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Judicial Review of Contract Interpretation by Labor Arbitrators: Whose Brand of Industrial Justice - Houston Lighting & (and) Power Co. v. Int'l Bhd. of Elec. Workers, Local Union No. 66

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Judicial Review of Contract Interpretation by Labor Arbitrators: Whose Brand of Industrial Justice?

Houston Lighting & Power Co. v. Int'l Bhd. of Elec. Workers, Local Union No. 66[1]

I. INTRODUCTION

The United States Supreme Court has prescribed the deference owed to an arbitrator's interpretation of labor agreements. The Court's decisions have made clear the narrow grounds upon which an arbitration award may be reversed. In *Houston Lighting & Power Co. v. Int'l Bhd. of Elec. Workers, Local Union No. 66*, the employer claimed that the labor arbitrator had exceeded his authority by misinterpreting the labor agreement. The Fifth Circuit Court of Appeals had to weigh the policy of deference to the arbitrator's interpretation against the need to ensure that the arbitrator acted within the authority which the parties to the labor agreement granted him.

II. FACTS AND HOLDING

In 1992, Houston Lighting and Power Company (HL&P) discharged Sam Thornal, a member of the International Brotherhood of Electrical Workers, Local Union No. 66 (Union), as part of a reduction in force.[2] The Union filed a grievance claiming that the discharge violated the seniority provision of the collective bargaining agreement (Agreement) because HL&P retained employees with less seniority than Thornal.[3] The Union's grievance was submitted to arbitration as required by the terms of the Agreement.[4]

The Union made two claims at the arbitration hearing. It first claimed that HL&P's evaluation process was facially invalid under the Agreement because it

1. 71 F.3d 179 (5th Cir. 1995).
2. *Id.* at 180-81.
3. *Id.* at 181.
4. *Id.*

was arbitrary, unjust and unreasonable.[5] Alternatively, the Union claimed that the process was unfairly and unreasonably applied to Thornal.[6]

On the first claim, the arbitrator found that the Union failed to show that the process was facially invalid under the Agreement.[7] On the second claim, however, the arbitrator found for the Union, finding HL&P's application of the evaluation process unreasonable as against Thornal.[8] The arbitrator reviewed and re-assessed Thornal's qualifications[9] and determined that Thornal had been incorrectly rated by HL&P.[10] Because Thornal would not have been discharged with the correct rating, the arbitrator ordered Thornal reinstated with backpay, seniority and lost benefits.[11]

HL&P appealed the arbitrator's order to the federal district court and moved for summary judgment.[12] The district court denied HL&P's motion for summary judgment and granted the Union's cross-motion for summary judgment.[13] As a result, the district court upheld the arbitrator's order and entered judgment in favor of the Union.[14]

On appeal, the Fifth Circuit Court of Appeals decided the issue of whether the arbitrator exceeded his authority when he re-evaluated Thornal's qualifications and re-calculated his rating.[15] The court decided that "[i]f the language of the agreement is clear and unequivocal, an arbitrator is not free to change its meaning."[16] Determining the individual employee qualifications, according to the court, is the exclusive right of HL&P under the Agreement.[17] The court noted that Article IV, Section 7 of the Agreement "subject[s]" this exclusive right to "an employee's right to assert a grievance."[18] According to the court, this phrase permits an arbitrator to determine whether the evaluation process was consistent

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5. *Id.* HL&P employees were evaluated through a merit-based system that evaluated them based on ability, skill and qualifications. *Id.* Based on their supervisor's evaluations, employees were rated as "above average," "average," or "marginal" within their job classification. *Id.* As part of the reduction in force, HL&P first discharged the employees rated "marginal" in their job classification. *Id.* Seniority was only used to break a tie when two employees were ranked equally in skill. *Id.* The company discharged two employees, Thornal and Byers, from the heavy equipment operator classification. *Id.* Seniority was not an issue since Thornal and Byers were the only employees in the classification rated "marginal." *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. The court noted that the "arbitrator drew from his collective bargaining experience in the federal public sector." *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 184.

17. *Id.*

18. *Id.*

with the Agreement, but not to make a "de novo determination" of an employee's qualifications.[19]

III. LEGAL BACKGROUND

The Taft-Hartley Act of 1947 (Act)[20] addressed the issue of labor contract enforcement and granted federal courts jurisdiction to hear suits alleging collective bargaining agreement (agreement) violations.[21] By 1960, the Supreme Court had interpreted this jurisdiction to mean that federal courts had authority to enforce agreements which provided for arbitration of labor contract disputes. Under this interpretation, the courts could order the union and employer to submit to arbitration.[22] With this settled, the main question left for determination was whether a court could order the enforcement of the labor arbitrator's award.[23]

The Supreme Court answered that question in the affirmative.[24] In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, following the district court's order for arbitration, the arbitrator required the company to reinstate the grievants and give them back pay.[25] When the company refused, the district court directed the company to comply.[26] The Court of Appeals for the Fourth Circuit reversed the district court, holding that the award was unenforceable because the agreement under which the grievance was brought had expired.[27] The Supreme Court, in turn, reversed the court of appeals and, in doing so, set down firm standards for review of arbitration awards in the context of labor disputes.[28]

The Supreme Court held that in accordance with the federal policy of settling labor disputes by arbitration, courts cannot review the merits of an arbitration award when arbitration is required by an agreement.[29] The Court recognized that because the arbitrator is to settle disputes at the factory level, he must have knowledge of the customs and practices of a particular factory or industry.[30]3

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19. *Id.*

20. *See,* 29 U.S.C. §§ 141 et. seq. (1996).

21. Mark Berger, *Judicial Review of Labor Arbitration Awards: Practices, Policies, and Sanctions,* 10 HOFSTRA LAB. L.J. 245, 261-62 (1992).

22. *Id.* at 262.

23. *Id.*

24. *United Steelworkers of American v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

25. *Id.* at 595.

26. *Id.*

27. *Id.* at 596.

28. *Id.* at 599.

29. *Id.* at 596.

30. *Id.* The Court noted that the plant (a mill or factory) is like another world. *Id.* at 596 n.2 "[T]he society . . . [of a plant] has of course a formal government of its own--the rules which management and the union have laid down--but . . . it also differs from or parallels the world outside in social classes, folklore, ritual, and traditions." *Id.* (quoting Charles R. Walker, *Life in the Automatic Factory,* 36 HARV. BUS. REV. 111, 117 (1958)).

Furthermore, the arbitrator must use his informed judgment in order to interpret and apply the agreement and, most importantly, to formulate remedies.[31]

It is especially crucial that the courts do not review the merits of an arbitration award when the arbitrator issues a written opinion. Recognizing that an arbitrator is not obligated to issue a written opinion,[32] the Court warned that a lower court's refusal to enforce an award solely because an ambiguity in the arbitrator's opinion reflects that the arbitrator may have exceeded his authority might encourage arbitrators to "play it safe" by not writing supporting opinions.[33] Such a result would be contrary to the policy of having an arbitrator issue opinions to engender confidence in the integrity of the arbitration process and to help clarify the underlying agreement.[34]

The Court, however, did not give the arbitrator unlimited power. The arbitrator cannot go outside the written agreement. [35]Instead, he must limit himself to interpreting and applying the agreement because, as the Court stated, "[the arbitrator] does not sit to dispense his own brand of industrial justice."[36] Though the arbitrator may look to other sources for guidance, the award must "[draw] its essence" from the agreement. If it does not "[draw] its essence" from the agreement, the court must refuse to enforce the award.[37]

In *United Paperworkers International Union v. Misco, Inc.*,[38] the Supreme Court reaffirmed the role of the courts in labor agreement arbitration. In *Misco*, the arbitrator ordered the company to reinstate an employee on the grounds that the company had insufficient cause to fire the employee.[39] Subsequently, the district court and the court of appeals refused to enforce the reinstatement ordered by the arbitrator on public policy grounds.[40] Reversing this decision by the lower courts, the Supreme Court cited the language in *Steelworkers v. Enterprise Wheel & Car Corp.* which set forth the federal policy of settling labor disputes by arbitrations and reminded courts not to review the merits of an arbitration award.[41]

The Supreme Court in *Misco* stated that reviewing courts cannot review claims that the arbitrator erred in determining the facts or in interpreting the

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31. *Id.* at 597.
32. *Id.* at 598.
33. *Id.*
34. *Id.*
35. *Id.* at 597.
36. *Id.*
37. *Id.*
38. 484 U.S. 29 (1987).
39. *Id.* at 34. The arbitrator found that there was insufficient cause to find the employee had possessed or used marijuana on company property where the employee was merely found in the backseat of a car on the company parking lot with a lit marijuana cigarette in the frontseat ashtray. *Id.*
40. *Id.* at 34-35.
41. *Id.* at 36 (citing *Enterprise Wheel*, 363 U.S. 593, 596 (1960)).

agreement.[42] This statement is based on the Court's observation that the parties in an agreement contract to have disputes settled by an arbitrator chosen by them and to abide by the arbitrator's view of the facts and meaning of the agreement.[43] Based on the Court's holding in *Misco*, even when a reviewing court disagrees with an arbitrator's interpretation of a contract, it may not refuse to enforce the arbitrator's award unless the arbitrator ignored the plain language of the contract.[44]

Despite these clear standards enunciated by the Supreme Court, there have been times when the courts have examined the merits of an arbitrator's findings of fact and interpretation of contracts.

In *HMC Management Corp. v. Carpenters Dist. Council*,[45] the Fifth Circuit Court of Appeals examined an arbitrator's award ordering reinstatement and backpay to the grievant.[46] The arbitrator had found that the company should reinstate the grievant because a similarly situated employee was reinstated after the same offense.[47] In a short opinion, the court found that the arbitrator had dispensed "his own brand of industrial justice."[48] To support this finding, the court noted that though the arbitrator found that the company did have just cause to terminate the grievant, the arbitrator ordered the reinstatement of the grievant because the arbitrator believed the company's behavior was improper.[49]

The Fifth Circuit's holding, however, was criticized for relying on the arbitrator's written findings and not allowing for the possibility that the arbitrator may have implicitly found that the employer had not shown sufficient cause for discharge when compared to the other employee's similar actions.[50] The court seemed to require an express finding of lack of just cause. This requirement, however, directly conflicts with *Enterprise Wheel*'s admonition that reviewing courts must not base a refusal to enforce an award on "[a] mere ambiguity in the opinion accompanying an award."[51]

The Fifth Circuit's decision was further criticized for its failure to recognize that arbitrators generally do not allow disparate penalties against similarly situated employees.[52] Moreover, many courts have recognized that when a labor agreement does not specifically prevent arbitrators from examining the degree of

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42. *Id.* at 38.

43. *Id.* at 37-38.

44. *Id.* at 38. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.*

45. 750 F.2d 1302 (5th Cir. 1985).

46. *Id.* at 1303.

47. *Id.*

48. *Id.* at 1304 (quoting *Enterprise Wheel*, 363 U.S. at 597.).

49. *Id.*

50. Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHL-KENT L. REV. 571, 596 (1990).

51. *Id.* (quoting *Enterprise Wheel*, 363 U.S. at 598).

52. *Id.*

punishment, a court should allow the arbitrator to consider not only whether there was just cause for punishment, but also whether the degree of punishment fit the infraction.[53]

In *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n*,[54] the arbitrator ordered the company to reinstate the pilot of the Mississippi Queen after the company had terminated the pilot for a near collision.[55] The company discharged the pilot pursuant to the collective bargaining agreement language providing that "[n]o Officer shall be discharged except for proper cause such as, but not limited to, inefficiency, insubordination, carelessness, or disregard of the rules of the Company."[56] The arbitrator found that although the pilot was guilty of gross carelessness, he was also the victim of disparate treatment.[57] This finding was based on three other serious mishaps in which the responsible pilots suffered no disciplinary action.[58] The district court vacated the arbitration award on the grounds that the arbitrator was bound by the agreement to find for the company if proper cause existed for discipline or discharge.[59] The Fifth Circuit Court of Appeals affirmed the district court's holding.[60]

The Fifth Circuit interpreted Supreme Court jurisprudence as "requiring vacation of arbitral decisions that reinstate discharged employees when such arbitral action is deemed to be an ultra vires act."[61] The Fifth Circuit relied on an earlier Fifth Circuit decision, *Container Products, Inc. v. United Steelworkers of America*,[62] in which the arbitrator reinstated a discharged employee to "promote good labor relations."[63] The arbitrator's findings in *Container Products* were similar to those of *Delta Queen* because the arbitrator failed to make a specific finding of "just cause" despite his finding that the employee was at fault for refusing to work.[64] The court in *Container Products* vacated the arbitration

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53. *Id. See, e.g.*, Federated Dep't Stores v. United Food & Commercial Workers, Local 1442, 901 F.2d 1494, 1496-98 (9th Cir. 1990); Dixie Warehouse v. Teamsters Local 89, 898 F.2d 507, 510-511 (6th Cir. 1990); Eberhard Foods, Inc. v. Handy, 868 F.2d 890, 892-93 (6th Cir. 1989); Florida Power Corp. v. IBEW, 847 F.2d 680, 681-83 (11th Cir. 1988); United States Postal Serv. v. National Assoc. of Letter Carriers, 839 F.2d 146 (3rd Cir. 1988). Although the degree of punishment was not at issue in the instant case, judicial history, especially in the Fifth Circuit, is instructive of the general mindset towards labor contract interpretation in arbitration.

54. 889 F.2d 599 (5th Cir. 1989), *cert. denied*, 498 U.S. 853 (1990).

55. *Id.* at 600.

56. *Id.* at 601.

57. *Id.* at 601 n.6.

58. *Id.* at 601.

59. *Id.* The agreement read, "[t]he right to discipline and discharge for proper cause are [sic] likewise the sole responsibility of the Company." *Id.* The arbitrator found gross carelessness, but he specifically avoided a finding of "proper cause." *Id.* at 604.

60. *Id.* at 604.

61. *Id.* at 602.

62. 873 F.2d 818 (5th Cir. 1989).

63. *Delta Queen*, 889 F.2d at 602 (citing *Container Prods.*, 873 F.2d at 820).

64. *Id.*

award, finding that because the arbitrator actually made an "implicit finding of just cause for the [employee's] dismissal," the arbitrator was not allowed by the agreement to impose a different remedy than what the company imposed.[65] Likewise, the Fifth Circuit in *Delta Queen* concluded that because the arbitrator had implicitly found proper cause, the arbitrator should be prohibited from ordering the employee's reinstatement.[66]

The Fifth Circuit in *Delta Queen* also stated that the rule in that circuit and the emerging trend among the other circuits[67] is "that arbitral action contrary to express contractual provisions will not be respected."[68] According to the court, the Eleventh Circuit in *Bruno's, Inc. v. United Fund & Commercial Workers Int'l Union* vacated an arbitrator's award because the arbitrator's establishment of a new operating procedure was contrary to the bargaining agreement.[69] The court in *Bruno's* held that the arbitrator "may not create a new rule to replace one he strikes down as unreasonable."[70] The Sixth Circuit examined circumstances similar to those in *Delta Queen* and found that an arbitrator lacked authority to reinstate an employee after finding that just cause existed for the employee's discharge and finding that the employer had sole responsibility for discipline.[71]

As noted above, other courts have differed with *Delta Queen* in cases with similar facts. The Eighth Circuit sided with the arbitrator's interpretation of an agreement in *Local 238, International Brotherhood of Teamsters v. Cargill, Inc.*[72] Despite the company's stated policy that any refusal of a random drug test would result in termination, the arbitrator in *Cargill* reinstated a grievant who refused to take the test.[73] The district court found that the language of the agreement was unambiguous and vacated the award.[74] The court of appeals, however, found that this same language was ambiguous because the provision in the collective bargaining agreement stating that disputes be grieved to an arbitrator and stating that the arbitrator had remedial discretion to review terminations for just cause was inconsistent with the company's termination policy.[75] While the drug policy seemed to call for termination, it was only incorporated by reference into the

65. *Id.* at 602-03 (quoting *Container Prods.*, 873 F.2d at 820).

66. *Id.* at 604.

67. The court cited the decisions of the Sixth and Eleventh Circuits to demonstrate the emerging trend. *Id.* at 603. These cases include Bruno's, Inc. v. United Food & Commercial Workers Int'l Union, 858 F.2d 1529 (11th Cir. 1988) and International Bhd. of Elec. Workers, Local 429 v. Toshiba Am., Inc., 879 F.2d 208, 210-11 (6th Cir. 1989).

68. *Delta Queen*, 889 F.2d at 604.

69. *Id.* at 603 (citing *Bruno's*, 858 F.2d at 1529).

70. *Id.* (quoting *Bruno's*, 858 F.2d at 1532).

71. *Id.* at 603 n.8 (citing Magnavox Co. v. International Union of Elec. Workers, 410 F.2d 388, 389 (6th Cir. 1969)).

72. 66 F.3d 988 (8th Cir. 1995).

73. *Id.* at 989.

74. *Id.*

75. *Id.* at 990.

collective bargaining agreement.[76] Because the agreement contained an ambiguity, it was "clearly a matter for the arbitrator and was well within his authority."[77] The court found that it should be even more deferential in this case since this was a question of remedy.[78]

The Eight Circuit also found it "highly significant" that the parties asked the arbitrator to determine if the grievant was discharged for just cause.[79] When both parties submit an issue to the arbitrator, the court stated that "we must look both to their contract and to the submission of the issue to the arbitrator to determine his authority."[80] The limits of an arbitrator's authority are defined in part by the parties' own submission to the arbitrator.[81] Therefore, since the company in this case asked the arbitrator to determine if there was just cause, it could not complain later when the arbitrator determined that there was no just cause.[82]

IV. INSTANT DECISION

A. The Majority

In the instant case, the Fifth Circuit Court of Appeals first noted that it would employ a de novo standard of review when reviewing a grant of summary judgment in a suit to vacate an arbitration award.[83] In labor disputes, the court noted that an arbitrator's "award cannot be set aside" as long as the arbitrator's decision drew its essence from the agreement and the arbitrator was "not fashioning his own brand of industrial justice."[84] The court also noted, however,

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76. *Id.*

77. *Id. See also,* Hamilton v. United States Postal Serv., 746 F.2d 1325, 1327 (8th Cir. 1984); Kewanee Mach. Div., Chromalloy Am. Corp. v. Local Union No. 21, Int'l Bhd. of Teamsters, 593 F.2d 314, 317 (8th Cir. 1979).

78. *Cargill,* 66 F.3d at 990. "Though the arbitrator's decision must draw its essence from the agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies.'" *Id.* (quoting *Misco,* 484 U.S. at 41).

79. *Id.* The court stated that "[w]hen two parties submit an issue to arbitration, it confers authority upon the arbitrator to decide that issue." *Id.* at 990-91. *See,* First Options, Inc. v. Kaplan, 115 S. Ct. 1920, 1923 (1995).

80. *Cargill,* 66 F.3d at 991 (quoting John Morell & Co. v. Local Union 304A, 913 F.2d 544, 561 (8th Cir. 1990), *cert. denied,* 500 U.S. 905 (1991)).

81. *Id.*

82. *Id.*

83. *Houston Lighting & Power Co.,* 71 F.3d at 181. *See also* Michael G. Munsell, Case Note, *Scope of Review for Orders Confirming, Vacating, or Modifying Arbitral Awards: An End to Deferential Standards,* 1996 J. DISP. RESOL. 213 (discussing the "normal" standard of review and the Supreme Court's resolution of a conflict among the circuits regarding the "hybrid" standard of review).

84. *Houston Lighting & Power Co.,* 71 F.3d at 182.

that vacation of the judgment is appropriate where the arbitrator exceeds his authority under the agreement.[85]

The Fifth Circuit reviewed the Agreement and found that the arbitrator went beyond his authority when he re-evaluated Thornal's qualifications.[86] According to the court, the Agreement's language[87] limited an employee to two possible claims.[88] First, the employee could contend that the system and procedures used by HL&P to evaluate the employee's ability, skill and qualifications were inconsistent with the terms of the Agreement or were an improper application of the Agreement.[89] Second, the employee could contend that HL&P discriminated against him or her in the evaluation process because of race, color, religion, sex or national origin.[90] Because the Union did not raise a discrimination claim, the arbitrator could only have ruled in favor of the Union for the former reason.[91]

The arbitrator found that the evaluation process was "within the scope of the contractually allowed factors" and found that the Union did not show that the process was facially invalid.[92] Based on these findings, the Fifth Circuit concluded that there were no grounds upon which the arbitrator could find for the Union.[93]

The court found that the "assert a grievance" phrase did not mean that HL&P gave up its right to determine an employee's qualifications if the employee asserts a grievance nor did it give the arbitrator the right to "make a de novo determination of the employee's qualifications."[94] The court noted that there was nothing in the Agreement which would allow the interpretation of "a grievance" "to include . . . a claim that an employee [was] unfairly or incorrectly evaluated for lay off."[95] Finally, the court found that the arbitrator acted outside the language of the Agreement when he relied on "his experience and practice in other arbitrations in the 'federal public sector'."[96] Based on these findings, the Fifth

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85. *Id.*

86. *Id.* at 183.

87. The court relied on Article IV, Section 7, which states that "[t]he Company shall determine ability, skill and qualifications, subject to an employee's right to assert a grievance under Article II," and Article II, Section 1, which states, "[a] grievance, as that term is used in this contract means any dispute involving the proper application or interpretation of this Agreement, or a claim that an employee has been unreasonably and unjustly discriminated against." *Id.* at 182, 184.

88. *Id.* at 184.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* "Federal public sector" arbitration is governed by federal statute and includes different rules for grievance arbitration." *See* Justin C. Smith & Craig Paul Wood, *Title VII of the Civil Service Reform Act of 1978: A "Perfect" Order?*, 31 HASTINGS L.J. 855, 856-62 (1980).

Circuit concluded that the arbitrator's re-evaluation of the employee went beyond the scope of his authority and beyond the parties' contractual agreement.[97]

B. The Dissent

In his dissent, Judge Lay relied on three main arguments to rebut the majority. First, Judge Lay argued that the trial judge properly relied on the parties to define the issues in light of the crowded court dockets that judges are now facing.[98] HL&P's own counsel admitted that the arbitrator had the right to determine whether Thornal was less qualified when HL&P stated in its brief that the issue "'was whether or not the Company had violated the collective bargaining agreement by laying off Thornal out of line of seniority.'"[99] Also, HL&P's counsel previously submitted the issue in the same way to the arbitrator.[100] Based on these earlier statements by HL&P's counsel, the dissent contends that the majority incorrectly "undermines the authority of the district court and creates uncertainty as to whether district courts may rely upon counsel's statement of issues in order to shorten proceedings."[101]

In Judge Lay's second argument, he emphasized that the terms of the Agreement allowed the arbitrator to re-evaluate Thornal.[102] The contract stated that "[t]he Company shall determine ability, skill and qualifications, subject to an employee's right to assert a grievance under Article II [of the Agreement]."[103] Article II defined a grievance as "any dispute involving the proper application or interpretation of this Agreement. . . ."[104] Article II of the Agreement also provided that "[t]he sole function of the arbitrator shall be to determine whether the Company or Union is correct with reference to the proper application and interpretation of this Agreement."[105] Based on the Agreement and the parties' submission of the issues to the arbitrator, the dissent concluded that the arbitrator was "expressly authorized" to examine whether HL&P correctly decided that Thornal was less qualified.[106] The dissent also stated that "[w]hile a court may review whether an arbitrator has exceeded his scope of authority, it must resolve all doubts in favor of the arbitrator's authority."[107]

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97. *Houston Lighting & Power Co.*, 71 F.3d at 184.

98. *Id.* at 184-85.

99. *Id.* (citing the district judge's opinion in Houston Lighting & Power Co. v. The Int'l Bhd. of Elec. Workers, Local No. 66, No. 94-908, at 2 (S.D.Tex. Aug. 25, 1994)).

100. *Id.* at 185.

101. *Id.*

102. *Id.* at 185-86.

103. *Id.*

104. *Id.*

105. *Id.* at 185.

106. *Id.*

107. *Id.* at 186.

Finally, the dissent differs with the majority on the issue of the arbitrator's authority to determine the remedy.[108] The majority contended that if the arbitrator found the evaluation process to be inconsistent with the Agreement, he could not re-evaluate Thornal himself, but had to allow HL&P to make the re-evaluation.[109] The dissent points out that "[i]t is well settled that courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on error of fact or on misrepresentation."[110]
As to the complaint that the arbitrator inappropriately relied on his knowledge of "grievances in the federal public sector," the dissent states that this merely explains the chosen remedy.[111] The dissent quotes the Supreme Court's decision in *Steelworkers v. Enterprise Wheel & Car Corp.* where the Court emphasized that the arbitrator should use his informed judgment, especially when he determines a remedy because there is a greater need for flexibility in determining a remedy.[112]

V. COMMENT

The majority found that the arbitrator had overstepped the authority that the parties gave him in their labor agreement.[113] The Fifth Circuit interpreted two portions of the Agreement to collectively mean that the arbitrator was not allowed to re-evaluate an aggrieved employee.[114] While the court's interpretation was plausible, the court had to stretch far to vacate the award. To reverse the arbitrator and the district court, the court had to find that its interpretation was not only plausible, but that it was also the only "rational" interpretation of the Agreement, and further, that the language was "clear and unequivocal."[115] Through these findings, the court made the difficult argument that the language was so unambiguous that the arbitrator, the district court, and the dissenting judge of this court must have been irrational to find as they did. While this argument would seem so difficult that a court would rarely reverse an arbitrator, the Fifth Circuit's finding is consistent with a disturbing trend to treat arbitrator's findings with less deference.

In order to vacate the arbitrator's award, the Fifth Circuit had to find that the language of the Agreement was "clear and unequivocal."[116] The dissent, however, reading the same clauses in the Agreement, found that the Agreement

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108. *Id.* at 187.

109. *Id.* at 186-87.

110. *Id.* at 187 (quoting *Misco,* 484 U.S. at 36).

111. *Id.* at 187 n.3.

112. *Id.* "The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency." *Id.* (quoting *Enterprise Wheel,* 363 U.S. at 597).

113. *Id.* at 184.

114. *Id.*

115. *Id.*

116. *Id.*

expressly authorized the arbitrator to re-evaluate Thornal.[117] The majority not only interpreted the language to mean the exact opposite of the dissent's interpretation, but also found that the language unambiguously prohibited the arbitrator from re-evaluating Thornal.[118] In actuality, the linchpin here is not the court's interpretation of the Agreement, but rather the finding that the language is "clear and unequivocal."[119]

One commentator, Mark Berger, notes that collective bargaining agreements are often designed to be ambiguous because of the necessities of the bargaining relationship.[120] Labor agreements are not the normal arms-length contracts between consensual parties designed to cover discrete events.[121] Rather, the parties are required by law to negotiate an agreement that will govern their mutual working environment for several years.[122] Because these forced negotiations result in a general document, it is unlikely that there is one meaning for a contract provision.[123] As a result, interpretation of the document may require more than standard principles of contractual analysis; and it is the arbitrator's job to determine which of these other principles to employ.[124] Thus, Berger submits that determining "error" by an arbitrator in this setting is more subjective than objective.[125] In other words, a district or appellate court is often not qualified to determine whether an arbitrator misinterpreted an agreement. The Supreme Court's narrow standard for reviewing arbitrators' awards reflects this reality.[126]

The commentators have noted the trend towards less deference to arbitrators.[127] According to Lynch, the public policy exception[128] has helped persuade some courts to give closer scrutiny to an arbitrator's interpretations of collective bargaining agreements.[129] The public policy exception was part of the reasoning behind the Fifth Circuit's decision in *Delta Queen Steamboat Co. v.*

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117. *Id.* at 185.

118. *Id.* at 184.

119. *Id.*

120. Berger, *supra* note 21, at 257.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 257-58. *See Enterprise Wheel*, 363 U.S. at 597 ("When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem.").

125. Berger, *supra* note 21, at 258.

126. *See supra* note 82.

127. Dennis O. Lynch, *Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. MIAMI L. REV. 237, 267-71 (1989); Craver, *supra* note 49, at 595-99; Timothy J. Heinsz, *Judicial Review of Labor Arbitration Awards: The Enterprise Wheel Goes Around and Around*, 52 MO. L. REV. 243, 247 (1987).

128. The public policy exception allows a court to forgo the usual deference to arbitration where, for instance, a court feels it would be against public policy to enforce an award reinstating a pilot who had flown while intoxicated. Lynch, *supra* note 126, at 268.

129. *Id.* at 269.

District 2 Marine Eng'rs Beneficial Ass'n, where a riverboat pilot's competency was in question.[130] Of course, this trend is nothing new.

While courts may use the public policy exception, it may also use the *Enterprise Wheel* standard to encroach on the purview of arbitrator discretion.[131] Professor Heinsz correctly states the paradox of the standard set forth by the Supreme Court in *Enterprise Wheel*: The "essence" of the contract is exactly what is in dispute, therefore, a court can seize the language of the Supreme Court standard to second-guess the arbitrator.[132] Examining the same language in an agreement that the arbitrator examines, the reviewing court may still claim that the arbitrator neither rationally applied the contract nor followed the essence of the contract, but instead, applied "his own brand of industrial justice."[133] In other words, though the *Enterprise Wheel* standard encourages courts to leave arbitration in the hands of experts, it also allows an overeager court to grab ambiguous language in an agreement and state that the arbitrator violated that language. In *Houston Lighting & Power Co.*, the Fifth Circuit did seize the opportunity to abuse the standard by overanalyzing the decision of the arbitrator and declaring that the interpretation was irrational.

The instant decision builds on the Fifth Circuit's erosion of confidence in the arbitrator's ability to interpret a collective bargaining agreement.[134] As Craver correctly states, it was the court in *Delta Queen* who "dispens[ed its] own brand of industrial justice" by essentially ignoring the contract when it re-interpreted the contract.[135] Similarly, the Fifth Circuit not only imposed its view of the contract on the parties, but in the process overturned the contracted-for interpretation of the arbitrator. It seems that the court reversed the presumption in favor of arbitrator discretion. Where a court should review a contract to see if the power exercised by the arbitrator was specifically prohibited by the contract, this court seems to have looked for specific language giving the arbitrator the power he exercised.

130. Craver, *supra* note 49, at 596.

131. Heinsz, *supra* note 126, at 247.

132. *Id.*

133. *Id.* at 249.

134. It even calls into question the ability of counsel to properly frame the issues for the arbitrator and the reviewing court. *Houston Lighting & Power*, 71 F.3d at 184-85.

135. Craver, *supra* note 49, at 597.

VI. CONCLUSION

The Fifth Circuit in *Houston Lighting & Power* follows a disturbing trend among some courts to lessen the judicial deference to arbitrator interpretation of labor contracts. This trend flies in the face of the Supreme Court policy against judicial meddling in arbitration. More importantly, this trend will serve to undermine the confidence of industry and the unions in the reliability of the arbitration process.

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