

## Can Arbitrators Exceed their Powers by Making an Award in Manifest Disregard of the Parties' Agreement?



Suppose arbitrators decide an issue within the scope of their authority but do so in manifest disregard of the parties' contract. Do they exceed their authority by making an award that has not even a barely colorable basis in the parties' contract or in applicable law?

The answer to that question, is, of course, "yes," and over the years we've discussed in a number of posts how arbitrators can exceed their powers under Federal Arbitration Act Section 10(a)(4) or Section 301 of the Labor Management Relations Act by making awards in manifest disregard of the parties' agreement. (See Loree Reinsurance and Arbitration Law Forum Posts [here](#)], [here](#)], [here](#)], [here](#)], [here](#)], [here](#)], [here](#)], [here](#)], and [here](#)].) As discussed in those posts, the U.S. Supreme Court has on multiple occasions ruled that commercial and labor arbitrators can exceed their powers by making an award that manifestly disregards "or does not 'draw its essence' from" the parties' agreement. See [Stolt-Nielsen S.A. v. AnimalFeeds Int'l Inc.](#), 130 S.Ct. 1758, 1768-70 (2010); [Oxford Health Plans LLC v. Sutter](#)], 133 S.Ct. 2064, 2067, 2068 (2013); [Eastern Associated Coal Corp. v. Mine Workers](#)], 531 U.S. 57, 62 (2000); [Steelworkers v. Enterprise Wheel & Car Corp.](#)], 363 U.S. 593, 599 (1960); [Paperworkers v. Misco, Inc.](#)], 484 U.S. 29, 38 (1987).

In our April 12, 2019 post ([here](#)) we reviewed how it is that the limited review powers courts have to vacate commercial and labor arbitration awards are designed to provide a limited, but very important, safety net to protect parties against egregious, material violations of arbitration agreements. Without that limited protection, the risks associated with agreeing to arbitrate would be intolerably high and parties would be much less apt to opt for arbitration over court litigation.

Courts vacate arbitration awards where arbitrators act outside the scope of their authority by ruling on issues that the parties did not agree to submit to them. That's what happened in *Brock Indus. Servs., LLC v. Laborers' Int'l Union.*, \_\_\_ F.3d \_\_\_, No. 17-2597, slip op. (7th Cir. April 8, 2019), which we discussed in our April 12, 2019 post [here](#)].

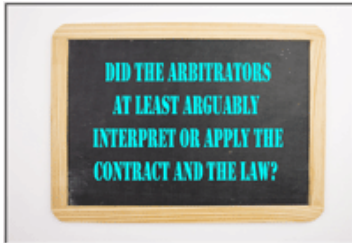
But to obtain vacatur of an award based on manifest disregard of the agreement, however, an award challenger must satisfy an exceedingly demanding standard. We've addressed the parameters of that standard in a number of other posts. (See, e.g., [here](#)], [here](#)], [here](#)], [here](#)], [here](#)], [here](#)], and [here](#)]. Our blog has also tried to give a feel for how Courts apply (or are supposed to apply) the standard by comparing the U.S. Supreme Court decision in *Stolt-Nielsen*, which held that an award should be vacated for manifest disregard of the agreement, to the Supreme Court decision in *Oxford*, which held that an award should not be vacated under that manifest disregard standard. (See Loree Reinsurance and Arbitration Law Forum posts [here](#)], [here](#)], and [here](#)].) And from time-to-time we've reported on other cases that have applied the standard.

While challenges to awards based on manifest disregard of the agreement are not uncommon, a very large majority of those challenges are either virtually certain to fail or at least highly unlikely to succeed. It is a relatively small universe of remaining, close cases that pose the biggest challenges for parties and courts.

Today we'll look at one of those close cases, which was decided by the Eighth Circuit Court of Appeals and explain why the case

failed to satisfy the demanding standard, even though, at least at first glance, it may be difficult to square the arbitration award with the parties' agreement.

#### CenterPoint Energy Res. Corp. v. Gas Workers Union: Background



In *CenterPoint Energy Res. Corp. v. Gas Workers Union, Local No. 340*, No. 17-1322, slip op. (8th Cir. April 10, 2019), the U.S. Court of Appeals for the Eighth Circuit reversed a district court judgment that vacated a labor arbitration award. The Court held that the arbitrator's award should not have been vacated because in making it, the arbitrator was at least arguably construing the contract. . . .? Slip op. at 2.

The Employer performed maintenance and service for appliances, including furnaces and air conditioners. The Employee, a service technician, was a member of a union that had a collective bargaining agreement (?CBA?) with the Employer.

The Employer monitored service-technician performance through laptops equipped with global positioning system (?GPS?), though which technicians would receive work orders, record start and completion times for work assignments, and input comments about work performed. The Employer required service technicians to keep accurate records of time spent on jobs.

The Employer questioned the Employee about alleged discrepancies between GPS records and the Employee's time sheets. These alleged discrepancies occurred on four different dates.

The Employer subsequently terminated the Employee for submitting false time sheets and neglect of duty.

The Union objected to the discharge, the Employer denied the grievance, and the Union demanded arbitration under the arbitration agreement in the CBA.

The arbitration centered on the meaning of CBA Article 26, ?Discipline and Discharge,? which provides:

The Company has the right to employ or promote in accordance with the provisions of this Agreement, to enforce discipline, to discharge employees for cause, including failure to recognize authority . . . . Without excluding other causes for discharge, the following shall constitute absolute causes from which there shall be no appeal to negotiation or arbitration between the Company and the Union (except that the question of whether the employee has been guilty of the facts constituting such absolute causes shall be a negotiable controversy) namely: 1. Use of, or being under the influence of, alcohol or nonmedical drugs at any time during the work day.2. Dishonesty3. Neglect of Duty4. Abuse of Sick Leave.Slip op. at 3 (quoting CBA).

## The Parties' Submissions



The Union argued to the Arbitrator that "the issue . . . was whether [the Employee] was discharged for just cause, and if not, what should be the appropriate remedy." Slip op. at 3. The Employer argued that "the first issue for the arbitrator was whether [the Employee] was discharged for cause." The Employer split that first issue into two alternative issues: "(a) whether [the Employee's] conduct on specific dates in 2015 constituted dishonesty or neglect of duty as defined by the 'absolute cause' provision in Article 26, and (b) alternatively, whether [the Employee's] conduct constituted 'just cause' as defined by Article 26." Slip op. at 3. The second issue, as framed by the Employer, was "what should be the remedy if [the Employee] was not discharged for cause." Slip op. at 3.

## The Arbitrator's Award



The Arbitrator "concluded that even if the [E]mployee committed one of the four offenses listed in the "absolute cause" provision of Article 26, he had authority to determine whether the [E]mployee was appropriately discharged." Slip op. at 3-4. He determined that "although [the Employee] acted dishonestly and neglected his duty on some of the days cited by the company, "the discharge penalty imposed on [the Employee] was arbitrary and discriminatory and must be modified to comport with the seriousness, length and scope of his misconduct." Slip op. at 4 (quoting Award). He accordingly ordered the Employee reinstated without back pay. Slip op. at 4.

## District Court Holds Award in Manifest Disregard of Agreement

The Employer commenced an action in the district court under Section 301 of the Labor Management Relations Act seeking to vacate the award. The district court vacated the award, holding that the arbitrator exceeded his authority. Slip op. at 4.

## The Eighth Circuit's Decision: No Manifest Disregard of Agreement



On appeal the Court reviewed the manifest disregard of the agreement standards, pointing out, among other things, how "it is the arbitrator's construction" of the contract for which the parties bargain, and that, accordingly, "[s]o long as the arbitrator is even arguably construing or applying contract, the arbitral decision must stand." Slip op. at 4 (citations and quotations omitted). Under that highly deferential standard, "[e]ven a serious error by the arbitrator in construing the contract is insufficient reason to set aside the award[,] and "[o]nly when an arbitrator issues an award that does not 'draw its essence from the contract,' because it reflects instead the arbitrator's own notions of industrial justice, may a court vacate an arbitrator's decision." Slip op. at 4 (citations and quotations omitted).

#### The Arbitrator Interpreted the Contract



The Court explained that the arbitrator had interpreted the contract. "Based on the company's right under the first sentence of Article 26 to discipline or discharge employees "for cause," said the Court, "the arbitrator concluded that Article 26 "includes a just cause standard for discipline and discharge." Slip op. at 5.

The Arbitrator, the Court said, "addressed the company's position, based on the "absolute cause" language of the second sentence, that he lacked authority to modify the discipline if he found that [the Employee] was guilty of dishonesty or neglect of duty at any time." Slip op. at 5. He "concluded that because the parties included a "just cause" standard in Article 26, "it seems unreasonable to think the Union would have agreed to language [that] gives the Company the unfettered right to discharge for any act of neglect of duty, dishonesty, abuse of sick leave, or use of alcohol or non-medical drugs." Slip op. at 5 (quoting Award).

On that score the Arbitrator "reasoned that "[i]n reviewing the language of Article 26, it is clear that the Parties did not intend that any employee found to have committed one of the four listed offenses could be summarily discharged without regard to the factors arbitrators normally consider in determining whether there was just cause for discharge." Slip op. at 5 (quoting Award). The Arbitrator "believed that "[t]o interpret Article 26 in any other manner would violate all of the basic notions of fairness and due process firmly established in the history of industrial relations and implicit in Article 26, which also includes a just cause standard for discipline and

discharge.'? Slip op. at 5 (quoting Award).

Further, '[t]he arbitrator expressed concern that 'almost every violation of Company policy could also be interpreted to constitute an act of neglect of duty or dishonesty.'? Slip op. at 5 (quoting Award). Because of 'the breadth of' the 'terms defined as 'absolute cause,' he reasoned that accepting [the Employer's] position would mean that 'an employee guilty of almost any violation of Company policy, no matter how insignificant, could be subjected to summary discharge without the right to challenge the appropriateness of the penalty before an arbitrator.'? Slip op. at 5 (quoting Award). The Arbitrator found support in two other arbitral decisions for this 'narrow[]' construction of 'neglect of duty.'? Slip op. at 5.

The Arbitrator did not "Disregard" or "Ignore" the Contract



The Employer's principal argument for reversal was that the Arbitrator disregarded or ignored Article 26. In rejecting this argument, the Court initially explained that '[a] party who disagrees with an arbitrator's contractual interpretation can always characterize the [award] as 'ignoring' language that favors that party's interpretation, but erroneous textual analysis is not a sufficient ground to vacate an award.'? Slip op. at 6 (citation omitted). 'If,' said the Court, 'the arbitrator attempts to construe the contract, but makes a serious error, the decision must stand, because the parties bargained for the arbitrator's interpretation.'? Slip op. at 6 (citation omitted).

To vacate an award for manifest disregard of the agreement, the challenger must show 'that the arbitrator based his decision on 'some body of thought, or feeling, or policy, or law that is outside the contract.'? Slip op. at 6 (quoting [Ethyl Corp. v. United Steelworkers of Am.](#)], 768 F.2d 180, 185 (7th Cir. 1985) (Posner, J.)). And the disregard 'must be clear'?it is not enough that an award 'includes an ambiguity that permits the inference that the arbitrator may have exceeded his authority. . . .'? Slip op. at 6 (citation and quotations omitted). Such ambiguities are interpreted in favor of enforcing an award, not vacating it. See slip op. at 6.

The Company attempted to justify its argument for vacatur by pointing to the 'arbitrator's reference to 'basic notions of fairness and due process firmly established in the history of industrial relations' as evidence of extra-contractual motivation.'? Slip op. at 6 (quoting Award). But the Court explained that '[t]he arbitrator. . . thought those notions were 'implicit in Article 26,' i.e., part of the contract, and relied on the fact that Article 26 also included a 'just cause' standard as support for this view.'? Slip op. at 6 (quoting Award). That meant it was 'not clear that the arbitrator acted on his own notions of industrial justice rather than an effort to construe the contract.'? Slip op. at 6.

The Court also pointed out that '[t]he arbitrator. . . also relied heavily on the potential breadth of the terms 'neglect of duty' and 'dishonesty,' and the arbitrator's view that accepting the company's position on 'absolute cause' would effectively negate the just cause standard derived

from the first sentence in Article 26. Slip op. at 6-7.

Right or wrong, said the Court, this is an interpretation of the contract. Slip op. at 7. And to that end, the arbitrator explained at length why he interpreted the contract to allow for review of the discipline "[e]ven if there was serious error in the analysis, the arbitrator was arguably construing the contract." Slip op. at 7-8.

The Arbitrator did not "Nullify" the Contract



The Court also rejected the Employer's argument that the Court affirm the district court's judgment on the alternative ground that the arbitrator's award nullifies the 'absolute cause' language of the agreement. Slip op. at 8. That contention, said the Court, was simply another complaint that the arbitrator misread the contract. Slip op. at 8.

The Court also explained that, in any event, whether or not the arbitrator's reading of the contract was correct, it did not entirely nullify the absolute cause language. Slip op. at 8. Under the Arbitrator's interpretation of Article 26, the company has an absolute right to impose discipline, even though it does not give the company unfettered authority to select discharge as the appropriate remedy. Slip op. at 8.

Manifest Disregard of the Agreement: What to Make of CenterPoint Energy?



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CenterPoint Energy underscores in the labor arbitration context the point the U.S. Supreme Court in Oxford made in the commercial arbitration context: Courts will uphold arbitration awards so long as there is at least a barely plausible basis for the Court to conclude that the arbitrator was interpreting the contract, even if the interpretation may be egregiously wrong.

Were the Court the decision-maker, it might well have concluded that Article 26 was, under contract interpretation rules, susceptible to only one reasonable interpretation, which vested in the Employer the absolute right to discharge an employee for dishonesty or neglect of duty. But the test is not simply whether the contract is unambiguous within the meaning of judicial contract interpretation

standards?there must be no barely colorable basis on which to conclude that the arbitrator based his or her decision on an interpretation of the contract. Instead, all the evidence must indicate that the arbitrator based his or her decision on some consideration outside the contract (and not incorporated into the contract by law or party consent).

As is apparent from the Court's discussion of the arbitrator's decision, if the Employer believed that Article 26 precluded an arbitrator from second-guessing an Employer's decision to discharge an employee for dishonesty or neglect of duty, then the Employer was mistaken. Article 26 was not drafted in sufficiently clear terms to render it insusceptible to any even barely colorable alternative interpretation, even a legally erroneous alternative interpretation. And the Arbitrator's decision made clear that the Arbitrator was at least attempting to interpret the contract in good faith, and was thus doing his job.

#### Photo Acknowledgements

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