FORUM

After the Labor Arbitration Award: The Public Policy Defense*

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In United Paperworkers International Union v. Misco, Inc. the Supreme Court reversed a Fifth Circuit decision, which, on public policy grounds, had affirmed the vacating of an arbitrator's award. This paper, prepared against the backdrop of the court of appeal's decision, explores rival conceptions of the scope of the public policy defense. An addendum treats the Supreme Court's decision. The author argues that under the Supreme Court's approach and the wider traditions of contract law, that defense involves a balancing approach—even in the labor-arbitration context. He suggests that the limitist view of that defense, in the just-cause context and elsewhere, would disregard the proper roles of judges and arbitrators in balancing societal and contractual concerns. He also points to considerations that would undercut the finality which the limitist approach is designed to promote. The author concludes by suggesting that the limitist position is incompatible with established traditions, recently reaffirmed by the Supreme Court, and that a broader conception of the public policy defense, which applies to contracts in general, also applies to labor arbitration awards.

My topic—the scope of the public policy defense to the enforceability of a labor arbitration award—is an old problem.1 That problem has recently been highlighted by a series of discordant decisions,2 and by the recent Supreme Court case, United Paperworkers International Union v. Misco. Inc.3

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1. See Local 453, Int'l Union of Elec. Workers v. Otis Elevator Co., 314 F.2d 25 (2d Cir.), cert. denied, 373 U.S. 949 (1963); Black v. Cutter Laboratories, 43 Cal. 2d 788, 278 P.2d 905 (1955), cert. dismissed, 351 U.S. 292 (1956). This paper was presented and prepared for publication before the Supreme Court decided Misco. The Court's decision is, accordingly, addressed only in the addendum to this paper. See infra pp. 256-57. The facts of Misco are set forth infra note 44.
2. See infra notes 17 & 20 and accompanying text.
In dealing with that problem, I propose to make four general points. First, under the approach announced by the Supreme Court, the public policy defense in the context of labor arbitration appears to operate substantially in the same way as it does throughout the law of contracts. Second, the Supreme Court's formulation of that defense and the general rationale for it appear to be incompatible with the so-called limitist view in the labor arbitration context. Under the limitist view, a labor arbitration award would be invalidated as contrary to public policy only if the award called for conduct violative of positive law. Third, similar difficulties also apply to the suggestion of the National Academy of Arbitrators in its amicus brief in the Misco case, namely, that the limitist view, regardless of whether it is to be applied across the board, should at least govern awards finding that an employer’s discharge or discipline lacked just cause. Finally, I will suggest that, notwithstanding the resultant uncertainties, the public policy defense in the labor-arbitration context is unlikely to escape an untidy balancing approach.

A convenient, if familiar, starting point for developing the foregoing points is that morale-building ode to labor arbitration, the Steelworkers Trilogy, and particularly the Court’s celebrated, if elusive, statement in Enterprise Wheel: an award, to be judicially enforceable, must “draw its essence” from the agreement. There are several varying formulations of the essence test. The following statement is a reasonably accurate summary: The labor arbitrator, under a standard arbitration clause (which covers all disputes over the interpretation or application of the agreement), is restricted to interpreting or applying the agreement; he is not to dispense his own private brand of justice. Accordingly, courts generally decline to enforce awards that they view as lacking any rational basis in the agreement. Such awards, even though ostensibly grounded

4. See infra notes 22-31 and accompanying text.
5. See infra notes 38-41 and accompanying text.
6. See infra notes 35-43 and accompanying text.
7. See infra note 44.
8. See infra note 73 and accompanying text.
10. 363 U.S. at 597.
12. See, e.g., Miller Brewing Co. v. Brewery Workers Local 9, 739 F.2d 1159, 1162-63 (7th Cir. 1984), cert. denied, 469 U.S. 1160 (1985).
13. See cases cited by Kaden, supra note 11, at 270; see also Hill v. Norfolk & W. Ry., 814 F.2d 1192 (7th Cir. 1987); Roberts & Schaefer Co. v. UMW, Local 1846, 812 F.2d 883 (3d Cir. 1987). On the convergence of the standards for judicial review under the Railway Labor Act and Section 301 of the Labor-Management Relations Act of 1947, see Brotherhood of Locomotive Eng'rs v. Atchison, T. & S.F. Ry., 768 F.2d 914, 921 (7th Cir. 1985); see also Devine v. White, 711 F.2d 1082, 1083-84 (1983) (award upheld even though court confessed its own inability to "fathom any coherent line of
in the agreement, violate judicial strictures against arbitrators relying on personal, rather than contractual, standards of justice. In short, under the Trilogy, arbitrators have jurisdiction to be wrong but not goofy. Judges, experienced as they are with judicial, arbitral, and academic writing, appreciate the haziness of that distinction.

The public policy defense, at first blush, seems quite removed from a challenge based on an award's irrationality under the agreement. The crux of that defense is that the arbitrator's award, no matter how faithful to the agreement, should not be enforced because the parties' private contract should be overridden by social ends. The rub is the unruly character of such ends and the resultant difficulty of defining the proper scope of the pertinent public policy. Corbin approved Professor Winfield's extraordinarily open-ended formulation. Public policy, Winfield observed, is "a principle of judicial legislation or interpretation founded on the current needs of the community." The public policy defense thus seems to be related to the rule that an award should be denied enforcement if it calls for an illegal act. But the greater pliability of the public policy defense, as compared to the illegality defense, poses a much greater risk to arbitral finality.

The Supreme Court, in W.R. Grace & Co. v. Rubber Workers, reasoning in his long and rambling opinion or "to identify either a glimmer of reasoned consideration".


15. See 6A A. Corbin on Contracts § 1375, note 15 (1962) and 14 S. Williston, A Treatise on the Law of Contracts § 1628 (3d ed. 1972), which show the varied contexts, labor arbitration aside, in which the public policy defense has blocked the enforcement of private bargains.


17. 461 U.S. 757 (1983). The facts of this procedurally complicated case will be somewhat simplified below. After the company had been charged with race and sex discrimination violative of Title VII, the company and the EEOC (but not the union) entered into a conciliation agreement. That agreement's provisions accorded certain job rights to female strike replacements who were junior to the reinstated strikers and, consequently, conflicted with provisions of the collective bargaining agreement. In compliance with the conciliation agreement, the company laid off senior males rather than the junior women. The district court held that the conciliation agreement overrode the collectively bargained provisions and validated the layoffs.

The Fifth Circuit reversed the district court in Southbridge Plastic Division v. Local 759, 565 F.2d 913 (5th Cir. 1978). The company immediately reinstated the laid off males.

Several grievances were filed by employees laid off in compliance with the conciliation agreement. One arbitrator upheld the grievance on the grounds that the collective bargaining agreement did not provide for good faith violations of its seniority provisions.

Therefore, good faith reliance on the court order did not protect the company from contractual liability.

The Supreme Court, after finding that the award met the Enterprise Wheel test, held that "public policy" did not warrant upsetting the arbitrator's award. The Court reasoned that enforcement of the collective bargaining agreement, as interpreted by the arbitrator, would not compromise the
placed public policy review of labor arbitration awards within the framework that had evolved for other contract disputes, stating:

As with any contract, however, a court may not enforce a collective-bargaining agreement that is contrary to public policy. See Hurd v. Hodge, 334 U.S. 24, 34-35 (1948). [The arbitrator's] view of his own jurisdiction precluded his consideration of this question, and, in any event, the question of public policy is ultimately one for resolution by the courts. See International Brotherhood of Teamsters v. Washington Employers, Inc., 557 F.2d 1345 (CA9 1977); Local 453 v. Otis Elevator Co., 314 F.2d 25, 29 (CA2), cert. denied, 373 U.S. 949 (1963). . . . If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. Hurd v. Hodge, 334 U.S. at 35. Such a public policy, however, must be well defined and dominant, and is to be ascertained “by reference to the laws and legal precedents and not from general considerations of supposed public interests.” Muschany v. United States, 324 U.S. 49, 66 (1945).18

Lower courts have invoked W.R. Grace in support of quite divergent approaches.19 Under what I will call the limitist view, the public policy defense is inapplicable unless the disputed award is illegal or calls for action that would violate a rule of positive law. By contrast, under what I will call the broader view, public policy has more scope, but exactly how much depends on the care with which it is applied, case by case.

The Court's citations in W.R. Grace and its language, as distinguished from its result, are, I believe, incompatible with the limitist view. First, in two of its own opinions,20 invoked in W.R. Grace, the Court had first considered whether the disputed agreements violated a statute and then considered, alternatively, whether the agreements should be denied enforcement as repugnant to public policy. Furthermore, in Grace, the Court's extensive discussion of the compatibility of the disputed backpay award and public policy would have been wholly unnecessary, under the limitist view. No rule of positive law would have been violated by compliance with that award. As noted above, it called for backpay to senior male employees laid off in violation of the collective agreement while junior female employees were retained in accordance with a conciliation public policy requiring obedience to a court order. Nothing in the arbitrator's interpretation of the collective bargaining agreement required the company to violate the court order.

20. Hurd v. Hodge, 334 U.S. 24, 34-35 (1948); Muschany v. United States, 324 U.S. 49, 66 (1945). In addition, the view of public policy set forth in Otis Elevator, 314 F.2d 25 (2d Cir. 1963), cited approvingly in W.R. Grace, was broader than the limitist view. The significance of this point is, however, diminished because Otis rejected that defense and upheld an arbitrator's reinstatement of an employee discharged for gambling on company premises.
agreement between the EEOC and the employer. The Court, however, in the circumstances of W.R. Grace, rejected the applicability of the public policy defense. Consequently, the Court did not have to confront the tension between the goals of the Trilogy and a public policy defense broader than the limitist view.

That tension is illustrated by the decision of the First Circuit in United States Postal Service v. American Postal Workers Union. An arbitrator had ordered reinstatement, without backpay, of a window clerk, fired after his guilty plea and conviction of embezzling postal assets. The arbitrator, noting the grievant's unblemished seven year record, as well as mitigating factors, held that the Service had lacked just cause for discharge but approved suspending and transferring the grievant to a job away from stamps and cash. The district court vacated the award as violative of "an important public policy against embezzlement of Government money." The court of appeals affirmed, despite the union's argument that public policy did not bar the Service from employing convicted embezzlers.

The court, after lip service to the need for a clearly defined public policy, found it in the pertinent positive law and that grab-bag of intuitions—"common sense." The positive law included the statutory requirement of a "prompt, reliable and efficient postal service," as well as the Service's statutory monopoly over first class mail. "Common sense" encompassed the adverse impact of reinstatement on employee incentives to be honest, on public confidence in the Postal Service, and, indeed, in the entire federal government. Nodding to the rehabilitative ideal, the court, however, expressly disclaimed any public policy against the Postal Service's voluntary hiring of an ex-convict, as distinguished from its being coerced to reinstate a recent embezzer.

In a later and discordant Postal Service case, the District of Columbia Circuit, in an opinion by Judge Harry Edwards, rejected the First Circuit's pliable public policy defense. The second case involved a contractual requirement that a discharge be consistent with "applicable laws and regulations." The arbitrator, relying on that provision, had excluded evidence of the grievant's statements—the only evidence of his misappropriation of funds—on the ground that a timely Miranda warning had not been given. That ground had also been the basis for ex-

22. 736 F.2d 822 (1st Cir. 1984).
23. Id. at 824.
24. Id. at 825.
25. Id.
27. Id. at 3.
cluding those statements in the grievant's criminal trial, which had resulted in an acquittal.

The district court declined to enforce the award, finding that it did not draw its essence from the contract. The court of appeals, after rejecting that finding, also rejected the Postal Service's alternative contention that the award should be set aside as a violation of public policy.

Speaking for a unanimous court, Judge Edwards observed that under *W.R. Grace*, the public policy defense was to be extremely narrow and that it failed in the case before him because neither the reinstatement of the grievant nor the arbitrator's view of *Miranda*, even if erroneous, violated the law. Judge Edward's limitist approach to public policy coincided with the position advanced by Judge Easterbrook, concurring in *E.I. DuPont Co. v. Grasselli Employees Association*, recently decided by the Seventh Circuit.

In *DuPont*, my colleagues, Judge Posner and Judge Easterbrook, did not agree on the proper approach to public policy concerns. Accordingly, my discussion of that case must be at least as tactful as the average faculty meeting. An arbitrator in this case had reinstated, without back pay, an employee who had, without provocation, assaulted his supervisor and another employee and tried to create a potentially damaging chemical reaction. The district court vacated the award, on two principal grounds. First, by stressing the grievant's lack of fault while failing to give equal consideration to workplace safety, the arbitrator had enforced his own notions of equity rather than the agreement. Second, the award conflicted with public policy regarding workplace safety. The Seventh Circuit rejected each of these grounds and upheld the award.

A majority of the panel (consisting of Judge Cummings, who wrote for the court, and Judge Posner) observed that courts must be cautious in upholding the public policy defense because, compared to the irrationality defense, it potentially involves less deference to arbitration awards and more danger to arbitral finality. Less deferential review was appropriate, however, because that defense implicates societal interests beyond the interest in arbitral finality that constrains the irrationality defense. It is presumably because of those wider interests that the validity of the public policy defense calls for a judgment de novo by the court.

The court broke new ground in refining the procedural arrangements appropriate for judicial handling of the public policy defense in the situation presented by the *DuPont* case. The court identified two compo-

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29. *See Postal Workers*, 789 F.2d at 8-9; *see also* Northwest Airlines v. Air Line Pilots Assoc., 808 F.2d 76 (D.C. Cir. 1987), petition for cert. filed (U.S. Mar. 26, 1987).
32. *Id.* at 614-15.
ments of the issue of workplace safety: first, the arbitrator's factual finding that a recurrence of the grievant's rampage was extremely unlikely; and second, the arbitrator's judgment that this remote chance of harm did not require a dismissal of the grievance. Without disturbing particular factual findings or laying down a clear-cut rule, the court suggested that a less deferential standard of review for an arbitrator's finding of fact interwoven with a public policy defense might be more appropriate. It pointed to the clearly erroneous standard embodied in Federal Rule 52(a) as a possibility. By contrast, de novo review was appropriate for the arbitrator's act of judgment, that is, his weighing of the remotes of the danger against the pertinent public policy.

Judge Easterbrook, in his concurrence, forcefully espoused the limitist position, reasoning this way: The award should have been treated exactly like a contractual provision permitting the retention of an employee who had gone on one rampage but was unlikely to go on another. Unless such a provision violates positive law, an award which, in effect, reads such a clause into the contract should not be defeated on public policy grounds. A more open-ended public policy approach would be too sweeping; it would conflict with the "real" public policy embodied in the federal Arbitration Act. Under that policy, an award must be enforced if the arbitrator's reading of the contract is "permissible" rather than a frolic of his own. Consequently, the public policy defense fails unless it is based on outcome-illegality. Similarly, there is no justification for a less deferential judicial review of factual findings entwined with a broader view of that defense.

Judge Easterbrook's position, given his emphasis on the value of arbitral finality and autonomy, is appealing. His authorities do not, however, appear to be as powerful as his reasons. Thus, the federal Arbitration Act, even if it is generally applicable to labor arbitration, cannot bear the weight that he puts on it. The public policy defense is not foreclosed merely because the Arbitration Act fails to list it as a ground for vacating an award. After all, an award that calls for illegal conduct will be vacated even though the Act does not specifically provide

33. Id. at 616-17.
34. Id. at 617. But cf. Amalgamated Meat Cutters, Local 540 v. Great W. Food Co., 712 F.2d 122, 123 (5th Cir. 1983) (while vacating an arbitration award reinstating a truck driver who had imbibed intoxicating liquor shortly before an accident, the court declared that it would not review the arbitrator's factual findings or merit determinations).
35. Grasselli Employees Ass'n, 790 F.2d at 618.
37. Grasselli Employees Ass'n, 790 F.2d at 618.
for that result. That result is axiomatic; courts must not enforce private bargains or arbitral awards contrary to positive law.\textsuperscript{39}

Similar reasoning should foreclose judicial enforcement of either: (1) an award that enforces a contract clause that is, on its face, contrary to public policy; or (2) an award that, although based on a facially valid clause, is itself contrary to public policy. In such situations, public policy, like positive law, reflects a judgment that a private bargain must be limited in order to protect societal interests. It would be odd, indeed, if the parties could escape such a limitation merely by including a provision for enforcing the otherwise offensive agreement by arbitration. Nothing in the Arbitration Act or its background warrants that result. The Act was directed primarily at commercial contracts and, as the Supreme Court explained, "was designed to overcome an anachronistic judicial hostility to agreements to arbitrate which American courts had borrowed from English common law."\textsuperscript{40} The Act was, in short, designed to place arbitration agreements on the same footing as other contracts,\textsuperscript{41} and not to give them special immunities.

Admittedly, it is fairly arguable that a broader public policy defense is unacceptable in the context of labor arbitration because such a defense clashes with the values behind the Trilogy and because those values in turn get added strength from the role of labor arbitration as a substitute not only for litigation but also for the strike. But the Trilogy's primary focus is on the contract and its grant of jurisdiction to the arbitrator.\textsuperscript{42} By contrast, the public policy defense concentrates, as we have seen, on whether the parties' private purposes and the public policy favoring labor arbitration should be subordinated to competing public policies.\textsuperscript{43}

Furthermore, to assume a clash between the parties' general commitment to arbitral finality and the public policy defense is to run the risk of bootstrapping. That assumption begs a crucial question, that is, whether the parties' agreement contains an implicit limitation on finality when an award is offensive to public policy. After all, a pervasive and commonly accepted public policy defense has been apart of the legal background for all contracts. One could, accordingly, conclude from that background that the parties to a collective bargain had implicitly agreed to public policy as a limitation on finality, just as finality is implicitly limited by external law or the Enterprise Wheel irrationality test.

\textsuperscript{40} Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 n.14 (1985).
\textsuperscript{43} See supra notes 14-18 and accompanying text; cf. Gardner-Denver, 415 U.S. at 49-52.
The National Academy of Arbitrators, in its amicus brief in *Misco*, proposed a custom-tailored limitist approach as an alternative ground for reversing the decision below that had overturned a reinstatement award on public policy grounds. The academy’s position is that even though a broader public policy defense might be justified elsewhere, the limitist approach should govern a challenge to an arbitration award reinstating an employee on the ground that his discharge lacked just cause.

I have reservations about the academy’s novel position. It might be useful, however, to begin with reasons supporting a special limitation in the just-cause context. Agreements incorporate “just cause,” presumably, in part, because that term is elastic enough to permit arbitrators to consider the developing, as well as the established, norms and values of the community, including those embodied in statutes, the Constitution and other sources of public policy. To be sure, an arbitrator generally lacks authority to implement external law or public policy, as such. Nonetheless, in applying a just-cause standard, an arbitrator must take account of those considerations because they shape standards of justice in the plant as well as in the larger community. Accordingly, under the broader view of the public policy defense, a court would essentially be rehashing the arbitrator’s award on the just-cause issue. Vacatur would tend to invite further litigation and accompanying threats to the basic values of arbitration: its finality, speed and economy. An open-ended public policy defense poses a special risk to those values in the just cause context and should, according, be rejected. In that context at least, Judge Edward and Judge Easterbrook are right.

Despite the characteristic skill and persuasiveness with which the academy’s position was developed by David Feller, William Murphy and

44. See Brief for the National Academy of Arbitrators, as amicus curiae, United Paperworkers Int’l v. Misco, Inc., 108 S. Ct. 364 (1987) (No. 86-651). In *Misco*, while police were finding marijuana in the grievant’s home, another policeman, during break time on the grievant’s night shift at the plant, saw him enter another employee’s car with several coworkers. The latter, however, left the car before the grievant was apprehended in the back seat, while a lighted marijuana cigarette was burning in the front ashtray. A search of the grievant’s own car on the plant premises revealed a plastic scale containing marijuana residue. That evidence was not known to the employer when it fired the grievant for violating a plant rule against employees’ bringing marijuana into, or consuming it on, the plant premises. The arbitrator found against the alleged violation and reinstated the grievant with back pay. The court of appeals (with one dissenter) affirmed the district court’s vacatur of the award on the ground that it had been contrary to a well-defined public policy. The reviewing court expressed its puzzlement concerning the arbitrator’s view of the evidence and also criticized his “narrow focus” on the grievant’s procedural rights. This focus and its emphasis on the employer’s lack of knowledge of the marijuana residue at the time of the discharge, the court concluded, contributed to an award contravening Louisiana’s serious and well-defined policy against the operation of dangerous machinery by employees under the influence of drugs.

Jan Vetter, there are difficulties with it. One difficulty arises from the implications of *Alexander v. Gardner-Denver* and related cases. Nonetheless, the Supreme Court authorized courts under Title VII in effect to override an award rejecting a claim that a discharge involved racial discrimination. The Court emphasized that arbitration is primarily an instrument of the parties' private purposes rather than a means for achieving public purposes reflected in the law of the land.

It is true that *Gardner-Denver* and its progeny involved external law rather than a free-floating public policy defense. But, as we have seen, that defense, like external law, reflects societal interests and the interplay between them and private contracts. It is also true that *Gardner-Denver* and its progeny involved an award rejecting, rather than upholding, a grievance. But that fact affects only whose ox is gored; it does not affect the differences in the institutional responsibilities and comparative advantages of judge and arbitrator with respect to societal interests, on the one hand, and the parties' bargain, on the other. It is those differences that presumably led the Supreme Court in *W.R. Grace* to say generally that the public policy defense is to be resolved ultimately by a court, rather than by an arbitrator.

Respect for those differences is important for protecting arbitral finality in its proper sphere. As Professor Kaden has reminded us, the
judicial urge to override outrageous awards is unlikely to be repressed by incantations about finality. But courts may be moved by an understanding of the special role and contributions of the grievance-arbitration process. Such understanding is likely to enhance judicial willingness to allow arbitrators to serve as the proctor of the bargain. But, by the same token, arbitrators, among others, should recognize the institutional responsibility of courts for the public interest in the just cause context, as elsewhere. In short, courts are more likely to respect the arbitrator's special responsibility for the parties' private purposes if there is a reciprocal recognition of the plenary judicial responsibility for public purposes.

The risks of disregarding these institutional considerations do not seem warranted by the likelihood that a limitist rule would significantly increase compliance with reinstatement awards. In "just-cause" cases, the essence test of Enterprise Wheel and the public policy defense often are virtually interchangeable. Thus, parties challenging reinstatement awards on public policy grounds typically have also invoked Enterprise Wheel. Indeed, as Judge Easterbrook in DuPont indicated, broader public policy concerns complement the Enterprise Wheel test by providing a guide "to the sorts of provisions that will not appear in contracts" and that, accordingly, cannot properly be inferred by an arbitrator. Thus, a party barred from overturning a troublesome reinstatement award on broader public policy considerations would presumably urge those considerations in support of an irrationality contention under Enterprise Wheel. Similarly, a court, moved by broader public policy concerns, might well be attracted to a loose irrationality test as a handy stick for striking down an unpalatable award.

In addition, the law of torts may provide special incentives for challenging a reinstatement award that is seen as undercutting the public policy in support of safety in the workplace or on the highways. Even though the disputed award does not call for illegal conduct, an employer may challenge the award. Because of concern about liability or punitive

53. See Kaden, supra note 11, at 274, 297; see also Meltzer, Ruminations About Ideology, Law and Labor Arbitration, 34 U. Chi. L. Rev. 545, 553-54 (1967).
54. See Kaden, supra note 11, at 274, 297.
55. For problems surrounding this private-public distinction, see Meltzer, Discrimination, supra note 45, at 724-25.
56. See, e.g., American Postal Workers Union v. United States Postal Serv., 789 F.2d 1 (D.C. Cir. 1986); cases cited infra note 58.
57. See E.I. DuPont Co. v. Grasselli Employees Ass'n, 790 F.2d 611, 620 (1986); see also Philadelphia Housing Auth. v. Union of Sec. Officers, 500 Pa. 213, 455 A.2d 625 (1983) (denying enforcement of award reinstating a housing authority security officer who had defrauded elderly tenant he was paid to protect; employer could not have intended that result).
58. Cf. S.D. Warren Co. v. United Paperworkers Int'l Union, Local 1069, 815 F.2d 178 (1st Cir. 1987) (enforcement of award reversed as contrary to both Enterprise Wheel test and public policy defense; Campbell, C.J., concurring, while agreeing with first ground, declined to join in unnecessary public policy review); see also General Teamsters, Local 249 v. Consolidated Freightways, 464 F. Supp. 346 (W.D. Pa. 1979).
damages for retaining hazardous employees, an employer would presumably want to avoid the charge of failure to exhaust judicial remedies. Indeed, a tort plaintiff might well invoke the familiar suggestion that an award should be treated as if both parties had incorporated it into the collective agreement, that is, as if the employer had expressly agreed, for instance, to retain a truck driver awarded reinstatement even though he had driven his rig while under the influence of alcohol. In a tort action, that contention would be a patently mechanical, out-of-context fiction. Nonetheless, fear of its impact might well be another factor in an employer's decision to resist an award.

An examination of several recent cases will identify additional difficulties that are likely to result from the application of the limitist rule. In the Seventh Circuit's decision in Jones Dairy, an arbitrator had upheld a meatpacking company's blanket rule barring employees from reporting unsanitary conditions to the government. The court, however, affirmed the vacatur of the award, reasoning that the rule was overbroad because it did not provide for exigent circumstances. Hence, it contravened the public policy of insuring sanitary meat production, reflected in the federal Meat Inspection Act.

There had, however, been no suggestion that the disputed rule violated a provision of positive law. Accordingly, under the limitist approach, the results would be different and more troublesome. Neither the meatpacking company's rule, nor an arbitrator's award upholding its validity, could be disturbed on the basis of public policy. And yet discharge of an employee for breach of that rule might well result in the employer's liability for a dismissal held to be wrongful on the ground that it contravened federal or state public policy. It would be odd, under section 301 of the Labor-Management Relations Act, if a court could not properly consider whether an arbitration award upholding the disputed rule was repugnant to the public policy that could be the source of wrongful dismissal liability.

Exploration of a variation of the situation in Jones Dairy also suggests that the limitist approach is unduly narrow. Suppose that the em-

60. See Amalgamated Meat Cutters, Local 540 v. Great Food Co., 712 F.2d 122 (5th Cir. 1983) (invoking "public policy" in overturning an arbitrator's reinstatement award, in similar circumstances).
61. Local P-1236, Amalgamated Meat Cutters v. Jones Dairy Farm, 680 F.2d 1142 (7th Cir. 1982).
62. Id. at 1145.
63. Later, in Grasselli Employees Ass'n, a majority of the court stated explicitly that no such violation had been involved in Jones Dairy. 790 F.2d at 616.
ployer had fired the employee for breach of the anti-whistleblowing rule and that an arbitrator upheld the discharge. Would a federal court, under section 301 of the LMRA, have grounds for upsetting the award? Perhaps, at least if the court could find: (1) that the award upholding the dismissal sanctioned conduct tortious under state law; (2) that the award was therefore contrary to the state’s positive law; and (3) that law was not preempted or was absorbed into the federal common law developed on the basis of section 301.

*Jones Dairy* and its hypothetical sequel illustrate how the limitist approach would complicate federal court litigation that involves state court issues. Had the court, because of the limitist approach, not invalidated the disputed anti-whistleblowing rule, the employer might well have enforced it by discharge. If the arbitrator upheld the discharge, his award could again be challenged on public policy grounds. The challenger would contend that the award authorized a discharge that would be tortious under state law. Those contentions would raise legal question especially difficult for federal courts confronting an unstable and changing body of state law. Nonetheless, under the limitist view of public policy, such issues are likely to proliferate. It is not easy to see why the resultant burdens would be warranted.

On the other hand, the need for nice analysis of state law issues could be avoided by giving more breathing room to the public policy defense. It is, of course, arguable that state law, as such, could more appropriately be decided by state courts. But such a result would scarcely promote genuine finality of arbitration awards. Furthermore, courts acting under section 301 are entitled to absorb state values compatible with national purposes into the body of federal law governing collective bargaining agreements.66

Other difficulties presented by the limitist approach are illustrated by *Garcia v. NLRB*.67 In *Garcia*, a UPS rule required an employee, stopping to make a delivery, to tap his horn. Garcia refused to comply, explaining (accurately) that honking was against the law. After his discharge was reduced to a 10-day suspension, a grievance objecting to the suspension was denied by a joint committee, on the ground that UPS had agreed to pay any resultant fines. The NLRB, deferring to the arbitration award, dismissed an unfair labor practice complaint. The Ninth Circuit reversed and chastised the Board. The court declared that punishing an employee for refusing to violate the law—any law—was contrary to public policy as well as to the NLRA.68

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67. 785 F.2d 807 (9th Cir. 1986).
68. 785 F.2d 807 (9th Cir. 1986), cert. denied, 108 S. Ct. 500 (1987), upholding award reinstating two undocumented aliens notwithstanding plausible claims that employment involved a violation of federal law by the employees.
I leave analysis of the Board's decision in *Garcia* for another time and turn to a variation of that case. Suppose that Garcia's union, invoking section 301, had asked a court to vacate the award. If the union had actually agreed to UPS' horn-tapping rule, the rule could be invalidated under the limitist approach, assuming that agreeing to the rule could be viewed as a conspiracy to violate or to bring about a violation of the law. But suppose that UPS had promulgated the rule unilaterally, relying on a broad management-rights clause. Would an award upholding that rule satisfy the limitist test? The award could not be invalidated on the ground that it had aided or abetted a violation by Garcia. Garcia's refusal to violate the law spawned the litigation. To be sure, the indemnity agreement and the company rule are designed to aid, abet and induce a violation by other employees. But until they commit a violation, the company rule in and of itself appears not to violate a rule of positive law however repugnant it may be to public policy. *Garcia* suggests that a bit more breathing room for the public policy defense would reduce the need for fine-spun speculations about state law that do not seem of great moment in the grievance context.

The same suggestion is implicit in *Simpson v. APA Transport Corp.* In *Simpson*, an arbitrator upheld a discharge for theft, after receiving into evidence certain damaging employee admissions. The employee had admitted to thefts predating those under investigation but had made these admissions to a lie-detector operator immediately after taking a lie-detector test forbidden by a state statute. Upholding the award, the court rejected the public policy defense, citing the absence of a clear-cut state court determination of whether the statute barred the use of post-polygraph admissions. The court recognized that the employer might be liable to the grievant for wrongful dismissal but urged that that issue was for the state court. Furthermore, the plaintiff's failure to request relief under state law obviated the need for the federal court to consider whether there would have been pendent jurisdiction over the state-based claim.

The arbitrator's understandable failure to consider the state public policy was complemented by the court's questionable failure to do so. As a result, the award was upheld without any explicit consideration at any stage of the proceeding of whether the court's decision created incentives for employers in the future to undercut the policies underlying the

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and unpreempted state law by the employer. One judge dissented, urging that the arbitrator had violated the policy of reconciling labor law and immigration law. *Id.* at 1394. The majority indicated that the award should not be vacated unless it was in "manifest disregard of the law." *Id.* It is difficult to see why the quoted standard should be controlling rather than illegality, whether or not manifest, of the conduct called for by the award. See supra text accompanying note 18.

The foregoing cases suggest that adoption of the limitist approach in section 301 actions attacking arbitration awards that deny grievances by discharged employees would frequently not promote finality of arbitration awards. Instead, state courts would become the battleground for contentions that the discharge was tortious because it violated public policy. Furthermore, a parsimonious view of public policy in the section 301 context might contribute to a determination by a state court, relying on public policy, that the discharge was wrongful. Finally, the limitist view might also contribute to a decision that a state remedy was not preempted by section 301 or by the contractual arbitration award. One of the significant labor law developments of our time has been the limitation, based on public policy concerns, of the employment-at-will doctrine. In light of that development it seems anomalous that, under the limitist view, similar public policies could not properly be considered by a court exercising jurisdiction under section 301.

Rejection of the limitist view does not mean the acceptance of the overexpansive view of public policy underlying decisions such as the Fifth Circuit's holding in *Misco*\(^71\) or the First Circuit's *Postal Workers*\(^72\) case. A preferable approach is embodied in sections 178 and 179 of the Restatement of Contracts,\(^73\) read in light of *W.R. Grace*. Under that approach, finality and the other values stressed in the Trilogy would be weighed against any special and clearly defined countervailing public interest.

The Restatement's approach, like all balancing tests, is ill-defined and difficult to apply. It is also difficult to prevent that approach from becoming the avenue for an end run around the Trilogy. But similar uncertainties and risks to important values, such as freedom of contract, surround the application of public policy so as to bar enforcement of other contracts. In the wider tradition of contract law, such risks generally are the price paid for flexibility in judicial efforts to safeguard public

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70. For similar questions of whether an arbitration award should be denied enforcement as contrary to the policy of the NLRA although not necessarily illegal, see Local 1, Amalgamated Lithographers v. Stearns & Beale, Inc., 812 F.2d 763 (2d Cir. 1987); cf. International Org. of Masters v. Trinidad Corp., 803 F.2d 69 (2d Cir. 1986).


72. See United States Postal Serv. v. American Postal Workers Union, 736 F.2d 822 (1st Cir. 1984).

73. These sections provide as follows:

§ 178. When a Term is Unenforceable on Grounds of Public Policy

(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is
welfare under changing conditions, mores and values.\textsuperscript{74}

In the end, precedent, general principles of contract law, and practical considerations operate, in my view, against completely exempting section 301 actions to enforce labor arbitration awards from limitations on contractual freedoms imposed by courts in other contexts. That observation does not necessarily answer the question about the scope of the public policy defense to labor arbitration awards. Instead, it enlarges the question so as to cover public policy concerns throughout the whole area of contract law, as well as wills and trusts. That larger question is business for another time. Meanwhile, it serves once again to remind us that recourse to the coercive power of courts in relation to labor arbitration awards cannot wholly escape the wider traditions of the law.

\textbf{ADDENDUM}

After this paper had been submitted for publication, the Supreme Court decided \textit{Misco}.\textsuperscript{75} Speaking through Justice White, it reversed the court below and upheld the arbitrator’s award, principally on these grounds: (1) Absent any claim of dishonesty by the arbitrator, the court of appeals could not properly reject the arbitrator’s finding of what the Supreme Court described as “historical fact” (that the grievant had not violated the plant rule), merely because that finding had been improvident or even silly.\textsuperscript{76} (2) Nor could the reviewing court properly deny enforcement because the arbitrator, in accordance with the prevailing practice, had refused to consider any evidence unknown to the company peacefully outweighed in the circumstances by a public policy against the enforcement of such terms.

(2) In weighing the interest in the enforcement of a term, account is taken of
(a) the parties’ justified expectations,
(b) any forfeiture that would result if enforcement were denied, and
(c) any special public interest in the enforcement of the particular term.
(3) In weighing a public policy against enforcement of a term, account is taken of
(a) the strength of that policy as manifested by legislation or judicial decisions,
(b) the likelihood that a refusal to enforce the term will further that policy,
(c) the seriousness of any misconduct involved and the extent to which it was deliber-
erate, and
(d) the directness of the connection between that misconduct and the term.
\textsection{179. Bases of Public Policies Against Enforcement}

A public policy against the enforcement of promises or other terms may be derived by the court from
(a) legislation relevant to such a policy, or
(b) the need to protect some aspect of the public welfare, as is the case for the judicial policies against, for example,
(i) restraint of trade (\textsection{186-188),
(ii) impairment of family relations (\textsection{189-191), and
(iii) interference with other protected interests (\textsection{192-196, 356).
\textbf{Restatement (Second) of Contracts} 6-7 (1979).

74. \textit{See 6A. A. Corbin on Contracts} \textsection{1374, at 6-8, \textsection{1375, at 10-14 (1962).}
76. \textit{Id.} at 371.
at the time of discharge.\textsuperscript{77} (3) Finally, the lower court's approach to public policy, although based on common sense, did not comply with the formulation in \textit{W.R. Grace},\textsuperscript{78} that is, that such a policy must be "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."\textsuperscript{79}

The Court chose to dispose of \textit{Misco} without addressing the issue covered by the grant of certiorari; that is, whether, as the union had urged, the public policy defense operates 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.\textsuperscript{80} The Court thus declined to approve what has been described above as "the limitist approach." On the other hand, the Court rejected the expansive approach to public policy reflected in the Court of Appeals' vacatur in \textit{Misco}. The Court also rejected the procedural suggestion of the Seventh Circuit, that judicial review of adjudicative facts linked to the public policy defense should be less deferential.\textsuperscript{81} In the end, the Court, in \textit{Misco} as in \textit{W.R. Grace}, placed the public policy defense against labor arbitration awards within the general traditions of contract law\textsuperscript{82} but provided scant guidance regarding the scope of that defense. The resultant uncertainty is the price tag for the flexibility afforded by that defense throughout all of contract law.

\textsuperscript{77} Id.
\textsuperscript{78} See supra note 18 and accompanying text.
\textsuperscript{79} \textit{Misco}, 108 S. Ct. at 373.
\textsuperscript{80} Id. at 374 n.12; see also id. at 375 (Blackmun, J., concurring, joined by Brennan, J).
\textsuperscript{81} The stated purpose of the concurrence was to emphasize the narrow and multiple grounds for the majority's decision. The concurrence also noted that compliance with the formulation of the public policy defense in \textit{W.R. Grace}, while necessary for activating that defense, was not sufficient to do so. Id. at 376.
\textsuperscript{82} See supra note 34 and accompanying text.

The Court declared that "[a] court's refusal to enforce an arbitrator's award under a collective-bargaining agreement . . . is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy . . . . That doctrine derives from the basic notion that \textit{no court will lend its aid to one who founds a cause of action upon an immoral or illegal act}, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests . . . ." \textit{Misco}, 108 S. Ct. at 373 (emphasis added) (citations omitted). Plainly, the foregoing declaration by the Court is much broader than the limitist view of the public policy defense.

Clarification of the Court's position may result from its action, two weeks after deciding \textit{Misco}, granting certiorari, in United States Postal Service v. National Association of Letter Carriers, 810 F.2d 1239 (D.C. Cir.), stay granted, 107 S. Ct. 2094, cert. granted, 108 S. Ct. 500 (1987), \textit{motion granted}, 108 S. Ct. 745 (1988), to consider whether an arbitration award ordering the Postal Service to reinstate an employee discharged (and convicted in criminal proceedings) for failing to deliver thousands of pieces of mail should, as the district court held 631 F. Supp. 599 (D.D.C. 1986) but the court of appeals disagreed, be set aside as contrary to public policy. See \textit{Justice to Review Public Policy Exception to Arbitration in Public Sector Setting}, 239 \textit{DAILY LAB. REP.} A-6 (Dec. 15, 1987). Whatever the Court's action may mean, it is plain that, under the limitist view, embraced by the court of appeals, the award does not contravene public policy.