

Judicial Review Standards for Interest Arbitration Awards Under the Employee Free Choice Act

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Introduction

IMAGINE A NEWLY ESTABLISHED petroleum refinery in the midst of contract negotiations with a union. Approaching the sixtieth day of contract talks, the sides cannot agree on wages. The employer argues that because he has incurred considerable debt in opening the plant, he cannot afford to bring his employees up to the same salary as employees at other, longer-established refineries. The employer is confident that his position will succeed, and that the union will accept his counter offer of a significant pension plan. However, just prior to the negotiations deadline, the union insists on both industry-standard wages and pensions. Pursuant to federal law, an arbitrator steps in, listens to the evidence, and eventually decides that he believes the refinery can afford to pay standard wages. The arbitrator awards the wages and pension plan the union desires, and also an increase in vacation and sick time that the parties had agreed was off the table. The arbitrator issues his decisions without explanation. Unable to lay off the crucial employees in the bargaining unit, the refinery is forced to relocate.

The process described in the hypothetical above is called “interest arbitration”: the creation of a collective bargaining agreement by a neutral third party in an attempt to create terms which are fair to both sides.¹ When interest arbitration is legally mandated, one or both parties may feel aggrieved by the result, and wish to challenge the terms

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1. *Chi. Typographical Union No. 16 v. Chi. Newspaper Publishers' Ass'n*, 853 F.2d 506, 509 n.6 (7th Cir. 1988).

of the collective bargaining agreement. In the above hypothetical, the company might argue that the arbitrator ignored evidence, or the parties' positions prior to arbitration, in formulating an award. A provision of the Employee Free Choice Act ("EFCA"),² a proposed act of Congress, would mandate interest arbitration of initial collective bargaining agreements when the union and the employer cannot agree on a contract within a prescribed period of time.³ The EFCA, however, does not provide courts guidance on how to review the collective bargaining agreements it would mandate.

On its own, the EFCA is inadequate to meet the needs of employers and unions who will be affected by its compulsory arbitration provisions. The EFCA's first-contract compulsory arbitration provisions will lead unions to become reliant on an arbitrator to resolve their contract disputes, yet the EFCA does not specify a standard or scope for judicial review of interest arbitration awards.⁴ Because federal courts have not developed a body of law to address the review of labor union contracts, the EFCA should be amended to require that (1) courts conduct arbitrations in on-the-record hearings; (2) courts vary the level of deference accorded to interest arbitration awards, based on the arbitrator's expertise; and (3) arbitrators craft awards according to a prescribed set of substantive standards.

Part I of this Comment discusses the frustrated legal landscape that newly unionized employees face in negotiating a contract with a recalcitrant employer, defines interest arbitration and its traditionally limited role, and explains why Congressional Democrats have proposed compulsory interest arbitration as a solution to bad-faith bargaining by employers. Part II argues that the EFCA will lead parties to fall back on interest arbitration to award them a contract, instead of attempting to bargain for one. Part III examines why federal judicial policy surrounding arbitration of disputes under a pre-existing collective bargaining agreement and existing standards for judicial review of administrative decisions are, by themselves, inadequate tools for effectively reviewing interest arbitration awards. Part IV of this Comment examines Canadian law and state law concerning judicial review of interest arbitration decisions, and suggests that Congress adopt Canada's flexible approach to agency review, and the kinds of substantive standards that states require arbitrators to use in creating a contract.

2. S. 1041, 110th Cong. § 3 (2007).

3. *Id.*

4. *See id.*

I. The Employee Free Choice Act's Remedial Role in Federal Labor Law

A. Current Law: The National Labor Relations Act's Limited Ability to Promote Collective Bargaining

Section 8(d) of the National Labor Relations Act ("NLRA"), the federal act which governs private-sector union-employer relations, provides that while a union and an employer are required to bargain in good faith over the terms and conditions of employment to be set forth in a collective bargaining agreement, "such obligation does not compel either party to agree to a proposal or require the making of a concession"⁵ The Supreme Court expressly limited the right of the National Labor Relations Board ("NLRB") to set the substantive terms of a collective bargaining in any way, even as a remedy for a violation of the NLRA.⁶ In doing so, Justice Black announced the fundamental policy of the NLRA with respect to the government's role in collective bargaining:

It was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. This fundamental limitation was made abundantly clear in the legislative reports accompanying the 1935 Act.⁷

The reason for this "fundamental limitation" is that the NLRA was not meant to set the terms and conditions of employment, but was instead meant to allow employers and employees to work together to establish mutually acceptable conditions of employment.⁸ In upholding the NLRA's constitutionality under the doctrine of substantive due process, the Court stated that the NLRA gives the NLRB no ability to mandate labor contracts.⁹

In deciding that the NLRA was not intended to set the terms of a collective bargaining agreement, the Court acknowledged the tension between this restriction and "a practical enforcement of the principle that [the parties] are bound to deal with each other in a serious at-

5. 29 U.S.C. § 158(d) (2008).

6. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107–09 (1970) (holding that the NLRB has broad power to effectuate the policies of the NLRA, but may not do so in a way that interferes with the freedom to contract of either the union or the employer).

7. *Id.* at 103–04.

8. *See id.* at 104 n.2.

9. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 25, 43–46 (1937).

tempt to resolve differences and reach a common ground."¹⁰ There is no legal guarantee of a speedy collective bargaining process, or even the eventual production of a contract. Therefore, as long as a party avoids overt "bad faith" conduct, such as insistence upon permissive bargaining topics,¹¹ that party may engage in so-called "surface bargaining"¹² with impunity. On the effects of surface bargaining, Professor Archibald Cox said that "[t]he bargaining status of a union can be destroyed by [an employer] going through the motions of negotiating almost as easily as by bluntly withholding recognition [of the union]."¹³ Other examples of bad faith bargaining methods are limited to extreme conduct like "regressive bargaining"¹⁴ or insistence on exclusively unilateral control of all terms.¹⁵ Bad faith cannot be deduced simply from the unreasonableness of the suggested terms.¹⁶

The effect of these rules is that a contract is rarely produced in the face of a recalcitrant employer.¹⁷ Even where the employer violates the duty to bargain in good faith, the usual remedy—an NLRB order to resume bargaining—has a low enough cost to justify the ille-

10. *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 486 (1960) (holding that the requirement that the parties bargain for a contract "in good faith" was not violated when a union engaged in certain planned, concerted on-the-job activities designed to harass the employer).

11. *See NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348-49 (1958) (holding that mandated acceptance of permissive bargaining proposals as a condition precedent to any agreement constitutes bad faith).

12. Surface bargaining is defined as "sitting at the table but making no active effort to reach agreement with a view toward forcing the union to contemplate a strike knowing that the employer has the right to hire permanent strikebreakers." Roy Adams et al., *The North American Agreement on Labor Cooperation: Linking Labor Standards and Rights to Trade Agreements*, 12 AM. U. J. INT'L L. & POL'Y 815, 832 (1997).

13. Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1413 (1958).

14. Regressive bargaining occurs when "an employer withdraws a bargaining proposal on which tentative agreement has been reached and, in its place, substitutes a regressive proposal" without good cause for doing so. *Valley West Health Care, Inc.*, 312 N.L.R.B. 247, 252 (1993), *enforced*, 67 F.3d 307 (9th Cir. 1995).

15. *See NLRB v. A-1 King Size Sandwiches*, 732 F.2d 872, 877-88 (11th Cir. 1984) ("[T]he Company insisted on unilateral control over virtually all significant terms and conditions of employment, including discharge, discipline, layoff, recall, subcontracting and assignment of unit work to supervisors.").

16. *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 407-09 (1952) (holding that proposals "touching any condition of employment without regard to the traditions of bargaining in the particular industry" are not per se violations of the NLRA).

17. Paul C. Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 361-62 (1984) [hereinafter Weiler, *Striking a New Balance*].

gality when the employer feels it benefits him.¹⁸ Unions, however, take a much greater risk when they attempt to pressure an employer into bargaining. The NLRA does protect some concerted activities, like strikes¹⁹ and work slowdowns.²⁰ Yet other tactics, like refusing to perform some work duties or engaging in a sit-down strike,²¹ are not protected.²² During negotiations, an employer may not unilaterally implement bargaining proposals, such as wage decreases, before bargaining has reached an impasse.²³ A genuine impasse only exists when one of the parties presents a final proposal on an issue like employee wages, health benefits, or other areas of critical importance to the employees' ability to work,²⁴ and the other side rejects it without hope of further negotiation.²⁵ In the case of a drive for a first-time collective bargaining agreement, this merely means that the status quo of wages remains in effect during the course of bargaining. Even if the employees successfully force an employer into a genuine bargaining impasse, they risk being supplanted by replacement workers while they engage in a protected strike.²⁶ When the strike ends, replaced employees²⁷

18. Richard N. Block, *Rethinking the National Labor Relations Act and Zero-Sum Labor Law: An Industrial Relations View*, 18 BERKELEY J. EMP. & LAB. L. 30, 37 (1997).

19. A "strike," as defined in section 142 of the Labor Management Relations Act, includes "any strike or concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees." 29 U.S.C. § 142(2) (2008).

20. The NLRA provides that employees have a right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* § 157. Striking employees have the same rights. *See NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 347 (1938). The NLRA also provides that "nothing in this [Act], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C. § 163. The term "strike" is defined to include work slowdowns. *Id.* § 142(2).

21. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252 (1939) (noting that the seizure and retention of an employer's property was clearly unlawful).

22. *See Vencare Ancillary Servs. Inc. v. NLRB*, 352 F.3d 318, 323-25 (6th Cir. 2003). At issue in *Vencare* were so-called "partial strikes." *Id.* at 322.

23. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962).

24. *See, e.g., Ford Motor Co. v. NLRB*, 441 U.S. 488, 500-01 (1979) (holding that the choice of a cafeteria food service provider at an automotive plant vitally affects employee interests).

25. *See Taft Broad. Co.*, 163 N.L.R.B. 475, 478 (1967), *enforced*, 395 F.2d 622 (D.C. Cir. 1968) (noting that an impasse occurs "after good-faith negotiations have exhausted the prospects of concluding an agreement," and is "a matter of judgment").

26. *See NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).

27. 29 U.S.C. § 152(3) (2008) defines "employee" to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and

must either wait for new jobs to open up, or for their old ones to be vacated by the replacement employees.²⁸ Therefore, in order to gain the benefits that the NLRA is meant to provide, workers are often forced to wager their jobs on their own ability to force the employer's hand into bargaining. The firings, discipline, and ill-will that such a process produces destabilizes the union's base of support²⁹ and could lead to the eventual decertification of the union as the employees' bargaining representative. Thus, it is usually in the employer's interest to avoid impasse, provoke the union to engage in illegal or unprotected concerted action like sit-down or partial strikes, and then resolve the contract on more favorable terms than it would obtain by trading concessions with the union.

B. Interest Arbitration: The Alternative to Traditional Bargaining

"'Interest arbitration' in labor matters involves the submission of disputes over terms for a new collective bargaining contract to an independent third party who determines what the *new* terms of the contract will be."³⁰ Interest arbitration is distinct from grievance arbitration, where the arbitrator merely decides a dispute by interpreting and applying an existing union contract (a collective bargaining agreement).³¹ Whereas the decisions of a grievance arbitrator result in binding interpretations of the contract itself, the decisions of an interest arbitrator result in the award of a legally binding contract.³²

There are two basic types of interest arbitration. In conventional interest arbitration, the neutral arbitrator hears all of the evidence and uses his or her own judgment to create a binding contract between the parties.³³ In final offer arbitration, the arbitrator must choose between final proposals by each party on the disputed issues.³⁴

substantially equivalent employment." *Id.*; see also *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967) (noting that a striker remains an employee until he has obtained other regular and substantially equivalent employment).

28. *Fleetwood Trailer Co.*, 389 U.S. at 380-81.

29. See Weiler, *Striking a New Balance*, *supra* note 17, at 361-62.

30. *Chi. Typographical Union No. 16 v. Chi. Newspaper Publishers' Ass'n*, 853 F.2d 506, 509 n.6 (7th Cir. 1988).

31. Joseph R. Grodin, *Political Aspects of Public Sector Interest Arbitration*, 64 CAL. L. REV. 678, 678 n.1 (1976).

32. *Id.*

33. Arvid Anderson & Lauren Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153, 157 (1987).

34. *Id.* at 157. See generally Robert G. Howlett, *Interest Arbitration in the Public Sector*, 60 CHI.-KENT L. REV. 815 (1984) (discussing experts' views on the success of various types of interest arbitration procedures).

Some jurisdictions employ hybrid approaches such as permitting arbitrators to choose between final offers on an issue-by-issue basis only for certain issues, or allowing them to choose a “package” of issues that may even encompass all the terms of the contract.³⁵

An arbitrator’s choice of contract terms are therefore closely analogous to a legislative process.³⁶ Interest arbitration is commonly used by state legislatures to set the terms of public employee contracts in the face of bargaining impasses.³⁷ For example, in 1983 Ohio enacted the Ohio Public Employee Collective Bargaining Act to end a harmful cycle of “strikes and [employer] reprisals.”³⁸ While it would be possible for the Legislature to step in and determine the terms of any collective bargaining agreement, this is often done by selection of an individual arbitrator or panel of arbitrators.³⁹

The idea of private-sector compulsory interest arbitration statutes runs counter to the traditional idea of when interest arbitration should be employed. Interest arbitration has been accepted in the case of public employees because they have no right or at least a very limited right to strike,⁴⁰ or in many cases even to sit down at the bargaining table with their employer.⁴¹ It has been argued that the success of collective bargaining requires either the right to strike or compulsory arbitration, but not both.⁴² Interest arbitration has been used as a “means of enhancing the personal dignity of [public] employees by providing them with a formal process for participating in the determination of their basic employment conditions,” when those means would otherwise be absent.⁴³

35. Anderson & Krause, *supra* note 33, at 157–58.

36. *Id.* at 153.

37. Charles Craver, *Public Sector Impasse Resolution Procedures*, 60 CHI.-KENT L. REV. 779, 783–84 (1984) [hereinafter Craver, *Public Sector Impasse*].

38. James T. O’Reilly, *Ohio Strikes Back: Constitutional Invalidation of Labor Settlement Procedures*, 57 U. CIN. L. REV. 1351, 1351 (1989).

39. See, e.g., *City of Warwick v. Warwick Regular Firemen’s Ass’n*, 256 A.2d 206, 208 (R.I. 1969) (noting that Rhode Island interest arbitration law allowed the appointment of a three-member panel, comprised of one member from the union, one from the municipality, and a third member either agreed upon or appointed by the Chief Justice of the Rhode Island Supreme Court).

40. See Howlett, *supra* note 34, at 816.

41. Janet Currie & Sheena McConnell, *The Impact of Collective-Bargaining Legislation on Disputes in the U.S. Public Sector: No Legislation May Be the Worst Legislation*, 37 J.L. & ECON. 519, 522 (1994) (discussing “no duty to bargain” jurisdictions).

42. Anderson & Krause, *supra* note 33, at 155.

43. Craver, *Public Sector Impasse*, *supra* note 37, at 787; see also *id.* at 802–03 (discussing the sources of public employees’ frustrations).

C. The Remedial Purpose of the Employee Free Choice Act's Compulsory Interest Arbitration Provisions

The Employee Free Choice Act, a bill sponsored three separate times in Congress,⁴⁴ would significantly change the nature of union certification and collective bargaining in the United States. Each version of the Act, including the 2007 version currently pending in the Senate, would provide for first-contract⁴⁵ arbitration in cases where mediation has otherwise failed.⁴⁶ The bill has had wide support: the 2007 version had forty-seven co-sponsors in the Senate.⁴⁷ Under the 2007 version, ten days following the receipt of a newly organized labor organization's or newly certified representative's request to collectively bargain, the parties are supposed to begin good-faith bargaining.⁴⁸ If the parties have not reached an agreement on a contract within ninety days of the beginning of bargaining, the dispute is referred to the Federal Mediation and Conciliation Service ("FMCS") for mediation.⁴⁹ If mediation is not successful in resolving the parties' dispute, the dispute is sent to an arbitration board to be established by the FMCS.⁵⁰ The arbitrators' decision binds the parties for a period of two years, during which time the parties may amend the contract only by "written consent of the parties."⁵¹

A handful of explicit references to the mandatory arbitration provisions litter the most recent House debate.⁵² In the few places where the mandatory arbitration provisions are mentioned, the members of Congress who support them do so by pointing to the remedial effect that an arbitration process will have on an otherwise frustrated union landscape: "Today, you get harassed, you get intimidated, you get an election, and after the election, you get appeals. And you get endless

44. The amendment would be codified in section 8(h) of the NLRA. S. 1041, 110th Cong. § 3 (2007). The 2005 version of the Act is found at S. 842, 109th Cong. (2005). The 2003 version of the Act is found at S. 1925, 108th Cong. (2003).

45. "First-contract" refers to a first-time collective bargaining agreement.

46. S. 1041 § 3; S. 842 § 3; S. 1925 § 3.

47. S. 1041.

48. S. 1041 § 3.

49. *Id.*

50. *Id.*

51. *Id.*

52. 153 CONG. REC. H2055-56 (daily ed. Mar. 1, 2007). The majority of the debate in the House of Representatives concerned the Act's first provision, which would allow the NLRB to certify a union showing majority support through signed, valid authorization cards.

bargaining that in our own State of California, people have been waiting 7, 8, 9 years for a union that they won in an election.”⁵³

Labor statistics support this description. Union density, the percentage of the private non-agricultural workforce that is union members, declined from a high of 35% in 1954 to a little over 20% by 1980.⁵⁴ The overall success rate for unions attempting to win certification elections plunged from 73% in 1955 to 37% in 1980.⁵⁵ The overall success of certified unions in negotiating first contracts declined as well, from 86% of newly certified unions signing contracts in 1955 to 63% in 1980.⁵⁶ At the same time that unions were becoming less successful, instances of illegal employer tactics were on the rise. Charges alleging discriminatory anti-union conduct by the employer “rose from under 3,100 to over 18,300 between 1955 and 1980.”⁵⁷ During the same period, charges of employer violations of the duty to bargain in good faith rose from 1200 to 10,000.⁵⁸ While a general shift in attitudes towards unions themselves may be to blame for a portion of these declines, the numbers nevertheless show that by 1980, unions that vied for certification achieved their ultimate goal—a contract—less than one quarter of the time.

The major argument in favor of amending the NLRA to include the EFCA is that the policies that shape our current system of collective bargaining date back to a time when labor was a far more vital institution than it is today, and far more capable of succeeding in collective bargaining. Awarding unions with majority support the benefits of a contract could be considered the fruits of their labors, equal to winning a certification election or gaining voluntary recognition from the employer. This argument appeals to a sense of fairness, the idea that workers unionize for better conditions and are not able to achieve them under the current statute.⁵⁹ Thus, the balance of power that the NLRA originally struck would be righted by compulsory interest arbitration.

53. *Id.* (statement of Rep. Miller).

54. Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1771 (1983).

55. Weiler, *Striking a New Balance*, *supra* note 17, at 353 tbl.1.

56. *Id.*

57. PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 238 (1990).

58. *Id.*

59. *See Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing on H.R. 800 Before the Subcomm. on Health, Employment, Labor and Pensions of the Comm. on Education and Labor*, 100th Cong. 61–62 (2007) (statement of Nancy Shiffer, Attorney, AFL-CIO).

II. Compulsory Interest Arbitration's Effect: Leading the Parties Away from Hard Bargaining and into Reliance on the Arbitrator

Scholars have extensively debated the question of whether compulsory interest arbitration has an overall negative or positive effect on unions and employers. Supporters of the EFCA might point to the fact that compulsory interest arbitration tends to decrease the costs to both parties.⁶⁰ These include not just the cost of actually sitting at the bargaining table, but also the personnel costs and loss of good faith associated with economic warfare between the parties (such as strikes, lockouts, and so on). A state-mandated first-contract helps the union achieve satisfactory terms that will increase an employee's desire to bargain in the future.⁶¹ Another benefit of compulsory first-contract arbitration is the "face-saving" effect both parties experience.⁶² When neither party is forced to make concessions during the normal bargaining process, neither party can be accused of selling out its constituency.

For the same reasons, under the EFCA, the parties will be more likely to fall back on interest arbitration instead of attempting to agree to a contract through negotiations. In many current bargaining scenarios, the relative strengths of the parties' overall bargaining positions will determine the course of the negotiations and the eventual terms of the agreement.⁶³ Those strengths may be based in part on the economic situation of the employer and the individual employees, but may also be affected by the parties' levels of organization and tactical sophistication. A strike, or even prolonged negotiations, has the effect of putting tremendous pressure on both sides to voluntarily settle their differences through compromise, because both sides suffer when dispute costs are high.⁶⁴ Under interest arbitration, the focus shifts away from the negotiations and onto the arbitration as the real event.⁶⁵ This shift destroys the potentially therapeutic aspect of the

60. See, e.g., David Bloom, *Is Arbitration Really Compatible with Bargaining?*, 20 *INDUS. REL.* 233, 243 (1981); Janet Currie & Sheena McConnell, *Collective Bargaining in the Public Sector: The Effect of Legal Structure on Dispute Costs and Wages*, 81 *AM. ECON. REV.* 693, 693 (1991).

61. WEILER, *supra* note 57, at 250.

62. Peter Feuille, *Selected Benefits and Costs of Compulsory Arbitration*, 33 *INDUS. & LAB. REL. REV.* 64, 70 (1979).

63. See generally Weiler, *Striking a New Balance*, *supra* note 17, at 361-62.

64. *Id.* at 366.

65. See *Developments in the Law—Public Employment*, 97 *HARV. L. REV.* 1611, 1710 (1984); Howlett, *supra* note 34, at 820.

bargaining process, corrodes the understanding that the parties build in negotiations, and turns bargaining into an adversarial tribunal in which the parties speak not to one another, but to the arbitrator.⁶⁶

Rather than simply aiding the illegally treated unions that its supporters in Congress mention, the EFCA may less frequently lead the parties to establish a sensible bargaining posture with the employer, knowing that the arbitrator will step in, split the difference, or do what he or she otherwise thinks is reasonable.⁶⁷ Authors have pointed out that the institution of compulsory arbitration has a “chilling” or “narcotic” effect on the parties by inducing them to rely on an arbitrator rather than meaningful negotiations in their own interest.⁶⁸ One study showed a low percentage of contract negotiations under compulsory arbitration laws that were completed without resort to either a strike or the compulsory arbitration mechanism.⁶⁹ Of the five types of jurisdictions mentioned in that study, those with compulsory interest arbitration had the lowest instance of voluntarily negotiated agreement, at only 66%.⁷⁰ The study’s authors estimated that introducing compulsory arbitration into a jurisdiction where there was already a voluntary arbitration law increased the chances of the parties relying on arbitration between 6% and 23%.⁷¹

An EFCA proponent might point out that the law does not merely provide for compulsory first-contract arbitration, but also provides a mechanism for the parties to mediate their dispute with an FMCS mediator.⁷² As the argument goes, this provision of the EFCA might cut into the number of disputes that would result in interest arbitration. If the parties were at all apt to voluntarily settle their disputes, they would have the opportunity to do so and avoid arbitration altogether. The FMCS’s 2004 annual report, however, details its lack of success in first-contract negotiations, which it acknowledges are “critical because they are the foundation for the parties’ future labor-management relationship” and are “often more difficult than estab-

66. *Developments in the Law*, *supra* note 65; Howlett, *supra* note 34, at 820.

67. See Jordan T.L. Halgas, *Reach an Agreement or Else: Mandatory Arbitration Under the California Agricultural Labor Relations Act*, 14 SAN JOAQUIN AGRIC. L. REV. 1, 30–36 (2004) (appraising critically the recently-enacted California Agricultural Labor Relations Act, which contains compulsory interest arbitration provisions).

68. *Developments in the Law*, *supra* note 65, at 1709–11 (stating that arbitration chills a party’s negotiating efforts and is narcotic because a party finds little use in negotiating once it has experienced arbitration).

69. Currie & McConnell, *supra* note 41, at 532.

70. *Id.*

71. *Id.* at 539.

72. S. 1041, 110th Cong. § 3 (2007).

lished successor contract negotiations, since they frequently follow contentious representation election campaigns.”⁷³ Out of the 398 initial contract bargaining cases submitted to the FMCS in 2004 that reached mediation, 181 (about 45%) were closed successfully (i.e., an agreement was reached).⁷⁴ The percentage of non-mediated cases in which collective bargaining agreements were reached was actually higher, at almost 59%.⁷⁵ In fact, the FMCS’s success rate in first-contract arbitration mediations fell from 53% in 2000 to 45% in 2004.⁷⁶ The FMCS has since discontinued publishing statistics on its success rates in first-contract mediations in its annual reports.⁷⁷

The numbers and express statements from the FMCS highlight the ineffectiveness of mediations in first-contract situations, especially those that follow closely on the heels of a certification election, as is the case with the EFCA. In general, effective mediators must take their time, occasionally serve as a conduits for information exchanges between the parties, hold joint- and single-party sessions, and most importantly, gain the confidence of the parties.⁷⁸ The thirty-day maximum that the EFCA allows for mediation, and the fact that parties may be weighing their chances of success under an arbitrator’s discretion, both dampen a mediator’s chance for success.

III. The Inapplicability and Inadequacy of Existing Federal Judicial Review Standards in the Interest Arbitration Context

Whatever the relative merits of these positions may be, the arguments both for and against interest arbitration point towards a common theme: compulsory interest arbitration will likely mean increased reliance on government-appointed arbitrators to decide disputed issues. Because the EFCA is a government-imposed remedy, judicial review of an arbitrator’s decision will be a major concern of parties frustrated by the resulting contracts. The novelty of labor-manage-

73. FED. MEDIATION & CONCILIATION SERV., ANNUAL REPORT 18 (2004), available at http://fmcs.gov/assets/files/annual%20reports/FY04_AnnualReport_FINAL113004.doc.

74. *Id.* at 18–19.

75. *Id.* at 19.

76. *Id.* at 18.

77. See FED. MEDIATION & CONCILIATION SERV., ANNUAL REPORT 6–10 (2007), available at http://fmcs.gov/assets/files/annual%20reports/FY2007_Annual_Report.pdf.

78. See Donald H. Wollet & Robert H. Chanin, *The Law and Practice of Teacher Negotiations*, in ARBITRATION AND CONFLICT RESOLUTION 404–05 (Edwin R. Temple & Robert B. Moberly eds., 1979).

ment interest arbitration under federal law⁷⁹ leaves open the question of how courts should review compulsory interest arbitration awards.

The EFCA itself gives courts little or no guidance in deciding how to review interest arbitrators' decisions, and the legislative debate does little to clarify these important questions. Interest arbitrators appointed under the EFCA may have little experience in the industry, region, or workplace whose law they purport to hand down. The EFCA does not provide a mechanism by which the arbitrator can clarify the meaning of the provisions he or she has written, does not require that an award be explained or even written, and does not require the arbitrator to discriminate between situations in which the parties have agreed to all but a few sticky issues, and situations in which there is wholesale disagreement as to all of the terms of the agreement.⁸⁰ The EFCA appears to give the arbitrator an unrestrained freedom to set the terms and conditions of employment, without consideration of the economic realities of what the union or employer require.

Accordingly, without significant amendments to the proposed EFCA, or the adoption of additional regulation by the FMCS, compulsory interest arbitration awards cannot be effectively reviewed.⁸¹ While models of federal court judicial review do exist, they will be ineffective in facilitating effective review of interest arbitration awards without amendment. There are two basic concerns. First, the concern is whether these standards of review would be sufficiently restrictive or deferential. While a generally restrictive standard of review will encourage frivolous appeals and prevent the arbitrator from bringing

79. Interest arbitration clauses are sometimes included in voluntarily agreed upon collective bargaining agreements. *See, e.g.*, *Sheet Metal Workers' Int'l Ass'n, Local Union No. 2 v. McElroy's, Inc.*, 500 F.3d 1093, 1095–96 (10th Cir. 2007). These clauses require interest arbitration of future collective bargaining agreements, and could be used to set original terms in new areas of bargaining following an agreement on an initial collective bargaining agreement, but before the initial agreement has expired. *See id.*

80. S. 1041, 110th Cong. § 3 (2007).

81. The ordinary presumption is that actions of administrative agencies, like the FMCS's administration of interest arbitrations under the EFCA, will be subject to judicial review. *See* 5 U.S.C. § 702 (2008) (providing that a person "adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof"); *see also* *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967) ("The legislative material elucidating [the Administrative Procedure Act] manifests a congressional intention that [the Act] cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's generous review provisions must be given a hospitable interpretation." (internal quotation marks omitted)).

creativity or expertise to the process,⁸² a generally deferential standard may make courts unable to respond to the scenario described in this Comment's introduction, or lead to other results that abrogate the public interest.⁸³ Second, a related concern is what, if any, substantive or procedural considerations courts require of the individual or body issuing the reviewed decision.

A. Grievance Arbitration Under Pre-Existing Collective Bargaining Agreements

Grievance arbitration, the arbitration of a dispute over some right arising under the collective bargaining agreement,⁸⁴ is the kind of arbitration around which federal labor policy has coalesced. In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*,⁸⁵ the Supreme Court limited judicial review of the grievance arbitrator's decision to the question of whether the arbitrator drew his decision from the essence of the contract or instead attempted to "dispense his own brand of industrial justice."⁸⁶ If he or she complied with this limited requirement, his or her award would be upheld. The Court has since applied this rationale and concluded that an arbitrator who makes an obvious error of fact or fails to consider the evidence before him will not have his or her award overturned if he interprets the contract and only the contract.⁸⁷ The Court has also looked to common-law principles of public policy as a basis for overturning arbitrators' decisions.⁸⁸ Such policy "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general

82. See Charles Craver, *The Judicial Enforcement of Public Sector Interest Arbitration*, 21 B.C. L. REV. 557, 568, 572 (1980).

83. Craver, *Public Sector Impasse*, *supra* note 37, at 794.

84. Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1007-08 (1955).

85. 363 U.S. 593 (1960).

86. *Id.* at 597.

87. See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 511 (2001) (holding that an arbitrator who failed to consider a letter dispositive of a collusion claim was not overruled). *But see* *AT&T Techs. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) ("[T]he question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination."). To some extent, the Court abrogated the *laissez-faire* principle of unreviewability, holding that a court may examine the nature of the grievance to see if it involves "continuing rights" under the contract and is therefore arbitrable. See *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 209 (1991).

88. See *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers of Am.*, 461 U.S. 757, 765-67 (1983) ("As with any contract . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy.").

considerations of supposed public interests.’”⁸⁹ Subsequent federal court decisions, however, have tended to blur the line between vacating an award and disagreement with the public policy.⁹⁰

In *Enterprise Wheel*,⁹¹ Justice Douglas identified two rationales in reaching the conclusion that judicial review of grievance arbitration should be limited.⁹² First, he considered the idea that the parties validly contracted for the right to arbitrate their disputes, and therefore contracted for the arbitrator’s decision.⁹³ Second, Douglas looked to the public policy in favor of arbitration announced in the previous *Steelworkers* cases:⁹⁴ the notion that the arbitrator requires the independence to consider claims a court might be unwilling to entertain⁹⁵ and flexibility in crafting and spelling out a remedy.⁹⁶ The latter policy extends even so far as to cover the arbitrator’s decision to refuse to author a written opinion in support of arbitral awards or orders that contained “mere ambiguity which permits the inference that the arbitrator . . . exceeded his authority”; such awards were held in *Enterprise Wheel* to be fully enforceable.⁹⁷

The policies and realities that shape judicial review of a grievance arbitrator’s decision do not carry over into the interest arbitration context. The former dean of Yale Law School, Harry Shulman, analogized contracting parties to legislators, who must plan for any number of possible future needs and arrangements between the parties:

The parties seek to foresee the multitude of variant situations that might arise, the possible types of action that might then be available, the practicalities of each and their anticipated advantages or disadvantages. Choice between the suggested possibilities is ren-

89. *Id.* at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

90. *See, e.g.*, *Iowa Elec. Light & Power Co. v. Local Union 204, Int’l Bhd. of Elec. Workers*, 834 F.2d 1424, 1427 (8th Cir. 1987) (finding that there was a dominant national policy requiring strict adherence to nuclear safety rules). *See generally* Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3, 4–5 (1988) (discussing the danger of allowing judges to fashion specific policy exceptions to the general non-intervention rule).

91. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

92. *See* David A. Wright, “*Foreign to the Competence of the Courts*” Versus “*One Law For All*”: *Labor Arbitrators’ Powers and Judicial Review in the United States and Canada*, 23 COMP. LAB. L. & POL’Y J. 967, 975 (2002).

93. *Enterprise Wheel*, 363 U.S. at 599.

94. *See* *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 566–67, 569 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 582 (1960).

95. *Am. Mfg. Co.*, 363 U.S. at 567.

96. *Enterprise Wheel*, 363 U.S. at 598.

97. *Id.* at 598–99.

dered more difficult by the very process of bargaining and the expected subsequent administration of the bargain. The negotiations are necessarily conducted by representatives removed in variant degrees from direct confrontation with the anticipated situations. They act on the basis partly of their own experience and partly of the more or less incomplete or clashing advice of constituents The pressure for trade or compromise is ever present.⁹⁸

This laundry list of different considerations does not confront the grievance arbitrator, confined as he or she is to the four corners of an existing agreement. The grievance arbitrator is akin to a judge or jury, because his or her job is simply to interpret and apply an existing agreement, not create the “essence” of the contract. Judicial review of grievance arbitration awards is confined to the limited question of whether he or she has fulfilled his or her duties to the parties.⁹⁹

However, the concerns Shulman lists are precisely the concerns an interest arbitrator must consider if he or she is to create a document that can lead to a successful relationship between the parties. While grievance arbitrators can draw from the history of relations between the parties, interest arbitrators under the EFCA often have a primarily legal background,¹⁰⁰ and may have no prior knowledge of the parties or their negotiations.¹⁰¹ Ambiguities, while allowed for in the grievance arbitrator’s decision, may be the subject of litigation and exploitation by a party who wishes to challenge the most natural or intended reading of an arbitrator’s award.¹⁰² Thus, the deferential policies which inform review of grievance arbitration awards are inapplicable in the interest arbitration context.

B. Appellate Review of Agency Decisions

Because the EFCA delegates authority to the FMCS to carry out first-contract interest arbitrations, the federal court standards for review of administrative decisions are the most logical judicial review standards to apply to interest arbitration. This type of judicial review is governed by the Administrative Procedures Act (“APA”),¹⁰³ which designates a number of different standards judges may apply to administrative determinations, including *de novo* review, review of the

98. Shulman, *supra* note 84, at 1003–04.

99. *Enterprise Wheel*, 363 U.S. at 597–99.

100. Weiler, *Striking a New Balance*, *supra* note 17, at 377.

101. S. 1041, 110th Cong. § 3 (2007) (providing no mechanisms by which prior negotiations or mediations are recorded).

102. See Leroy Marceau, *Drafting a Union Contract*, in *ARBITRATION AND CONFLICT RESOLUTION*, *supra* note 78, at 33–34.

103. 5 U.S.C. § 706 (2006).

record for substantial evidence, and review of the decision for an abuse of discretion. Despite the existence of several tests, courts and scholars have acknowledged that the standards are inexact and allow judges great latitude in reviewing agency decisions.¹⁰⁴

Substantial evidence is the standard normally used to review agency determinations that involve fact finding.¹⁰⁵ Such agency decisions are only reversed where a reasonable mind, after review of the entire record, would necessarily come to a different conclusion.¹⁰⁶ Substantial evidence is only required when there is a record made at the proceeding.¹⁰⁷ Without a record, review for some evidence in support of the decision would be frustrated.¹⁰⁸ The Supreme Court has suggested in dicta that where a procedure is “nonadjudicatory, quasi-legislative” in nature, the substantial evidence standard is inappropriate as well.¹⁰⁹ In addition, an administrative decision reviewed for substantial evidence cannot be upheld on the sole ground that the administrator had expertise in the subject of the dispute.¹¹⁰

The minimum standard to be applied to any agency determination is the “arbitrary, capricious, or abuse of discretion” test.¹¹¹ To reverse a decision under this standard, the reviewing court “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”¹¹² Although narrower than substantial evidence, abuse of discretion still

104. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488–89 (1951) (“A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application.”); see also Robert Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 89 (1944) (“To define the difference [between substantial evidence and abuse of discretion review] with exactness is a difficult task; perhaps the distinction in result will be one of approach and attitude on the part of the appellate judge.”).

105. 5 U.S.C. § 706(2)(E) (2006) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute . . .”).

106. See *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992).

107. See 5 U.S.C. § 706(2)(E).

108. *Steadman v. SEC*, 450 U.S. 91, 96–97 (1981).

109. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

110. *Balt. & Ohio R.R. Co. v. Aberdeen & Rockfish R.R. Co.*, 393 U.S. 87, 91–92 (1968); *Brand v. Miller*, 487 F.3d 862, 868–69 (Fed. Cir. 2007).

111. 5 U.S.C. § 706(2)(A); see also *Block v. Pitney Bowes Inc.*, 952 F.2d 1450, 1454 (D.C. Cir. 1992) (noting that section 706(2)(A) is a “catch-all” provision for agency decisions); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 376–77 (1998) (holding that courts may require administrative decisions to be logical and rational, and to cite the legal standard which they actually apply).

112. *Overton Park*, 401 U.S. at 416 (citations omitted).

requires a "searching and careful" review of the record.¹¹³ The "abuse of discretion" test may in some cases lead to overturning a decision that would otherwise be supported by substantial evidence.¹¹⁴ Where an administrator's ultimate decision rests primarily on a question of fact or interpretation of fact that "requires a high level of technical expertise," the court will defer to "the informed discretion of the responsible federal agencies."¹¹⁵

Based on these considerations, it is unclear which standard courts would use to evaluate interest arbitration decisions. Although interest arbitrations clearly require a fact finder weigh the evidence and determine what weight should be accorded to it, courts may be more likely to apply the more deferential abuse of discretion standard if they decide that EFCA-mandated arbitrators deal in specialized determinations that courts should not interfere with (though, as stated above, interest arbitrators are not necessarily experts in the subject-matter of a contractual dispute).¹¹⁶ An interest arbitration involves a "quasi-legislative"¹¹⁷ or "quasi-judicial"¹¹⁸ act, rather than the application of law to fact; however, these proceedings adjudicate a significant private right, rather than a merely public function, and "it is generally understood that arbitrary and capricious review is applied most frequently in cases involving judicial challenges to informal rulemakings,"¹¹⁹ such as licensing procedures.¹²⁰

As then-Judge Scalia said, "the distinction between the substantial evidence test and the arbitrary or capricious test is 'largely semantic.'"¹²¹ One thing is clear, however: even under the most deferential standard of review possible, courts will need a record of the arbitration proceedings in order to understand what happened and whether the arbitrator considered the purpose of the arbitration and the con-

113. *Id.*

114. *See* *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1974) ("The District Court properly concluded that, though an agency's finding may be supported by substantial evidence . . . it may nonetheless reflect arbitrary and capricious action.").

115. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)).

116. *Weiler, Striking a New Balance*, *supra* note 17, at 377.

117. *Craver, Public Sector Impasse*, *supra* note 37, at 788 n.38.

118. *Howlett*, *supra* note 34, at 836.

119. *HARRY T. EDWARDS & LINDA A. ELLIOT, FEDERAL STANDARDS OF REVIEW* 168 (2007).

120. *See, e.g., Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978) (discussing nuclear power plant license); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970) (discussing broadcast license).

121. *Ass'n of Data Processing Serv. Orgs., Inc. v. Board of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984) (citations omitted).

tentions of the parties. A written record is essential to meaningful judicial review,¹²² and the EFCA should require it. Even assuming a court evaluated past precedent and determined that one or another standard of review was clearly appropriate for judicial review, the important question of what specific considerations courts search for in assessing a decision remains. The EFCA leaves arbitrators to choose whatever rationales or policies they wish in justifying their decisions, and thus there is “no meaningful standard against which to judge the agency’s exercise of discretion,” a fact which threatens to render the agency action unreviewable.¹²³

IV. Canadian and State Law: Drawing from Two Established Models of Interest Arbitration Award Review

Part III has revealed that federal courts cannot even begin to review interest arbitration awards under the EFCA without amending it. This section presents two suggestions for amendments to the EFCA. The first, drawn from Canadian administrative law, is that courts should use a different standard of review depending upon the circumstances under which the interest arbitration occurs. The second suggestion, drawn from state law, is that arbitrators be required to consider a set of substantive criteria in formulating the terms and conditions of an interest arbitration award.

A. Canada’s Flexible Approach to Judicial Review

Eight jurisdictions—British Columbia, Manitoba, Newfoundland, Ontario, Prince Edward Island, Quebec, Saskatchewan, and the federal jurisdiction of Canada—provide for first-contract interest arbitration by the government, generally upon application by either party.¹²⁴ Unlike their American counterparts,¹²⁵ Canadian labor laws, which are organized almost exclusively by province or territory, are subject

122. Brian J. Malloy, *Binding Interest Arbitration in the Public Sector: A “New” Proposal for California and Beyond*, 55 HASTINGS L.J. 245, 267 (2003).

123. *Heckler v. Cheney*, 470 U.S. 821, 830 (1985). The APA provides a very limited exception to judicial review for actions “committed to agency discretion.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting 5 U.S.C. § 701(a)(2) (1964)). This exception is “applicable in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’” *Overton Park*, 401 U.S. at 410 (quoting S. REP. NO. 79-752, at 26 (1945)).

124. Block, *supra* note 18, at 45 (citing GEORGE W. ADAMS, CANADIAN LABOR LAW § 10-134 to -140 (2d ed. 1994)).

125. In a survey done of nearly every compulsory interest arbitration scheme in the United States, Anderson and Krause found only one state—Wisconsin—where the process had been amended by statute. Anderson & Krause, *supra* note 33, at 158; see also Martin H.

to “frequent amendments [to] prevent these laws from tilting too far in the direction of any party for an extended period of time.”¹²⁶ Because arbitration is often compulsory in Canada and performed by administrative agencies, arbitral decisions are reviewed by courts in the same way as other binding administrative decisions.¹²⁷

Until 1979, Canadian courts used the ground of jurisdictional error to overturn an arbitrator’s decisions on substantive grounds when the court found that the arbitrator had applied the wrong legal test.¹²⁸ This poorly defined and heavily subjective idea was criticized as expansionist, interventionist, and detracting from the efficiency and expertise of the administrative agency involved.¹²⁹ The jurisdictional paradigm was severely curtailed in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*,¹³⁰ when the Canada Supreme Court determined that certain administrative decisions would be reviewed under a “patent unreasonableness” standard.¹³¹ In determining that a more fluid approach should be applied to decisions of a public-sector labor relations board, the Court considered “the ‘delicate balance’ that the enabling legislation required the board to strike between the need to maintain public services and collective bargaining, and the specialized nature of the legislation that the board had to apply and interpret.”¹³² The Court went on to enumerate the factors it would consider in setting the standard of review in each case: “not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.”¹³³ After an analysis of these factors, known as the “pragmatic and functional” approach, the reviewing court sets upon a standard of review: either the

Malin, *Labor Law Reform: Waiting for Congress?*, 69 CHI.-KENT L. REV. 277 (1993) (discussing the need for amendments to the NLRA).

126. Block, *supra* note 18, at 43–44.

127. Wright, *supra* note 92, at 983.

128. *Id.* at 983–85.

129. *See id.*

130. [1979] 2 S.C.R. 227 (Can.).

131. *Id.* at 237; *see also* *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 214–16, 2008 SCC 9 (Can.), available at <http://scc.lexum.umontreal.ca/en/2008/2008scc9/2008scc9.pdf>.

132. Lorne Sossin & Colleen M. Flood, *The Contextual Turn: Iacobucci’s Legacy and the Standard of Review in Administrative Law*, 57 U. TORONTO L.J. 581, 585 (2007).

133. *Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 1088 (Can.).

patent unreasonableness standard, an intermediate “reasonableness simpliciter” standard, or a correctness standard.¹³⁴

Two Canadian Supreme Court cases illustrate the interesting possibility of a different standard of review being applied to labor arbitrators’ interpretations of collective agreements. In *Dayco Ltd. v. CAW-Canada*,¹³⁵ the Court reviewed the question of whether an arbitrator’s finding that a contractual obligation survived the expiration of the agreement was owed deference, where a statute imported a clause into the contract that arguably allowed the arbitrator to decide his own jurisdiction.¹³⁶ The Court found the arbitrator was due little deference because an arbitrator’s expertise “falls short of the wide ranging policy-making function sometimes delegated to labour boards. . . . In short, an arbitration board falls towards the lower end of the spectrum of those administrative tribunals charged with policy deliberations to which the courts should defer.”¹³⁷ In *C.J.A., Local 579 v. Bradco Construction Ltd.*,¹³⁸ the statute that mandated grievance arbitration provided for “final settlement” of the grievance by the arbitrator, and otherwise the issue was one of garden-variety contractual interpretation.¹³⁹ Because this activity fell within the arbitrator’s expertise, the Court applied the patent unreasonableness standard, and concluded that since the arbitrator’s decision was supported by some evidence, it would not be reversed.¹⁴⁰

In addition to substantive fairness, Canadian law allows for reversal of administrative decisions on a variety of procedural fairness grounds. The Canadian Supreme Court identified five “fairness factors” used in this determination: (1) the nature of the decision being made and the process followed in making it; (2) the statutory scheme guiding the agency from which appeal is taken; (3) the importance of the decision to the individual given the nature of the right; (4) the expectations of the individual given the nature of the administrative proceeding; and (5) the expertise and considerations of the agency in choosing their procedure.¹⁴¹ Applying these factors, the Court held

134. *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 1004–05 (Can.).

135. [1993] 2 S.C.R. 230 (Can.).

136. *Id.* at 240–45, 248–53.

137. *Id.* at 266.

138. [1993] 2 S.C.R. 316 (Can.).

139. *Id.* at 318.

140. *Id.* at 339, 349.

141. *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, 838–40 (Can.).

that while a written decision or oral hearing by an immigration agency is not always required, a “reasonable apprehension of bias” in decision-making would overturn an agency’s decision.¹⁴² In addition, the Court has overturned arbitrators’ rulings on the basis of evidentiary error, holding that an arbitrator’s failure to consider “relevant evidence”¹⁴³ or properly interpret “just and sufficient cause”¹⁴⁴ were procedural errors.

Drawing from the Canadian experience, the standard of review courts use should vary according to the expertise of the individual arbitrator with respect to the complexity and type of the issues presented.¹⁴⁵ Because the arbitrator may operate as fact-finder in technical and unfamiliar areas, courts should not give EFCA arbitrators’ judgment the deference automatically accorded to other agencies.¹⁴⁶ Indeed, even if the arbitrator or arbitrators were experts in a given industry, a challenge to their award might involve routine matters, or it might involve matters of first impression. The terms of the contract might set a precedent for wages and benefits in an emergent field, or simply mirror contracts already established in the same field. Consideration of the nature of the challenge, the context of the contract dispute, and policy implications will naturally shape how much leeway courts can afford to give the arbitrator.

142. *Id.* at 830.

143. *Syndicat des Employes Professionnels de l’Universite du Quebec a Trois-Rivieres v. Universite du Quebec a Trois-Rivieres*, [1993] 1 S.C.R. 471, 484 (Can.).

144. *Cie Miniere Quebec Cartier v. Quebec*, [1995] 2 S.C.R. 1095, 1096 (Can.).

145. In addition, Canadian courts have approached appeals from administrative tribunals by individually analyzing each issue presented and applying a standard of review appropriate to the tribunal’s expertise and mandate on that particular question. *See, e.g.*, *City of Calgary v. ATCO Gas and Pipelines Ltd.*, [2006] 1 S.C.R. 140, 162–63, 2006 SCC 4 (Can.). This approach is seemingly implied by an inquiry that looks at the tribunal’s expertise and the nature of the question (i.e., whether it is a question of law, of fact, a technical question, etc.). However, the late Judge Iacobucci of the Canadian Supreme Court seems to have regarded the application of a single standard of review to each appeal as more appropriate. *See Canadian Broad. Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, 209–10 (McLachlin, J., dissenting) (“While conceding that issues which are clearly jurisdictional or involve statutory interpretation must be judged by the more stringent standard of correctness, [Judge Iacobucci] nevertheless goes on to suggest that the standard for ‘the decision as a whole’ must be patent unreasonability. I, on the contrary, see the functional test as question-specific. A single case may present several issues.” (citation omitted)).

146. *INS v. Ventura*, 537 U.S. 12, 16–17 (2002); *New Eng. Health Care Employees Union, Dist. 1199 v. NLRB*, 448 F.3d 189, 193–94 (2d Cir. 2006). This suggests an alternative solution, however: create an intermediate expert administrative body (like the BIA or the NLRB) that reviews labor boards’ decisions, and allows court review of the intermediate body’s decision. In that case, a lower level of judicial scrutiny would be appropriate.

By the same token, a fluid concept of procedural fairness could be used to help resolve questions of whether the arbitrator has overstepped her proper role in crafting an award. A wily arbitrator might take it upon herself to rethink or reopen issues which were considered settled before the arbitration. However, from another point of view, the interest arbitrator needs to be able to consider every proposed provision of the contract if she is to create a functional system for employer-union relations and “not a mere collection of unrelated provisions.”¹⁴⁷ A more experienced or expert arbitrator might be allowed to reopen areas settled before arbitration in order to craft the fairest possible award. As in Canada, an award might be overturned if a less experienced arbitrator fails to consider evidence the court sees as especially relevant, which is a far stricter level of review than even substantial evidence review.¹⁴⁸ In short, a flexible approach to judicial review allows courts to ensure not only that an individual arbitration yields fair results, but that EFCA-mandated awards create a vast common-law that future arbitrators will look towards in shaping their own awards.

B. The Use of Substantive Standards in State-Level Judicial Review

A large number of states have interest arbitration statutes that apply to both the public and private sectors. Many of these statutes are silent on the question of judicial review or the appeals process.¹⁴⁹ Courts have applied a due process rationale in requiring some judicial review of the interest arbitrator’s decision.¹⁵⁰ The seminal case in this area is *Mt. Saint Mary’s Hospital v. Catherwood*,¹⁵¹ in which the New York Court of Appeals held that the ordinary due process constraints mandating judicial review of administrative decisions required judicial

147. Leroy Marceau, *Drafting a Union Contract*, in *ARBITRATION AND CONFLICT RESOLUTION*, *supra* note 78, at 34.

148. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998) (holding that substantial evidence review “gives the agency the benefits of the doubt, since it requires not the degree of evidence which satisfies the *court* that the requisite fact exists, but merely the degree which *could* satisfy a reasonable factfinder.”).

149. Grodin, *supra* note 31, at 698 n.70.

150. See Div. 540, *Amalgamated Transit Union v. Mercer Improvement Auth.*, 386 A.2d 1290, 1293–94 (N.J. 1978); *City of Providence v. Fire Fighters*, 305 A.2d 93, 95–96 (R.I. 1973); *Bayscene Resident Negotiators v. Bayscene Mobilehome Park*, 18 Cal. Rptr. 2d 626, 633–35 (Ct. App. 1993) (“Where a local rule has the effect of closing the courts to the defaulting party making the decision of the arbitrator the final determination in the case, the party is denied due process of law.” (quoting *Hebert v. Harn*, 184 Cal. Rptr. 83, 86 (Ct. App. 1982))).

151. 260 N.E.2d 508 (N.Y. 1970).

scrutiny of interest arbitration awards.¹⁵² The court recognized that interest arbitration awards were legislative or quasi-legislative acts, and applied the arbitrary or capricious test to these decisions, equating it with judicial review of acts of the Legislature itself.¹⁵³ Much more recently, the California Court of Appeal placed interest arbitration awards squarely in the realm of quasi-legislative acts, and upheld the arbitrary and capricious standard in reviewing awards under the Agricultural Labor Relations Act.¹⁵⁴

Many, if not most, state-level interest arbitration statutes include substantive standards for the interest arbitrator to apply in creating the interest arbitration award.¹⁵⁵ These standards have three functions.¹⁵⁶ First, they insulate the statutes from non-delegation challenges under state constitutions.¹⁵⁷ The basic constitutional concern interest arbitration decisions raise is that they give legislative authority to private individuals, who must somehow be made politically accountable.¹⁵⁸ Political accountability has also been achieved by creating an administrative agency with responsibility for conducting arbitrations¹⁵⁹ or reviewing the decisions of the arbitrator prior to court review.¹⁶⁰ Second, standards allow the reviewing court to determine

152. *Id.* at 515–17; see Comment, *Compulsory Arbitration: The Scope of Judicial Review*, 51 ST. JOHN'S L. REV. 604, 615–17 (1978).

153. *Mt. Saint Mary's*, 260 N.E.2d at 517–18; see also *Caso v. Coffey*, 359 N.E.2d 683, 687–88 (N.Y. 1976).

154. *Hess Collection Winery v. Agric. Labor Relations Bd.*, 45 Cal. Rptr. 3d 609, 618–19, 621–22 (Ct. App. 2006). The statutory scheme provided for Board review of the arbitrator's decision on whether it was clearly erroneous or arbitrary and capricious, and court review on whether the Board abused its discretion or acted outside of its jurisdiction. *Id.* at 621. For what it is worth, some laws, including New York's 1970 Taylor Law, mandate a "substantial evidence" standard. See Anderson & Krause, *supra* note 33, at 176 (questioning whether there is any difference between these standards).

155. Howlett, *supra* note 34, at 832.

156. *Id.*

157. See, e.g., *Salt Lake City v. Int'l Ass'n of Firefighters, Locals 1645, 593, 1654 & 2064*, 563 P.2d 789 (Utah 1977); *Harney v. Russo*, 255 A.2d 560 (Pa. 1969); *Fire Fighters Local No. 946 v. City of Laramie*, 437 P.2d 295 (Wyo. 1968). The most vital challenges to compulsory interest arbitration laws themselves have concerned the non-delegation provisions of many state constitutions. See Malloy, *supra* note 122, at 247–48; Craver, *Public Sector Impasse*, *supra* note 37, at 789–90.

158. Craver, *Public Sector Impasse*, *supra* note 37, at 791. Although the principle of non-delegation exists under federal Constitutional law, it is disfavored, rarely applied, and satisfied by the mere existence of an "intelligible principle" in the enabling legislation. CATHERINE M. DONNELLY, *DELEGATION OF GOVERNMENTAL POWER TO PRIVATE PARTIES* 123–25 (2007).

159. Craver, *supra* note 82, at 565; see also Malloy, *supra* note 122, at 261.

160. CAL. LAB. CODE § 1164.3(a) (West 2008) (providing for review of the arbitrator's decision where a provision of the agreement is: (1) unrelated to wages, hours, or other

whether the action taken below was arbitrary or capricious.¹⁶¹ Third, they allow the parties to effectively prepare their case for the interest arbitrator.¹⁶² Typical of interest arbitration statutes is the Michigan Police and Fireman's Arbitration Act, which lays out eight criteria for the arbitrator to follow in shaping the award:

- (a) The lawful authority of the employer.
- (b) Stipulations of the parties.
- (c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs.
- (d) Comparison of the wages, hours, and conditions of . . . the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other employees performing similar services and with other employees generally
- (e) The average consumer prices for goods and services
- (f) The overall compensation . . . received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- (g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- (h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.¹⁶³

Federal law substantive standards are an important way that Congress can assist the arbitrator in shaping an award, and allow courts to effectively review interest arbitration awards. Abrogations by the arbitrator of statutorily-imposed scope or other standards can be effectively remedied by post-arbitration judicial review.¹⁶⁴ Because the EFCA will cover disputes in a wide range of industries, substantive standards should include criteria that have across-the-board applicability. A narrower set of criteria is more appropriate where the arbitration law regulates one particular industry, such as the Rhode Island

conditions of employment; (2) based upon a clearly erroneous finding of material fact; or (3) arbitrary or capricious in light of the mediator's findings of fact).

161. *City of Warwick v. Warwick Regular Firemen's Ass'n*, 256 A.2d 206, 211 (R.I. 1969).

162. Howlett, *supra* note 34, at 832.

163. MICH. COMP. LAWS ANN. § 423.239(a)-(h) (West 2006). For a comparison of this and other standards, see 2 ARVID ANDERSON, LAUREN KRAUSE & PARKER DENACO, LABOR AND EMPLOYMENT ARBITRATION § 48.05 (2007).

164. *Firefighters Local 1186 v. City of Vallejo*, 526 P.2d 971, 976 n.6 (Cal. 1974) (citing California cases); *see also Sheriffs' Ass'n v. Milwaukee County*, 221 N.W.2d 673 (Wis. 1974).

Policeman's Arbitration Act.¹⁶⁵ The Michigan statute directs the arbitrator to create an award encompassing all mandatory topics of bargaining, i.e., those which concern "wages, hours, and other terms and conditions of employment"¹⁶⁶ but no other topics.¹⁶⁷ The Michigan statute also limits the arbitration's scope by allowing the parties to stipulate to the issues which will be outside of the scope of arbitration.¹⁶⁸

At the same time, the existence of substantive standards should allow the arbitrator to use her particular expertise in construing them, rather than foreclosing discretion in their application. Appellate courts should not attempt to define what every phrase or term within a set of substantive standards means in a given context, or perhaps even generally. The Michigan law, for example, leaves a great deal up to the arbitrator's discretion, however, including who counts as a "comparable" employer, what qualifies as an inability to pay, and whether the union's demands should figure into the arbitrator's calculus.¹⁶⁹

Conclusion

The EFCA is insufficient, on its own, to meet the needs of unions and employers who would be affected by its compulsory arbitration provisions. The drafters of the legislation have ignored the jurisprudence and research surrounding interest arbitration both at home and abroad. This Comment suggests two major changes to the EFCA—the use of a flexible standard of review and substantive standards—in order to balance the competing concerns of deference to expertise and the proper role of the courts in preserving the integrity of the arbitration process. Questions of judicial review, arbitral standards, and labor policy are enmeshed and inseparable from one another. Action by the courts is normally seen as a necessary evil to be used sparingly, but the number of arbitrations that the EFCA contemplates warrants a systematic and efficient approach to judicial review that gives courts a broad enough role to prevent unfairness, but one that keeps judicial economy and arbitral discretion in mind.

165. See R.I. GEN. LAWS § 28-9.2-10 (2008) (including "hazards of employment" criterion).

166. MICH. COMP. LAWS ANN. § 423.239(h); see also 29 U.S.C. § 158(d) (2008); NLRB v. Katz, 369 U.S. 736, 742–43 (1962).

167. Grodin argues that while an arbitrator should not be forced to arbitrate non-mandatory topics of bargaining, it is unclear whether the arbitrator should be allowed to put these provisions in the final agreement. Grodin, *supra* note 31, at 697.

168. MICH. COMP. LAWS ANN. § 423.239(a)–(h).

169. ANDERSON, KRAUSE & DENACO, *supra* note 163, § 48.05.