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JUDICIAL REVIEW OF LABOR ARBITRATION AWARDS: THE CLASH BETWEEN THE PUBLIC POLICY EXCEPTION AND THE DUTY TO BARGAIN

HARRY T. EDWARDS*

I. INTRODUCTION

In 1960, in three landmark decisions that have come to be known as the *Steelworkers Trilogy*, the Supreme Court made it clear that arbitration is "a kingpin of federal labor policy" in the United States. The Court exalted the role of the arbitrator as a force for industrial peace, articulated a view of the labor contract as a working arrangement between labor and management engrossing unwritten understandings and plant practices not reflected in the written terms, and announced a doctrine of judicial self-restraint in cases in which the parties have assigned the task of dispute resolution to an arbitrator privately selected.

In short, the Court proclaimed that a fundamental goal of the nation’s labor legislation is the promotion of binding arbitration as a way of resolving disputes that arise during the term of a collective bargaining agreement.

The policies enunciated in the *Steelworkers Trilogy* are grounded both in economic rationality and common sense. Arbitration provides a relatively speedy, informal and inexpensive alternative to litigation and to economic warfare; it is therapeutic in the sense that it allows workers to "have their day in court;" it often involves a judgment from someone who is well known and well respected by the parties; it is a flexible process that easily may be changed to suit the needs of the parties; and, most importantly, it is an extension of collective bargaining — the private system of jurisprudence created by and for the benefit of the parties. However, it has always been understood that, in order to be fully effective,

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arbitration must afford finality. Thus, the Supreme Court has emphasized that the courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. . . . "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." 4

In recent years, this long-standing policy of judicial deference has been significantly undercut by a series of lower court decisions that vacate arbitration awards on the ground that they conflict with public policy. In my view, these courts have engaged in unprincipled and unwarranted judicial activism, because the awards in question did not violate any statute, regulation or other manifestation of positive law, or compel conduct by an employer, union or employee that would violate such a law. Under the guise of public policy, therefore, these courts have substituted their own views of industrial justice for the views of the arbitrator.

A few months ago, the Supreme Court issued its decision in United Paperworkers International Union v. Misco, Inc., 5 which goes a long way toward putting an end to this alarming practice. The Court stated in no uncertain terms that the so-called "public policy exception" should be construed in an extremely narrow fashion, and that lower courts do not have broad powers to vacate arbitration awards on the ground that they purportedly violate some public policy. Regrettably, the opinion in Misco contains several false starts and make-weights which may allow lower courts to circumvent an otherwise unmistakable mandate from the Supreme Court. This was made evident just two weeks after the decision in Misco was issued, when the Eighth Circuit adopted an expansive interpretation of the public policy exception that appears to ignore the basic tenor of the Supreme Court’s recent decision. 6

Judicial decisions that subscribe to a broad public policy exception commit two fundamental errors: first, they disregard the commands of the Steelworkers Trilogy; second, they overlook the threat that an ill-defined public policy exception poses to the reciprocal duty to bargain imposed on employers and unions under the nation’s labor laws. In most instances when a court decides that an employer is not required to abide

by an arbitral award because it allegedly conflicts with some asserted public policy, the employer is given a free rein to act as it wishes with regard to a term of employment covered by the duty to bargain. The court thus effectively removes that subject from the ambit of collective bargaining, despite the fact that the subject, and the entire grievance-arbitration structure as well, are mandatory subjects of bargaining under our national labor laws. This is ironic, because the offending courts seemingly fail to recognize that, in vacating arbitration awards under a broad public policy exception, they are infringing the explicit public policy underlying the duty to bargain.7

II. THE RULE OF JUDICIAL NONINTERVENTION WITH LABOR ARBITRATION

Section 301(a) of the Labor Management Relations Act provides that:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.8

In Textile Workers Union v. Lincoln Mills,9 the Supreme Court held that section 301(a) "authorizes federal courts to fashion a body of federal law for the enforcement of ... collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements."10 Given the legal foundation established by Lincoln Mills, the Court found it easy to enunciate the principles of judicial nonintervention with arbitration found in the Steelworkers Trilogy.

In order to understand the parameters of the current debate over the public policy exception, it is important to recall the broad sweep of the Court's holdings in the Steelworkers Trilogy. In United Steelworkers v.

7. The Supreme Court recently granted certiorari in another case involving the public policy exception. United States Postal Serv. v. National Ass'n of Letter Carriers, 810 F.2d 1239 (D.C. Cir.) (per curiam), cert. granted, 108 S. Ct. 500 (1987). It will be interesting to see whether the Court uses this case to make it clear that an expansive public policy exception is inconsistent with the well established and dominant public policy favoring the duty to bargain as an essential component of labor-management relations.
Warrior & Gulf Navigation Co.," the Court observed that a collective bargaining agreement, unlike a typical business contract, is a "generalized code," given "the breadth of the matters covered, as well as the need for a fairly concise and readable instrument." The agreement is augmented, moreover, by "the common law of a particular industry or of a particular plant." When disputes inevitably arise as to the agreement's application and interpretation, arbitration is the "vehicle by which [the agreement is given] meaning and content." These grievance-arbitration procedures, the Court explained, are "at the very heart of the system of industrial self-government."

The Court further noted that the judiciary's limited task "in these cases [is] to bring into operation [a] . . . process which substitutes a regime of peaceful settlement for the older regime of industrial conflict." Thus, in United Steelworkers v. American Manufacturing Co., the Court stated that the courts "have no business weighing the merits of [a] grievance," since "[t]he agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." And in Warrior & Gulf, the Court pointed out that there is a strong presumption of arbitrability when questions arise over whether certain issues are subject to arbitration. In the Court's words, "[d]oubts should be resolved in favor of coverage."

In United Steelworkers v. Enterprise Wheel & Car Corp., moreover, the Court stressed that lower courts must exercise considerable self-restraint in reviewing an arbitrator's award under section 301 of the Labor Management Relations Act; their inquiry normally should be limited to ascertaining simply whether the award "draws its essence from the collective bargaining agreement." The Court cautioned that, even when presented with an ambiguous decision by an arbitrator, judges lack authority to second-guess his decision: "[i]t is the arbitrator's construction

12. Id. at 578.
13. Id. at 580.
14. Id. at 579.
15. Id. at 581; see also Bowen v. United States Postal Serv., 459 U.S. 212, 225 (1983).
17. Id. at 585; cf. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104 (1962) ("The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace.").
19. Id. at 568.
20. Warrior & Gulf, 363 U.S. at 583.
which was bargained for; and so far as the arbitrator’s decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.”

Very recently, in Misco, the Court strongly reaffirmed its continuing support for the highly deferential standard of review set forth in Enterprise Wheel:

Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator . . . . The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract. So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined . . . . [A]s 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.25

In short, then, courts do not possess “unbridled authority to review the correctness of an arbitrator’s decision.”26

The foregoing passage indicates, however, that the judiciary may be called upon to review an arbitration award in the rare case where an arbitrator has allegedly exceeded his authority under the collective bargaining agreement, thus basing the award on his “own notions of industrial justice.”27 This limited exception to the rule of judicial nonintervention makes perfect sense. As Professor St. Antoine has noted, the existence of an arbitration clause in a collective bargaining agreement indicates that an employer and a union have chosen to employ an arbitrator as their “contract reader,” such that he is authorized to render binding interpretations of the agreement.28 In construing the agreement, the arbitrator may certainly “look for guidance from many sources,”29 including the common law of the shop. But, an arbitrator who ignores the contract and interjects his own values into the decision-

24. Id. at 599.
25. 108 S. Ct. at 370-71 (emphasis added) (citation omitted).
making process exceeds his authority and thus abdicates his special role as “contract reader” for the parties. Likewise, arbitral awards “procured by the parties through fraud or through the arbitrator’s dishonesty need not be enforced,” since in these situations, too, the arbitrator will not fulfill his limited role as “contract reader” for the parties.

For the most part, the courts have refused to allow these limited exceptions to swallow the rule of nonintervention. Indeed, each year, literally thousands of arbitration cases are processed and awards are implemented without challenge from the parties or interference by the courts. Only infrequently do courts find that particular arbitration awards did not draw their essence from the contract or were rendered in circumstances indicating some type of “bad faith.” Moreover, in those “very rare instances when an arbitrator’s procedural aberrations rise to the level of affirmative misconduct,” the Supreme Court has insisted that the lower courts resist the temptation to “settl[e] the merits accord[ing] to [their] own judgment.” Instead, they are required simply to vacate the award and remand for further arbitral proceedings if permitted by the agreement. In this way, the courts continue to hew to a policy of nonintervention to the greatest extent possible.

III. THE BURGEONING PUBLIC POLICY EXCEPTION

In W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers, the Supreme Court for the first time had to decide under what circumstances a court could refuse to enforce an arbitration award on the ground that it violates some public policy. The Court began by noting that public policy issues are “ultimately . . . for resolution by the courts,” and thus are not left to the sole discretion of the arbitrator. However, the only occasion for not enforcing an award on public policy grounds would be when the collective bargaining agreement “as interpreted by [the arbitrator] violates some explicit public policy.” An “explicit” public policy, the Court explained,

must be well defined and dominant, and is to be ascertained “by reference to the laws and legal precedents and not from general considera-
tions of supposed public interests.”

By formulating the exception in this manner, the Court clearly intended to limit severely the possibility of potentially intrusive judicial review under the guise of public policy.

The narrow scope of the public policy exception is also evident from the Court’s disposition of the employer’s contentions in *W.R. Grace*. The case involved an arbitration award that required an employer to recompense employees who had been laid off from work in violation of the seniority provisions of a collective bargaining agreement. The employer had departed from the seniority procedures in order to comply with a court-approved conciliation agreement between it and the Equal Employment Opportunity Commission; under the conciliation agreement, the company was required to maintain the existing percentage of women in employment during any reductions in the work force. The employer instituted an action to overturn the award, claiming that compliance would be inconsistent with the public policy favoring “obedience to judicial orders.”

The Supreme Court disagreed and enforced the arbitrator’s award, even though the asserted public policy was unquestionably “well defined and dominant.” The Court pointed out that, although the award and the conciliation agreement were certainly in some tension, the former did not mandate “that layoffs be conducted according to the collective-bargaining agreement. The award simply held, retrospectively, that the employees were entitled to damages.” Moreover, the employer’s “dilemma... was of [its] own making,” since it had “committed itself voluntarily to two conflicting contractual obligations.” *W.R. Grace* thus stands for the proposition that the public policy in question not only must be “well defined and dominant,” but also must be in sharp conflict with the arbitrator’s award.

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38. *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)). In *Muschany*, the Court continued:

As the term “public policy” is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy. It is a matter of public importance that good faith contracts... should not be lightly invalidated. Only dominant public policy would justify such action.

324 U.S. at 66 (citations omitted).

39. 461 U.S. at 766.

40. *Id.* at 768-69.

41. *Id.* at 767.

42. The employer also claimed that the arbitrator’s decision conflicted with the public policy favoring “[v]oluntary compliance with Title VII.” *Id.* at 770. In rejecting this argument, the Court acknowledged that the asserted public policy was well established. Nonetheless, the Court pointed out that the conciliation agreement between the employer and the EEOC was reached without the union’s consent, and was therefore contrary to “the federal labor policy that parties to a collective-
It is critical to recognize that in *W.R. Grace* the Court limited its inquiry to whether the *award itself* violated some explicit public policy or compelled conduct that violated such a policy. Indeed, the Court noted at two junctures that the precise question presented was whether the collective bargaining agreement "as interpreted by [the arbitrator]" transgressed some explicit public policy. The Court did not, therefore, consider the merits of the employees' underlying grievances. Viewed in this light, the Court's decision represents nothing "more or different than what the courts have said over the years in construing *Enterprise Wheel*."

Prior to *W.R. Grace*, most courts limited the public policy inquiry to whether the award itself violated established law or sought to compel some clearly unlawful action. For example, 25 years ago the Second Circuit had to consider whether an arbitration award reinstating a convicted gambler — who had been fired for breaking the employer's rule prohibiting gambling at work — violated public policy. The applicable collective bargaining agreement gave the employer the right to discharge employees for "just cause," and the union the right to challenge the appropriateness of the employer's decision through binding arbitration. Citing a series of mitigating factors, an arbitrator decided that discharge was too harsh a punishment, and ordered the employer to reinstate the employee without backpay or the accrual of seniority. Two different district court judges refused to enforce the award. They claimed that the award violated "overriding public policy," since it would "indulge[ ]

bargaining agreement must have reasonable assurance that their contract will be honored." *Id.* at 771.

Furthermore, the Court noted that enforcement of the arbitrator's award would promote conciliation and compliance with federal anti-discrimination laws:

If, as in this case, only the employer faces Title VII liability, the union may enter the conciliation process with the hope of obtaining concessions in exchange for helping the employer avoid a Title VII suit. If, however, both the union and the employer are potentially liable, it would be in their joint interests to work out a means to share the burdens imposed by the Commission's demands.

*Id.* at 771-72.

43. *Id.* at 766, 768 (emphasis added).
44. *American Postal Workers Union*, 789 F.2d at 8.
crime" and "cripple[ ] [the] employer's power to support the law." 47

In reversing the decisions below, then-Judge Thurgood Marshall, writing for a unanimous panel which included Judges Friendly and Kaufman, first noted that the arbitrator's decision fell well within the bounds of his authority under the collective bargaining agreement. He also noted that the employer should have sought an explicit exclusion from the "just cause" provision in the collective bargaining agreement if it had wanted an unencumbered right to discharge employees who broke the company's rules on gambling. He recognized, however, that the power to enforce arbitration awards was "'at all times exercised subject to the restrictions and limitations of the public policy of the United States,'" 48 and that the penal law under which the employee had been convicted conclusively established that there was a distinct public policy against gambling at work.

Judge Marshall concluded, nonetheless, that the proper inquiry was not whether there was a public policy against gambling at work, but whether there was a public policy against the reinstatement of someone who had been convicted for gambling at work — the precise award made by the arbitrator. In answering this question in the negative, he said:

[The public] policy [against gambling at work] has been vindicated . . . in the very manner that the State of New York contemplated, by a criminal conviction and the judicial imposition of a penalty. . . . There is no federal policy that requires greater vindication of the public condemnation of gambling than this. The law is not that Draconian. . . .

Moreover, in light of the important role which employment plays in implementing the public policy of rehabilitating those convicted of crime, there can hardly be a public policy that a man who has been convicted, fined, and subjected to serious disciplinary measures, can never be ordered reinstated to his former employment . . . . 49

Judge Marshall emphasized that his opinion should not be interpreted as a condonation of the employee's misconduct. That was beside the point. Having bargained for the arbitrator's determination of whether the employee's gambling constituted "just cause" for discharge under the collective bargaining agreement, the employer was obligated to implement the award.

48. 314 F.2d at 29 (quoting *Hurd v. Hodge*, 334 U.S. 24, 35 (1948)).
49. 314 F.2d at 29. The court also rejected the wholly fallacious argument that reinstating the employee could have potentially subjected the employer to prosecution under a penal law which made it a criminal offense for an employer knowingly to condone or assist in the sale of lottery "policies" on his premises. Given that the employer had sought to discharge the employee for his actions and had warned him against such conduct in the future, it could hardly be said that the employer would be found to have violated the statute. *See id.*
Even though *W.R. Grace* (and most lower court decisions antedating it) restricted the inquiry to whether the award itself was contrary to public policy, several courts of appeals concluded in the wake of *W.R. Grace* that the public policy exception is not so limited. In *United States Postal Service v. American Postal Workers Union*,\(^5\) for example, the First Circuit refused to enforce an arbitration award requiring the reinstatement of a postal employee who had been convicted of embezzling postal funds. The court believed that enforcing the award would violate the public policies "'against embezzlement of Government money'"\(^51\) and in favor of the prompt delivery of the mails. In reaching this decision, the court did not dispute the fact that there was no legal proscription whatsoever against the Postal Service's employment of a convicted embezzler. It was clear, moreover, that the Postal Service had freely negotiated the "just cause" and arbitration clauses in the parties' collective bargaining agreement and was free to bargain for their alteration or removal in the future.\(^52\)

A similar result was reached by the Fifth Circuit in *Amalgamated Meat Cutters, Local 540 v. Great Western Food Co.*,\(^53\) where an arbitrator ordered a trucking company to reinstate a driver who admitted that he had been drinking shortly before an accident in which his truck overturned. The court refused to enforce the award, which it deemed contrary to "'the public policy of preventing people from drinking and driving [as] embodied in the case law, the applicable regulations, statutory law, and pure common sense.'"\(^54\) The court failed to note, however, that there was nothing in the award itself which ran afoul of this otherwise commendable public policy.

The Seventh Circuit joined these ranks in *E.I. DuPont de Nemours & Co. v. Grasselli Employees Independent Association*,\(^55\) where an arbitrator ordered the reinstatement of an employee who had suffered a mental breakdown at the employer's plant and subsequently assaulted other employees and destroyed company property. Although the court enforced

\(^50\) 736 F.2d 822 (1st Cir. 1984).
\(^51\) Id. at 824 (quoting from the decision below).
\(^52\) See also S.D. Warren Co. v. United Paperworkers Int'l Union, Local 1069, 815 F.2d 178 (1st Cir.) (refusing to enforce award reinstating employees who had been discharged for selling marijuana at the employer's plant on the ground that it violated the public policy against a safe workplace), vacated, 108 S. Ct. 497 (1987).
\(^53\) 712 F.2d 122 (5th Cir. 1983). *But cf.* Oil, Chem. & Atomic Workers, Local 4-228 v. Union Oil Co., 818 F.2d 437, 442 (5th Cir. 1987) ("Whether [the employee's] post-award drug use renders enforcement of her reinstatement award against public policy presents an issue that should be resolved by the arbitrator, not the court.").
\(^54\) 712 F.2d at 125.
\(^55\) 790 F.2d 611 (7th Cir.), cert. denied, 107 S. Ct. 186 (1986).
the award because the arbitrator found that the likelihood of recurrence was remote, it explicitly rejected the standard urged by the union — that the contract as construed by the arbitrator must violate some positive law before a court may bar its enforcement.56

The foregoing decisions of the First, Fifth and Seventh Circuits are in clear conflict with decisions issued by those circuits that have continued to give the public policy exception a narrow compass. In *American Postal Workers Union v. United States Postal Service*,57 for example, the District of Columbia Circuit enforced an arbitration award which called for the reinstatement of a postal employee who had admitted that he converted postal funds to his own use.58 In rejecting the Postal Service's argument that reinstating the employee would be contrary to public policy, the court stated:

[C]ourts will not enforce an arbitration award if the award itself violates established law or seeks to compel some unlawful action. However, this rule, which is sometimes referred to as a public policy exception, is extremely narrow. . . .

... [I]t is plain from the language in *W.R. Grace* itself that the Court meant to say only that an arbitration award may not be enforced if it transgresses "well defined" and "dominant" "laws and legal precedents." It is also clear from the opinion in *W.R. Grace* that judges

56. See id. at 616. *But cf.* UAW v. Keystone Consol. Indus., 793 F.2d 810 (7th Cir.), cert. denied, 107 S. Ct. 403 (1986) (citing *W.R. Grace*, court enforces award requiring employer to make annual pension contribution as called for in pension agreement with union, despite the fact that Internal Revenue Service had granted the employer a waiver from statutory obligation to make minimum contribution).

57. 789 F.2d 1 (D.C. Cir. 1986). In the interest of full disclosure, it should be noted that I authored the unanimous panel decisions in *American Postal Workers Union* and *Northwest Airlines v. Air Line Pilots Ass'n Int'l*, 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. filed*, 55 U.S.L.W. 3678 (U.S. Mar. 26, 1987) (No. 86-1548). In addition, I joined the per curiam decision in United States Postal Serv. v. National Ass'n of Letter Carriers, 810 F.2d 1239 (D.C. Cir.), cert. granted, 108 S. Ct. 500 (1987). In each of these cases the court held that the arbitrator's award must violate positive law or otherwise compel conduct in violation of such a law for a court to deny enforcement. While I was not a member of the panel in United States Postal Serv. v. National Ass'n of Letter Carriers, 789 F.2d 18 (D.C. Cir. 1986) (per curiam), that decision, too, adopts a narrow view of the public policy exception.

58. The employee acknowledged this after being interrogated by federal law enforcement officers. The judge presiding over his criminal trial suppressed the statements he made to these officers, since he had not been advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The employee was subsequently acquitted.

The arbitrator also refused to consider these inculpatory statements, claiming that he was entitled to consider the fact that the Postal Service had agreed in the collective bargaining agreement to comply with "'applicable laws.'" *American Postal Workers Union*, 789 F.2d at 3 (quoting from the agreement). Having excluded the employer's primary evidence of misconduct, the arbitrator thus overturned the employer's discharge and reduced the punishment to a long disciplinary suspension without back pay.

In reversing the trial court's vacation of the arbitrator's award, the court of appeals, citing the *Steelworkers Trilogy*, concluded that the arbitrator's decision clearly drew its essence from the collective bargaining agreement. It was immaterial, in this connection, that the arbitrator may have made a mistake of law, since the parties had bargained for his reading of the contract. *See id.* at 4-8.
have no license to impose their own brand of justice in determining applicable public policy; thus, the exception applies only when the public policy emanates from clear statutory or case law, "not from general considerations of supposed public interests." 59

The public policy exception, as thus understood by the court, could not successfully be invoked by the Postal Service:

The arbitrator’s award was not itself unlawful, for there is no legal proscription against the reinstatement of a person such as the grievant. And the award did not otherwise have the effect of mandating any illegal conduct. . . .

. . . For us to embrace the employer’s argument here would be to run the risk of allowing an ill-defined “public policy” exception to swallow the rule in favor of judicial deference to arbitration. We will not endorse any such blatant disregard of the teachings of Enterprise Wheel and W.R. Grace. 60

The Ninth Circuit embraced an analogous interpretation of W.R. Grace in its decision in Bevles Co. v. Teamsters Local 986, 61 where an arbitrator had ordered the reinstatement of two employees who had been discharged after their employer learned that they were undocumented aliens. The court rejected the employer’s contention that the arbitrator’s award was contrary to the public policy against the employment of undocumented aliens. While such individuals had no legal right to be in the country, the court pointed out that no federal law in force at the time forbade the employer from hiring them. Similarly, the employer could not rely on a state statute that purportedly did so, since its enforcement had been enjoined pending a review of its constitutionality. 62 The Ninth Circuit was thus unwilling to deny enforcement absent a distinct and present conflict with positive law. 63

59. 789 F.2d at 8 (quoting W.R. Grace, 461 U.S. at 766) (emphasis in original).
60. 789 F.2d at 8-9. The court also pointed out that, even if the arbitrator’s understanding of the employee’s Fifth Amendment rights was incorrect, the decision to exclude his statements from consideration was not unlawful and it did not require the employer to violate the law. See supra note 58; cf. Washington-Baltimore Newspaper Guild, Local 135 v. Washington Post Co., 442 F.2d 1234, 1239 (D.C. Cir. 1971) (“an award will not be vacated even though the arbitrator may have made, in the eyes of judges, errors of fact and law unless it ‘compels the violation of law or conduct contrary to accepted public policy’”) (quoting Gulf States Tel. Co. v. Local 1692, Int’l Bhd. of Elec. Workers, 416 F.2d 198, 201 (5th Cir. 1969)).
62. See id. at 1392-93 (“We hold that the arbitrator’s award of reinstatement and backpay notwithstanding the immigration status of the employees neither violates a clearly defined public policy nor is in manifest disregard of the law. Neither the company nor its employees are subject to any criminal or civil liability . . . .”) (footnote omitted).
63. The Third Circuit appears to adhere to a narrow interpretation of the public policy exception as well. In Kane Gas Light & Heating Co. v. International Bhd. of Firemen & Oilers, Local 112, 687 F.2d 673 (3d Cir. 1982), cert. denied, 460 U.S. 1011 (1983), an arbitrator ordered the reinstatement of an employee who, in sub-zero temperatures, cut off the gas supply to an entire borough. The court refused to deny enforcement, noting that the employer did not bring to its
Because *W.R. Grace* inexplicably engendered this split in the circuits, the Supreme Court received several petitions for certiorari requesting it to put the public policy dispute to rest. In its recent decision in *Misco*, the Court, although not settling the question once and for all, strongly suggested that the narrow interpretation of the public policy exception is the correct one.

IV. *Misco* and the Narrow View of the Public Policy Exception

In January, 1983, Isiah Cooper was arrested by the police in the parking lot of Misco, Inc.'s paper plant in Monroe, Louisiana. He had been sitting in the back seat of a car in which there was found a lighted marijuana cigarette in the ashtray of the right front door and marijuana smoke in the air. The car was not owned by Cooper, and two other Misco employees were seen leaving the vehicle just prior to Cooper's arrest. A few weeks later, Misco fired Cooper for allegedly violating a company rule against the possession or use of drugs on company property. Pursuant to the applicable collective bargaining agreement, Cooper's union filed a grievance on his behalf, claiming that Misco did not have "just cause" to fire him. After efforts to resolve the grievance failed, the dispute was submitted to arbitration.

In sustaining the grievance and ordering that Cooper be reinstated with backpay and full seniority, the arbitrator concluded that Misco failed to prove that Cooper had actually violated the company rule. In the arbitrator's view, "finding Cooper in the backseat of a car and a burning cigarette in the front-seat ashtray was insufficient proof that Cooper was using or possessed marijuana on company property." After *W.R. Grace* was decided, the Third Circuit faced the public policy issue again in Super Tire Eng'g Co. v. Teamsters Local Union No. 676, 721 F.2d 121 (3d Cir. 1983), cert. denied, 469 U.S. 817 (1984). In that case, an arbitrator ordered the reinstatement of an employee who had been fired for drinking during work hours. The court, citing both *W.R. Grace* and its earlier decision in *Kane*, refused to set aside the award, since the employee's "reinstatement conflicts with no law or well-defined policy." *Id.* at 125 n.6. However, the court further observed that "[t]here was no evidence that [the employee] poses a threat to fellow workers or society." *Id.* This dictum suggests that this panel of the court might have countenanced a broader interpretation of the public policy exception.

The Sixth Circuit, without issuing a written opinion, recently affirmed a district court decision enforcing an arbitrator's award in the face of a public policy challenge. The trial court, however, cited with apparent approval some of the recent decisions of the First, Fifth and Seventh Circuits. Premium Bldg. Prods. Co. v. United Steelworkers, 616 F. Supp. 512 (N.D. Ohio 1985), aff'd without opinion, 798 F.2d 1415 (6th Cir. 1986). Thus, at least before *Misco* was decided, the view of the Sixth Circuit was somewhat unclear. *See infra* note 119.

64. *Misco*, 108 S. Ct. at 369 (summarizing the findings of the arbitrator).
tor refused to consider evidence that the police had also discovered mari-
juana in Cooper's car on the same day that he was arrested, since Misco
had not been aware of this fact at the time he was discharged. Indeed,
Misco did not learn of the marijuana in Cooper's car until a few days
before the arbitrator held a hearing approximately eight months later.

Misco filed suit in district court, seeking to vacate the award on
several grounds. One argument was that compelling Cooper's reinstate-
ment would be contrary to the public policy purportedly favoring the
safe operation of dangerous machinery.\textsuperscript{65} Misco pointed out that Cooper
had operated a machine that cut rolling coils of paper with sharp blades.
The district court agreed with Misco, and the Fifth Circuit affirmed, rul-
ing that reinstatement would violate the public policy "against the opera-
tion of dangerous machinery by persons under the influence of drugs or
alcohol."\textsuperscript{66} In addition, the court held that the arbitrator improperly
refused to consider evidence that marijuana had been found in Cooper's
car. Even without this evidence, the court noted, the arbitrator commit-
ted serious error in finding that the circumstances surrounding Cooper's
arrest did not establish that Cooper had violated the company rule.

Before reaching the public policy issues, a unanimous Supreme
Court, speaking through Justice White, forcefully reaffirmed the deferen-
tial standard of review applicable in all cases in which courts are called
upon to review an arbitrator's award under section 301 of the Labor
Management Relations Act.\textsuperscript{67} Under this standard, the Court had little
trouble concluding that the Fifth Circuit erred in second-guessing the
arbitrator's evidentiary ruling, not the least because it was common prac-
tice for arbitrators to restrict their inquiry "to the facts known to the
employer at the time of the discharge."\textsuperscript{68} Likewise, the Fifth Circuit
overstepped its authority in deciding that the evidence with regard to
Cooper's arrest established that Cooper had actually violated the com-
pany rule. As the Court put it: "No dishonesty [on the part of the arbi-
trator] 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{69} The Court further
noted that, "[e]ven if it were open to the Court of Appeals to have found
a violation [of company rules] because of the marijuana found in

\textsuperscript{65} Misco also claimed that Cooper's reinstatement would be contrary to the public policy against drug use.

\textsuperscript{66} Misco, Inc. v. United Paperworkers Int'l Union, 768 F.2d 739, 743 (5th Cir. 1985).


\textsuperscript{68} 108 S. Ct. at 371 n.8.

\textsuperscript{69} Id. at 371.
Cooper's car," deference to an arbitrator's decision is particularly appro-
appropriate "*when it comes to formulating remedies.*"70

With respect to the public policy contentions, the Court first re-
viewed the legal principles enunciated in *W.R. Grace*. In so doing, it
made clear that its decision in that case was not meant to herald an ex-
pansive interpretation of the public policy exception:

[W.R. Grace] does not . . . sanction a broad judicial power to set aside
arbitration awards as against public policy. Although we discussed the
effect of [the arbitrator's] award on two broad areas of public policy,
our decision turned on our examination of whether the award created
any explicit conflict with other "laws and legal precedents" rather than
an assessment of "general considerations of supposed public
interests."71

This short but critical passage reveals that the Court's public policy in-
quiry appears to have two distinct parts. A court should first ascertain
whether the asserted public policy is well established in the positive law,
*i.e.*, statutes, regulations or case law. If no such public policy is found to
exist, the inquiry is over. If, on the other hand, the court discovers a well
established public policy, it should then ask whether "the award created
any explicit conflict" with that policy.72

The Court rejected the Fifth Circuit's public policy analysis because
it utterly failed to satisfy the first part of this two-part test. In the
Court's view, the Fifth Circuit "made no attempt to review existing laws
and legal precedents in order to demonstrate that they establish a 'well
defined and dominant' policy against the operation of dangerous machin-
ery while under the influence of drugs."73 While the Court recognized
that this purported public policy was well grounded in common sense, it
stressed that such generalized considerations would not suffice when set-
ting aside an award which derived from an otherwise valid collective bar-
gaining agreement. "At the very least," the Court stated, "an alleged
public policy must be properly framed under the approach set out in
*W.R. Grace.*"74

The Court proceeded, nonetheless, to find other faults in the Fifth
Circuit's public policy analysis. The Court first noted that, even if the
purported public policy against the operation of dangerous machinery
under the influence of drugs were well grounded in the positive law,
Misco had not clearly shown that this policy had been violated in this

70. *Id.* at 372 (quoting *Enterprise Wheel*, 363 U.S. at 597) (emphasis in original).
72. 108 S. Ct. at 373 (emphasis added).
73. *Id.* at 374.
74. *Id.* at 373.
case: "the assumed connection between the marijuana gleanings found in Cooper's car and Cooper's actual use of drugs in the workplace [was] tenuous at best."75 Furthermore, in drawing the inference that Cooper had violated or would violate the alleged public policy, the Fifth Circuit had engaged in impermissible fact-finding. The Court stressed that factual determinations are the sole province of the arbitrator, even when a court is inquiring into a possible violation of public policy.76

These remarks are certainly consistent with the Court's long-held view that the judiciary has only a very circumscribed role to play in reviewing an arbitrator's award. But, they are also potentially misleading in that they could be read to suggest that Misco would have prevailed if the arbitrator had determined that Cooper had actually operated dangerous machinery while under the influence of drugs and if the public policy proscribing that behavior were well defined and dominant. The problem, of course, is that even if both of these things had been proven, there was nothing in the arbitrator's award that would have violated this public policy. The arbitrator merely ordered Misco to reinstate Cooper, and, apparently, there was no legal proscription against the employment or reinstatement of someone in Cooper's position.

That the focus is properly directed to whether the arbitrator's award, as opposed to the underlying behavior which led to Cooper's dismissal, violated some public policy is evident from the language the Court employed in describing the contours of the public policy exception. As noted above, the Court stressed that the exception was only intended to cover situations in which "the award created any explicit conflict"77 with some well established public policy. The Court put it another way when it noted that in W.R. Grace it had "cautioned... that a court's refusal to enforce an arbitrator's interpretation of [collective bargaining] contracts is limited to situations where the contract as interpreted would violate 'some explicit public policy.'"78 In this case, the arbitrator interpreted the agreement to allow Cooper's reinstatement under the specific circumstances presented. In other words, the arbitrator "read" the agreement to provide that the mere presence of an employee in a car where marijuana was found did not constitute "just cause" for discharge.

75. Id. at 374. The Court noted that it was proper for the Fifth Circuit to consider the fact that marijuana had been found in Cooper's car in pursuing its public policy inquiry. Id.
76. Id. The Court thus rejected the suggestion made by the Seventh Circuit in E.I. DuPont de Nemours, 790 F.2d at 617, that courts applying the public policy exception owe less deference to an arbitrator's factual findings.
77. 108 S. Ct. at 373 (emphasis added).
78. Id. (latter emphasis added).
There was nothing surprising about the arbitrator's decision in Misco, and it surely did not violate any explicit public policy. This is best understood with the realization that the employer in Misco was not required to fire Cooper for his alleged acts of misconduct; in other words, if Misco had elected not to discharge Cooper (even knowing positively that Cooper was guilty of misconduct), no laws or regulations "would [have stood] in the way." The same point held true when the arbitrator in Misco ruled that the employer could not fire Cooper under the parties' collective bargaining agreement. In either case, no public policy is infringed; there may be a general public policy against marijuana use, but the law does not prohibit the employment of persons like Cooper.

Along these same lines, Justice Blackmun noted in his concurring opinion, which was joined by Justice Brennan, that

framing . . . an alleged public policy under the approach set out in W.R. Grace would [not] be sufficient to justify a court's refusal to enforce an arbitration award on public policy grounds. Rather, I understand the Court to hold that such compliance is merely a necessary step if an award is not to be enforced.80

The concurrence seems to highlight the point that, even though an employee's conduct may be against public policy, it does not follow that an arbitrator's award reinstating that employee is similarly violative of that public policy. But, having disposed of the case on the ground that the Fifth Circuit did not even attempt to see whether the asserted public policy was in fact well established, the Court in Misco did not have to decide if a lower court "may refuse to enforce an award on public policy grounds only when the award itself violates" positive law.81

The Supreme Court was not completely silent on the question whether the award in question violated the public policy relied upon by the Fifth Circuit. Because the award gave Misco the option of placing Cooper in another job for which he was qualified, the Court noted that Cooper would not necessarily operate dangerous machinery in the future, thus creating the possibility of another breach of the asserted public policy.82 This observation, unfortunately, is another false lead, for the Court could not possibly have meant to license lower courts to speculate as to whether reinstatement to certain jobs is more or less likely to result in a future violation of some purported public policy. Instead, the Court was again merely highlighting another deficiency in the Fifth Circuit's public

79. E.I. DuPont de Nemours, 790 F.2d at 619 (Easterbrook, J., concurring).
80. 108 S. Ct. at 376 (Blackmun, J., concurring).
81. Id. at 374 n.12.
82. See id. at 374.
policy rationale. It would appear, then, that the Court would have reached the same result even if the arbitrator had found that Cooper smoked marijuana on the job and had ordered Misco to return him to his former job, since apparently there is nothing in any statutes, regulations or case law which rendered Cooper's reinstatement unlawful.

V. AN UNCERTAIN RIDE ON AN UNRULY HORSE

The English courts recognized over 150 years ago that public policy "is a very unruly horse, and . . . once you get astride it you never know where it will carry you."83 The Eighth Circuit's decision in Iowa Electric Light & Power Co. v. Local Union 204, International Brotherhood of Electrical Workers,84 which was issued just two weeks after Misco, confirms the wisdom of our common law brethren.

Iowa Electric is another case about a bargaining unit employee who challenged his dismissal in arbitration. In order to beat the noontime lunch crowd, a nuclear power plant machinist deliberately defeated the interlock system that kept the plant's secondary containment area pressurized. This area is kept pressurized in order to arrest the spread of radiation in the unlikely event that it leaks from the primary containment area around the nuclear core. The employee was discharged for violating the company safety rule proscribing his conduct, but an arbitrator subsequently reinstated him under the "just cause" provision in the applicable collective bargaining agreement. The employer then succeeded in having the award vacated in the district court. In affirming the decision below, the Eighth Circuit held that "returning [the employee] to work would violate the public policy of this nation concerning strict compliance with safety regulations at nuclear facilities."85

It should be noted at the outset that this case is distinguishable from Misco in at least two important ways. First, the Eighth Circuit, unlike the Fifth Circuit, did not rely on generalized notions of presumed public interests in framing the public policy it relied upon. Instead, it pointed to statutes, regulations and court precedent which demonstrated that the company's safety rule was an integral part of "a strict regulatory scheme devised by Congress for the protection of the public from the hazards of nuclear radiation."86 Second, there was no doubt that the employee vio-

84. 834 F.2d 1424 (8th Cir. 1987).
85. Id. at 1426.
86. Id. at 1428. The Nuclear Regulatory Commission ("NRC") has promulgated regulations governing the operation of all nuclear power plants. Under these regulations, each operator must develop its own detailed safety rules in order to obtain and maintain its federal license to operate a
lated the company rule and, moreover, the asserted public policy when he defeated the interlock system. It is also worth noting that the court in *Iowa Electric* conceded that the arbitrator had acted within his authority in ordering the employee’s reinstatement.

The points that distinguish *Iowa Electric* make it appear to be harder than *Misco*, where the Court had several alternative grounds on which to criticize the Fifth Circuit’s decision. Here, the public policy question was clear — could the court consider the employee’s past and possible future conduct in applying the public policy exception, or was it bound to limit its inquiry to whether the arbitrator’s award itself was illegal? In choosing the former course, the court expressly disregarded the union’s contention “that there is no ‘well defined and dominant’ public policy specifying that workers who violate secondary containment at nuclear power plants must be fired” or, for that matter, cannot be rehired.

The Eighth Circuit believed that it was complying with *Misco* because the employee in this case had undeniably violated a well established public policy. But this simply cannot be the guiding principle; if it were, a court could vacate an arbitration award reinstating an employee who had clearly violated any one of the innumerable laws and regulations proscribing different types of conduct in society. For example, a court might find a breach of public policy for a failure to pay child support, or a traffic violation, or a delinquent income tax payment, or an extra-marital affair, to cite but a few absurd possibilities. These examples are absurd in part because the “illegal” conduct cited rarely will be job-related. But, under the reasoning of *Iowa Electric*, it is not clear why that should matter — for that case can be read to stand for the proposition that a court can vacate an arbitrator’s award whenever the employee’s underlying conduct violates a public policy, whether or not the conduct is job-related.

Even if the court in *Iowa Electric* intends a job-relatedness caveat, from what authority is this limitation drawn, and who determines its application? A court that claims that it will only vacate awards when the underlying behavior is safety-related, to give but one example, is necessarily imposing its own views of industrial justice, since it is entirely un-

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87. *Id.* at 1427.
clear what conduct should be included within that amorphous term. Moreover, it is not for the courts to decide that safety is a relevant criteria for reviewing arbitral awards.

The problem, in short, is that there are no limiting principles once a court chooses to look past the legality of the arbitrator's award to the nature of the underlying conduct at issue. The Eighth Circuit's protestations to the contrary are particularly revealing in this regard:

Our holding today should not be read as a blanket justification for the discharge of every employee who breaches a public safety regulation at a nuclear power plant. There may be circumstances under which a violation might be excused. But in this case, [the employee's] violation of the safety rule was serious. Nor, as the Union contends, was it an unknowing violation. . . . [The employee's] call to the control room for permission to defuse the system demonstrates that he knew the interlock was important.8

This ruling reflects an astonishing disregard of the teachings of the Steelworkers Trilogy; the court in Iowa Electric not only engages in impermissible factfinding, but also informs us that, in some future case, it might choose to enforce an award reinstating an employee who was fired for inadvertently defeating the interlock system, since that breach would be unknowing. Likewise, the court says that it might uphold the reinstatement of an employee fired for defeating the interlock system of the tertiary rather than the secondary containment system (assuming for the sake of argument that one exists), since that breach would not be as serious or important. This application of the public policy exception is simply untenable. In the proverbial next case, only the court will know whether the arbitrator's award violated public policy. The court admits as much when it states that it will determine the "circumstances under which a [safety] violation might be excused."89 To guide its decision-making, the court presumably will abide by some amorphous serious/knowing/important "standard" that will be given content by the judges themselves on a case-by-case basis.

It is easy to sympathize with the view of the Eighth Circuit in Iowa Electric; most people share a natural concern about nuclear safety. But this really is beside the point, because there is no necessary connection between the discharge of the employee in Iowa Electric and improved safety at the plant. Indeed, there was no law or regulation compelling the employee's dismissal. If the Eighth Circuit's view is correct, one wonders why the Nuclear Regulatory Commission has failed to issue regula-

88. Id. at 1429-30 (emphasis added) (footnote omitted).
89. Id. at 1429.
tions mandating dismissal of employees like the grievant in *Iowa Electric* or why Congress has failed to amend the National Labor Relations Act to remove the issue of “safety” at nuclear power plants from the subjects encompassed within the duty to bargain. The point is that it is virtually impossible to square the holding of *Iowa Electric* with the principles enunciated in the Steelworkers Trilogy, W.R. Grace and Misco. The Supreme Court has told us that the courts have no business overturning an arbitration award unless it conflicts with some explicit public policy, and there was no such conflict in *Iowa Electric*.

There is little difference between the limiting principles — if one can call them that — adopted by the Eighth Circuit and those adopted by courts of similar ilk. For example, the First Circuit stated in *United States Postal Service* that, in analyzing the employer’s public policy contentions, it would consider “the common sense implications that [reinstatement] would have on other . . . employees and on the public in general” and on the postal service's “mandate of efficiency.”

The Seventh Circuit took matters one step further in *E.I. DuPont de Nemours*. In that case, the court refers to the “legal standard regarding the public policy exception” that it “stated,” but one looks in vain for the place in which the court gives that standard any content. These courts have charted a dangerous course, for the expansive public policy exception they embrace lacks ascertainable limits and provides a convenient vehicle through which judges can impose their own “general considerations of supposed public interests.” These decisions, moreover, provide malleable precedent for future courts seeking to overturn what they deem to be disagreeable arbitration awards, thereby inviting further judicial activism of the worst sort. Such activism is particularly inappropriate here, since the starting point in this area of law is one of judicial nonintervention.

VI. THE THREAT TO THE DUTY TO BARGAIN

One might attempt to defend an expansive public policy exception on the ground that, under the common law of contracts, the courts “tended to heed the axiom that ‘whatever is injurious to the interests of

90. See supra note 86.
91. See infra section VI.
92. 736 F.2d at 825, quoted with approval in *Iowa Electric*, 834 F.2d at 1429. As noted earlier, the Supreme Court rejected a “common sense” approach to the public policy exception in Misco. See 108 S. Ct. at 374.
93. 736 F.2d at 826.
94. 790 F.2d at 616.
the public is void, on the grounds of public policy.'"96 Judicial authority to refuse to enforce contracts on such broad public policy grounds was subject to a critical caveat, however; the legislature retained the ultimate power to limit judicial discretion by defining what constitutes public policy.97 Thus, the breadth of any public policy exception to the rule of judicial nonintervention with respect to arbitration awards must be viewed in light of the statutes governing labor relations in this country.98 When so viewed, it is difficult to believe that Congress envisioned the "free-wheeling judicial exercises"99 that the expansive public policy exception makes possible.

The National Labor Relations Act, as amended, compels employers and unions to negotiate collectively over all "mandatory" subjects of bargaining.100 These mandatory subjects are delineated generally in section 8(d) as "wages, hours, and other terms and conditions of employment."101 The Court has held, however, that Congress entrusted the National Labor Relations Board with "the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain."102 In carrying out this responsibility, the Board determines those subjects over which an employer is prohibited from taking unilateral action during the course of the collective bargaining relationship.103

96. 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 1629 (3d ed. 1972); see also Hurd v. Hodge, 334 U.S. 24 (1948), cited in Misco, 108 S. Ct. at 373, and in W.R. Grace, 466 U.S. at 766; Crocker v. United States, 240 U.S. 74 (1916). But see Girard's Executors, 43 U.S. (2 How.) 126, 197 (1844) ("courts are not at liberty ... to look at general considerations of the supposed public interests and policy ... beyond what [the] constitution and laws and judicial decisions make known to us").

97. See, e.g., Chicago, B & Q R.R. v. McGuire, 219 U.S. 549, 565 (1911) ("While the court, unaided by legislative declaration and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, its determination ... must yield to the legislative will ... "); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 340 (1897) ("when the law making power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts").

98. See Bowen v. United States Postal Service, 459 U.S. 212, 220 (1983) ("[T]he relationship ... created by the collective-bargaining agreement ... [is not] a simple contract of hire governed by traditional, common law principles. ... Rather, it is an agreement creating relationships and interests under the federal common law of labor policy."); cf. Lincoln Mills, 353 U.S. at 456 ("the substantive law to apply in suits under 301(a) is federal law, which the courts must fashion from the policy of our national labor laws").


A host of issues have been deemed to fall within the phrase "other terms and conditions of employment." It is well settled, for example, that plant rules, safety, discipline (up to and including discharge), and grievance and arbitration procedures are all mandatory subjects of bargaining. In negotiating over these subjects, "Congress intended that the parties should have wide latitude . . . , unrestricted by any governmental power to regulate the substantive solution of their differences." This is consistent, of course, with the view adopted in the Steelworkers Trilogy that issues relating to the workplace that are not governed by statute or regulation are best left to private negotiations between labor and management. The First, Fifth, Seventh and Eighth Circuits — like their sister circuits — would certainly subscribe to these black letter rules. Yet, in embracing and applying an expansive public policy exception, these courts seem oblivious to the fact that their decisions lead to a de facto evisceration of the cardinal public policy embodied in these rules — the duty to bargain.

In Iowa Electric, for example, the union and the employer most likely bargained over all of the mandatory subjects listed above. The collective bargaining agreement eventually signed by the parties was quite unremarkable in providing that an employee could not be discharged unless the company had "just cause," and that a discharged employee was entitled to a hearing before a neutral arbitrator to determine whether this standard had been met. Equally unremarkable is what the agreement did not contain. There was no provision mandating discharge for breaches of specific company rules relating to safety. Similarly, the employer conceded that there was no provision limiting the jurisdiction of the arbitrator in reviewing disciplinary penalties. The parties had therefore agreed that questions involving safety warranted no special treatment, and were fully amenable to the arbitration procedures set forth in the agree-

110. With some exceptions beyond the scope of this article, these general principles also apply under the Railway Labor Act and a number of other statutes governing collective bargaining.
Framing the agreement in this way was unquestionably lawful under existing law. That Congress would leave important safety issues not governed by statute or regulation to private negotiations was implicit in *Misco*, where the Court recognized that “[t]he issue of safety in the workplace is a *commonplace* issue for arbitrators to consider.” The Court in *Misco* merely acknowledged that it is well established under the NLRA that safety is a mandatory subject of bargaining.

In ordering the reinstatement of an employee who was discharged for deliberately defeating the interlock system of the secondary containment area, the *Iowa Electric* arbitrator “read” the contract to provide that the company was not entitled to take that action under the specific circumstances presented. The Eighth Circuit conceded that this “reading” drew its essence from the contract when it stated that “the arbitrator’s authority is not disputed.” It nonetheless vacated the arbitrator’s award. The court decided, in effect, that the parties — who employed an arbitrator merely to give content and meaning to their contract — had reached an impermissible agreement with regard to this safety issue. The court reached this result even though the safety issue in question, not to mention the entire grievance and arbitration system, were mandatory subjects of collective bargaining, and even though there was nothing unlawful about the parties’ agreement.

In practical terms, the court’s decision licenses the employer to take unilateral action with respect to this safety issue. Henceforth, the employer is virtually free to fire any employee who threatens the integrity of the secondary containment system, confident of the fact that it will likely prevail in court if an arbitrator rules that it did not have “just cause.” The employer will know that the Eighth Circuit and the district courts in that jurisdiction are obliged to follow the precedent set in *Iowa Elec-

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113. 108 S. Ct. at 374 n.11 (emphasis added). For this reason, the Court stated in *Misco*:

> Had the arbitrator found that Cooper had possessed drugs on the property, yet imposed discipline short of discharge because he found as a factual matter that Cooper could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened.

_id. at 374; see also* Gateway Coal Co. v. UMWA, 414 U.S. 368, 379 (1974) (arbitration process is as “applicable to labor disputes touching the safety of the employees as to other varieties of disagreement”); Northwest Airlines, 808 F.2d at 81 (“The fact that the arbitration touches on issues related to airline safety is irrelevant. There have been numerous arbitrations under the [Railway Labor Act] involving grievances that implicate safety issues, and no court has ever ruled that an arbitral board lacked jurisdiction to consider such issues.”).
114. *See* *Fibreboard Paper Prods. v. NLRB, 379 U.S. 203, 222 (1964)* (Stewart, J., concurring) (“the conditions of a person’s employment . . . most obviously [include the] safety practices . . . observed”); supra note 105.
115. 834 F.2d at 1427.
tric. Likewise, if an arbitrator sustains a discharge, the union will not be foolish enough to challenge the decision in court, for it knows, too, of the binding effect of *Iowa Electric*. In short, the employer is no longer strictly bound by the duty to bargain over grievance and arbitration procedures as they relate to this safety issue. The relevant language in the collective bargaining agreement is thus rendered meaningless.

The irony inherent in this scenario is readily apparent. Imagine that, during the initial negotiations over the collective bargaining agreement, the employer had refused to bargain over the disciplinary penalty to be imposed for employees who defeat the interlock system, because it believed that this should always constitute grounds for automatic discharge. By refusing to bargain over what clearly is a mandatory subject, the employer would have committed an unfair labor practice and the Board would have issued a bargaining order if the union had challenged the employer's intransigence. But after *Iowa Electric*, the employer is able to achieve during the term of the collective bargaining agreement that which it could not achieve at the outset — an unfettered right (attained outside of collective bargaining) to discharge employees who breach the interlock system in the secondary containment area.

By contrast, imagine that the employer decides after its victory in *Iowa Electric* that discharge is too harsh a punishment for first-time violators of the rules governing the interlock system, and agrees to new contract terms that explicitly provide that such offenders will only be subject to corrective discipline, in the form of a long suspension without pay. Like the original contract arrangements, this new provision would be entirely lawful under the NLRA. It would, however, appear to be inconsistent with *Iowa Electric*, which can be said to stand for the proposition that *not* firing an employee who defeats the interlock system is contrary to the public policy favoring the strict observance of safety regulations at nuclear power plants. The court would have to reach this result, since there is no analytical difference between an agreement that expressly delineates specific discipline for specific conduct, and an agreement that an arbitrator "reads" to provide the same thing. The irony here is that the court will never have the opportunity to enforce this result, since neither the employer, nor the union, nor any third party will have a cause of action when the employer complies with the new agreement. The agreement would thus continue in force despite the fact that the Eighth Cir-
cuit has held it inconsistent with public policy to employ someone who breaches the interlock system. Similarly, if under the agreement originally in place the employer had decided to retain the employee who defeated the interlock system, or had decided not to seek judicial review of the award ordering his reinstatement, these decisions would stand unchallenged. Once again, no one would have a cause of action to compel the company to fire the employee, notwithstanding the Eighth Circuit’s holding in Iowa Electric.

The result is that, under a decision like the one rendered in Iowa Electric, the employer is left holding all the cards. If, on the one hand, it wishes to retain an employee who defeats the interlock system, the courts cannot “stand in the way.”117 If, on the other hand, it wishes to ignore a contractual provision requiring it to retain an employee, or a “just cause” provision requiring it to submit grievances over safety-related discharges to binding arbitration, it will find relief in the courts in the Eighth Circuit. Employers are thus permitted to take unilateral action that was once considered impermissible, regardless of their statutory obligations or the terms of the collective bargaining agreements they signed. Needless to say, whether or not the union gave up something in return for the employer’s original promise to submit safety-related discharges to arbitration under the “just cause” provision is implicitly deemed irrelevant.118 Furthermore, the Eighth Circuit and courts of a similar bent have failed to recognize that they have effectively assumed a responsibility long held to be within the domain of the Board — that of deciding which aspects of the employment relationship are truly mandatory subjects of bargaining. Remarkably, for all their discussion of public policies such as safety, honesty, and the prompt delivery of the mails, these courts neglect to ask whether their decisions conflict with the critical public policy embodied in the duty to bargain.119

One should not conclude from this that employers are helpless to prevent the reinstatement of employees they deem undesirable under a

117. E.I. DuPont de Nemours, 790 F.2d at 619 (Easterbrook, J., concurring).
118. Obviously, these problems could not arise under the narrow interpretation of the public policy exception, since there is no duty to bargain over contract terms which violate positive law or compel conduct that does the same. The NLRA “does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal.” Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212 (1985).
119. In Professional Adm’rs Ltd. v. Kopper-Glo Fuel, Inc., 819 F.2d 639 (6th Cir. 1987), an arbitrator permitted pension plan trustees to increase unilaterally the employer’s required contributions. The Sixth Circuit refused to enforce the award because the trustees had impermissibly taken action with respect to a mandatory subject of collective bargaining. Although the court did not address the scope of the public policy exception, its decision is one of few that focuses on the fact that the duty to bargain is the important public policy at stake.
narrow public policy exception. Quite the contrary, an employer is free to return to the bargaining table when its current agreement expires and obtain modifications that facilitate its desires. The nuclear power plant operator in *Iowa Electric* could seek an agreement that provides that breaches of the interlock system constitute grounds for automatic discharge. Similarly, the agreement could be modified to limit the authority of the arbitrator to review disciplinary penalties in cases involving safety issues. The employer could even bargain to remove the application of all safety-related questions from the jurisdiction of the arbitrator. The employer could also refuse to hire arbitrators it deems unfit. As the Supreme Court has noted, an employer is "always free to choose an arbitrator whose knowledge and judgment [it] trust[s]."120 In addition, the employer could lobby the Nuclear Regulatory Commission to change the industry’s mandatory employment standards, or it could seek direct relief from Congress. Congress (and the state legislatures) have shown themselves perfectly able to pass laws regulating employment in many industries, both private and public. There are innumerable licensing and certification requirements contained in the nation’s statutes and regulations, particularly in the transportation industry, and there is nothing to stop Congress (and the state legislatures) from adding more if they so desire. Congressional relief could also come in the form of a change in the statutorily-mandated duty to bargain. But, in the absence of any of these internal or external limitations on the arbitrator’s ability to weigh the merits of the employer’s disciplinary action, the employer and the union should be bound by the arbitrator’s decision.

VII. THE FUTURE OF THE PUBLIC POLICY EXCEPTION

At this point, the future of the public policy exception is uncertain. Two weeks after the Supreme Court decided *Misco*, and on the same day the Eighth Circuit decided *Iowa Electric*, the Court granted certiorari in *United States Postal Service v. National Association of Letter Carriers*,121 yet another case involving the public policy exception. There, a postal employee was discharged shortly after being arrested for unlawfully delaying the delivery of the mails. He later pled guilty and was sentenced to eighteen months probation. The employee’s union grieved his dismissal under the “just cause” provision of the applicable collective bargaining agreement. When the parties were unable to settle the grievance, it

120. *Gateway Coal Co.*, 414 U.S. at 379.
121. 810 F.2d 1239 (D.C. Cir.) (per curiam), *cert. granted*, 108 S. Ct. 500 (1987); see supra note 57.
was submitted to an arbitrator, who ordered that the employee be reinstated without back pay upon the fulfillment of certain conditions.\(^\text{122}\)

Although the employee satisfied the conditions established by the arbitrator, the Postal Service refused to reinstate him. Instead, it succeeded in having the District Court vacate the arbitrator's award solely on the ground that it was contrary to public policy. In reversing that decision, the District of Columbia Circuit first noted that, under its previous decisions in *American Postal Workers Union*\(^\text{123}\) and *Northwest Airlines v. Air Line Pilots Association International*,\(^\text{124}\) the public policy exception must be construed in an "extremely narrow" fashion.\(^\text{125}\) The court then enforced the award in question because there was no legal prohibition against the employee's reinstatement. It thus rejected the Postal Service's invitation to "impose [its] own brand of justice" by holding that reinstatement was "inconsistent with the public's interest in an efficient and reliable postal service."\(^\text{126}\)

There are several reasons why the Supreme Court may have taken this case for review. One possibility is that the Court wishes to put a stop to open-ended applications of the public policy exception exemplified by cases like *Iowa Electric*. Adopting a narrow interpretation of the public policy exception would be entirely consistent with the rationale, disposition and tenor of *Misco*, and would require the Court merely to adopt the bright-line rule set forth in the last footnote of that opinion:

\[
\text{[A] court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law.}\]

\(^\text{127}\)

Unfortunately, the Court did not find occasion to reach the merits of this bright-line rule because other notable deficiencies in the Fifth Circuit's decision allowed it to dispose of the case on different grounds.\(^\text{128}\)

Although vote-counting is always a murky business, there would appear to be at least four votes for the bright-line rule in *United States Postal

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122. The employee was to be reinstated after a 60-day medical leave upon demonstrating that he had regularly attended and had fully participated in Gamblers Anonymous meetings, that he had not gambled and that he was physically able to return to work. See 810 F.2d at 1240 n.3.
123. 789 F.2d 1 (D.C. Cir. 1986); see supra note 57.
125. *United States Postal Service*, 810 F.2d at 1241.
126. Id. at 1241-42 (quoting *American Postal Workers Union*, 789 F.2d at 8) (brackets in original).
127. 108 S. Ct. at 374 n.12. If the Court were to embrace this narrow interpretation of the public policy exception, there is no reason to think that it would only consider relevant whether the employer, but not the union or employees, is compelled to violate positive law.
128. See id. at 375-76 (Blackmun, J., concurring).
Service. Justice Blackmun (the author of W.R. Grace and the concurrence in Misco), Justice Brennan (who joined the concurrence in Misco) and Justice Marshall (the author of Otis Elevator years ago) would seem strongly in favor of the narrow interpretation of the public policy exception. And Justice White, who did everything but adopt this bright-line rule in writing for a unanimous Court in Misco, could be expected to agree.

Chief Justice Rehnquist, however, indicated that he might not subscribe to the bright-line rule when he granted the Postal Service's application to stay the court of appeals' mandate in United States Postal Service pending disposition of the petition for certiorari. In his brief opinion, which was issued before the Court heard oral arguments in Misco, the Chief Justice argued that the two cases were distinguishable:

Although [Misco] presents the [public policy] issue in the context of a private employer, [the Postal Service] presents a stronger case for setting aside the arbitrator's award because it operates under a statutory mandate to ensure prompt delivery of the mails.

The Chief Justice further alleged that reinstatement would "seriously impair" the Postal Service's "ability to impress the seriousness of [its] mission upon its workers."

The Chief Justice's position appears to embrace false dichotomies. To begin with, there is nothing in the nation's labor laws or the Court's previous decisions to support the proposition that the judiciary should be more solicitous of public policy claims when the Postal Service seeks review of arbitration awards. Indeed, collective bargaining for postal employees is governed by the same statute (i.e., the NLRA) and the same duty to bargain applicable in Misco. Therefore, even though the Postal Service is a quasi-public employer, there is no principled way to distinguish it from the employer in Misco with respect to judicial deference to arbitration awards.

The Court has been offered a further opportunity to differentiate among types of employers in Northwest Airlines, where the carrier appears to argue in its petition for certiorari that airline arbitration awards are somehow different because the airline industry is heavily regulated and involves public safety. If this view is adopted along with the Chief

130. Id. at 2095.
131. Id.
132. See infra note 137.
133. See generally Petition for Writ of Certiorari, Northwest Airlines v. Air Line Pilots Ass'n Int'l (No. 86-1548). In Northwest, the carrier discharged a first officer who had violated a company
Justice's proposal in *United States Postal Service*, the Court will effectively endorse a sliding scale, where the level of judicial deference to an arbitrator's award would depend upon the type of employer involved. Purely private and purely public employers would be on the ends of the scale with regulated private industries somewhere in between. Such a scale would certainly be unmanageable and, moreover, unwarranted, since it would ultimately derive solely from the Court's view of the importance of the alleged public policy at stake.

It adds nothing to the analysis to point out that an employer functions under a statutory mandate. The employer in *Misco* had a statutory obligation to provide a safe working environment, and it cited a provision of the Occupational Health and Safety Act to this effect in a brief submitted to the Court. The Court rejected this specious line of argument, no doubt because the asserted connection between Cooper's reinstatement and the safety of the workplace was "tenuous at best." Likewise, the argument that the Postal Service's obligation to deliver the mails promptly will be compromised in some significant way by a decision simply to reinstate an employee, even one who once delayed the mails, "rest[s] on [nothing] more than speculation or assumption" about the employee's future behavior. Nearly every employer in the country operates under one or more federal or state statutory mandates, and it is not for the courts to decide which ones are "important" and which ones are not.

There is one statutory mandate, however, that is directly applicable in the review of arbitration awards, but is somehow overlooked by courts like the Eighth Circuit. This mandate, expressed in no uncertain terms in the NLRA, provides that employers and unions are to make their own arrangements regarding any aspect of the employment relationship subject to the duty to bargain, and that the Government (including the courts) should not interfere with their bargained-for agreement unless it is clearly illegal. In other words, "when neither the collective-bar-

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134. See Brief in Opposition to Petition for Certiorari at 8-9, *Misco* (No. 86-651).
136. Id.
137. Since Congress incorporated the NLRA, with minor exceptions not applicable here, into
gaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract. Thus, when courts entertain public policy claims, the proper question to ask is whether the statutory mandate expressed in the nation’s employment laws will be compromised by a decision to vacate an arbitral award. If courts continue to overturn awards merely because they believe that some other, unrelated statutory mandate they deem important is threatened, judicial deference to arbitration will become a distant memory.

This problem will be avoided if the Court adopts the bright-line rule proposed in the last footnote in Misco when deciding United States Postal Service. Only this rule is consonant with the public policies that inform the NLRA. The lower courts will not be deprived of their public policy powers, of course, if the Court were to follow this recommended course. They will still retain the authority to find an arbitrator’s award contrary to public policy when the arbitrator construes the collective bargaining agreement in a way that compels the violation of positive law. For example, if an arbitrator requires “closed shop” or “hot cargo” arrangements that violate the NLRA, the award should be vacated. A similar result would be reached if, for example, an arbitrator reinstates a school bus driver who is fired after it is discovered that he had no driver’s license. An arbitrator cannot override state law that positively prohibits unlicensed persons from driving a school bus. Likewise, in Northwest Air lines, the arbitrator could not have compelled the reinstatement of the pilot if the FAA had refused to recertify him for flight duty. These are legitimate examples of the public policy exception.

In United States Postal Service, Congress could have prohibited the Postal Service from employing a postal carrier who has been convicted of delaying the mails. However, Congress did not do this. Instead, it simply passed a law making it a crime to delay the mails. This suggests that Congress believed that criminal punishment would be sufficient, and that persons who violate the mail statutes should not also be deprived of fu-


139. Cf. American Postal Workers Union v. United States Postal Serv., 682 F.2d 1280 (9th Cir. 1980), cert. denied, 459 U.S. 1200 (1983) (vacating award that ordered reinstatement of worker whose employment was barred by federal statute); General Warehousemen & Helpers Local 767 v. Standard Brands, 579 F.2d 1282 (5th Cir. 1978) (en banc), cert. dismissed, 441 U.S. 957 (1979) (award required employer to give employees displaced at one plant superseniority at another plant where different union was the certified bargaining agent, in violation of the NLRA).
140. See supra note 133.
turing employment in order to send an even stronger message to other employees.

The danger posed by an expansive public policy exception is not just that it will be regularly abused by judges who are anxious to impose their own "self-mesmerized views of economic and social theory,"141 thus undercutting the duty to bargain. An ill-defined exception will also encourage employers to resort to litigation as a regular course when faced with awards they do not like. Even if an employer knows that a particular public policy challenge is unwinnable, it can achieve substantial delay in implementing an award if it knows that the courts are generally solicitous of public policy claims.142 Arbitral finality will thus be significantly reduced,143 and unions will know that they will ultimately have to resort to strikes and other forms of economic warfare to settle their grievances. This would greatly disserve unions, employers and the public at large.

VIII. Conclusion

An expansive public policy exception is a mischievous weapon in the hands of a judge determined to implement his or her own brand of industrial justice. Any result-oriented judge who has a modicum of intelligence can find a perceived conflict between an arbitrator's award and the judge's own notions of public policy. If enough judges take this course, the Supreme Court's mandate of judicial deference to arbitration will be substantially eroded, if not destroyed. At the same time, certain mandatory subjects will be removed from the ambit of collective bargaining, thus eroding the duty to bargain as well. This surely is not what Congress had in mind in enacting the nation's labor laws, nor is it what the Court had in mind in deciding the Steelworkers Trilogy, W.R. Grace and Misco. By endorsing the narrow view of the public policy exception, the Court will emphasize once again that binding, final arbitration "furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining."144

142. See Ethyl Corp. v. United Steelworkers, 768 F.2d 180, 188 (7th Cir. 1985), cert. denied, 475 U.S. 1010 (1986) ("some companies nowadays are trying to reduce the credibility of unions by dragging out the grievance process through challenges in court to arbitration awards").