

2000


Contract Reading' in Labor Arbitration

Theodore J. St. Antoine

University of Michigan Law School, tstanton@umich.edu

Available at: <https://repository.law.umich.edu/articles/1432>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

 Part of the [Courts Commons](#), [Dispute Resolution and Arbitration Commons](#), [Labor and Employment Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

St. Antoine, Theodore J. "Contract Reading' in Labor Arbitration." ADR Currents 5, no. 3 (2000): 1, 13-6.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CURRENTS

The Newsletter of Dispute Resolution Law and Practice

“Contract Reading” in Labor Arbitration

By Theodore J. St. Antoine

A quarter century ago, I used the phrase “contract reader” to characterize the role an arbitrator plays in construing a collective bargaining agreement.¹ This phrase has almost invariably been misunderstood to refer to reading or interpreting the contract.

When I spoke of the “contract reader,” it was in the context of judicial review of an award. My point was this: When a court has before it an arbitrator’s award applying a collective bargaining agreement, it is as if the employer and the union had signed a stipulation stating: “What the arbitrator says this contract means is exactly what we meant it to say. That is what we intended by agreeing the award would be ‘final and binding.’” In this sense an “erroneous interpretation” of the

Continued on page 13

IN THIS ISSUE

Published by the American Arbitration Association

SEPT.-NOV. 2000

ADR Update

page 4

New ADA Guidelines

page 5

Interpreting the New York Convention

page 8

The Phenomenon of Nondisclosure in Mediation

page 17

Arbitration of Performance Bond Disputes

page 19

Court Roundup

page 24

Continued from page 1

contract by the arbitrator is a contradiction in terms.

This paper updates this thesis, emphasizing what may be the hottest issue in judicial review: When may a court set aside an arbitral award on the ground that it violates public policy? It also addresses the "contract interpretation" aspect of the "contract reader"—namely, How should an arbitrator go about "reading" or interpreting a contract?

Judicial Review

In the *Steelworkers* trilogy the U.S. Supreme Court made arbitration the linchpin in the federal scheme for the implementation of collective bargaining agreements.² In *Enterprise Wheel*, one of the three cases, the Court imposed tight constraints on judicial review of arbitral awards. So long as the award is not the product of fraud or corruption, does not exceed the arbitrator's authority under the parties' submissions, and "draws its essence" from the labor contract, a court is to enforce the award without any attempt to "review the merits." Despite these strictures, the itch of the judiciary to right seeming wrongs compelled the Court to revisit the subject in *Paperworkers v. Misco*.³

Misco presented the public policy question in dramatic fashion. The 5th Circuit had refused to enforce an award reinstating a paper-cutting machine operator, whose car had been found to contain marijuana while parked in the company lot. The Supreme Court reversed, declaring that "as 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." The Court cautioned that "a court's refusal to enforce an arbitrator's interpretation of [labor] contracts is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"

Many lower courts have still not got the message. Judges have been so offended by the reinstatement of deviant postal workers, sexual harassers and alcoholic airline pilots that they have disregarded the Supreme Court's directives in *Enterprise Wheel* and *Misco*. The 1st and 5th Circuits have taken it upon themselves to find an award at odds with their notions of public policy, even though the action ordered would not have violated any positive law or established public policy had it been taken by the employer on its own initiative.⁴ The 4th, 6th, 7th, 9th, 10th and D.C. Circuits have been more faithful to the *Misco* mandate.⁵ The 2nd, 3rd, 8th and 11th Circuits have vacillated on the issue, but the most recent decisions seem more in line with *Misco*.⁶

final and binding dispute resolution procedure, as it is almost invariably described in the parties' contracts.

We may shortly have further enlightenment from the Supreme Court on this issue. In March 2000 the Court granted *certiorari* in *Eastern Associated Coal Corp. v. Mine Workers*.⁸ This was a case of marijuana ingestion by a mobile equipment operator. The lower courts sustained the employee's reinstatement. They acknowledged that federal regulations expressed a "well defined and dominant public policy" against drug use by "those in safety-sensitive positions," but went on to say: "there is no such policy against the reinstatement of employees who have used illegal drugs in the past." The 4th Circuit affirmed without deigning to publish its opinion.

If the employer has the lawful authority to take unilaterally the action directed by the arbitrator, the arbitral award should be upheld against "public policy" claims.

The rejection of otherwise legitimate awards on the basis of a nebulous public policy usually is based on the highly subjective feelings of particular judges. For me, three estimable critics have correctly assessed the problem and arrived at the right solution. In various formulations, Judge Frank Easterbrook and professors Charles Craver and David Feller have concluded that if the employer (or the employer in conjunction with the union) has the lawful authority to take unilaterally the action directed by the arbitrator, such as reinstatement of a wrongdoing employee, the arbitral award should be upheld against "public policy" claims.⁷

This simple principle seems so self-evident, and so implicit in the Supreme Court's rulings to date, that it should become the accepted norm in the future. This approach is entirely in keeping with the underlying notion that the arbitrator is the parties' designated spokesperson when it comes to reading and applying the contract. It merely confirms that arbitration is a

The key issue is whether the remedial action ordered by the arbitrator, not the triggering conduct of the employee, is contrary to public policy. Of course the drug-taking employee acted contrary to public policy. But the award-issuing arbitrator did not and his or her decision should stand. That is the way the Supreme Court should rule in this case.

Is vacating an arbitral award on the ground that it has "no rational basis" contrary to the "contract reader" thesis? Regrettably, I cannot say that it is. In agreeing to a final and binding arbitration procedure, the parties presumably took it for granted that arbitrators would not be insane and would not reach decisions that are totally unreasonable. In any event, it is probably impossible to keep courts from intervening, on one theory or another, when an award seems utterly irrational. One can only hope that careful, artful crafting of arbitral opinions will keep this judicial exception to the finality doctrine to the barest minimum.

Continued on page 14

Continued from page 13

Contract Interpretation

Arbitrators have a tough job. How should they go about divining the parties' intent when the reality is the parties never contemplated the particular issue that has arisen? What should they do when the "plain meaning" of the contract conflicts with bargaining history or established practice?

Numerous arbitrators of high repute have accepted (or at least paid lip service to) the plain meaning rule and its benighted first cousin, the parol evidence rule.⁹ Carlton Snow and Richard Mittenthal have said nearly all that needs to be said about the plain meaning rule and past practice. Snow bluntly stated: "Arbitrators' continued invocation of the plain meaning rule is anomalous in light of the trend to reject the rule by the courts, the [Uniform Commercial Code], the Restatement [of Contracts], and treatise writers."¹⁰ Mittenthal was prepared to declare almost 40 years ago that past practice "may be used to clarify what is ambiguous, to give substance to what is general, and perhaps even to modify or amend what is seemingly unambiguous."¹¹

California Supreme Court Justice Roger Traynor put his finger on the problem when he said:

A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of

the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.¹²

In my view, if fidelity to the parties' intent (or their putative intent about an unanticipated problem) is the touchstone of sound contract interpretation, the *a priori* rejection of any evidence reasonably probative of that intent cannot be justified. In collective bargaining, what I call "contextual interpretation" is likely to be grounded in evidence concerning negotiating history and past practice.

Recent decisions indicate that some arbitrators are prepared to look behind the apparent plain meaning of the written instrument to discern intent from bargaining history and other parol evidence.¹³ (Some arbitrators play it safe by finding an ambiguity in the contract language, which makes their resort to extrinsic evidence quite conventional.)

Logically there seems no reason not to consider such evidence. If the parties decided to cloak certain provisions of their agreement in a private code for reasons they considered sufficient (for example, to conceal trade secrets from the employer's competitors), an arbitrator should entertain evidence to that effect, however clear and unambiguous the language might otherwise appear.¹⁴

What about the practical argument in favor of the plain meaning rule—the time and cost of trying to prove that what seems clear and unambiguous is not. Here, as in so many other areas, the solution has to be the sound discretion of the arbitrator. I would not reject out of hand an offer to prove that the apparently clear and unambiguous was in fact intended to mean something totally different. But I would refuse proffered evidence that reflected one party's internal, uncommunicated understandings of the contract terms, and I would give short shrift to testimony or exhibits that were vague and

not directly on target. The language finally chosen by the parties to embody their agreement is entitled to that much respect.

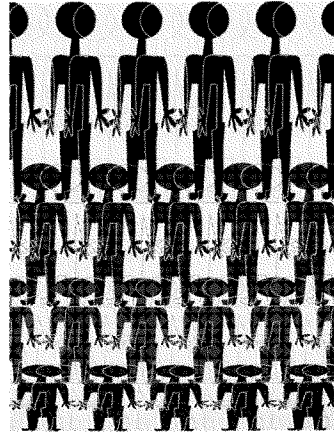
Today's major issue concerning past practice is whether it can modify or override clear contract language to the contrary. My sense is that arbitrators will find that a long-standing and well-accepted practice may prevail even over a clear, express provision in the agreement.¹⁵ However, there is also substantial authority that past practice cannot trump an unambiguous contract term.¹⁶

Employers have responded to the encroachments of past practice by resorting to various types of "zipper" clauses designed to make the final written agreement the exclusive source of employee rights. Arbitrators are divided on the efficacy of this approach.¹⁷

The past practice cases are highly fact-specific. Generalizations are hazardous. But in my view two fundamental principles are apposite. First, any contract, including a collective bargaining agreement, is subject to amendment by the parties. Absent statutory or contractual restrictions, the parties can fashion their contract and amend it as they choose by deeds just as well as by words. Second, for a practice to become sufficiently well-established to be binding on the parties, it must meet the following usual criteria: clarity, consistency, longevity and mutual acceptability. Mutual acceptability is especially crucial if the practice is claimed to have superseded a clear, express contract provision to the contrary. If all these conditions are met, the practice should prevail over the contractual language.

Role of External Law

Once a great debate raged within the National Academy of Arbitrators over what an arbitrator should do when confronted with a conflict between the terms of a collective bargaining agreement and the requirements of external



Theodore St. Antoine is the James E. and Sarah A. Degan Professor Emeritus of Law at the University of Michigan. He is a member of the board of directors of the American Arbitration Association and the outgoing president of the National Academy of Arbitrators. This article is adapted from an article prepared for the Proceedings of the 53rd Annual Meeting, National Academy of Arbitrators, to be published in 2001 by The Bureau of National Affairs, Inc.

law. I still believe that in the rare case of an irreconcilable clash between contract and law (or dominant public policy), if the parties have not expressly or impliedly authorized external law to be taken into account, the arbitrator should follow the contract and ignore the law.¹⁸

The civil rights statutes provide vital protections against discrimination in employment on the grounds of race, sex, religion, age, disability and the like. An arbitral award in a case where statutory rights are implicated is, of course, not entitled to the same final and binding effect that is customary in pure contract arbitrations.¹⁹ But under footnote 21 in *Alexander v. Gardner-Denver*, an arbitration decision in a discrimination case may be admitted in subsequent court proceedings and accorded "great weight" if certain conditions are met. These conditions include contractual provisions that

applicable law and pertinent court interpretations. That will also serve to establish the arbitrator's "special competence." This approach could require more than the two or three page opinions often specified for expedited arbitrations.

Thus, in all the steps of a case involving statutory claims, the arbitrator should act "defensively" because of the possibility that the award may be challenged in court. (Whether that occurs will depend on the loser's assessment of its chances of securing a more favorable result in the courts.) Arbitrators should imagine that a federal judge is looking over their shoulder, scrutinizing every move and testing it against the *Gardner-Denver* criteria. That should sharpen everybody's skill at contract and statute reading!

An analogous defensive approach also should be followed in the "public policy" cases. If a sexual harasser or a drug offender in a safety-sensitive job is involved, neither the advocates nor the arbitrator should turn a blind eye to the policy implications. Judicial review is a distinct possibility. The likelihood that the award will be upheld is increased if the arbitrator forthrightly confronts the

policy issues and convincingly explains why the result reached is compatible with the public good.

Conclusion

The roles of arbitrators and courts in interpreting and enforcing labor agreements are very different. The arbitrator is the parties' designated contract reader. Absent such abnormal circumstances as fraud, corruption or an exceeding of arbitral authority, the arbitrator's award should be accepted by a reviewing court as if it were the parties' own stipulated, definitive interpretation of the agreement. Of course, the award is subject to challenge for illegality or violation of public policy. But that should be the limit of judicial review. If the parties themselves could lawfully have done what the arbitrator has ordered, the award

should be affirmed and enforced.

In construing and applying the collective bargaining agreement, arbitrators have employed a variety of traditional interpretive tools. I have rejected the broadest application of the plain meaning rule, which precludes hearing evidence that would contradict the contract. I would admit at a hearing all credible evidence, within the constraints of procedural feasibility, which shows the actual intent of the parties. I would also accept proofs of well-established, mutually accepted practices that indicate a modification or amendment of the contract. In so doing I am not trying to elevate the arbitrator over the parties. My aim is to be faithful to the parties' manifest intent in the deepest, truest sense.

The days when unions, employers and arbitrators inhabited a self-made world of labor relations, for the most part untouched by public law and regulation, are gone. Back then the parties generally had no way of challenging the arbitrator's final and binding pronouncements, except to exclude that arbitrator from future service. Today, in cases involving a civil rights statute, a federal judge can bring an arbitrator up short with a one-line order.

Arbitrators should not flinch from having to change some of their customary ways. Change, after all, is the law of growth and survival, and arbitrators ignore that truth at their peril.

Endnotes

1 St. Antoine, "Judicial Review of Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny," in Dennis & Somers, eds., *Arbitration—1977, Proceedings of the 30th Annual Meeting of the National Academy of Arbitrators* 29, 30-36 (BNA Books 1978).

2. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

3. 484 U.S. 29 (1987).

4. E.g., *Exxon Corp. v. Exxon Workers*, 118 F.3d 841 (1st Cir. 1997); *Exxon Corp. v. Baton Rouge Oil & Chemical Workers*, 77 F.3d 850 (5th Cir. 1996).

5. *Westvaco Corp. v. Paperworkers*, 171 F.3d 971 (4th Cir. 1999); *MidMichigan Regional Medical Ctr.-Clare v. Prof'l Employees*, 183 F.3d 497 (6th Cir. 1999); *Chrysler Motors Corp. v. Allied Indus.*

Continued on page 16

In all the steps of a case involving statutory claims, the arbitrator should act "defensively" because of the possibility that the award may be challenged in court.

"conform substantially with [the applicable statute]," "procedural fairness," "adequacy of the record," and the "special competence of particular arbitrators."²⁰

Advocates and arbitrators alike have a professional responsibility to ensure compliance with these Supreme Court standards in discrimination cases. Except for procedural fairness, which arbitrators presumably always bear in mind, the *Gardner-Denver* factors require deliberate attention.

Even if an antidiscrimination provision in a collective bargaining contract closely tracks a particular civil rights statute, the judicial gloss on the legislation should be considered. Advocates should educate the arbitrator on these nuances in their particular case. In turn the arbitrator should demonstrate an awareness of the

Continued from page 15

Workers, 959 F.2d 685 (7th Cir. 1992), *cert. den.*, 506 U.S. 908 (1992); *UFCW Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 174 (9th Cir. 1995); *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201 (10th Cir. 1999); *Northwest Airlines v. ALPA*, 808 F.2d 76 (D.C. Cir. 1987), *cert. den.*, 486 U.S. 1014 (1988).

6. Compare *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990), *cert. den.*, 499 U.S. 922 (1991) (reinstatement set aside), with *IBEW Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704 (2d Cir. 1998) (reinstatement upheld). Compare *U.S. Postal Serv. v. Letter Carriers*, 839 F.2d 146 (3d Cir. 1989) (reinstatement sustained), with *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993) (reinstatement set aside). Compare *Iowa Elec. Light & Power Co. v. IBEW* 204, 834 F.2d 1424 (8th Cir. 1987) (reinstatement vacated), with *Homestake Mining Co. of California v. Steelworkers Local 7044*, 153 F.3d 678 (8th Cir. 1998) (reinstatement upheld). Compare *U.S. Postal Serv. v. Letter Carriers*, 847 F.2d 775 (11th Cir. 1988) (reinstatement set aside), with *Florida Power Co. v. IBEW*, 847 F.2d 680 (11th Cir. 1988) (reinstatement sustained).

7. Easterbrook, "Arbitration, Contract, and Public Policy," in Gruenberg, ed., *Arbitration—1991: The Changing Face of Arbitration in Theory and Practice, Proceedings*

of the 44th Annual Meeting of the National Academy of Arbitrators 65, 70-77 (BNA Books 1992); Craver, "Labor Arbitration as a Continuation of the Collective Bargaining Process," 66 *Chicago-Kent L. Rev.* 571, 604-

Arbitrators, 30-31 (BNA Books 1961).

12. *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 37, 442 P.2d 641 (Cal. 1968).

13. *E.g., Meadow Gold Dairies*, 110 LA 865, 870 (Bognanno 1998); *Fors Farms*, 112 LA 33 (Cavanaugh 1999); *Akzo Nobel Salt, Inc.*, 113 LA 645, 649-50 (Goldberg 1999). Cf. *Union Foundry Co.*, 113 LA 63 (Baroni 1999). But cf. *Mason City Community School Dist.*, 109 LA 1125 (Hoh 1997).

14. Professor Corbin is in accord. Perillo, ed., *Corbin on Contracts* § 24.8 at 55 (Rev. ed. 1998).

15. *E.g., Coca-Cola Bottling Co. of Michigan*, 104 LA 705, 708 (Shanker 1995) ("waiver" of specified times for lunch).

16. *E.g., Robinson Township Municipal Auth.*, 109 LA 995, 998-99 (Dean 1997).

17. Compare *Village of Bourbannais*, 113 LA 332 (Traynor 1999) (zipper clause prevails), with *Donaldson Co.*, 113 LA 723 (Kessler 1999).

18. The Supreme Court seems in accord. An arbitral award is legitimate only if it "draws its essence" from the labor agreement, and arbitrators exceed the scope of the submission if they base their decision on their view of the "requirements of enacted legislation." *Enterprise Wheel, supra*, n. 2.

19. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n. 21. (1974); cf. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998).

20. See *id.*, 415 U.S. at 60 n. 21. ▲

Arbitrators should not flinch from having to change some of their customary ways. Change, after all, is the law of growth and survival, and arbitrators ignore that truth at their peril.

5 (1990); Feller, "Court Review of Arbitration," 43 *Lab. L. J.* 539, 543 (1992).

8. 120 S. Ct. 1416 (2000). For the case below, see 66 F. Supp. 2d 796 (S.D. W. Va. 1998), *aff'd per curiam*, 188 F.3d 501, 1999 WL 635632 (4th Cir. 1999) (unpublished).

9. *E.g., Gibson Refrigerator Co.*, 17 LA 313, 317 (Platt 1951); *Thunderbird Hotel*, 69 LA 10, 13 (Weiss 1977); *Merchandise Mart Properties*, 105 LA 704, 709 (Daniel 1995).

10. Snow, "Contract Interpretation," 55 *Fordham L. Rev.* 681, 704 (1987).

11. Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," in Pollard, ed., *Arbitration and Public Policy, Proceedings of the 14th Annual Meeting of the National Academy of*