

A MODEL TO PREDICT WHY COURTS VACATE ARBITRATION AWARDS IN LABOR AND EMPLOYMENT DISUTES

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ABSTRACT

In the tradition of labor arbitration, it is widely accepted that the decision of the arbitrator is final. However, increasingly, legislation, litigation, and practice are reducing the finality of arbitration. Studies suggest that this vacateur rate can range from 15% to 30%. Section 10 (A) of the U.S. Federal Arbitration Act provides that courts may review an arbitration award only if the process has been tainted in certain ways: (1) where the award was procured by corruption, fraud, or other means; (2) where there was evident partiality or corruption in the arbitrators; (3) where the arbitrators were guilty of misconduct in refusing to postpone a hearing upon sufficient cause shown or refusing to hear evidence pertinent and material to the controversy or any other misbehavior by which the rights of any party might have been prejudiced; (4) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award on the subject matter submitted was not made. Additionally, the role of the arbitrator's behavior and whether there should be a public policy exception for the vacating of awards are emerging as factors. Arbitrator behaviors that have been of concern are how disclosures are handled, what decisions are made about requests to postpone hearings, the responses to actual or perceived questions of partiality or conflicts of interest, and considerations where there is a refusal to hear evidence. Public policy exceptions include unequal bargaining power, the absence of genuine mutuality, as reflected by the inadequacy or lack of consideration, a shocking of the public conscience by an 'unconscionable' agreement, insufficient mental capacity to understand the terms of the arbitration agreement on the part of the employee plaintiff, evidence of an 'overreaching' by the employer, in violation of traditional standards of equity and fairness, evidence that there was a de facto waiver of arbitral rights. An example of an award contrary to public policy would be reinstating the proven sex offender as a grade school teacher. Drawing on the work of Helm, Leroy and Feuille; Jedel, LaVan and Perkovich; and others, the present research examines the bases for which arbitration awards, both union and employment ones, are being vacated by the courts. A model is proposed to aid the development of future research on the topic. Illustrative cases are also included.

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INTRODUCTION

Legal Background

With the passage of the Wagner Act and the onset of the Second World War with its wartime regulation of collective bargaining by the War Labor Board, arbitration was embraced as a means of dispute resolution so that wartime production would not be disturbed. Then, after the end of the War, employers and unions alike continued to use arbitration.

It was with this warming to arbitration, especially in the labor-management context, that the Supreme Court first considered the matter of labor-management arbitration. In that case, *Textile Workers v. Lincoln Mills*, the Court determined that because labor peace was an integral part of federal labor policy federal law, and more specifically the Labor-Management Relations Act, should govern the review of disputes arising under labor arbitration because arbitration in that context was the means of achieving labor peace during the term of collective bargaining agreements. Subsequently, in a series of cases regarded as the Steelworkers Trilogy, the Court placed some context to that federal law that it deemed dispositive in *Textile Workers*.

In the first of those cases, *Steelworkers v. American Manufacturing* the Court held that the role of federal courts reviewing issues arising in labor-management arbitration should be narrow. It declared that it was not the province of the courts to determine the merits of the matter to be arbitrated, as that was what the parties to the collective bargaining agreement placed in the hands of the arbitrator they chose to hear the matter. Rather, in the eyes of the Court, the courts role was to “ascertain...whether...the claim is governed by the contract” and nothing more. In the second of the cases comprising the Trilogy, *Steelworkers v. Warrior & Gulf Navigation*, implementing its rationale from *American Manufacturing*, declared that a collective bargaining agreement was more than a contract and was, rather, a generalized code of conduct governing the entire bargaining relationship. In other words, the Court opined, it created a common law of the shop and that a matter should be deemed arbitrable unless it could be said “with positive assurance that a matter was not susceptible to coverage under the agreement.” Finally, the Court emphatically declared, any doubts should be resolved in favor of arbitrability. The final case in the Trilogy, *Steelworkers v. Enterprise Wheel*, the Court determined the proper role of reviewing courts when they are asked to vacate or enforce arbitration awards. There the Court held that because the parties bargained for the decision of the arbitrator, the courts should not substitute their judgment for that of the arbitrator and that a mere inference that an arbitrator may have exceeded his authority was not a justification for vacating the award.

For almost three decades, that was the state of the law. However, in *Paperworkers v. Misco*, the Court found that if an arbitrator’s award violated “public policy” it was appropriate for a court to vacate the award. The Court explained in *Misco* that such action was proper because it was nothing more than an extension of the common law doctrine that a contract that was illegal could not be enforced and thus, because the arbitrator acted pursuant to such an agreement, an award that violated public policy similarly could not be enforced. However, the Court seemed to indicate that the public policy exception to the limited review of arbitration awards was also to be applied narrowly because the operative “public policy” was to be only that which was “explicit” and “well-defined and dominant” grounded in the laws and regulations of the land. It added that “general considerations of supposed public

interests” would be insufficient to invoke the exception. A good example of what the Court had in mind in *Misco* was the Court’s most recent exposition on the public policy exception. In that case, *Eastern Associated Coal v. Mineworkers*, an arbitrator reinstated, with conditions, a driver of heavy machinery who had tested positive for drugs and who had been discharged for testing positive one year earlier but who had been reinstated on that occasion by another arbitrator, again with conditions. The Court conceded that the public policy forbade such an employee from using drugs. However, the Court also found that the public policy also declared that employee rehabilitation was an important factor and set forth regulations on that issue. Thus, the Court declared, the arbitrator did not violate public policy when he reinstated the employee, but penalized him by reinstating him with various conditions.

With the decreasing penetration of union representation among today’s workers, and with the growth of employment discrimination and litigation, arbitration is now used rather than litigation. Thus, it does not fit neatly into the paradigm of *Lincoln Mills* and the *Steelworkers Trilogy* and reviewing courts have adopted additional bases for vacating awards. For example, “arbitrary and capricious,” in “manifest disregard of the law,” is “completely irrational,” ignores the “plain meaning” of the underlying contract, creates a “substantial injustice,” and/or is unsupported by the facts of the dispute. It is with this history and current state of affairs that we conducted our study.

A variety of reasons have been given for this increase in the propensity to litigate arbitration awards. In addition, it has been noted that there have been expanded grounds for vacating arbitration awards. Flanagan (2000), for example, reported a finding by a Circuit Court that an award could be vacated if the arbitrator manifestly disregarded the law, the facts, or both. The overwhelming deference given to arbitration decisions under the framework of the Federal Arbitration Act (FAA), the court stated, did not adequately address the strong public policy concerns in employment claims. Giving credence to this perspective is a recent Supreme Court ruling. In a 2008 ruling, the U.S. Supreme Court held that FAA §§10 and 11 do provide the exclusive bases for vacatur and modification of arbitral awards in proceedings brought under the FAA's framework for expedited judicial review. Additionally, it ruled that parties may not contract for greater judicial review within that framework. At the same time, the Court expressly left open the possibility that an award could be subjected to expanded judicial review outside the context of the FAA (Foster and Bigge, 2008). It should be noted that this case involved commercial rather than labor arbitration.

Court Level Differences

LeRoy’s (2007) data in 426 federal and state court cases concluded that Federal Courts confirmed 92.7% of arbitrator awards, compared to 78.8% for state courts. This statistically significant difference was also observed for appellate courts, where the confirmation rate in federal courts was 87.7%, contrasted to 71.4% for state courts. Zuckerman (2000) noted that the Supreme Court has ruled that when parties are seeking to vacate an arbitration award, they are not limited to the venue where the award was issued.

Factors Shaping Judicial Review

Helm (2006) considered some of the questions that shape judicial review of arbitration awards. The provisions of section 10 (A) of the Federal Arbitration Act provide that courts may review an arbitration award only if the process has been tainted in certain ways: (1) where the award was procured by corruption, fraud, or other means; (2) where there was

evident partiality or corruption in the arbitrators; (3) where the arbitrators were guilty of misconduct in refusing to postpone a hearing upon sufficient cause shown or refusing to hear evidence pertinent and material to the controversy or any other misbehavior by which the rights of any party might have been prejudiced; (4) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award on the subject matter submitted was not made.

However, in breaking new ground, the court placed itself in the position of a fact finder, a role traditionally occupied solely by the arbitrators, and concluded that the arbitrators “manifestly disregarded” the evidence. Rather than deferring to the arbitration panel’s finding of the facts, the court itself reviewed the documentary evidence and testimony, reached a conclusion different from that of the arbitration panel, and, by so doing, determined that the panel must have just ignored the evidence. This “manifest disregard of the facts” represents an additional standard for the vacating of an award, at least in the employment arbitration setting.

Public Policy Exceptions

Gingerich (2008) found a variety of defenses that are successfully being used in employment discrimination cases to avoid the forfeiting of a trial in favor of the relegation of employment discrimination claims to a binding arbitration process. These defenses include unequal bargaining power, the absence of genuine mutuality, as reflected by the inadequacy or lack of consideration, a shocking of the public conscience by an ‘unconscionable’ agreement, insufficient mental capacity to understand the terms of the arbitration agreement on the part of the employee plaintiff, evidence of an ‘overreaching’ by the employer, in violation of traditional standards of equity and fairness, evidence that other actions by the employer constituted a *de facto* waiver of their arbitral rights, or various statutory requirements whereby the enforceability of a binding arbitration clause of a statutorily based claim may be expressly limited.

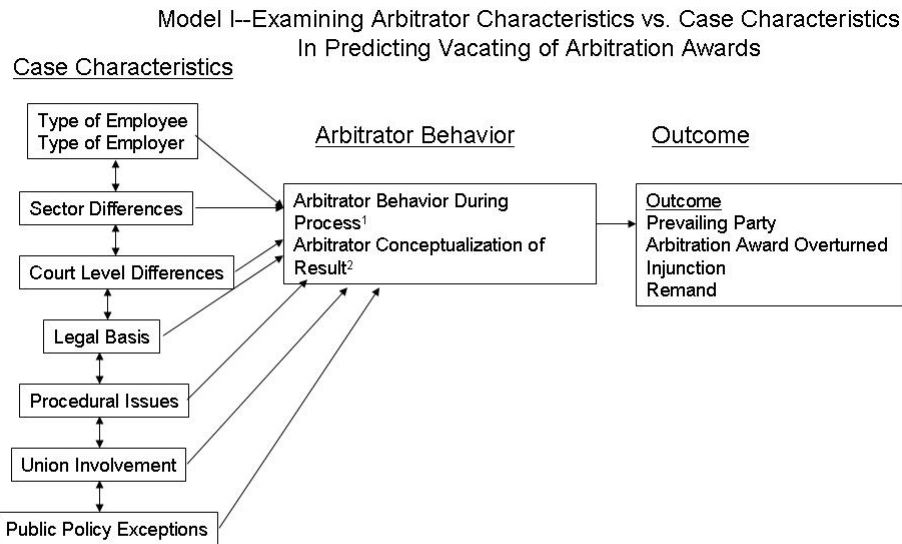
Petersen and Boller (2004) note that the Supreme Court has recognized a “public policy exception” to the finality of arbitration awards, especially in cases involving the reinstatement of discharged employees. However the Supreme Court has not explicitly identified what kind of award would constitute a public policy exception (other than to say the public policy should be very clearly and explicitly defined, thus suggesting very narrow grounds for finding an arbitrator’s award to be in violation), so considerable latitude resides in the lower courts, and how they implement this guideline. The additional question is presented as to just what extent, if any, an arbitrator should seek to take into account public policy in a particular case, in pursuance of seeking to assure the finality of the arbitral decision.

Pereles and Pereles (2003) similarly focused on the use of the public policy exception when vacating an arbitration award. They looked at the current interpretation of the public policy exception in the unionized segment of the private sector and the historical evolution of the exception, and focused on strategies for employers and unions to either use or defend against the public policy exception to the finality of arbitral awards.

Arbitrator Behavior

A review of the literature suggests a variety of arbitrator behaviors may be indicative of whether or not an award may be vacated. These include how various disclosures are handled, what decisions are made about requests to postpone hearings, the responses to

actual or perceived questions of partiality or conflicts of interest, and considerations where there is a refusal to hear evidence. (Choquette, 2005b; Anonymous, Aug.-Oct. 2006; Rossein and Hope, 2007; Anonymous, Feb.-Apr. 2006; Anonymous, 2007)



1 Disclosure, refusal to postpone hearing, partiality, refusal to hear evidence

2 Award exceeded authority, manifest disregard for the law, irrational ruling

PRESENT STUDY

The above model conceptualizes the factors that can be hypothesized to affect vacatur. This study is an extension of the previous research conducted by Jedel, LaVan, and Perkovich (2008). In that study, a random sample of 101 litigated cases, involving arbitration awards, were analyzed. In brief, the authors found that 1/3 of the cases were vacated. The rationale for vacating the cases included manifest disregard of the law, an arbitrary and capricious award (20% of the vacated cases), and public policy violations (6.7% of the vacated cases). While public policy was not a major issue, it remains a tool for courts to use to give the losing party to a labor dispute a second chance at prevailing. A refusal to hear pertinent evidence was not a common cause of vacatur. This was a reason for vacating the award in only 6.7% of the vacated cases. The most common reason for vacating an award was that it was not linked to the contract or that the arbitrator exceeded his or her authority (83.3% of the vacated cases). Another rationale that the courts used was that the arbitrator issued an irrational award (26.7% of the vacated cases). These are substantial figures, even though courts are supposed to give great deference to arbitral rulings.

Illustrative Cases

An example of a case in which a court concluded that the arbitrator had exceeded his authority is *187 Concourse Associates v. Fishman and Service Employees International Union, Local 32B-J*. In this case, the grievant engaged in a physical altercation with one of his supervisors, when questioned about work absences. The arbitrator concluded that the grievant's behavior was completely unacceptable, and the employer had no option but to

terminate him. Nevertheless, because of the grievant's prior good work record, the arbitrator said that the grievant should be given another opportunity to show he could be a productive employee. As a result, the arbitrator directed that the grievant be reinstated, without back pay, be given a final warning, and be placed on a six-month probationary period.

The employer refused to comply with the award, and brought legal action, arguing that the arbitrator exceeded his authority under the terms of the collective bargaining agreement because the grievant was guilty of the alleged misconduct. The agreement provided that no employee [after the probationary period] could be discharged without just cause, and that the arbitrator had no authority to add to, subtract from, or modify the agreement. At arbitration, the issue submitted to the arbitrator concerned whether the grievant had been discharged for just cause. The court concluded that the arbitrator, by stating that the employer had no option but to terminate the grievant, must have meant that he had found just cause for termination. They further supported their conclusion by observing that the arbitrator had credited the employer's version of the facts, and discounted that of the grievant. Therefore, the court agreed with the employer that the arbitrator's award did not draw its essence from the collective bargaining agreement and must be vacated. It said he lacked the authority to impose a different remedy than that selected by the employer, once he had concluded that just cause did exist for the action of termination. While the reasoning of the court in this case might be subject to challenge, it is clear that the arbitrator opened the gates for just that possible situation, when he offered the judgment that the employer had no option but termination. Had that statement been omitted, it might well be that this court would have allowed his decision to stand. The case highlights the criticality of crafting the language of the award carefully, and assuring that it is directly tied to the facts of the case, the language of the agreement, and the issue before the arbitrator, if the arbitrator is to minimize the chance of the award being vacated.

A contrary result ensued in *Air Line Pilots Association, International v. Trans States Airlines, Inc.* There, the arbitration decision to reinstate a pilot discharged after allowing an intoxicated off-duty airline employee to board the plane, was sustained, despite the employer's contentions that, *inter alia*, the arbitrator had exceeded his authority and had violated public policy. The court concluded in this case that the arbitrator had not explicitly or implicitly found that just cause existed for termination. Though he did find some merit to the charge about allowing an intoxicated passenger to board the plane, the arbitrator was careful to note that the conduct was not as egregious as the employer had alleged. The court also noted that there was no specific provision in the collective bargaining agreement that mandated termination for an offense such as the one the arbitrator had found the grievant to have committed, and there were no provisions limiting the options available to the arbitrator in reviewing the employer's action. With respect to the additional claim by the employer that the reinstatement had the effect of violating public policy, the court drew guidance from the *Misco* and *Eastern Associated Coal* cases, and noted that the question before it was not whether the infraction the arbitrator cited violated public policy, but whether the reinstatement of the grievant did. The court stated that, as *Eastern Associated Coal* had instructed, "reasonable people can differ as to whether reinstatement or discharge is the more appropriate remedy," however in the case before this court the parties had agreed to entrust this remedial decision to the arbitrator. Since the arbitrator had found reinstatement proper, they concluded there was no clear violation of a public policy in reinstating the discharged pilot. The differences in this case, and the outcome are clear. The contract language was different, the arbitrator did not make a conclusion on the facts and then seemingly reach a contrary remedy, and the court left the discretion with the arbitrator that enabled his decision to stand.

A third case in the sample illustrates another court's narrow reading of the public policy exception, while including its direction that the precise terms of the arbitrator's award must be sufficiently clear and understandable so that ambiguity is not left remaining. In *New York State Electric and Gas Corporation v. System Council U-7 of the International Brotherhood of Electrical Workers*, the court was faced with the question of whether an arbitrator's decision to reinstate an employee discharged after repeatedly stating his desire to harm some managers and supervisors violated a public policy of not permitting violent individuals to return to the workplace. The employer had argued that the prevention of workplace violence was a well-defined public policy, and claimed that the Occupational Safety and Health Administration had disseminated facts that showed the growth of workplace violence. This employer also said that it had a common law duty to protect its employees. In this case there was no allegation that the award exceeded the scope of the issue submitted to the arbitrator, nor that the award violated the language of the agreement.

The court examined the arbitrator's decision, and concluded he had not found the grievant's behavior to be violent or dangerous, or of a nature to pose any threat to the other employees. Rather than evaluate the relative degree of workplace conduct in this case as compared to some other, where a public policy exception might have been found, the court concluded that judgment was not within the scope of its review, and it was satisfied that the arbitrator's assessment and factual findings was what was proper. The court also noted that no government agency had implemented any specific legal regulations governing the issue. Therefore, since the arbitrator's decision did not violate any provision of law or regulation that required an employer to terminate an employee who had made verbal threats, the generalization of the common law duty to protect employees was not specific enough to allow for a conclusion that there was a public policy exception that should override the arbitrator's decision. Since the court found the arbitrator's determination of the backpay remedy ambiguous, it did order clarification on that one issue alone. However, in light of the language of the agreement, and the carefully written findings and conclusions of the arbitrator, which the court did not seek to reinterpret or set aside in favor of its own evaluation of the facts, the arbitrator's decision was enforced.

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