elapsed between the filing of a grievance and the
issuance of an arbitration award has increased from approximately 225 days

\textit{Table 1}

\begin{center}
\begin{tabular}{lcccccc}
\hline
Grievance filing to date award rendered & 224.72 & 230.26 & 292.15 & 335.39 & 322.48 & 377.08 \\
Pre-hearing delay & 191.53 & 196.70 & 252.02 & 292.70 & 276.38 & 332.08 \\
Post-hearing delay & 33.19 & 33.56 & 39.13 & 42.69 & 46.10 & 45.00 \\
\end{tabular}
\end{center}

As indicated by Table 1, the trend is to ever-increasing delays, most of which
occur prior to hearing.

\textsuperscript{72} Id. at 64. Congress, too, has declared the desirability of "final adjustment by a
method agreed upon by the parties . . . for settlement of grievance disputes arising over the
application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. §

\textsuperscript{73} It has been suggested that some employers try to harm the credibility of unions by
delaying the benefits of the grievance process through court challenge of arbitration awards.
See 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).

\textsuperscript{74} 1985 FMCS ANN. REP. table 5, at 36.
The delay when a party seeks judicial review in a federal district court has even more impact, adding well over a year in the average case.

Table 2

Elapsed Time in Days for Reported District Court Cases by Calendar Year

<table>
<thead>
<tr>
<th></th>
<th>1984</th>
<th>1985</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grievance filing to date court decision issued</td>
<td>Average</td>
<td>818</td>
</tr>
<tr>
<td></td>
<td>Shortest</td>
<td>204</td>
</tr>
<tr>
<td></td>
<td>Longest</td>
<td>2,037</td>
</tr>
<tr>
<td>Date arbitration award to date court decision issued</td>
<td>Average</td>
<td>411</td>
</tr>
<tr>
<td></td>
<td>Shortest</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td>Longest</td>
<td>1,662</td>
</tr>
</tbody>
</table>

These delays are significant enough to create years of uncertainty for the parties. If the cases are appealed further, the harm can be even greater.

III. REVIEW ON THE MERITS

The standard for court review of an arbitrator's award, even before Misco, seemed to leave little or no discretion for a court to second-guess or overrule the arbitrator's findings on the merits. As the Supreme Court noted:

Under well-established standards for the review of labor arbitration awards, a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one. When the parties include an arbitration clause in their collective-bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "draw[w] its essence from the collective bargaining agreement," a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous.

Despite the wide acceptance given to these standards, there remained substantial controversy and confusion over whether the "draw its essence"
standard permitted a court to overrule the arbitrator’s findings of fact and interpretation of the contract. Both commentators and courts have disagreed as to whether courts may intervene in cases of what they perceived as “gross” error.

The *Misco* Court stated that with regard to the arbitrator’s interpretation or application of the contract, “as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.”

This holding provides support for the position that courts should not overturn an arbitrator’s award on the merits because that award is the full extent of what the parties have bargained for. As Professor St. Antoine has persuasively argued, the arbitrator is the parties “contract reader” and, in effect, the contract means what the arbitrator says it means. Thus, *Misco* will not require reexamining the standards of those courts that have already held that they are not entitled to review the merits of an arbitration award. It must be recognized, however, that a no-review position can lead to decisions like *Safeway Stores v. American Bakery.* In that case, the company departed from its practice of ending the pay week on Wednesday and issuing checks the next day, and instead ended the pay week on Friday and issued checks the following Tuesday. The first paycheck under the new system covered only Thursday and Friday, resulting in sixteen hours’ pay, and the union filed a grievance charging a violation of a contract provision guaranteeing forty hours’ pay each week. The arbitrator sustained the grievance and ordered the employer to pay the employees for an additional twenty-four hours of work even though no work had been performed. The Court of Appeals for the Fifth Circuit upheld the arbitrator’s award because it was based on the terms of the contract, explaining:

> If such a result is unpalatable to an employer or his law-trained counsel who feels he had a hands-down certainty in a law court, it must be remembered that just such a likelihood is the by-product of a con-

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77. Compare St. Antoine, *supra* note 60, at 1140 (advocating that awards not be reversed for “gross” error because the award of the contract reader is the parties’ stipulated adopted contract) with Kaden, *supra* note 60, at 297 (arguing that judges could reverse “outrageous” awards or awards disclosing clear error such as wrongful assumption of a crucial fact).
79. St. Antoine, *supra* note 60, at 1146. The issues are reminiscent of the apocryphal story of three umpires discussing their trade:

Umpire Number One: I call 'em like I see 'em.
Umpire Number Two: I call 'em like they are.
Umpire Number Three: They ain’t nothing 'til I call 'em.

Anonymous.
80. 390 F.2d 79 (5th Cir. 1968).
sensually adopted contract arrangement. . . . The arbiter was chosen to be the Judge. That Judge has spoken. There it ends.\textsuperscript{81}

Similar deference has been shown by some courts to the factual findings of arbitrators.\textsuperscript{82}

In a number of pre-\textit{Misco} cases, however, lower courts were unwilling to totally abandon the field to arbitrators and asserted a limited authority to review decisions in applying the “draw its essence” standard. This asserted authority was expressed in a number of ways which might be inconsistent with \textit{Misco}. Some courts asserted the authority to overrule the arbitrator for certain mistakes of fact. In \textit{National Post Office Mailhandlers Union v. United States Postal Service},\textsuperscript{83} for example, the Court of Appeals for the Sixth Circuit stated:

> Where the record that was before the arbitrator demonstrates an unambiguous and undisputed mistake of fact and the record demonstrates strong reliance on that mistake by the arbitrator in making his award, it can fairly be said that the arbitrator “exceeded [his] powers or so imperfectly executed them” that vacation may be proper.\textsuperscript{84}

The First Circuit, too, has held that an arbitrator’s decision can be set aside if “mistakenly based on a crucial assumption which is ‘concededly a non-fact.’”\textsuperscript{85} In \textit{Misco}, by contrast, the Court seemed to reject fact-finding by a court. With regard to the employer’s argument that the arbitrator grievously erred in failing to find marijuana use, the Court stated: “No dishonesty is alleged; only improvident, even silly, factfinding is claimed. This is hardly sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts.”\textsuperscript{86}

With regard to interpretation of the contract, some courts, such as the Third Circuit, have stated that an award draws its essence from the collective

\textsuperscript{81. \textit{Id.} at 83-84. \textit{See also} International Chem. Workers Union, Local 526 v. Day & Zimmerman, 791 F.2d 366 (5th Cir.) (upholding award of arbitrator who found that company violated agreement by permitting army to perform bargaining unit work at government owned ammunition plant controlled by army even though company argued it led to absurd result of paying employees for work neither performed nor subcontracted), \textit{cert. denied}, 107 S. Ct. 274 (1986).

82. “An arbitrator’s award will not be vacated because of erroneous findings of fact or misinterpretations of law.” American Postal Workers Union v. United States Postal Serv., 682 F.2d 1280, 1285 (9th Cir. 1982) (citation omitted), \textit{cert. denied}, 459 U.S. 200 (1983). An award “will not be set aside by a court for error either in law or fact, . . . if the award contains the honest decision of the arbitrators, after a full and fair hearing of the parties.” Coast Trading Co. v. Pacific Molasses Co., 681 F.2d 1195, 1198 (9th Cir. 1982) (citations omitted). \textit{See also} International Bhd. of Firemen, Local 261 v. Great N. Paper Co., 765 F.2d 295, 296 (1st Cir. 1985) (arbitrator’s credibility findings entitled to deference).

83. 751 F.2d 834 (6th Cir. 1985).

84. \textit{Id.} at 843 (citations omitted).


86. 108 S. Ct. at 371.
bargaining agreement if the interpretation "can in any rational way be derived from the agreement, viewed in light of its language, its context, and any indicia of the parties' intention" and should be overruled only if there is "manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop." Awards are not to be overturned unless "completely irrational." Other circuits inquired whether the award "represents a plausible interpretation of the contract in the context of the parties' conduct..." or is an "egregious deviation from the norm." The First Circuit has held that a court may review and set aside an arbitrator's award if the decision is:

- unfounded in reason and fact;
- based on reasoning so palpably faulty that no judge or group of judges, ever could conceivably have made such a ruling; or
- mistakenly based on a crucial assumption that is concededly a non-fact.

While these standards are admittedly deferential, they contain the seeds of overbroad judicial intrusion because the tests put forth are subjective. What is defensible to one judge can be completely irrational to another. Because the standards lack clarity, they invite parties to seek judicial review.

88. Id.
90. Riverboat Casino v. Local Joint Executive Bd., 578 F.2d 250, 251 (9th Cir. 1978).
92. Local 1445, United Food & Commercial Workers Int'l Union v. Stop & Shop Cos., 776 F.2d 19, 21 (1st Cir. 1985) (citing Bettencourt, 560 F.2d at 1050).
93. It is not argued that these standards are not generally applied in a deferential manner. Indeed, their application most often leads to upholding awards, even in close cases. See, e.g., Roberts & Schaefer Co. v. Local 1846, United Mine Workers, 812 F.2d 883 (3d Cir. 1987) (vacating judgment of district court and upholding award directing construction company to use only subcontractors that recognized the United Mine Workers Union). In this case, the court had "serious doubts about the correctness of the" award and believed that "the weight of the evidence... [was] to the contrary." Id. at 886. It nonetheless upheld the award because it "cannot be said to be irrational" and "it was the decision of an arbitrator that the company bargained for, and it is that decision with which it must now cope." Id. The concern, rather, is that the standards sound more inviting than they really are and mislead parties into seeking court challenge.
94. In Newark Morning Ledger Co. v. Newark Typographical Union Local 103, 797 F.2d 162, 167 (3d Cir. 1986), the court could find "no rational basis" for an arbitrator's award in a wage rate case where the court felt that the arbitrator's arithmetic was flawed and that such flaw reflected a flawed understanding of the agreement. The court thus held that the district court properly modified the award to direct a lower wage rate. Id. In dissent, Judge Mansmann stated that the "award can be interpreted as having a rational basis in the record. The strong national policy favoring the arbitration of labor disputes requires no more than that." Id. at 170. Particularly troubling is the failure of the court to remand to the arbitrator for a determination of whether an arithmetical error had been made and, if so, how it affected the award.
which, whatever the outcome, causes delay that harms the fabric of industrial relations. The standards can further mislead district judges into overturning defensible awards. Even where a court of appeals ultimately reverses the district court and upholds the award, the harm has been done. An appeals court decision, years after the arbitration hearing, cannot patch together the rent in the fabric of the bargaining relationship.

The statement in *Misco* that a court may not overturn for "serious error" should leave a court with less discretion to determine if an award is a "plausible interpretation" or an "egregious deviation." The problem with a number of the standards developed by the lower courts is that these courts have put themselves into the role of the arbitrator and, in effect, "judicialized" the process of labor arbitration. A key to understanding why these courts have overextended is to look at the standard they apply implicitly or explicitly: Could a judge have made such a ruling? The focus ought not be whether the arbitrator's decision is "in the realm of what a judge might decide." Rather, if there is to be a review, and *Misco* leaves little room for review on the merits, the focus ought be whether the decision is in the realm of what an arbitrator might decide. That is the benefit of the parties' bargain. Arbitrators are not necessarily required to follow principles of contract law or judicial precedent. Rather, the parties bargained for arbitration which has its own set of rules and notions of the law of the

95. See supra notes 70-75.
96. The delays can be extensive. See, e.g., Local P-9, United Food & Commercial Workers Int'l Union v. George A. Hormel Co., 776 F.2d 1393 (8th Cir. 1985) (910 days from arbitration award to court of appeals decision).
97. 108 S. Ct. at 371.
98. As the Court of Appeals for the Seventh Circuit has noted: [Flor judges to have taken upon themselves to determine the correctness of the arbitrator's award would inevitably have judicialized the arbitration process, in much the same way that judicial review, even of a deferential sort, tends to judicialize the administrative process. The administrative agency must (at least when its proceedings resemble adjudication) find facts like a court, and reason like a court, if it is to withstand correction by the court. And so it would be with arbitrators if their decisions were subject to the kind of review that courts give agencies. Yet the idea of arbitration, as of administrative decision-making but more strongly since there is no counterpart in arbitration to the Administrative Procedure Act, is to provide an alternative to judicial dispute resolution, not an echo of it. If the parties to an arbitration want appellate review of the merits of the arbitrator's decision, they can establish appellate arbitration panels, though they rarely do. But they cannot get such review from the federal courts - which would mean, first from the district court, and then, on appeal, from the court of appeals. This would make arbitration a three-tiered, rather than as in normal adjudication a two-tiered, process; it would make arbitration more judicial than adjudication.

Ethyl Corp. v. United Steelworkers, 768 F.2d 180, 183-84 (7th Cir. 1985) (reversing district court and upholding arbitrator's award granting 1982 vacation pay to employees on payroll October 15, 1981, when plant shut down), cert. denied, 475 U.S. 1010 (1986).
99. See *Stop & Shop Cos.*, 776 F.2d at 22.
The parties most certainly did not bargain for the decision of a federal judge, who by training and experience is immersed in notions of federal judicial precedent.

Further, if a court insists on reviewing an award, applying the test of "could any arbitrator have so read the contract" will be less difficult and more productive than the "any judge" rule. A judge trying to decide whether any judge could so rule will unavoidably have to apply his or her subjective view of judging. Comparatively little judicial precedent on point will exist on the exact meaning of labor contract provisions. By comparison, literally thousands of reported arbitral decisions exist to help us determine whether "any arbitrator" could have so read the collective bargaining agreement. If the parties should have known that the disputed interpretation was possible in arbitration, they should be held to their bargain. This position was implicitly authorized in Misco. In discussing the arbitrator's ruling that he would not consider evidence not relied on by the employer in ordering the discharge, the Court stated, with apparent approval: "As the arbitrator noted, this approach was consistent with the practice followed by other arbitrators."

Comparing reported arbitration decisions and arbitration treatises with judicial rulings demonstrates that courts have not always given parties the benefit of their bargain in this regard. Not only have courts overturned the decision of the bargained-for arbitrator, but they have even reached decisions that run contrary to prior decisions of a number of arbitrators. This can represent judicial usurpation of the arbitral forum and lead to a judge, rather than an arbitrator, imposing his or her "own brand of industrial justice." If a particular reading of a contract clause is one that another arbitrator could have made, the parties should be given the benefit of

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100. In United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the Supreme Court stated:

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. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished.

Id. at 581-82.

101. See, e.g., Labor Arbitration Reports (BNA) (89 volumes) and Labor Arbitration Awards (CCH) (86 volumes).

102. 108 S. Ct. at 371.

103. The suggestion is not that the parties have automatically adopted the majority or prevailing view of arbitrators on the issue but, rather, whether any other arbitrator has or
their bargain. The bargain was the contract language as read by arbitrators, not by courts. It should be even easier to see this where another arbitrator has reached a similar result in another case.

A number of recent cases demonstrate the problems that courts can cause when they fail to consider the full range of interpretations to which the parties agreed when they bargained for arbitration. In the recent case of Independent Employees' Union v. Hillshire Farm Co., 104 for example, the court overturned the remedy of makeup overtime imposed by an arbitrator. In that case, the employer improperly assigned overtime out of seniority order and the arbitrator found that the company could offer aggrieved employees the opportunity to perform makeup work at overtime rates rather than to receive back pay without working. The court found it "almost unimaginable" that the parties could have contemplated such a result because it allowed the company to assign overtime "without fear of true retribution." 105

The court's desire to protect employee rights was laudable and its interpretation a defensible one for an arbitrator. The outcome was not, however, "unimaginable" and the court's interpretation is but one of two in an area where arbitrators disagree. Arbitration cases go both ways, 106 with some upholding back pay awards 107 and others allowing makeup work instead. 108 Had the court considered these matters before making its ruling, it would have had to understand that the choice was left to the arbitrator. Had the parties chosen to bargain for a more certain result, they could have explicitly stated that the remedy for such violation shall be overtime pay or makeup

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104. 638 F. Supp. 1154 (E. D. Wis. 1986), rev'd, 826 F.2d 530 (7th Cir. 1987).
105. Id. at 1157.
106. Although the majority of arbitrators to consider the question have ordered payment of wages rather than makeup overtime, as did the court, see Iowa Pub. Serv. Co., 85 Lab. Arb. (BNA) 318 (1985) (Madden, Arb.); Union Carbide Corp., 81-1 Lab. Arb. Awards (CCH) § 8178 (1981) (Duff, Arb.) (directing payment of wages for missed overtime opportunity despite company's offer of additional work at overtime rate), many other arbitrators have approved makeup overtime opportunities as an appropriate remedy. See, e.g., Price Bros. Co., 76 Lab. Arb. (BNA) 10 (1980) (Shanker, Arb.); Kimberly Clark Corp., 82 Lab. Arb. (BNA) 985 (1984) (Wyman, Arb.). Often, those cases rejecting makeup overtime as a remedy do so on the basis of concerns about whether the grievant would be in a position to accept the overtime when it was offered, see Olin Corp., 70-2 Lab. Arb. Awards (CCH) (1970) (Sullivan, Arb.), whether the overtime would be charged to grievant in terms of current entitlement to other overtime, and whether it would either be bargaining unit work to which some other employee would otherwise be entitled or mere make-work. See Huston Chem. Corp., 69-1 Lab. Arb. Awards (CCH) § 8178 (1968) (King, Arb.). Thus, the court intruded into an area most properly left to the discretion of the arbitrator.
overtime. By failing to specify, they left the matter up to the arbitrator and not the court.

Similarly, the district judge in *E. I. DuPont de Nemours & Co. v. Grasselli Employees Independent Association* placed himself in the position of labor arbitrator in overturning an arbitrator's determination that the discharge of an employee for assaulting two other employees was not for just cause. The arbitrator had relied on both the grievant's mental or emotional breakdown when he assaulted the employees causing him to be not "at fault" and the remote likelihood of recurrence. The arbitrator also found that the company had discharged the grievant before investigating, a violation of its own guidelines. The district court held that the arbitrator failed to confine himself to the contract in premising his decision on the employee's lack of fault "without an equally corresponding consideration of the extent of the violence involved and the employer's strong interests in maintaining a safe work place." As to the second basis for the arbitrator's decision, the court found that "the alleged procedural irregularities are not relevant to the just cause issue submitted to arbitration, which mainly turns upon an examination of the employee's conduct." While the Court of Appeals for the Seventh Circuit ultimately reversed and upheld the award, the district court's intrusion cost the parties years of delay and confusion.

Had the district judge in *DuPont* looked to arbitral precedent before giving in to his desire to correct what he saw as a "wrong" decision, he would have found that the term "just cause" as used in a collective bargaining agreement carries with it a lot of baggage. Arbitrators do consider issues of "fault" and procedure in interpreting just cause issues and the parties signing the contract knew or should have known this. Whether those concepts should or should not have led to the decision at issue was for the arbitrator to decide. Had the parties wished to further limit the arbitrator, they could have done so. They did not.

In a similar recent case, the Court of Appeals for the Fifth Circuit substituted its judgment on what constitutes "just cause" for that of the

110. *Id.* at 3315.
111. *Id.* at 3316.
112. E. I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass'n, 790 F.2d 611, 615 (7th Cir.) ("While this Court does not necessarily agree with the arbitrator's conceptions of just cause, mere disagreement does not allow an overturning of the award."). *cert. denied*, 107 S. Ct. 186 (1986).
114. As the court of appeals noted, "This notion of fault analysis as part of a just cause determination is not a novel concept based on the personal whims of a single arbitrator; the same concept has been applied by several other arbitrators." *DuPont*, 790 F.2d at 614.
115. See F. Elkouri & E. Elkouri, *supra* note 2, at 673-75 and cases cited therein.
In 

the employer fired two employees who had been placed on probation for wasting time and performing substandard work. After the union filed grievances on behalf of the discharged employees, HMC rehired one of them. An arbitrator reviewed the case of the employee who had not been rehired and ordered his reinstatement with back pay. The arbitrator found that both employees were working under the same disciplinary probation and written warning at the time of their discharge. Both employees were told that any incident which occurred during the probationary period would result in immediate dismissal... [and] both employees were performing the same tasks in the same location... which resulted in the decision to dismiss them.

Thus the arbitrator felt "that while there may have been adequate grounds to discharge both employees, [HMC] acted improperly when it decided to rehire [one employee] but not [the other]." The Court of Appeals for the Fifth Circuit affirmed the district court’s finding that the arbitrator’s award was not grounded in the bargaining agreement and was thus unenforceable. The court believed that the arbitrator had failed to base his opinion on the contract which provided that neither party shall discriminate in violation of any laws, that the company may discharge an employee for just cause and that inefficiency is a "just and reasonable cause for discharge." Instead, the court believed the arbitrator's award to be "based on his sense of what was improper behavior on the part of an employer" and thus a dispensing of his own industrial justice, which is not enforceable.

Had the court been willing to consider the broad range of arbitral precedent on the issue of just cause, it, too, would have discovered that the arbitrator’s ruling was or should have been in the contemplation of the parties at the time the collective bargaining agreement was negotiated. One part of the just cause concept is that discriminatory application of a standard can indicate that this just cause test is not met.

116. 750 F.2d 1302 (5th Cir. 1985).
117. Id. at 1303.
118. Id.
119. Id. at 1304 (citation omitted).
120. Id.
121. Id.
122. Id.
123. "It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variations." F. Elkouri & E. Elkouri, supra note 2, at 684-85. See, e.g., Major Safe Co., 76-2 Lab. Arb. Awards (CCH) § 8642 (1976) (Weiss, Arb.) (in case where six employees given unequal penalties, including suspensions, for violating same rule, arbitrator directs management to convert penalty of each to written reprimand, the least severe of penalties imposed initially).
These pre-Misco courts failed to accede to the Supreme Court's broad recognition that arbitrators need to interpret the words of the contract in light of a number of factors including "the law of the shop." Parts of the law of the shop are the practices and interpretations that have grown up around issues like just cause for discharge and remedies for breach of a collective bargaining agreement. Some courts have also failed to recognize that unlike judicial precedent, the outcome of an arbitration award can be changed in future cases. A future arbitrator may not feel bound to apply it in every case. More importantly, a disgruntled party can guarantee a

124. Cf. Local Joint Executive Bd. v. Riverboat Casino, 817 F.2d 524, 529 (9th Cir. 1987) (upholding arbitration award that found parties had entered into strike settlement agreement despite employer argument that arbitrators wrongly used their personal knowledge of how bargaining works to conclude that an agreement had been accepted by "silent acquiescence"). The court found that:

The arbitrators were hired to determine whether or not the parties had entered into a contract. They examined the words and conduct of the parties and concluded that a contract exists. The arbitrators drew on their personal knowledge of how contract negotiations function, but there is no evidence that they inappropriately applied their notions of negotiating conduct in contradiction to the facts that were presented to the arbitrators.

Id.

125. See, e.g., F. Elkouri & E. Elkouri, supra note 2, at 651-91.

126. See also Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif. L. Rev. 663, 750 (1973) (noting that "there is little doubt that orders directing . . . remedial action are what the parties intend the arbitrators to issue, and arbitrators will grant this kind of relief, usually without question, whether or not there is specific language in the agreement authorizing it"). While it is clear that courts will not uphold punitive awards unless the contract so authorizes, see, e.g., Bacardi Corp. v. Congreso de Union, 692 F.2d 210 (1st Cir. 1982) (setting aside portion of award providing double damages for failure to pay proper holiday pay and attorney's fees to union), the degree of deference shown to the arbitrators' remedies in less clear cases can vary, even within a circuit. Compare General Tel. Co. v. Communications Workers, 648 F.2d 452, 456 (6th Cir. 1981) (overturning district court and finding arbitrator had authority to award daily mileage commuting expenses incurred by employee when company wrongly refused to pay moving expenses) with National Gypsum Co. v. Local 135, United Steelworkers, 793 F.2d 759, 767 (6th Cir. 1986) (vacating portion of award in which arbitrator ruled company estopped from charging 70 weeks supplemental unemployment benefits against certain employees' 300-week entitlement where employees were on voluntary layoff at time when employer, but not employees, knew that the trust fund would soon be depleted and that employees on voluntary layoff would not be entitled to another 300-week accrual and did not give employees notice). See also United Elec., Radio & Mach. Workers, Local 1139 v. Litton Systems, 704 F.2d 393 (8th Cir. 1983), rehe'g en banc, 728 F.2d 970 (8th Cir. 1984). In Litton Systems, the arbitration award gave employees one week of paid vacation where company had forced certain employees to take vacations in March during inventory shutdown. The district court and a panel of the Eighth Circuit vacated the award. However, the full Eighth Circuit reinstated the award, adopting the dissent and stating that "those questions are, in all but the clearest cases, the arbitrator's business, not ours." Id. at 401.

127. An arbitrator may, of course, distinguish prior decisions, even under the same contract, and is, of course, not bound by interpretations of other contracts. Whether an arbitrator is bound to follow the prior award of another arbitrator under the same contract on indistinguishable facts is a debated issue. See, e.g., F. Elkouri & E. Elkouri, supra note 2, at 421-30 and cases cited therein.
different outcome by negotiating for contract language explicitly limiting
the authority of the arbitrator.

As has been argued numerous times, courts ought not be in the business
of second-guessing arbitrators on the merits of cases. Courts ought not sit
as "super-arbitrators" debating the merits of various theories of industrial
justice. Rather, if they are going to review the merits, whether that be
within their limited authority or not, they should at least ask the right
questions. Standards that refer to what a rational judge might do are
subjective and invite parties to try their luck before a judge. A standard
that explicitly recognizes the broad range of arbitral interpretations available
as part of the parties' bargain should make the prospect of review less
inviting.

IV. LIMITS ON THE ARBITRATOR'S AUTHORITY

As noted above,\textsuperscript{128} one of the strongest reasons why courts should defer
to the contractual findings of labor arbitrators is that the parties to a
collective bargaining agreement can limit the arbitrator's authority. For
purposes of a particular hearing, this authority can be explicitly limited in
the parties' submission of the issue to be decided and in agreed-upon limits
to the arbitrator's power to deal with that issue. For purposes of the
collective bargaining agreement and particular issues arising thereunder, the
parties can explicitly limit the power of the arbitrator or explicitly limit the
remedies which he or she may dispense for contract violations. Finally,
under the standards of \textit{Enterprise Wheel}, the arbitrator is empowered only
to interpret the collective bargaining agreement. An arbitrator is not em-
powered to reject the collective bargaining agreement and apply his or her
own brand of industrial justice.\textsuperscript{129} As noted in \textit{Misco}, "The arbitrator may
not ignore the plain language of the contract . . ."\textsuperscript{130} and, to avoid reversal,
should be acting within the scope of his or her authority.\textsuperscript{131}

A. Submission Agreements

Unlike the question of whether an arbitrator has jurisdiction over the
subject of a grievance, which can be tested in court prior to arbitration,\textsuperscript{132}
the issue of whether an arbitrator has, in his or her award, exceeded the

\textsuperscript{128} \textit{See supra} notes 62-67 and accompanying text.
\textsuperscript{129} \textit{United Steelworkers v. Warrior & Gulf Navigation Co.}, 363 U.S. 574 (1960).
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} A party refusing to arbitrate on the basis that an arbitrator lacks jurisdiction must
overcome a presumption that the arbitration clause covers the dispute in question. \textit{Warrior &
Gulf Navigation Co.}, 363 U.S. at 582-83.
scope of the issue submitted can be discovered only after the award is
issued. Thus, there must be some level of court review to preserve the
bargain of the parties, the limit on the range of issues which the parties
agreed to let the arbitrator decide. The need for some review is obvious.
The parties selecting an arbitrator to determine whether a particular dis-
charge was for just cause do not authorize the arbitrator to rule on the
propriety of all subcontracting in the past year.

While judicial review thus provides a means to preserve the bargain of
the parties to submit only a limited issue to the arbitrator, a court must
exercise restraint in exercising its power. Sometimes, the scope of the
submission is not clear and it is the arbitrator's job to interpret it. Further,
because grievances and arbitration submissions are most often not drafted
by lawyers, it is the arbitrator familiar with the law of the shop who is
best able to determine the intent of the parties. The need for deference was
recently stated by the Sixth Circuit in Champion International Corp. v.
United Paperworkers International Union:133

[T]he extraordinary deference given to an arbitrator's ultimate decision
on the merits applies equally to an arbitrator's threshold decision that
the parties have indeed submitted a particular issue for arbitration:

Considering the strong presumption in favor of a party's right to
arbitration and the extent of an arbitrator's authority, it would be a
strange and grudging interpretation of Steelworkers Trilogy to demand
that arbitrators stay narrowly within the technical limits of the
submission. We do not mean to imply that an award that clearly
goes beyond the grievance submitted to the arbitrator is enforceable
. . . . But we do hold that the presumption of authority that attaches
to an arbitrator's award applies with equal force to his decision that
his award is within the submission.134

After setting forth the standard that the arbitrator's interpretation of the
submission must be given deference, the court nevertheless ruled that the
arbitrator had clearly exceeded the terms of a submission involving the
removal of Sunday maintenance work when the arbitrator went on to deal
in the award with the additional issue of fire brigade crew seniority. In the
view of the court, the seniority grievance had been withdrawn from arbi-
tration and, in any event, the grievance at issue did not deal with the
composition of an unrelated fire brigade crew. Thus, the court affirmed
the order of a district court modifying the award and limiting its application
to those issues submitted to the arbitrator.135

133. 779 F.2d 328 (6th Cir. 1985).
134. Id. at 335 (quoting Johnston Boiler Co. v. Local Lodge No. 893, 753 F.2d 40, 43 (6th
Cir. 1985)).
135. See also Local Union No. 2-477, Oil, Chem. & Atomic Workers v. Continental Can
Co., 524 F.2d 1048, 1050 (10th Cir. 1975) (arbitrator exceeded authority by consolidating and
deciding two grievances when only one submitted for arbitration), cert. denied, 425 U.S. 936
(1976).
B. Explicit Contract Language

Some collective bargaining agreements contain clauses that specifically limit the authority of the arbitrator under certain circumstances. In *St. Louis Theatrical Co. v. Local 6, St. Louis Theatrical Brotherhood*, for example, the contract provided that if an employee was disciplined for participation in a work stoppage, such employee "shall have no recourse to any other provisions of this Agreement except as to the fact of participation." A union steward was discharged for participating in a ten- to fifteen-minute work stoppage. While the arbitrator did find the employee guilty of participation in the work stoppage, he found discharge too severe and reduced the penalty to a thirty-day suspension. The Court of Appeals for the Eighth Circuit overturned that part of the award reducing the penalty stating that the arbitrator had exceeded his authority. The court stated: "Nowhere does the agreement give the Arbitrator the authority to determine the fairness or equity of the company's discipline of employees who engage in work stoppages or other prohibitive activities. . . . The agreement is not susceptible to any construction beyond its plain meaning." The court also stated that "[w]hile the Company's form of discipline may have been severe, this fact is neither the arbitrator's nor our concern . . . [and] the arbitrator decided issues not properly before him and, therefore, . . . the arbitrator's award failed to draw its essence from the collective bargaining agreement."

Similarly, in *Riceland Foods v. Local 2381, United Brotherhood of Carpenters*, the contract provided that the arbitrator "shall not [decide] whether or not the type of discipline selected was appropriate." In that case four employees refused to follow employer safety rules involving shaving and the use of respirators. The arbitrator concluded that the employees had violated the rule but changed the discipline from discharge to reinstatement without back pay. The Court of Appeals for the Eighth Circuit held that "the arbitrator was not authorized to evaluate the propriety of the discipline selected" and thus vacated the award.

In *Morgan Services v. Local 323, Chicago and Central States Joint Board Workers Union*, an employee was discharged for insubordination under a contract which provided that an employee "may be discharged without

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136. 715 F.2d 405 (8th Cir. 1983).
137. *Id.* at 408.
138. *Id.* at 409.
139. *Id.*
140. 737 F.2d 758 (8th Cir.), *reh’g granted*, 749 F.2d 1260 (8th Cir. 1984), *cert. denied*, 471 U.S. 1102 (1985).
141. *Id.* at 760.
142. *Id.*
143. 724 F.2d 1217 (6th Cir. 1984).
[redress] if proven guilty of . . . insubordination." Although the arbitrator seemed to find insubordination, he reviewed the discharge and directed reinstatement of the employee without back pay. The Court of Appeals for the Sixth Circuit, rejecting the argument that the phrase "without [redress]

was ambiguous and thus within the purview of the arbitrator, ruled that the award was in conflict with "an express and unambiguous reservation on the arbitrator's powers" and refused to uphold the award.

Thus, one of the roles of a court as guardian of the arbitration process is to ensure that the arbitrator stays within the limits set by the parties. The danger with precedent such as Morgan Services, however, is that it may sometimes too narrowly circumscribe the role of the arbitrator. As the Court of Appeals for the Seventh Circuit has recently noted, an arbitrator must be free to apply the law of the shop and past practice in interpreting the contract.

C. "His Own Brand of Industrial Justice"

It is well settled that an arbitrator is empowered only to apply the collective bargaining agreement and, if he or she rejects the agreement in favor of his or her "own brand of industrial justice," a court has little choice but to deny enforcement. The issue can arise where the arbitrator explicitly rejects the contract and also where the arbitrator resorts to external sources, such as the law, as the basis for his or her opinion.

As noted above, where the arbitrator merely applies the contract in a manner different from what a court would have done, court intervention is not appropriate. There are cases, however, where arbitrators have issued decisions that seem to clearly reject the contract. The Court of Appeals for the Sixth Circuit thought it had before it such a case in Grand Rapids Die Casting v. UAW Local 159. In that case, an employee was fired for

144. Id. at 1219.
145. Id. at 1223-24. See also Frederick Meiswinkel, Inc. v. Laborer's Union Local 261, 744 F.2d 1374, 1376 (9th Cir. 1984) (vacating award and remanding where contract allowed arbitration of any disputes "other than a jurisdictional dispute" and arbitrator's award decided issue which was subject of jurisdictional dispute), cert. denied, 470 U.S. 1028 (1985) and Randall v. Lodge No. 1076, Int'l Ass'n of Machinists, 648 F.2d 462 (7th Cir. 1981) (refusing to enforce award where arbitrator referred to past understandings despite contractual provision stating that past understandings not part of contract).
146. Chicago Newspaper Publishers' Ass'n v. Chicago Web Printing Pressmen's Union No. 7, 821 F.2d 390, 396, 398 (7th Cir. 1987) (upholding enforcement of award in which arbitrator had used past practices of the parties to interpret provisions of contract which he found ambiguous) (employer unsuccessfully arguing that the contract forbade resort to past practice by providing that the arbitrator "was not 'free to add to, subtract from or modify the provisions of the'" contract and that, in any event, there was no past practice justifying the award).
147. See infra note 35 and accompanying text.
148. See supra notes 76-127 and accompanying text.
149. 684 F.2d 413 (6th Cir. 1986).
excessive absenteeism. The arbitrator made no finding on whether the employee had violated a company rule on absenteeism or on whether violation of the rule was just cause for discharge. Instead, the arbitrator found that the absenteeism rule was offensive because it was a "significant distortion of due process and subjects the grievant to a merry-go-around of discipline without any significant way to leave the circle." The arbitrator stated that the original suspension of the employee "shocks the conscience of this arbitrator and the resulting discharge must be set aside. The parties should revise the language."

The court of appeals set aside the ruling of a district court which had upheld the award, finding that "the only reasonable conclusion to draw from the arbitrator's opinion is that the basis for the decision was his disapproval of the procedures set out in . . . the collective bargaining agreement." The court believed that the arbitrator's reasoning was not drawn from the essence of the contract and that he substituted terms and discipline he felt were reasonable. An arbitrator is not empowered to decide whether or not he or she likes the terms of the contract but, rather, must enforce the contract as agreed to by the parties. For this reason, the court refused to enforce the award. Significantly, however, the court did not vacate the award and leave the union and fired employee without recourse. Rejecting the employer's argument that the court could decide only whether to enforce or vacate the award, the court remanded the matter to a different arbitrator because the original arbitrator had failed to rule on the original issue submitted: whether the employee was discharged for just cause.

Thus, the award of an arbitrator who explicitly contravenes the contract cannot be enforced because it fails to "draw its essence" from the contract. Indeed, it rejects the contract. Such review by a court serves to preserve the benefit of the parties' bargain and to keep arbitrators from exceeding their authority. Cases of explicit contract rejection, however, should be

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150. Id. at 415.
151. Id.
152. Id. at 416.

The fact that an arbitrator is an expert aided by a free procedure and vested with power by the consent of the parties does not mean that the courts should exercise no supervisory function. The parties' consent is but a limited one, and
rare and the terms “draws its essence” and “his own brand of industrial justice” are sufficiently vague to allow a court to think it is preserving the parties’ bargain when it is really usurping the function of the arbitrator. While there must be a right of review on these grounds to preserve the integrity of the contract and the arbitration system, it should be exercised sparingly.

A question that has divided courts and commentators in applying the “his own brand of industrial justice” and “draws its essence” standards is the issue of whether arbitrators should apply and interpret external law in applying the collective bargaining agreement, an issue not addressed in Misco. On the one hand, the arbitrator’s charter is to apply the agreement. An award based on statutory authority may not draw its “essence” from the contract. On the other hand, contracts incorporate, or are written against the backdrop of, applicable law and often have gaps. To deny the arbitrator recourse to the law in all situations may be to ignore the parties’ bargain.

The classic view is that arbitrators are limited to application of the contract and should not resort to outside law. This view was applied by

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they need some assurance of protection from an arbitrator who may run amuck. Furthermore, judicial review has a preventative as well as curative value. Its very presence keeps arbitrators aware that their power is limited and reduces the temptation to play god for the parties.

*Id.* at 24.

155. In Ethyl Corp. v. United Steelworkers, 768 F.2d 180 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986), the court stated:

> The problem with the expression, ‘draws its essence from the collective bargaining agreement,’ is that it invites the kind of error that the district judge fell into in this case, of setting aside an arbitration award because the judge is not satisfied that the award has a basis in a particular provision of the contract.

> Whenever an arbitrator misreads a contract, it is possible to say that his award fails to draw its essence from the contract; that the ground of the award is not the contract but the arbitrator’s misreading. But so long as the award is based on the arbitrator’s interpretation—unsound though it may be—of the contract, it draws its essence from the contract.

*Id.* at 184.

156. The Court of Appeals for the Third Circuit recognized the need to allow an arbitrator to read the entire contract in Super Tire Eng. Co. v. Teamsters Local Union No. 676, 721 F.2d 121 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984). In that case the district court vacated an arbitrator’s finding that an employee caught drinking on company property was improperly discharged. The district court had based its ruling on a contract provision that provided immediate dismissal was proper for “proven drinking during working hours.” The arbitrator had determined that the employee had not been properly warned that if he was caught drinking again (this was his second offense) he would be fired. The court of appeals reversed, holding that it could not say that the arbitrator’s award did not draw its essence from the contract because the arbitrator had based it on his reading of the “immediate dismissal” and “just cause” provisions of the contract. *Id.* at 125.


the Court of Appeals for the Third Circuit in Graphic Arts International Union Local 97B v. Haddon Craftsmen. In that case, the district court vacated an award in a case involving the employer’s unilateral implementation of production quotas along with disciplinary penalties for failure to meet the quotas. Before the arbitrator, the union had argued that even though no claim had been filed with the National Labor Relations Board (NLRB), the arbitrator had jurisdiction to determine that the unilateral implementation violated Section 8(a)(5) of the National Labor Relations Act (NLRA). The arbitrator, in denying the grievance, found she had no jurisdiction to resolve the unfair labor practice. 

The district court vacated the award because, in its view, the company had violated the NLRA. In reviewing this decision, the court of appeals noted that decisions on which the district court and union relied were cases in which unfair labor practice charges had been filed, and the parties in grievance arbitration had stipulated that the arbitrator should determine whether the company committed an unfair labor practice. Here there was no such stipulation. The court felt that the arbitrator’s domain is derived from, and limited by, the collective bargaining agreement and held that the arbitrator properly disclaimed authority to consider the NLRA issue and, because the award did involve an interpretation of the contract, it should be enforced. 

Similarly, the Court of Appeals for the Ninth Circuit in Gateway Structures v. Carpenters Forty-Six Northern California Counties Conference Board refused to overturn an arbitrator’s decision that a union and non-union contractor should be treated as one entity. The employer had contended that the arbitrator did not apply NLRB case law, and reached a result contrary to that which the NLRB would have reached. The court rejected these arguments, stating that “parties who bargain for arbitration do not bargain for an award identical to judicial determination. To assert that the arbitrator misapplied a fact-specific test like the alter ego doctrine does not justify a refusal to enforce the arbitration award.” With regard to the employer’s argument that the award would interfere with the NLRA rights of some employees, the court noted that an aggrieved party could resort to the NLRB and that an NLRB ruling would take precedence but

159. 796 F.2d 692 (3d Cir. 1986). 
161. Haddon Craftsmen, 796 F.2d 692. 
162. 779 F.2d 485 (9th Cir. 1985). 
163. Id. at 489-90. See also Local Joint Executive Bd. v. Royal Center, 796 F.2d 1159, 1164 (9th Cir. 1986) (holding that issue of whether sale of a business was a bona fide, arm’s-length transaction was arbitrable even though NLRB had already ruled on the issue), cert. denied, 107 S. Ct. 881 (1987); Edna H. Pagel, Inc. v. Teamsters Local Union 595, 667 F.2d 1275, 1279-80 (9th Cir. 1982) (holding NLRB’s refusal to issue a complaint does not bar union from seeking relief through arbitration).
that "the speculative possibility of subsequent NLRB decisions" ought not prevent enforcement of the award.  

Indeed, where a contract and arbitration agreement are silent as to the arbitrator's power regarding external law, an award can be vulnerable if based on the law. In *Roadmaster Corp. v. Production & Maintenance Employees' Local 504*, the court vacated part of an arbitration award where the arbitrator found that the employer violated Section 8(d) of the NLRA by failing to offer to bargain with the union prior to the contract's termination and, on that specific basis, ordered the contract extended for a year. The union argued that the arbitrator was empowered to invoke the statute because the contract automatically included all applicable law. The court noted that the contract contained no provision incorporating applicable law nor one empowering the arbitrator to do so. The court felt that because the arbitrator did not interpret the contract but, rather based the award "on his view of legislative requirements, he has exceeded the scope of submission." 

The Court of Appeals for the Second Circuit has taken a different view. In *Ottley v. Sheepshead Nursing Home*, the court held that an arbitrator did not exceed his power by basing an award on the NLRA rather than on the agreement, stating:

> We reject a per se rule that denies enforcement of an award simply because it rests upon an arbitrator's interpretation of external law. . . . Rapid, binding decisions promote industrial peace and create a system of industrial self-government. . . . If, however, we confine the arbitrator to mechanically interpreting contracts in a vacuum, we critically hinder his ability to achieve these goals. The contract, after all, was drafted against a backdrop of stringent government regulation. It makes little sense to require the arbitrator to ignore this background and to render a decision that may be in conflict with the mandate of law and that therefore might later be set aside. 

The issue, of course, may be avoided if the arbitrator writing the opinion clearly indicates that the award is based on contract interpretation and that, while reference to the law has been made, he or she recognizes that the contract is preeminent. If the arbitrator does not do this, perhaps the answer to the debate lies in continuing to give awards as much deference as possible. If an arbitrator's award, though based on the contract, may be inconsistent with guidelines of a federal agency, it is not necessarily "wrong." The

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164. *Gateway Structures*, 779 F.2d at 490.
165. 655 F. Supp. 1460 (S.D. Ill. 1987), aff'd, 851 F.2d 886 (7th Cir. 1988).
166. *Id.* at 1465.
167. 688 F.2d 883 (2d Cir. 1982).
168. *Id.* at 888-89.
agency's view may yet change, or if a party feels that a practice violates the NLRA, it may file a charge and have the issue litigated before the agency that has jurisdiction and expertise, the NLRB. This will enable the agency to operate within its zone of expertise and labor arbitration to operate within its zone of expertise: applying the collective bargaining agreement.

Entirely distinguishable from the above debate are cases where the contract or the submission agreement give the arbitrator authority to apply the law. In such a case, the arbitrator's interpretation of the law is part of the parties' bargain. This means, however, that the parties are, for purposes of their agreement, bound to the arbitrator's construction of the law, even if different from that of a court or agency. Such a case occurred in American Postal Workers Union v. United States Postal Service in the Court of Appeals for the D.C. Circuit. There, the district court had vacated an arbitrator's award reinstating a discharged employee because the arbitrator found inadmissible the employee's custodial statements admitting dishonesty on the basis of Miranda. The contract provided, in part, "that the discharge of a Postal Service employee must be 'consistent with applicable laws and regulations,'" a provision which the arbitrator and district court felt could include Miranda warnings for employees interrogated by postal inspectors, who are federal law enforcement officers. The district court, however, felt the arbitrator wrongly applied Miranda because of its interpretation of other ambiguous parts of the contract. The court of appeals disagreed and reinstated the award, stating:

Therefore, as the District Court acknowledged, the arbitrator plainly had the authority to consider legal rules, including the possible requirement of a Miranda warning, in construing the contract. It is irrelevant whether the arbitrator's judgment was correct with respect to the applicability of Miranda. An arbitrator's reading of the contract is entitled

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170. 789 F.2d 1 (D.C. Cir. 1986).

171. Id. at 3.
to enforcement unless the award itself violates established law or seeks
to compel some unlawful action. Here, the arbitrator’s judgment was
nothing more than a ruling on the admissibility of evidence, which drew
its essence from the parties’ contract and violated no established law.
A court has no choice in such a circumstance but to uphold and enforce
the arbitrator’s award.\footnote{172}

V. Issues of Public Policy

The issue of whether an arbitration award should be overturned on public
policy grounds is not, on its face, an issue of deferring to the factual or
contractual findings of an arbitrator. Rather, the question of whether an
award violates public policy is, as the Supreme Court recognized in \textit{W. R. Grace}, “ultimately one of resolution by the courts.”\footnote{173} The issue is most
relevant to this inquiry to the extent that a court uses public policy as a
vehicle to second-guess either the arbitrator’s factual findings or his or her
reading of the contract. Just as arbitrators should be careful to base their
findings on the collective bargaining agreement and not on their own notions
of justice, courts must be careful to base public policy arguments on “real”
public policy rather than vague and unsubstantiated notions of policy applied
because they think an arbitrator erred.

The \textit{W. R. Grace} Court stated that:

\begin{quote}
As with any contract, however, a court may not enforce a collective-
bargaining agreement that is contrary to public policy. \ldots If the con-
tract as interpreted by [the arbitrator] violates some explicit public policy,
we are obliged to refrain from enforcing it. Such a public policy,
however, must be well defined and dominant, and is to be ascertained
“by reference to the laws and legal precedents and not from general
considerations of supposed public interests.”\footnote{174}
\end{quote}

Most recently, the Court’s \textit{United Paperworkers International Union v. Misco, Inc.}\footnote{175} decision overturned a ruling by the Court of Appeals for the
Fifth Circuit that the reinstatement of a person accused of drug use violated
public policy and reaffirmed \textit{W. R. Grace}. The Court stated, “[W]e
explicitly held in \textit{W. R. Grace} that a formulation of public policy based
only on ‘general considerations of supposed public interests’ is not the sort
that permits a court to set aside an arbitration award . . . .”\footnote{176}

Despite the narrowness of the \textit{W. R. Grace} definition, courts have
overturned arbitration awards on public policy grounds in ways which

\begin{footnotes}
\footnote{172} Id.
\footnote{173} W. R. Grace & Co. v. Local Union 795, Int’l Union of Rubber Workers, 461 U.S.
\footnote{174} Id. at 768 (quoting Muschany v. United States, 324 U.S. 66 (1945)).
\footnote{175} 108 S. Ct. 364 (1987).
\footnote{176} Id. at 374.
\end{footnotes}
second-guess arbitrator’s factual findings and apply “general considerations of supposed public interests.” A number of cases arising before and after *W. R. Grace* and before *Misco* demonstrate the intensity of the debate. Relying on a broad interpretation of public policy, a number of courts have overturned awards on this basis. In *Amalgamated Meat Cutters v. Great Western Food Co., Local 540*, the Court of Appeals for the Fifth Circuit refused to enforce an award which ordered reinstatement of a tractor-trailer driver who had been drinking on duty. The court asserted that “no citation of authority” was needed to establish that enforcement of such an award was against public policy, but went on to discuss court decisions and federal regulations which evidenced a public policy against drinking on the job by professional drivers.

Similarly in *United States Postal Service v. American Postal Workers Union*, the First Circuit denied enforcement of an arbitrator’s award directing reinstatement of a postal employee who admitted embezzling money orders. The court relied on several federal statutes regulating the conduct of postal employees and protecting the public in its use of the postal service.

In *Misco*, the Fifth Circuit had refused to enforce an award which required reinstatement of an employee who had been discharged for drug use. The Fifth Circuit noted that the employee operated a “slitter-rewinder” which the arbitrator had found to be “an unusually dangerous machine” and found that there was a public policy “against the operation of dangerous machinery by persons under the influence of drugs or alcohol” and that there were Louisiana statutes against drug use. The arbitrator had ruled that the company did not prove the employee to have violated its rule against possession or use of drugs on company premises and that the discovery of a trace of marijuana residue in the employee’s own car did not change the result because that discovery came after the discharge.

Rejecting the Fifth Circuit’s view, the Court noted that, first, the lower court’s definition of public policy did not seem to comport with the directive in *W. R. Grace* that a policy must be “ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’” The court of appeals did not review laws and legal precedents but rather drew upon “general considerations of supposed public

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177. 712 F.2d 122 (5th Cir. 1983).
178. *Id.* at 124-25.
179. 736 F.2d 822 (1st Cir. 1984).
180. *Id.* at 825.
182. *Id.* at 743.
183. *Misco*, 108 S. Ct. at 374 (citation omitted).
interests” in concluding that there was a policy against operating dangerous machinery while under the influence of drugs.\textsuperscript{184}

Second, the Court found the Fifth Circuit to have erred in finding that the discovery of marijuana gleanings in grievant’s car established a violation of the policy against operating machinery while under the influence of drugs or alcohol. The Court felt this connection was “tenuous at best”\textsuperscript{185} and, in any event, the drawing of inferences from the evidence was for the arbitrator and not for the court of appeals.\textsuperscript{186} In effect, the lower court engaged in factfinding which exceeded its authority.

Thus, “public policy” review can be inappropriate for two reasons. First, it can be a cover for second-guessing the factual determinations of the arbitrator. As Judge Tate, dissenting in the Fifth Circuit’s \textit{Misco} decision stated, the arbitrator’s opinion “squarely finds that [the discharged employee] himself had not violated the company rule.”\textsuperscript{187} Thus, the Fifth Circuit’s decision that reinstatement of a person under the influence of drugs violates public policy presumed that the employee was under the influence of drugs, a fact directly contrary to the finding of the arbitrator. As the Supreme Court noted in \textit{Misco}, “The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them . . . .”\textsuperscript{188}

Second, a delegation of power to exercise “public policy” review of arbitrators’ awards requires safeguards and limits to prevent judges from exercising their own senses of justice, substituting their views for those of the parties expressed in their contract. The term “public policy” will have different meaning to different persons. The possible extent of the broad public policy theory is demonstrated by another Fifth Circuit case decided before \textit{Misco} reached the Supreme Court, \textit{Oil Workers International Union Local 4-228 v. Union Oil Co.}\textsuperscript{189} In that case, an employee was discharged after receiving a ten-year unadjudicated probation for possession of prohibited drugs. The arbitrator directed her reinstatement with back pay, noting that the terms of her probation forbade drug use and that she had strong incentive to comply, and crediting her statements that she would remain drug-free.\textsuperscript{190} Shortly after the arbitration award, she tested positive for marijuana use in a company physical. Relying on the test, the employer refused to reinstate her. She later tested positive in probation service tests. The district court refused to enforce the reinstatement award, noting that while the arbitrator had assumed the probation system would protect the

\textsuperscript{184. Id.}
\textsuperscript{185. Id.}
\textsuperscript{186. Id.}
\textsuperscript{187. 768 F.2d at 743.}
\textsuperscript{188. 108 S. Ct. at 374.}
\textsuperscript{189. 818 F.2d 437 (5th Cir. 1987).}
\textsuperscript{190. Id. at 439.}
employer's interest, it did not. The employee used drugs and her probation was not revoked and, in the view of the court, the arbitrator's reliance on her promise was unjustified. The district court then found that enforcement of the reinstatement award would violate public policy in light of the employee's recent drug use and the probability of a safety hazard.

Before the Fifth Circuit, the employer echoed this public policy argument. The union, on the other hand, responded by arguing a public policy in favor of rehabilitation, a policy evidenced by the grant of unadjudicated probation rather than confinement.

The Fifth Circuit found that the arbitrator was free "to credit the public policy favoring drug rehabilitation and find that [the employee] no longer used drugs and would not present a safety risk." In light of the subsequent drug use, however, the court felt that public policy could bar enforcement and remanded the issue to the arbitrator for reconsideration in light of the employee's post-award drug use "to the extent that this conduct proves his findings were based on an erroneous prediction."

The message of Union Oil is clear. Under the broadest view, public policy can mean whatever a judge wishes it to mean. If an arbitrator's award were based, not on the contract, but on his or her weighing of a general public policy against drug use against a general public policy in favor of rehabilitation, it would be invalid.

A number of courts and judges have taken a far more limited view, believing that the public policy view is "extremely narrow" and that an arbitrator's decision should be overturned on public policy grounds only when the decision requires someone to act unlawfully. Two recent decisions of the Ninth Circuit provide examples. In Amalgamated Transit Union Local 1309 v. Aztec Bus Lines, the arbitrator ordered the reinstatement

191. Id. at 440.
192. Id.
193. Id. at 442.
194. Id. at 443.
195. "When an arbitrator bases his award on public policy considerations, he has overstepped his authority and the court may review the substantive merits of the award." Local No. P-1236, Amalgamated Meat Cutters v. Jones Dairy Farm, 680 F.2d 1142, 1144 (7th Cir. 1982).
196. United States Postal Serv. v. National Ass'n of Letter Carriers, 810 F.2d 1239, 1241 (D.C. Cir.) (per curiam) (holding that district court erred when it vacated award reinstating letter carrier who pled guilty to unlawful delay of mail), cert. denied, 108 S. Ct. 500 (1987), cert. dismissed, 108 S. Ct. 1589 (1988). The arbitrator's judgment on "just cause" was "precisely what the parties had bargained for" and the "extremely narrow" public policy exception gave the lower court no grounds to proscribe the reinstatement. Id.
197. See, E. I. DuPont, 790 F.2d at 617-20 (Easterbrook, J., concurring).
198. 654 F.2d 642 (9th Cir. 1981) (per curiam).
of a bus driver who violated company policy by driving a bus despite knowing that its brakes were faulty. The court held that the arbitrator's order did not violate public policy. Taking a narrow view of the public policy exception, the court stated: "We agree that forcing a party to a collective bargaining agreement to break the law is against public policy, but no California statute has been called to our attention which would make it illegal to employ bus drivers who have previously shown bad judgment."\(^{199}\)

In *Bevies Company v. Teamsters Local 986*,\(^ {200}\) an arbitrator ordered the reinstatement of two employees fired when their employer learned they were undocumented aliens. The court held that the award did not "violate a clearly defined public policy [since] [n]either the company nor its employees are subject to any criminal or civil liability under federal law arising from their employment relationship."\(^ {201}\)

Other courts have refused to overturn, on public policy grounds, awards directing reinstatement of drug users,\(^ {202}\) letter carriers pleading guilty to unlawful delay of mail,\(^ {203}\) persons assaulting supervisors,\(^ {204}\) and gamblers.\(^ {205}\) In another case, a court enforced an award directing reinstatement of a religious program radio announcer despite the argument that enforcement of the award would infringe on the first amendment rights of the employer radio station.\(^ {206}\) As Judge Easterbrook noted, in disagreeing with the concept of a broad public policy inquiry:

I find the principle itself objectionable. A power to set aside awards on grounds of public policy, as distinct from rules of law, is too sweeping.

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199. *Id.* at 644.


201. *Id.* at 1392-93 (footnote omitted).


203. *See* United States Postal Serv., 810 F.2d 1239.

204. *See* E. I. DuPont, 790 F.2d 611.

205. *See* Local 453, Int'l Union of Elec., Radio & Mach. Workers v. Otis Elevator Co., 314 F.2d 25 (2d Cir.) (enforcing contract interpreted by arbitrator to require reinstatement of company employee who violated company rule against gambling on premises and was convicted of a misdemeanor), *cert. denied*, 373 U.S. 949 (1963). The court found that the public policy represented by the New York statutory prohibition was vindicated by criminal conviction and further vindicated by a seven-month uncompensated layoff upheld by the arbitrator. The court also found no "greater vindication of the public condemnation of gambling" was required. *Id.* at 29.

A court lacks this power for the same reason the arbitrator does—the function of arbitrator and court is to carry out a contract, and contracts bind unless made unlawful by rules of positive law.\textsuperscript{207}

The \textit{Misco} decision leaves for another day a decision on the issue of whether a court may refuse, on public policy grounds, to enforce a labor arbitration award only when the award itself violates positive law or requires a party to engage in unlawful conduct.\textsuperscript{208} What is clear, however, is that the directives of \textit{W. R. Grace} should be observed more closely.

\section*{Conclusion}

Labor arbitration provides the parties a means to settle industrial disputes short of economic warfare and lengthy court litigation. Finality is necessary to ensure that often emotional issues are left in the past. Finality is threatened, however, not only by overbroad court review of arbitration awards, but also by judicial decisions which seem to promise broad review and thus invite parties to delay implementation of the award while contesting its validity in court. The delays which accompany court review are extensive and can damage our entire system of collective bargaining by rendering less effective the sanctioned means for preventing labor disputes: labor arbitration.

As the \textit{Misco} Court noted, as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his or her authority, a court should not overturn the arbitrator's decision merely because it disagrees with his or her factual findings, contract interpretations or choice of remedies. To apply this test, unions, employers, representatives, attorneys and judges must understand that a federal court asked to set aside a labor arbitration award does not sit to hear an "appeal" of the arbitrator's decision. Nor does such court sit to review for error the ruling of an allegedly inferior agency. Congress, the Supreme Court and the parties have given labor arbitrators the power and duty to interpret the labor contract. Thus, he or she is not an inferior agency. So long as the arbitrator has confined himself or herself to interpreting the collective bargaining agreement, the parties should not be heard to complain. The parties themselves chose the arbitrator and gave him or her power to make a final ruling. Thus, because contract interpretation is for the arbitrator and not for the court, a court is not empowered to say that an arbitrator has misinterpreted the contract. If the arbitrator's decision is not tainted by corruption or fraud, if it does not violate the law or order a party to commit an illegal act, and if it is not clearly beyond limits set on the arbitrator's authority, it should be enforced.

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\footnotesize
\textsuperscript{207} \textit{E. I. DuPont}, 790 F.2d at 618.
\textsuperscript{208} 108 S. Ct. at 374-75 n.12.
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APPENDIX A TO TABLE 2

U.S. District Court Decisions Reviewing Arbitration Awards:
1/1/84 - 12/31/84

8. *Local P-9 United Food & Commercial Workers Int’l Union v. George A. Hormel Co.*, 599 F. Supp. 319 (D. Minn. 1984) (185 days from award, 814 days from incident) (first award upheld, but second award which reversed the first was vacated), *rev’d*, 776 F.2d 1393 (8th Cir. 1985) (remanding for hearing to determine whether the first arbitrator’s award was final or whether it was a draft open for reconsideration).


Appendix B to Table 2

U.S. District Court Decisions Reviewing Arbitration Awards:
1/1/85 - 12/31/85

1. Trailways Lines v. Trailways Joint Council, 624 F. Supp. 880 (E.D. Mo. 1985) (495 days from award) (upheld), aff’d, 807 F.2d 1416 (8th Cir. 1986).


15. Lone Star Indus. v. Teamsters Local 291, 125 L.R.R.M. (BNA) 3063-64 (9th Cir. 1986).