JUDICIAL STANDARDS FOR ENFORCEMENT AND VACATUR OF LABOR ARBITRATION AWARDS

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In order to understand the deference courts give arbitration awards in the field of labor law it is essential to review the evolution of binding arbitration in America. In England during the 19th century the judiciary viewed private agreements to arbitrate personal disputes as attempts by individuals to oust judicial jurisdiction.[1] Early nineteenth century American courts exhibited similar hostility to private agreements to arbitrate.[2] The judicial hostility toward arbitration coupled with the widely held doctrine that any group of workers acting in concert was an illegal conspiracy against the public interest meant binding labor arbitration was a theory whose time had not yet come.[3]

As nineteenth century America morphed from an agrarian, localized economy into its modern industrialized form, interstate commerce grew in significance. As a result, early legislation in the employment field centered on employer-employee relations in the burgeoning railway system. Legislative officials soon recognized the need for a mechanism whereby disputes arising between railway workers and owners could be reconciled without resort to work stoppages, lockouts, or judicial review. As a result, in 1888 the United States Congress enacted the Arbitration Act as the first federal labor relations law in America.[4] The Act confronted the

[1] Najita, Joyce M & Stern, James L. Labor Arbitration Under Fire. 1 (Cornell University Press, 1997)
[2] Id.
[3] Kelly, Matthew A. Labor and Industrial Relations. 93 (John Hopkins University Press, 1987).
[4] Id. at 94

threat labor disputes posed to the nascent national economy by authorizing a voluntary arbitration system overseen by a Board of Investigators which consisted of three individuals, one selected by each party and one selected by both[5]. This system, although never actually used, laid the groundwork for the composition of arbitration boards used a half century later.

At the same time the judiciary began to move away from its hostility toward labor unions. In 1842 the Massachusetts Supreme Court rejected the doctrine in Commonwealth v. Hunt and held that labor combinations were not unlawful per se.[6] The Court held labor organizations formed for the lawful purpose of increasing wages and improving working conditions were not illegal conspiracies. The Justice's decision focused on the means used to obtain the benefits, and in effect modified the common law doctrine of conspiracy and substituted the doctrine of Legal Ends and Means in its place.[7]

Later legislative attempts to oversee relations between workers and their employers created voluntary arbitration mechanisms whereby day to day workplace disputes could be settled efficiently without resort to judicial remedies. These initiatives were not limited to railway disputes, nor were they limited to legislation enacted by the federal government. By 1886 three states, Maryland, New York and Massachusetts, passed laws providing for workplace arbitration.[8] These mechanisms created bodies to arbitrate workplace disputes, and where precursors to the Arbitration Act of 1888, and its successor, the Erdman Act of 1898.[9] The states formed their own methods, but arbitration boards were commonly comprised of three members, some divided between members of the moneyed or working classes, others by political party.

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[5] Id. at 95
[6] Kelly, supra at 94
[7] Id.
[8] Industrial Arbitration in New York State (413 1907)
[9] Id.

These boards were rendered ineffectual in states that shared the New York protocol, which provided no provision for compelling the parties to arbitrate their disputes.[10] By the end of the century fifteen other states had enacted similar provisions for binding arbitration of labor disputes.[11] The failure of these boards to bring a semblance of labor peace can be ascertained from statistics compiled during period of 1888 to 1894. During that period there were 4,457 recorded strikes in jurisdictions that had laws creating arbitration boards authorized to hear industrial disputes.[12] Of those disputes, only twenty requests for binding arbitration were brought by unions and eleven by employers.[13] It quickly became clear that in order for arbitration to be a solution to the rising problem of labor strife, legislation would have to be created compelling labor and management to submit their disagreements to impartial third party umpires.

The federal government was forced to deal with these issues after nationalizing the railroads during the First World War.[14] Congress authorized a Director General of Railroads to establish a tripartite board responsible for dispute settlement. A Board of Adjustments was created and bestowed with final authority to resolve all workplace grievances. The post war Transportation Act codified its initiatives and established the United States Railroad Labor Board to investigate and publish findings as to interest disputes, which arose during contract negotiations. TheAct also gave the board final authority to resolve all grievances and rights disputes, those based on contractual provisions.[15] Thus was born the first compulsory arbitration provision. A decade later the Post World War Two Railway Labor Board was limited to arbitrating disputes that arose during the existence of a collective bargaining agreement, but had power to neither mediate nor

[10] Id. At 415
[11] Id. At 413
[12] Id. At 416
[13] Id.
[14] Kelly, supra at 97
[15] Id. At 98

issue binding rulings in new contract, or interest, disputes.[16] This format, whereby arbitration provisions defined in collective bargaining agreements terminate at the expiration of those agreements, lives on to this day.

Statutory regulations passed between the two great wars, fueled by the great depression and Franklin Delano Roosevelt's New Deal legislation, furthered the doctrine of binding arbitration. By the time the Second World War started it was plainly the position of the nation that binding arbitration was the preferred way for parties to collective bargaining agreements to settle their differences.[17] The Railway Labor Act of 1926, explicitly, and the National Labor Relations Act of 1934, by implication, created mechanisms whereby either the employer or the union could compel their counterpart to submit disputes to binding arbitration.[18] The way these laws empower arbitrators to hear and rule on issues arising under the agreements they are bound by is less important than the bottom line result. Disputes over issues that arise in the day to day operations of workplaces, where the parties have agreed to arbitrate beforehand, are now given great deference by courts.[19] The judiciary has had more than 70 years to enunciate its position as to the enforceability of arbitration decisions. On the following pages we will examine the deference given to arbitrators by the courts and doctrines which lead judges to vacate those very same awards.

[16] Id.
[17] Najita, supra at 2
[18] Id. at 3
[19] Id. at 5

THE FOUNDATION OF JUDICIAL AUTHORITY, REVIEW, AND DEFERENCE TO LABOR ARBITRATION

The Federal Arbitration Act of 1925 and the Taft Hartley Act have been guides for creating common law principles in labor arbitration.[20] Even though the F.A.A. expressly excludes contracts of employment, it has been cited where federal courts sought congressional grounding in opinions regarding arbitration in the organized workplace. The F.A.A. gives substantive federal meaning to valid arbitration clauses in collective bargaining agreements and courts hold that state laws restricting such clauses preempted.[21] The F.A.A. was enacted in close chronological proximity to the Railway Labor Act of 1926 and both reflected congressional intent that contractual disputes were best addressed in informal arbitral forums, if the parties so chose beforehand.[22] More than twenty years later article 301 of the Taft-Hartley amendment to the National Labor Relations Act explicitly codified congressional intent that contractual binding arbitration provisions in collect bargaining agreement be judicially enforceable.[23]

The Arbitration Act bestows quasi judicial powers to arbitrators. Under its auspices they have the power to require witness attendance as well as document production.[24] At the same time the Act explicitly subjects arbitral awards to judicial review. Further, it enunciates various reasons for judicial justification in vacating awards.[25] Awards may be vacated for arbitral misconduct based on corruption, fraud, evidential partiality on the part of the arbitrator, and refusal to hear pertinent evidence.[26] In essence, the act defines an arbitrator's decision as lacking finality if he or

[20] Elkouri, supra at 50
[21] Id.
[22] Najita, supra at 1-4
[23] Id. at 4
[24] Id.
[25] Id.
[26] Id.

she engages in conduct detrimental to the rights of a party or exceeds the authority granted by the contract governing the dispute.[27]

Even though the Wagner Act of 1935 failed to mention arbitration as a dispute resolution mechanism by encouraging collective bargaining it influenced the spread of contractual arbitration agreements.[28] The explosion of union organizing and the passage of state laws making arbitration agreements enforceable in state courts, resulted in more than three quarters of all collective bargaining agreements containing arbitration provisions.[29] When the United Automobile Worker's won recognition at General Motors, their agreement contained a multi tiered grievance procedure culminating in binding arbitration before an impartial third party.[30] Other major manufacturing employers soon followed suit, thereby making impartial final binding arbitration the default contractual method for settling disputes in the organized workplace.[31]

Congress codified its endorsement of binding arbitration in section 203(d) of the Taft Hartley Act.[32] The act enunciates congressional intent by stating that "final adjustment by a method agreed upon by the parties" is the desirable method for settling disputes over the interpretation of contractual clauses.[33] Additionally, section 301 of the Act gave federal courts jurisdiction to interpret and enforce labor arbitration provisions contained in collective bargaining agreements.[34] In Lincoln Mills[35], the Supreme Court stated that it was clearly Congress's intent

[27] Id.
[28] Najita, supra at 44
[29] Id.
[30] Id.
[31] Id.
[32] Id. at 45
[33] Id.
[34] Elkouri, supra at 51
[35] Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 456 (1957)

to reject the common law's hostility towards arbitration in contractual disputes.[36] The Court thereafter turned to the question of what substantive law to apply in section 301 suits. The Court held that the federal courts must develop a body of federal law, supplemented by compatible state law, in order to fashion judicial policy.[37] Additional concerns about the restriction on injunctive relief in labor disputes enunciated in the Norris LaGuardia Act were addressed in Lincoln Mills,[38] and later in Boys Market,[39] were the Court held that congressional policy, as codified in Taft Hartley, allowed for injunctive relief compelling a recalcitrant party to submit to contractually agreed to procedures in addition to legitimizing orders of specific performance enforcing the finality of the results there from.[40]

THE DOCTRINE OF JUDICIAL DEFERENCE AND FINALITY IN LABOR ARBITRATION

The great deference arbitral awards are given by federal courts grew out of the well-known Steelworkers trilogy cases handed down by the Supreme Court on June 2th, 1960. In American Manufacturing Justice Douglas declared that courts interpreting contractual clauses where the parties have agreed to arbitrate would contradict congressional intent and fly in the face of the bargain to which the parties agreed.[41] Hence, the Court established that even where a claim is clearly frivolous, judicial review is illegitimate.[42] In Warrior Gulf, Justice Douglas held that judicial hostility to toward agreements to arbitrate in commercial contracts did not apply to collective bargaining agreements.[43] Additionally, the Court held that agreements to arbitrate would be broadly construed unless disputes of a particular nature were explicitly excluded from

[36] Id.
[37] Id. at 457
[38] Id. at 458
[39] Boys Market, Inc. v. Retail Clerks Union, 398 U.S. 235, 252 (1970)
[40] 353 U.S. 448 at 458
[41] United Steel Workers of America v. American Manufacturing Co., 363 U.S. 564, 568-569 (1960)
[42] Id. at 568
[43] United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 575, 578 (1960)

arbitral review.[44] Circuit courts still apply this doctrine, evidenced in Kraft Foods v. Office of Professional Employees. There, the Court held that unless a collective bargaining agreement specifically bars a particular remedy, a no contract modification clause does not limit the arbitrator's options in fashioning a remedy.[45] Finally, Justice Douglas enunciated the position that as long as the arbitrator's decision "draws its essence" from the collective bargaining agreement courts have no business refusing to enforce them.[46] Interestingly enough, while the Court limited judicial review of arbitral awards, it also set the limits on how an arbitrator must ground his decision. When arbitrators dispense their own form of industrial justice and fail to base their decision on the essence of the contract courts have the right, indeed the obligation, to refuse enforcement of the award.[47] Henceforth, courts would be empowered to compel arbitration when the parties' contract clearly states their intention to submit their differences to arbitration, whether or not the claims appear to lack merit. In addition, arbitrator's determinations are granted great deference as long as their awards find their basis in the agreements they are authorized to interpret.[48]

ARBITRATION AND THE NATIONAL LABOR RELATIONS BOARD

The Wagner Act created the National Labor Relations Board to administer and enforce its provisions.[49] One of the functions of the Board is to rule on charges of unfair labor practices by both employers and unions.[50] The presumption in favor of arbitrability over the jurisdiction of the NLRB when disputes are subject to both Federal Labor Law and contractual obligations to

[44] Id. at 584
[45] Kraft Foods, Inc. v. Office and Professional Employees International Union Local 1295, 203 F. 3d 98, 102 (1st Cir. 2000)
[46] United Steel Workers of Am. V. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)
[47] Id.
[48] Kelly, supra at 156
[49] Id. at 107
[50] Id. at 108

arbitrate was enunciated by the Supreme Court in Carey v. Westinghouse Electric Co.[51] Once again, Justice Douglas authored the opinion and stated that where a grievance is subject to both a contractual arbitration provision and unfair labor practice charge, the labor board properly defers to the arbitral forum.[52] The Court held that the Board was within its rights when it vacates an award which was tainted by fraud, collusion, or gross procedural irregularities.[53] Additionally, the NLRB has the ability to overturn an award that is clearly repugnant to the Act.[54] Finally, the Court held that the Board could, it if wished, bring its superior authority to bear at any time. However, Justice Douglas cautioned against doing so, referring to the curative, theraputive effect arbitration has on labor relations.[55] Later, in Garcia v. NLRB, the 9th Circuit Court of Appeals set bright line rules where the Labor Board should defer claims to an arbitrator which could also form unfair labor practice charges.[56] The Court held that deferral is proper when the arbitration proceedings are 1) fair and regular 2) the parties have agreed to be bound 3) the decision is not repugnant to the purposes and policies of the act 4) the contractual issue is factually parallel to the unfair labor practice and 5) the arbitrator is presented generally with the facts relevant to resolving the unfair labor practice.[57] The elements stated by the Court in Garcia find their authority in the Spielberg Doctrine, which states the Board will defer to an arbitrators decision, as well as a pending arbitration, as long as the general procedural rules are met.[58] Later the Board established the Collyer Doctrine where, if an issue is susceptible to being resolved under a contractual arbitration clause, any unfair labor practice charges would be deferred until the

[51] Cary v. Westinghouse Electrical Corp., 375 U.S. 261 (1964)
[52] Id. at 272
[53] Id. at 271
[54] Id.
[55] Id. at 272
[56] Elkouri, supra at 57
[57] Garcia v. NLRB, 785 F. 2d 807 (9th Cir. 1986)
[58] Kelly, supra at 161

grievance procedure has run its course.[59] The NLRB has clearly acknowledged they would defer to the arbitral forum but, just as importantly, retain the right to review such an award.

JUDICIAL EXCEPTIONS TO THE DEFERENCE DOCTRINE

Clearly, courts have carved out exceptions to the deferral doctrine allowing them the option to review and overturn arbitration awards. Even with the broad language giving deference to arbitration contained in the Steelworkers Trilogy, the Supreme Court has left significant room to set aside awards.[60] There remain three wide-ranging exceptions to the deference doctrine.[61] Irrationality of an arbitrator's award has been held to be a reason for vacatur. Additionally, courts have recognized issues of procedural defects as well as awards that conflict with substantive law or public policy.[62]

GROSS AND SERIOUS ARBITRAL ERROR

The Supreme Court in Major League Baseball Association v. Garvey set the bar extremely high as to what type of arbitrator error leads a court to legitimately vacate an award. The Court held that serious error does not justify vacating an award as long as the arbitrator's award is drawn from the four corners of the contract.[63] The Court left open the option of vacating an award that was based on irrational or inexplicable error, but held that the dismissal of evidence contained in a writing did not rise to that level.[64] In Associated Milk Dealers the Seventh Circuit

[59] Id.
[60] Elkouri, supra at 60
[61] Najita, supra at 29
[62] Id.
[63] Major League Baseball Players Association v. Garvey, 532 U.S. 504, 509 (2001)
[64] Id. at 511

Court of Appeals vacated an award which was based on an arbitrator's interpretation that a contractual clause violated Federal antitrust statutes. The Court held that arbitrators are ill equipped to rule on antitrust violations, and to subject such a claim to an arbitrator would be gross error.[65] The First Circuit Court of Appeals held in Electronics Corporation of America, citing to the Federal Arbitration Act of 1925, that where an arbitrator based his award solely on a fact that was in essence a non fact, the award could not be allowed to stand.[66] There, the arbitrator had assumed, contrary to the evidence, that an employee had not been previously suspended by the employer, thereby upholding a grievance and ordering the offending employee back to work.[67] In Bieski, the Third Circuit Court of Appeals overturned a district court's dismissal of a motion to vacate an arbitration ruling, which was filed by employees whom were represented by a union faced with seniority dovetailing at two workplaces being merged. The Court held that the arbitration committee's decision that there was no merger was arbitrary and unreasonable in that it was clearly the case that the surviving employer had absorbed, as defined by the terms of the collective bargaining agreement, the other employer.[68] Furthermore, the court held that the arbitration board, as defined in the parties' collective bargaining agreement, envisioned equal union and management representation. In reality, the union took a position adverse to the workers in the shop, leaving them with little or no experienced advocates.[69] For this reason the Court held that the district court should enjoin the implementation of the arbitration award and remand back to the arbitration procedure for a procedurally correct

[65] Associated Milk Dealers Inc. v. Milk Drivers Union Local 753, 422 F. 2d 546, 552 (7th Cir. 1970)

[66] Electronics Corp. of America v. International Union of Electrical, Radio and Machine Workers Local 272, 492 F. 2d 1255, 1257 (1st Cir. 1974)

[67] Najita, supra at 33

[68] Bieski v. Eastern Automobile Forwarding Co. Inc., 396 F. 2d 32, 40 (3rd Cir. 1968)

[69] Id.

implementation of the grievance mechanism.[70] Clearly, in keeping with the Steelworkers Trilogy, the level of error exhibited in an arbitration award would have to be quiet high for a court to be comfortable enough to vacate.

The 5th Circuit Court of Appeals summed things up nicely when it articulated that if an arbitrators reasoning is so faulty that no judge or group of judges could ever conceivable reach the same conclusion the court will be justified in striking it down. But, they continued, even though a reviewing court would find the arbitrators ruling offensive, such offensiveness is not sufficient to vacate.[71]

PROCEDURAL ARBITRAL DEFECTS

Procedural defects in the arbitration have long been grounds for vacating an award. Clear bias of an arbitrator is grounds for vacatur as well. Such bias is evidenced by arbitrator behavior, which is unusual under the circumstances. In Holodnak v. Avco Corp., the arbitrator's irrelevant and sometimes offense questioning of the grievant led the Federal Court for the District of Connecticut to conclude he was biases. They observed that he openly badgered the grievant during the proceedings,[72] participated in the same line of questioning as the employers attorney, questioned the grievant's political views, and intimated the grievant held communist sympathies.[73] In addition to procedural issues the Court had with the arbitrator's behavior, it found that the union advocates failed in protecting the grievant's section 7 rights.[74] In the end,

[70] Id. at 42
[71] Safeway Stores v. American Bakery and Confectionary Workers Local 111, 390 F. 2d 79, # (5th Cir. 1968)
[72] Holodnak v. Avco Corp., 381 F. Supp. 191, 196 (D. Conn. 1974)
[73] Id. at 198
[74] Id. at 203

the Court held that after observing the record, and in the totality of the circumstances, the arbitrator violated the procedural rights of the grievant, leading them to vacate the award.[75]

FAILURE TO ADHERE TO THE ESSENCE OF THE CONTRACT

An arbitrator commits a fatal error when he bases his opinion on a prior ruling based on a different collective bargaining agreement. A failure to consider the "law of the shop" is also grounds for judicial vacatur of an award. In Trailways Lines v. Trailways Joint Council[76] the 8th Circuit Court of Appeals cited to Timken Co. v. Local Union No. 1123, holding that failure to consider evidence supported by the common rules of the industry is grounds for vacating an award.[77] Later, in Trailways the court held that by copying a large portion of his analysis from a previous decision applying a different contract, the arbitrator failed to honor the intentions of the parties as evidenced by the agreement they crafted, as well as the long standing past practices of the shop. It was this failure that led the court to vacate the award and remanded the issue back to the parties for further grievance adjustment.[78] To be sure, the court recognized in dicta that an arbitration award becomes a part of the collective bargaining agreement that creates the procedure, but the issue in the instant case was the arbitrator straying outside the four corners of the agreement.[79]

An arbitrator interpreting the scope of the parties' submission is granted the same deference as his interpretations of collective bargaining agreements. In Madison Hotel the Court held that an arbitrator basing his ruling on outside legal sources, without regard for the terms of the

[75] Id. at 206
[76] Timkin Co. v. Local Union No. 1123 United Steelworkers, 482 F. 2d 1012 (6th Cir. 1973)
[77] Trailways Lines, Inc. v. Trailways, Inc. Joint Council, 807 F. 2d 1416, # (8th Cir. 1986)
[78] Id. at 1426
[79] Id. at 1425

contract, would be valid grounds for disturbing an award.[80] The presence of a broadly worded arbitration clause can make it difficult for a court to find grounds to vacate. In Pack Concrete the employer and union negotiated a very broadly defined arbitration clause covering any dispute arising under the contract.[81]The company issued what it thought were layoff notices that the union took to be discharge slips.[82] The union then petitioned for reinstatement of the two affected individuals, which the company thereby denied.[83] The union filed for arbitration and submitted its briefs to the impartial umpire, who thereafter ruled in favor of the grievant.[84] The company petitioned the District Court to overturn the award on the grounds that the arbitrator exceeded his authority by deciding an issue that was not before him.[85] The court granted summary judgment for the defendant union which the Circuit Court reviewed de novo. [86] Although the Circuit Court acknowledged the arbitrator's authority is limited when he exceeds the boundaries of the submissions to him, the court held that his interpretation of the which issues are before him is accorded the same deference as his interpretation of the collective bargaining agreement.[87]

UNCLEAR AND INCOMPLETE AWARDS

Courts have been willing to remand awards back to the arbitrator where the award itself is either unclear or incomplete. In New Idea Farm Equipment the 6th Circuit Court of Appeals held that a district court erroneously concluded it could not remand an arbitrator's award for clarification.[88] The court cited to Timken Roller[89] in holding that a court is not required to

[80] Madison Hotel v. Hotel and Restaurant Employees Local 25, 144 F. 3d 855, 859 (D.C. Dist. Ct. App. 1998)
[81] Pack Concrete Inc. v. Cunningham, 866 F. 2d 283, 283 (9th Cir. 1989)
[82] Id.
[83] Id.
[84] Id.
[85] Id. at 284
[86] Id.
[87] Id.
[88] United Steelworkers of America Local 4839 v. New Idea Farm Equipment Corp., 917 F. 2d 964, # (6th Cir. 1990)

enforce an award which is not clear as to its meaning and effect.[90] This ambiguity can be evidenced by the parties themselves not knowing what the effect of the award is.[91] Although the court may not decide on issues that were not before the arbitrator, the court properly exercises its roll when it remands an ambiguous award back to the original umpire.[92]

VIOLATIONS OF PUBLIC POLICY AND STATUTORY LAW

Violation of public policy or substantive law are more basic to the question of not whether an arbitrator has acted outside his powers of contractual interpretation but as to the lawful enforcement of contractual provisions. Various courts have held that awards repugnant to statutory law, rights and obligations enunciated by the Wagner Act, and contractual provisions in violation of clearly stated public policy are correctly vacated. In Misco, the Supreme Court held that a while a court may refuse to enforce a contractual clause that operates in violation of public policy, it is not free to do so where an arbitration award rises to the same level.[93] The Court went on to hold that any decision on whether or not an award is subject to vacatur must focus on explicit conflicts with law or legal precedents, not whether the award was repugnant to general considerations of public policy.[94] The court applied this doctrine in Misco where the car of an employee working with heavy machinery was found to contain marijuana.[95] The Court held that the arbitrator's ability to determine whether or not the employee can be expected to be drug free in the workplace exists through his powers as fact finder, leaving it outside the purview of the

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[89] United Steelworkers v. Timken Roller Bearing Co., 324 F. 2d 738, 740 (6th Cir. 1972)
[90] 917 F. 2d 964 at 967
[91] Id. at 968
[92] Id.
[93] United Paper Workers International Union v. Misco Inc., 484 U.S. 29, # (1987)
[94] Id.
[95] Id. at 44

appellate court to determine whether or not a legal issue was present.[96] In his concurrence, Justice Blackmun stated that in order for a court to overturn an arbitrator's determination on public policy grounds such an award would have to be in contravention to "laws and legal precedents".[97] In the absence of such a substantial showing the Court held that arbitration awards cannot be subject to remand. A general review of the pertinent cases shows that when an award is merely contrary to general considerations of public policy courts will not vacate but, on the other hand, when the public policy is clearly referenced in specific laws and legal precedents courts are comfortable in vacating.[98]

VACATUR BASED ON A UNION'S FAILURE TO FAIRLY REPRESENT ITS MEMBERS

A union's failure to properly represent its members can be proper grounds for vacating an award. In Hines v. Anchor Motor Freight such a failure on the part of a bargaining representative left an arbitration award tainted, thereby subjecting it to judicial nullification.[99] The basis for overturning the arbitrator's decision is not grounded in any procedural or substantive misconduct by the employer or the arbitrator. The issue is the union's violation of its duties as outlined in the Wagner Act.[100] An employee whose grievance is adversely affected by his union's failure to properly represent him in an arbitration hearing is no longer bound by the grievance process.[101] In Hines the Court held the arbitral award reviewable on the grounds that the union breached its statutory duty to properly and fairly represent its members.[102] Although the Court admitted that the employer had not entered into any conspiratorial relationship with the union, they held that

[96] Id. at 45
[97] Id. at 47
[98] Elkouri, supra at 72
[99] Hines v. Anchor Motor Fright, Inc., 424 U.S. 554, # (1976)
[100] Najita, supra at 37
[101] Najita, supra at 34
[102] 424 U.S. 544 at 568

since the employer committed the grieveable act resulting in the arbitration they were exposed to suit under section 301 of the Labor Management Relations Act (Taft Hartley) of 1947.[103] In its discussion of finality in binding arbitration, the Court held that excusing arbitrator error is not proper where the union has failed to comply with its statutory duty to fairly represent the grievant.[104]

A union's breach must be more than mere negligence.[105] In Rawson the Supreme Court held that in order for a union's conduct to reach the level of a breach of its duty of fair representation such conduct would have to be arbitrary, discriminatory, or in bad faith.[106] Such discriminatory conduct is a substantive violation of union member's rights under federal law as created by the National Labor Relations Act.[107] Union malfeasance resulting from a failure to properly process grievances and represent their members is an established reason for judicial vacatur of arbitration awards, leaving both the union and the employer liable for damages and injunctive sanctions.[108]

RECENT DEVELOPMENTS

The Supreme Court has recently been willing to tolerate federal appellate court rulings that appear counter to the deference doctrine.[109] In some instances the lower courts have reflected the Supreme Court's general ambivalence to judicial finality.[110] The 5th Circuit Court has been particularly susceptible to the urge to substitute their interpretation of labor contracts for

[103] Id. at 562
[104] Id. at 571
[105] United Steelworkers of America v. Rawson, 495 U.S. 362, # (1990)
[106] Id.
[107] Id.
[108] Vaca v. Sipes, 386 U.S. 171, 197 (1967)
[109] Najita, supra at 40
[110] Elkouri, supra at 60

arbitrators.[111] The 4th Circuit Court has also exhibited a willingness to examine both the arbitrator's treatment of evidence as well as his reasoning.[112] The Circuit Court's reversal rate varies widely, with the 10th Circuit reversing 10.5 percent of cases reviewed and the 5th Circuit reversing an astonishing 42 percent of cases brought before it.[113]

Although the Circuit Courts have failed to develop universally recognized standards for enforcing awards practitioners need not lose heart.[114] The recent Supreme Court decision in Circuit City[115] declaring that the Federal Arbitration Act applies to employment contracts except those covering transportation workers should bring some sanity to the field.[116] Section 10 of the Act sets forth six grounds on which a court can rely in overturning an arbitration award 1) the award was procured by corruption fraud or undue means, 2) the arbitrator was guilty of evident partiality, 3) the arbitrator refused to postpone the hearing , upon sufficient cause shown, 4) the arbitrator refused to hear evidence pertinent and material to the controversy, 5) the arbitrator engaged in misbehavior prejudicial to the rights of a party and, 6) the arbitrator exceeded his or her power or so imperfectly executed them that a final and definite award was not made.[117]

[111] Id. at 61,62
[112] Id. at 62
[113] Id.
[114] Id. at 65,66
[115] Circuit City Stores, Inc. v. Saint Clair Adams, 532 U.S. 105 (2001)
[116] Id. at 67
[117] Id.