C-35505 A-C

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	)	**AWARD**
	)	
	)	**Grievant: Class Action**
between	)	**Post Office: Rock Hill, SC**
	)	
UNITED STATES POSTAL SERVICE	)	**Case Nos.: 4G 16N 4G C 21072406 (Case #1)**
	)	**4G 16N 4G C 21072425 (Case #2)**
	)	**4G 16N 4G C 21091887 (Caes #3)**
and	)	**DRT Nos: RHM012820; RHMO121320;**
	)	**RHMO1221**
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS	)	
	)	

Before: Jacquelin F. Drucker, Esq., Arbitrator

Appearances:

For the NALC: Don Lyerly, Regional Administrative Assistant

For the Postal Service: Mya Simpson, Labor Relations Specialist

Date of Hearing: October 19, 2021
Record Closed: November 23, 2021

Place of Hearing: 206 Wilson Street S
Rock Hill, SC 29730

Date of Award: December 23, 2021

Relevant Contract Provision(s): Articles 8, 15, and 19

Contract Year: 2016- 2019

Type of Grievance: Contract

AWARD SUMMARY

As to the merits of the grievances, the evidence of record establishes that the grievance in Case No. 1 must be sustained and that the unresolved issue in the grievance in Case No. 3 must be denied. The grievance in Case No. 2 had been sustained on the merits at Step B and, thus, the issue here is solely that of remedy. With regard to the remedy in Case Nos. 1 and 2, the Arbitrator issues a cease and desist order, directs that the qualified ODL Carrier in each case be compensated at the overtime rate for the overtime hours to which the ODL Carrier would have been assigned but for the breach, and directs that the non-ODL Carriers who were required to work overtime be paid, as a compensatory remedy, their straight-time rates for all overtime hours that were required in breach of Article 8.

Jacquelin F. Drucker, Esq.

I. STATEMENT OF THE CASE

The instant grievances relate to the Union's assertion that Management breached the National Agreement regarding overtime. The hearing of these matters was held on October 19, 2021, at the Postal Service facility located at 206 Wilson Street S, Rock Hill, South Carolina, and appropriate measures were taken to ensure pandemic-related safety of all participants. At hearing, the parties were ably represented. There was not agreement, initially, as to whether the grievances would be addressed in a single award or in the three separate awards. The parties, however, presented the cases in single arguments, as the issues on the merits are similar and the issues as to remedy are the same. The Arbitrator, having reviewed the evidence and considered the arguments presented at hearing and in post-hearing briefs, as to each of the three grievances, has found that they most efficiently and fairly can be resolved in this single Award.

At hearing each party was given a full and fair opportunity to present evidence and make arguments as to each of the grievances. After the opening statements and review of the evidence and was concluded, the advocates agreed to present written closing arguments. The submissions from both parties were timely received and the record was closed. In reaching the conclusions and Award set forth herein, the Arbitrator has given full and careful consideration to all arguments posed, all awards and authorities cited, and all evidence of record.

II. ISSUE

The issues in Cases 1 and 3 are as follows: Did Management violate Article 8 of the National Agreement in the assignment of overtime to non-ODL Carriers? If so, what shall be the remedy? As to Grievance 2, as the breach has been found and the grievance was upheld at Step B, the only issue is the determination of the remedy.

III. RELEVANT LANGUAGE FROM THE NATIONAL AGREEMENT

Article 8, Hours of Work, provides in Section 5 as follows:

> When needed, overtime work for full-time employees shall be scheduled among qualified employees doing similar work in the work location where the employees regularly work in accordance with the following:
>
> A. Employees desiring to work overtime shall place their names on either the "Overtime Desired" list or the "Work Assignment" list during the two weeks prior to the start of the calendar quarter. . . .
>
> * *
>
> D. If the voluntary "Overtime Desired" list does not provide sufficient qualified people, qualified full-time regular employees not on the list may be required to work overtime on a rotating basis with the first opportunity assigned to the junior employee.
>
> ***
>
> G. Full-time employees not on the "Overtime Desired" list may be required to work overtime only if all available employees on the Overtime Desired list have worked up to twelve (12) hours in a day or sixty (60) hours in a service week.

IV. FACTS AND ANALYSIS

The parties have agreed that, as to Case No. 2, Management breached the foregoing provisions of the National Agreement. Thus, Case No. 2 requires a ruling only with regard to the remedy and therefore is addressed in the section which follows.

With regard to Case No. 1, the Union has established that, on December 7, 2020, Management at this facility was notified that a particular Letter Carrier would be absent from work on December 8, 2020. Letter Carrier Amanda Mason was on the ODL, but there was no effort to contact her prior to December 8. Management asserts that an attempt was made to reach Carrier Mason by telephone at 6:15 a.m. on December 8. The record indicates that Ms. Mason did not answer the telephone. Ms. Mason's written statement, which the parties at hearing agreed is to be regarded as her testimony if she had been called as a witness, indicates that she did not receive a telephone call and that, upon following up, she ascertained that the wrong telephone number had been used. (The record, however, shows that the telephone number used was what Management had in its records for Ms. Mason. It is not clear if that number was incorrect or, if it was, how it came to be listed in Grievant's record.)

Five Carriers who were not on the ODL and thus had not volunteered for overtime, however, were required by Management to report to work two hours before their scheduled tours on December 8. As specified in the JCAM, however, "Before requiring a non-ODL carrier to work overtime on a non-scheduled day or off his/her own assignment on a regularly schedule day, management must seek to use a carrier from the ODL, even if the ODL carrier would be working penalty overtimes." As the Union notes, these Carriers already had been notified that they were required to work and, in fact, had begun to work BEFORE any effort was made to notify Ms. Mason. Thus, as the Union correctly argues, Management's assertion of an effort to reach Ms. Mason at 6:14 a.m. for overtime necessitated by an absence of which Management had noticed the day before, does not constitute compliance with Article 8.

By requiring these Carriers to work without having sought to use an ODL Carrier, Management was in violation of Article 8, Section 5.D, and Ms. Mason was wrongfully passed over for overtime work on her non-scheduled day.[1]

As to Case No. 3, the record indicates that one of two alleged violations pursued by the grievance was confirmed as a violation by the Step B team. That pertained to Management assigning Carriers to more than the 12-hour contractual maximums. The issues on which the Step B team did not agree relates to Union's assertion that Management on January 2, 2021, violated Article 8, Section 5 by not assigning non-scheduled-day overtime to Ms. Mason, who was on the ODL. The Union asserts that Management initially asserted that it had all routes covered on that date, which, as the date immediately following a holiday, would have been busy. Nonetheless, says the Union, Management received sick calls from Carriers, which then raised the need for overtime. Management asserts that it then attempted to contact Ms. Mason to have her report for overtime and that she did not answer the telephone and did not later return the call. Ms. Mason, however, provided a written statement indicating that she "didn't get a call 1-2-21 to come into work." Management asserts that it was only after the supervisor had been unable to reach Ms. Mason that it assigned non-ODL Carriers to cover the two routes. The Union asserts that the non-ODL Carriers worked beyond their daily work hour limitations on that day.

The central issue here relates to the failure to assign non-scheduled-day overtime to Ms. Mason. The Union in a case such as this bears the burden of proof in establishing at least a prima facie violation of Article 8, Section 5. Its case is predicated upon Management's failure to seek to assign the overtime, or at least a portion of the overtime, that was worked on January 2 to Ms. Mason. There is a factual dispute as to whether the effort was made to contact Ms. Mason, and the Arbitrator finds that the evidence of record is insufficient to allow her to conclude that Management failed to make this effort. Further, the record supports Management's assertion that the absences were unexpected, and the sequence of events in this case suggests that an effort was

[1] Management at Step B and in argument at hearing also made some representations regarding the applicability of the Work Assignment provisions as to some, but not all, of the five Carriers who were required to report early. This argument was abandoned in Management's closing brief, however, wherein Management addresses only the issue of remedy, but for one sentence in which it argues that Ms. Mason had been contacted on the day in question. Management's only defense on this point thus has been addressed and rejected above, for the Carriers were assigned before any effort was made to assign Ms. Mason.

made to reach Ms. Mason and that it was only after she did not respond that steps were taken to cover the routes at issue with non-ODL Carriers. While the Arbitrator does not accept Management's assertions as true, she finds that the record adduced by the Union is insufficient to establish, by a preponderance of the credible evidence, that Management violated Article 8, Section D.5 in the manner alleged. Accordingly, the Union claims as to the unresolved portion of this grievance must be denied.

Turning to the question of remedy for the contract violations found in Cases 1 and 2, the Union requests that the Arbitrator issue a cease and desist order, require a compensatory remedy in which Ms. Mason is to be paid for the overtime to which she should have been assigned, and require payment to the non-ODL Carriers who were required to work in violation of the contract.

Arbitrator has given careful consideration to the history of the same violations that have been found in recent years at the Rock Hill Post Office, predominately by various Step B teams. In fact, the record at hearing indicates that in 24 different grievances, from 2015 through 2020, Article 8, Section 5 violations have been found by either Formal Step A or Step B teams. It is instructive that, in these many resolutions, the remedy in every case until 2020 included a cease and desist directive and payment of compensation to the non-ODL employees who had been required to work in violation of the National Agreement. In fact, in light of the repeated violations, the Step B teams in many cases put Management at Rock Hill on notice that continued violations would warrant escalating monetary remedies. In mid-2020, however, the Step B team, although in agreement that violations had occurred, were not able to agree on the remedy, with Management rejecting not only the compensatory remedies of the past but also the fundamental remedy of the cease and desist directive. This led to an arbitration in which Arbitrator Glenda M. August imposed the same three-part remedy as sought by the Union in this case. Case No. K16N 4K C 20300521; RHMO61220 (December 9, 2020, and February 22, 2021).

Unlike the multiple Step B teams to have agreed on this issue, Management in this case opposes the Union's request for a cease and desist order. Management's argument is a bit hard to follow and not supported by any citations to authority that is directly on point, but the suggestion is that

nothing in the National Agreement specifies that a cease and desist remedy is available. As other arbitrators who have addressed this odd argument have held, however, (a) cease and desist orders are traditional, common, and logical remedies for breaches of collective bargaining agreements and (b) contracts, including collective bargaining agreements, rarely address the available remedial options to be applied in the event of a breach. Indeed, parties seldom can anticipate the forms in which breaches may occur and the appropriate nature of any make whole remedy that would be applied, be it by an arbitrator with regard to a collective bargaining agreement or a court with regard to a contract. As held by the United States Supreme Court in *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960), the need for the arbitrator to bring his or her informed judgment to bear in resolving a dispute under a collective bargaining agreement is "especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wise variety of situations."

In more than 30 years of arbitrating thousands of disputes under a vast variety of collective bargaining agreements, this Arbitrator has never before been presented with the suggestion that cease and desist orders are not appropriate remedies for contractual breaches. The Postal Service offers no relevant authority for this theory, which, to the extent it can be discerned from the arguments presented at hearing and in the closing brief, is wholly out of step with concepts of remedy in arbitral law, arbitral tradition, and basic contract law. Indeed, innumerable court decisions from all levels of the judiciary have confirmed arbitration awards that have included cease and desist orders. See, for example, *United Mine Workers of American v. Monongalia County Coal Co.*, 240 F. Supp. 3d 466 (N.D. W.V. 2017); *Honeywell Int'l, Inc. v. Industrial and Allied Workers Local Union No. 101,* 2009 U.S. Dist. LEXIS 70132, 2009 WL 2477550 (E.D. Va., 2009); and *Unite HERE Local 1 v. Hyatt Corp.,* 862 F.3d 588 (7th Cir., 2017). In fact, in *American Postal Workers Union, AFL-CIO v. United States Postal Service.,* 2019 U.S. Dist. LEXIS 202367, 2019 WL 6170056 (S.D. N.Y., 2019), the United States District Court for the Southern District of New York dismissed an action in which the union (in that case, the APWU) sought, among other remedies for repeated noncompliance with the contract, a cease and desist order from the court. In dismissing the union's complaint, the court noted that the APWU was seeking the kind of relief that it first must seek from an arbitrator under that National Agreement.

Management also seems to suggest that, as cease and desist orders are not referenced in the National Agreement, the determination of whether a cease and desist order is appropriate is a matter to be addressed at the national level. In this regard, Management alludes to a national-level award by Arbitrator Richard Mittenthal in *United States Postal Service and National Association of Letter Carriers*, Case No. N8-NA-0141 (1980). That award addressed a wholly unrelated and discrete question based on the highly specific facts related to the actions and failures of the National Joint Committee on Maximization that was agreed to in the Memorandum of Understanding on Maximization, which was incorporated in the 1978 National Agreement. It has no application here, for the purposes upon which Management seems to rely. Nonetheless, is it worth noting that Arbitrator Mittenthal cited the breadth of an arbitrator's authority to establish a fair remedy for breach of a collecting bargaining agreement by citing this passage from the United States Supreme Court's decision in *United Steelworkers of America v. Enterprise Care & Wheel Co., supra:* "the arbitrator 'must bring his informed judgment to bear in order to reach a fair solution. . [in] formulating remedies.'"

For all of the foregoing reasons, the Arbitrator finds that it is wholly appropriate that this Award include, as a remedy, an order that the Rock Hill Post Office cease and desist from breaches of Article 8, Section 5.

As to the compensatory remedies sought, the bypassed ODL Carriers in Cases 1 and 2 must be made whole by payment at the overtime rate for the time they would have worked were it not for Management's breach of Article 8. (In fact, the Step B team in Case No. 2 had agreed to this compensatory remedy.) In addition, the Arbitrator finds that a full make-whole, compensatory remedy in these two cases also requires that that the non-ODL Carriers for whom overtime was mandated be compensated for those hours at the straight-time rate for each overtime hour worked. The Arbitrator finds that this remedy is warranted both in light of the numerous Step B decisions in which it was agreed that this was an appropriate remedy and on the basis of rectifying the loss experienced by non-ODL Carriers who had exercised their contractual rights to establish their preference not to work overtime and who were protected against mandated overtime when sufficient, qualified ODL personnel were available. Contrary to Management's argument that such a remedy is punitive, the nature of this remedy is compensatory. As the

parties have jointly noted in the JCAM, one of the purposes of the ODL is to excuse full-time Carriers not wishing to work overtime from having to do so. This monetary award thus is not only derived from precedential Step B resolutions in which the remedy was crafted to correct the unwarranted imposition of overtime but also is issued as a means of compensating the non-ODL Carriers for the imposition on their lives and non-work hours when they were required by Management to work during times that, under the contract, they should have been free to spend in other life pursuits.

AWARD

Upon full and careful consideration of all evidence of record and the arguments and citations presented by the parties, the Arbitrator finds that, for the reasons stated above, the grievance in Case No. 1 is sustained and the unresolved portion of the grievance in Case No. 3 is denied. With regard to the remedy in Case Nos. 1 and 2, the Arbitrator (a) issues a cease and desist order, (b) directs that the qualified ODL Carrier in each case be compensated at the overtime rate for the overtime hours to which that ODL Carrier would have been assigned but for the breach, and (c) directs that the non-ODL Carriers who were required to work overtime be paid, as a compensatory remedy, their straight-time rates for all overtime hours that were required in breach of Article 8. The Arbitrator retains jurisdiction to resolve any disputes regarding the calculation and allocation of these remedies. The parties are to confer to identify the required payments and the recipients of same. If the parties have not been able to reach full agreement as to same within 90 days of the date of this Award, any unresolved disputes in this regard will be presented for determination by the Arbitrator.

December 23, 2021

Jacquelin F. Drucker, Esq.

Civil Action Number 3:08cv773
United States District Court, E.D. Virginia, Richmond Division

Honeywell Int. v. Ind. Allied Workers Local Union

Decided Aug 11, 2009

Civil Action Number 3:08cv773.

August 11, 2009

MEMORANDUM OPINION

RICHARD WILLIAMS, Senior District Judge

This matter is before the Court on the parties' cross motions for summary judgment. For the reasons stated below, the Court denies the plaintiff's motion and grants in part and denies in part the defendant's motion.

I.

Honeywell International, Inc. ("plaintiff" or "Honeywell") and Industrial Allied Workers Local Union No. 101 ("defendant" or "Union") have a thirty-year collective bargaining agreement history[1] in connection with Honeywell's Chesterfield plant, which produces plastic resin pellets. The Collective Bargaining Agreement ("CBA") at issue here was effective from May 15, 2005 through May 14, 2008. During this period, approximately fifteen to twenty Union truck drivers worked at the Chesterfield plant.

[1] Corporate ownership of the Chesterfield plant has varied over the years, but, as stipulated to by the parties and as noted by the arbitrator, such changes are irrelevant to the instant matter.

In 2007, after a cessation of a contractual relationship with a customer, Honeywell closed its "Warehouse 99," an offsite storage location in which "C-Train" materials were stored. Thereafter, Honeywell cancelled the lease on its third tractor, 2 which had, for more than thirty *2 years, been used by Union drivers to transport materials to offsite storage locations. In addition to transporting pellets to storage, Union drivers had used this tractor on an as-needed basis to transport lactam, a substance used in making the pellets, and lactam-related materials or, much less frequently, to engage in what Honeywell calls "tolling work," which involves the offsite transportation of pellets to local "tolling" companies, which blend, modify, and/or package the pellets according to customer specifications.

In May 2007, the Union filed two grievances, alleging violations of Article 4, Section 16(5) and Article 29 of the CBA insofar as Honeywell continued to subcontract offsite delivery work in the form of tolling deliveries without assigning such work to Union drivers. Honeywell denied these grievances, leading the parties to arbitration. On June 18, 2008, the parties conducted an arbitration hearing before Arbitrator Barton W. Bloom ("Arbitrator" or "Bloom"). Pursuant to the parties' past practices, the hearing was transcribed by a court reporter; this transcript was to serve as the official record of the hearing. In lieu of closing arguments, the parties agreed to submit post-hearing briefs, which were due thirty days after receipt of the transcript. Upon receiving the transcript, the Union lawyer sent an email to the Honeywell lawyer stating,

> If your Firm has a "do not use" list for court reporters, I think that the reporter who did our hearing in June should definitely be on it. This transcript is incoherent in parts. The hearing was not that chaotic. There are parts that make us both sound like we just learned English.

Honeywell's lawyer responded by email three minutes later, "That's unfortunate. Thanks for the heads-up." In its post-trial brief, the Union noted that the transcript "contained numerous errors in transcription," an assessment with which the Arbitrator concurred. Therefore, to supplement the transcript, Bloom referred to his notes from the hearing. *3

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At issue in the arbitration were four portions of the CBA: Article 1, Section 4, management function; Article 4, Section 16, truck driving assignments; Article 7, grievance procedure; and Article 29, subcontracting. Relevant portions of these provisions follow.

> Article 1, Section 4:
>
> Management Function — It is recognized that all management functions shall be retained by [Honeywell]. These functions shall include but are not limited to full and exclusive control of: the management and operation of the plant, the direction of the working forces, the scheduling and determination of the means and manner of production, the introduction of new or improved methods or facilities and the right to hire, train, suspend, discipline, discharge, promote, transfer and layoff employees and schedule and assign jobs. Such functions shall not be exercised contrary to the provisions of this Agreement. The intent of this Section is not to prevent the union from exercising its rights under Article 7.
>
> Article 4, Section 16 — Truck Driving Assignments
>
> . . . .
>
> 5. It is agreed between [Honeywell] and [the] Union that all truck driving work within the Hopewell-Petersburg-Richmond area now being performed by the Materials Movement Section and all truck driving work subsequently assigned to Materials Movement personnel shall be performed by the Materials Movement Section. [Honeywell] may subcontract such work only when it does not have available equipment and/or drivers when such work is of a rush nature and requires immediate transportation.
>
> Article 7, Section 2 — Arbitration
>
> . . . .
>
> (b) The arbitrator shall not have the authority to amend or modify this Agreement or establish new terms or conditions under this Agreement. The arbitrator shall determine questions of arbitrability.
>
> The arbitrator shall have no power to add to, subtract from, or otherwise modify any of the terms of this Agreement or any other agreement supplemental hereto and shall have no power to establish or fix wage rates.
>
> Article 29, Section 1
>
> For the purpose of preserving job opportunities for the employees covered by this Agreement, [Honeywell] agrees that work currently performed by, or hereafter assigned to the bargaining unit shall not be subcontracted if it would result in a reduction of the work force, by rollback or layoff in the job which would normally perform the work being subcontracted.

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On September 26, 2008, Arbitrator Bloom issued a thirty-five-page opinion in which he found that Honeywell was violating Article 4, Section 16(5) of the CBA "by failing to assign tolling delivery work to the third tractor operated by bargaining unit truck drivers before subcontracting with commercial carriers for such work." Finding that a constructive layoff, defined as a reduction in hours, occurred, the Arbitrator also found that Honeywell was violating Article 29 "by subcontracting with commercial carriers for tolling delivery work before assigning such work to the third tractor operated by bargaining unit truck drivers." He therefore ordered Honeywell to (1) acquire a tractor equivalent of the third tractor, to be operated by Union drivers performing bargaining unit work, including tolling work, before such work is subcontracted to commercial carriers, (2) pay, without interest or overtime, relevant back pay, and (3) cease and desist from (i) failing to assign to Union drivers and (ii) subcontracting to external contractors bargaining unit work before assigning it to Union drivers. On November 24, 2008, Honeywell filed its complaint under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, asking that the Arbitrator's award be vacated as failing to derive its essence from the CBA and/or reflecting the Arbitrator's own notions of right and wrong. On March 20, 2009, Honeywell filed its motion for summary judgment and the Union filed its cross motion for summary judgment. On May 13, 2009, a hearing was held on the motions for summary judgment.

II.

Pursuant to Federal Rule of Civil Procedure 56, summary judgment should be granted when there are no material facts in dispute and one side is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In reviewing a motion for summary judgment, a court must view the facts and any
5 inferences drawn from these facts in the *5 light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Nguyen v. CNA Corp.*, 44 F.3d 234, 237 (4th Cir. 1995). A fact is material when proof of its existence or nonexistence would affect the outcome of the case and is in dispute "when its existence or non-existence could lead a jury to different outcomes." *Cox v. County of Prince William*, 249 F.3d 295, 299 (4th Cir. 2001) (citing *Anderson*, 477 U.S. at 248). Under these parameters, the Court will evaluate the cross motions for summary judgment, recognizing that, as the parties agree, no genuine issue as to any material facts exists.

As the Fourth Circuit has recently noted, " [j]udicial review of an arbitration award in the collective bargaining context is `extremely limited,' and `among the narrowest known to the law.'" *Merck Co., Inc. v. International Chem. Workers Union Council of the United Food and Commercial Workers, Local 94C*, No. 08-1917, 2009 WL 1916706, at *3 (July 6, 2009) (quoting *Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345, 349 (4th Cir. 2008)). Notwithstanding allegations of factual errors or misinterpretations of the parties' agreements, arbitrators' decisions are not subject to review on their merits. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001). Rather, courts are entitled to "determine only whether the arbitrator did his job — not whether he did it well, correctly, or reasonably, but simply whether he did it." *Mountaineer Gas Co. v. Oil, Chem. Atomic Workers Int'l Union*, 76 F.3d 606, 608 (4th Cir. 1996). Thus, if an "`arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that `a court is convinced he committed serious error does not suffice to overturn his decision.'" *Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57, 62 (2000) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular

claim, or determining whether *6 there is particular language in the written instrument which will support the claim." *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960) (footnote omitted).

Under this exceedingly deferential standard, courts must enforce an arbitration award if it "draws its essence" from the CBA, *United Steelworkers of America v. Enterprise Wheel Car Corp.*, 363 U.S. 593, 597 (1960), which occurs provided that "[t]he arbitrator [does] not ignore the plain language of the contract," *Misco*, 484 U.S. at 38; *Norfolk W. Ry. Co. v. Transp. Commc'ns Int'l Union*, 17 F.3d 696, 700 (4th Cir. 1994). "An arbitrator does not have carte blanche, however, to `dispense his own brand of industrial justice,'" being instead "confined to interpretation and application of the parties' agreement." *United States Postal Serv. v. American Postal Workers Union*, 204 F.3d 523, 527 (4th Cir. 2000) (quoting *Enterprise Wheel*, 363 U.S. at 597). Moreover, as long as an arbitrator's factual findings and interpretation of the CBA are conducted within the parameters of the controlling agreement and are not "wholly baseless and without reason," *Norfolk W. Ry. Co.*, 17 F.3d at 700, "the courts have no business overruling him because their interpretation of the contract is different from his," *United States Postal Serv.*, 204 F.3d at 527.

In this case, the Arbitrator interpreted the CBA as providing that once Honeywell "assigns a task to the bargaining unit, that task remains bargaining unit work so long as [Honeywell], in its discretion, continues the operation for which such task is performed." Based on the materials before it and as presented to the Arbitrator, the Court cannot say this interpretation is "wholly baseless and without reason." The Court likewise reaches the same conclusion about the Arbitrator's findings concerning tolling work and the occurrence of a constructive layoff. Further, although Honeywell argues that the award enshrines the Arbitrator's own brand of industrial justice, pointing to his supplementation of the transcript with *7 his notes, the Court cannot concur with this assessment. Having reviewed the transcript, the Court can appreciate the need for reference to contemporaneous notes for clarification purposes, as the lawyers surely did.[2] Moreover, the Court could not identify any portion of the Arbitrator's opinion that was not based on testimony recorded in the transcript. In short, although it quite possibly would have, in the first instance, interpreted the CBA more in accordance with Honeywell's position, the Court must sustain the arbitration award.

> [2] It is clear that the court reporter had difficulty hearing portions of the arbitration hearing. Thus, to forestall a repetition of the instant debate, it would behoove the parties to ensure that future court reporters have a better vantage point of the proceedings.

The Court finds, however, that an award of attorney's fees to the Union is not warranted. Only when a litigant seeking to vacate an arbitration award under Section 301 of the LMRA "literally [has] no reasonably arguable legal support" is an award of attorney's fees appropriate. *Media Gen. Operations v. Richmond Newspaper Prof'l Ass'n*, 36 Fed. Appx. 126, 134 (4th Cir. 2002). Here, Honeywell had a plethora of legitimate grounds for challenging the arbitration award. Consequently, the Court will not award attorney's fees to the Union.

III.

Having reviewed the submitted evidence, including the Arbitrator's opinion and arbitration hearing transcript, the Court cannot say that the Arbitrator's opinion "failed to derive its essence from the CBA" or that it enshrines the Arbitrator's own notions of right and wrong. Accordingly, the Court denies the plaintiff's motion for summary judgment and grants in part the defendant's motion for summary judgment. Specifically, the Court enforces the arbitration award, but denies the Union's request for attorney's fees.

An appropriate Final Order shall issue.

Monongalia Cnty. Coal Co. v. United Mine Workers of Am.

234 F. Supp. 3d 797 (N.D.W. Va. 2017)
Decided Feb 16, 2017

CIVIL ACTION NO. 1:16CV04

02-16-2017

MONONGALIA COUNTY COAL COMPANY, Plaintiff, v. UNITED MINE WORKERS OF AMERICA, International Union and United Mine Workers of America, Local Union 1702, Defendant.

Daniel D. Fassio, Michael D. Glass, Ogletree, Deakins, Nash, Smoak & Stewart, PC, Pittsburgh, PA, for Plaintiff. Charles F. Donnelly, UMWA Legal Department, Charleston, WV, for Defendant.

IRENE M. KEELEY, UNITED STATES DISTRICT JUDGE

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Daniel D. Fassio, Michael D. Glass, Ogletree, Deakins, Nash, Smoak & Stewart, PC, Pittsburgh, PA, for Plaintiff.

Charles F. Donnelly, UMWA Legal Department, Charleston, WV, for Defendant.

MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [DKT. NO. 13] AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [DKT. NO. 15]

IRENE M. KEELEY, UNITED STATES DISTRICT JUDGE

Pending for consideration are cross motions for summary judgment filed by the plaintiff, Monongalia County Coal Company ("Company"), and the defendants, United Mine Workers of America, International Union and United Mine Workers of America, Local Union 1702 (collectively "Union"). Finding that the Arbitrator's decision fails to draw its essence from the collective bargaining agreement and instead reflects the Arbitrator's own notions of right and wrong, the Court grants the Company's motion (dkt. no. 15) and **VACATES** the Arbitrator's award.

I. FACTUAL BACKGROUND

The Company operates the Monongalia County Mine (the "Mine"), an underground coal mine located in West Virginia and Pennsylvania. The Union represents the Company's bargaining unit (union) employees for purposes of collective bargaining. The Company and the Union are bound by a collective bargaining agreement ("CBA") (dkt. no. 7–1) that governs the wages, hours, and working conditions of union employees at the Mine.

In 2015, the Company contracted with a third-party, Jennchem, to design, supply, and install a pumpable crib system[1] in the Mine. This system requires workers to hang cylindrical bags from bolts installed in the mine roof at predetermined locations. The bags are then filled with a cementitious mixture, which dries quickly and forms a strong concrete-like pillar that provides support to the ceiling of the mine.

[1] "Cribbing" is used to support the ceiling of a mine. Traditionally, cribbing consisted of multiple layers of wood stacked in a box-like formation from the ground to the roof. Modern advances, however, have provided other forms of cribbing, including hydraulics, mechanical jacks, or concrete-like pillars, such as the ones at issue here.

At the outset, union mine employees hung the bags and Jennchem employees filled them with the cement mixture. After problems arose with the bag hanging performed by the union employees, however, the Company decided that, because of
800 Jennchem's familiarity and expertise with *800 the product, Jennchem should perform the entire operation. When the Union objected, the Company countered that it was allowed to contract all of this work out to Jennchem under Article 1A, § (i) of the CBA. This Article provides in pertinent part as follows:

> All construction of mine or mine related facilities including the erection of mine tipples and the sinking of mine shafts or slopes customarily performed by classified Employees of the Employer normally performing construction work in or about the mine in accordance with prior practice and custom, shall not be contracted out at any time unless all such Employees with necessary skills to perform the work are working no less than 5 days per week, or its equivalent for Employees working alternative schedules.

(dkt. no. 14 at 4).

The Company justified its decision to contract out the bag hanging to Jennchem based on the fact that, pursuant to Article 1A § (i), all union employees involved were working five days per week. The Union disagreed, arguing that, because hanging the bags was work previously performed by union workers, its members had suffered a loss of work. After the parties were unable to resolve the matter through the grievance process, the matter was referred for resolution to Arbitrator Betty Widgeon ("Arbitrator").

II. PROCEDURAL BACKGROUND

On July 10, 2015, the Arbitrator conducted a hearing with the parties at which the Company presented two arguments. It first contended that the installation of the pumpable crib bags was construction work under Article 1A, § (i) of the CBA. It next asserted that, because the Mine's union employees were working no less than five days per week, it was free to contract that work to Jennchem. Although the Union did not dispute that its members were working no less than five days per week, it contended the work involved was "maintenance" work under Article 1A, § (g)(2),[2] which required the Company to use only union workers. Thus, it reasoned that, even if all union members were already working a full work schedule, the maintenance work would have resulted in overtime and additional payments into the employees' benefit fund.

[2] Article 1A, § (g)(2), provides in pertinent part:

> Repair and Maintenance Work—Repair and maintenance work of the type customarily performed by classified Employees at the mine or central shop shall not be contracted out except (a) where the work is being performed by a manufacturer or supplier under warranty, in which case, upon written request on a job-by-job basis, the Employer will provide to the Chairman of the Mine Committee a copy of the applicable warranty or, if such copy is not reasonably available, written evidence from a manufacturer or a supplier that the work is being performed pursuant to warranty; or (b) where the Employer does not have available equipment or regular Employees (including laid-off Employees at the mine or central shop) with necessary skills available to perform the work at the mine or central shop.
>
> Dkt. no. 14–1 at 4

The Arbitrator rendered a decision ("Decision") favorable to the Union on August 31, 2015. She found that the Company had violated the CBA by using Jennchem to complete bargaining unit work (dkt. no. 4). Specifically, her Decision concluded that the "installation of pumpable cribs does not fall into the construction exception, and because it is, at the very least, repair and maintenance work, it is Union work." Dkt. no. 4 at 4. The Decision also required the Company to cease and desist using outside contractors to hang the bags, and awarded the Union compensatory *801 damages for the hours billed by Jennchem. Id.

Following the Decision, a dispute arose concerning the formula to be used in determining the amount of damages to be paid by the Company (dkt. no. 14–1). After additional briefing, the Arbitrator issued a Supplemental Decision, accepting the Union's position and basing her award of the hours due on the calculations and estimates supplied by the Union (dkt. no. 4–1). Accordingly, she ordered the Company to compensate the Union for 3,000 labor hours connected to the bargaining unit work performed by Jennchem. Id.

The Company filed suit against the Union on January 8, 2016 (dkt. no. 1). Its complaint challenges the Arbitrator's Decision on the basis that it 1) exceeded the scope of the Arbitrator's authority and power; 2) failed to draw its essence from the Agreement; 3) was based on the Arbitrator's own notions of right and wrong; 4) was arbitrary and capricious; and 5) conflicted with public policy interests by undermining enforcement of the Agreement. As a remedy, it sought to vacate the Arbitrator's award with prejudice.

The Union filed a combined answer and counterclaim on February 17, 2016, challenging the Court's jurisdiction to vacate the award because the Agreement provides for final and binding arbitration as the sole means of resolving disputes arising under the Agreement (dkt. no. 7). Its counterclaim seeks a declaration that the award is final, binding, and enforceable. It also asks the Court to compel enforcement of the award and to permanently enjoin the Company from utilizing third-party contractors in any manner inconsistent with the Agreement.

Both parties have moved for summary judgment (dkt. nos. 13 and 15), and those motions are fully briefed and ripe for review.

III. LEGAL STANDARD

A. Summary Judgment

Summary judgment is appropriate where the "depositions, documents, electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials" establish that "there is no genuine

dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a), (c)(1)(A). When ruling on a motion for summary judgment, the Court reviews all the evidence "in the light most favorable" to the nonmoving party. Providence Square Assocs., L.L.C. v. G.D.F., Inc. , 211 F.3d 846, 850 (4th Cir. 2000). The Court must avoid weighing the evidence or determining its truth and limit its inquiry solely to a determination of whether genuine issues of triable fact exist sufficient to prevent judgment as a matter of law. Anderson v. Liberty Lobby, Inc. , 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The moving party bears the initial burden of informing the Court of the basis for the motion and of establishing the nonexistence of genuine issues of fact. Celotex Corp. v. Catrett , 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has made the necessary showing, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Anderson , 477 U.S. at 256, 106 S.Ct. 2505 (internal quotation marks and citation omitted). The "mere existence of a scintilla of evidence" favoring the non-moving party will not prevent the entry of summary judgment; the evidence must be such that a rational trier of fact could reasonably find for the nonmoving party. Id. at 248–52, 106 S.Ct. 2505.*802 **B. Judicial Review of Arbitration Awards**

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Judicial review of arbitration awards is "among the narrowest known to the law." PPG Indus. Inc. v. Int'l Chemical Workers Union Council of United Food and Comm'l Workers , 587 F.3d 648, 652 (4th Cir. 2009) (internal citations omitted). Arbitration awards are presumptively valid. Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union , 76 F.3d 606, 608 (4th Cir. 1996). This is because the parties to a CBA "bargained for the arbitrator's interpretation and resolution of their dispute." Id. Consequently, courts generally defer to the arbitrator's reasoning and should not overturn their factual findings unless there has been fraud by the parties or dishonesty by the arbitrator. Id. Indeed, "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." PPG Indus. , 587 F.3d at 652 (quoting United Paperworkers Int'l Union v. Misco, Inc. , 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987)).

Nevertheless, courts should overturn arbitration awards when the "award violates well-settled and prevailing public policy, fails to draw its essence from the collective bargaining agreement or reflects the arbitrator's own notions of right and wrong." Mountaineer , 76 F.3d at 608 (citing Misco , 484 U.S. at 38, 108 S.Ct. 364). Thus, an "arbitrator cannot 'ignore the plain language of the contract' to impose his 'own notions of industrial justice.' " PPG Indus. , 587 F.3d at 652 (quoting Misco , 484 U.S. at 38, 108 S.Ct. 364).

A court's review "must determine only whether the arbitrator did his job—not whether he did it well, correctly, or reasonably, but simply whether he did it." Mountaineer Gas , 76 F.3d at 608. This determination requires the Court to examine: "(1) the arbitrator's role as defined by the Agreement; (2) whether the award ignored the plain language of the Agreement; and (3) whether the arbitrator's discretion in formulating the award comported with the essence of the Agreement's proscribed limits." Id. (citing United Steelworkers of America v. Enterprise Wheel & Car Corp. , 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)).

Moreover, when construing the contract, "the arbitrator must take into account any existing common law of the particular plant or industry, for it is an integral part of the contract." Clinchfield Coal Co. v. District 28, United Mine Workers of America & Local Union No. 1452 , 720 F.2d 1365, 1368 (4th Cir. 1983) (quoting Norfolk Shipbuilding and Drydock Corp. v. Local No. 684 of the Int'l Brotherhood of Boilermakers , 671 F.2d

797, 800 (4th Cir. 1982)). Finally, "[t]he 'basic objective' of a reviewing court in the arbitration context is 'to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties.' " PPG Indus. , 587 F.3d at 654 (quoting First Options of Chicago, Inc. v. Kaplan , 514 U.S. 938, 947, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)).

IV. DISCUSSION

The material facts in this case are not in dispute. The parties either agree or concede that the work of hanging the bags was previously performed by union employees, and that those employees were working no less than five days per week during the relevant time period. The Company assigns two legal errors to the Arbitrator's Decision. First, it asserts that the Decision ignores the plain language of the CBA, as well as the "common law of the shop." Second, it contends that the damages awarded in the Supplemental Decision are arbitrary and capricious, and based on her own
803 sense of fairness or *803 equity. The Union argues that, under the CBA, the parties agreed to be bound by the Arbitrator's decision, and further argues that legal precedent requires courts to give arbitrators great deference and only overturn their awards in the most limited of circumstances, none of which they contend are present in this case.

A. The Arbitrator's Decision That The Work Was Not Construction

Cognizant of the very limited circumstances under which it may overturn an arbitration award, this Court still must do so if the award "fails to draw its essence from the collective bargaining agreement." Mountaineer Gas , 76 F.3d at 608. In determining whether the Arbitrator did her job, the Court must determine "whether the award ignored the plain language of the Agreement." Id.

The question presented is whether the work of hanging the bags was construction work or repair and maintenance work. Under the CBA, if the work was construction, the Company was free to contract it to Jennchem because union employees were working no less than five days per week. See Dkt. no. 14–1 at 5. If, however, the work was repair and maintenance, it belonged solely to the union employees, with limited exceptions that are not present in this case. See Dkt. no. 14–1 at 4. Because union employees were working no less than five days per week, the Union contended that hanging the bags was repair and maintenance work.

In order to determine whether the work was construction or maintenance, the Arbitrator necessarily had to construe the relevant language of the CBA, which does not explicitly categorize the work at issue. In support of its position, the Company submitted multiple prior arbitral decisions, which defined construction as "the creation of something new that had not existed before" (dkt. no. 4 at 4). Thus, "because the pumpable cribs were being erected and placed where there previously was nothing," the Company argued that "there is nothing to maintain" and the work "can only ever be viewed as construction." Id.

The entirety of the Arbitrator's reasoning rejecting this argument and concluding that the work was maintenance and repair work, not construction, is contained in a single paragraph of her Decision (dkt. no. 4 at 4). Disagreeing with the Company's characterization of the work, she found that, "[i]n the places where the pumpable cribs are being erected, there was previously something there: coal." Id. That coal "kept the ceiling of the mine from collapsing." Id. She credited the Union's argument that, "with the removal of the coal, various measures were put into effect to keep the ceiling stable and that the installation of these cribs was one of those measures."Id. The Arbitrator did not "view[ ] each installation ... as an individual construction project or even as a part of a larger construction project but as steps taken to maintain the integrity and stability of the mine ceiling." Id.

The words "construction" and "repair and maintenance" have distinct and clear definitions in the context of this case. To "construct" means "[t]o form by assembling or combining parts; build."[3] 804 To *804 "maintain," on the other hand, has two plausible definitions that could apply to this case: either "[t]o keep in an existing state; preserve or retain" or "[t]o keep in a condition of good repair or efficiency."[4] As the Company noted, and the arbitral precedent it cited confirms, in this context, the common usage of "repair and maintenance" refers to the upkeep of equipment, machinery, or existing facilities.[5] Indeed, the language of the CBA's clause covering repair and maintenance work supports such a finding, as it strongly suggests that it applies to machinery or equipment, and twice references that the repair or maintenance work might be performed in the "central shop." See Dkt. no. 14–1 at 4.

[3] See Construct , American Heritage Dictionary, https://ahdictionary.com/word/search.html?q=construct. Interestingly, Black's Law Dictionary (6th Ed. 1998) explicitly differentiates between the two terms, as it defines "construct" thusly:

> To build; erect; put together; make ready for use. To adjust and join materials, or parts of, so as to form a permanent whole. To put together constituent parts of something in their proper place and order. "Construct" is distinguishable from "maintain," which means to keep up, to keep from change, to preserve.

[4] See Maintain , American Heritage Dictionary, https://ahdictionary.com/word/search.html?q=maintain.

[5] See, e.g. , Case No. D–971AI–9, Consol–McElroy Coal Co. and UMWA Local Union 1638, District 6 , at 11–12 (Dec. 3, 1997) (Nicholas, Arb.) ("On the other hand, repair and maintenance that is work which—by definition—involves repairing existing equipment or servicing machinery or facilities in order to keep them in good working order.") (dkt. no. 18–1 at 96–97).

Despite the fact that the plain language of the CBA appears clear, the Arbitrator may have found some ambiguity, although she did not explicitly say so. See PPG Indus. , 587 F.3d at 654 (noting that courts should not second-guess an arbitrator's finding of ambiguity). The Court recognizes that "construing or applying the contract" is generally within the exclusive purview of the Arbitrator. See PPG Indus. , 587 F.3d at 652.

Nevertheless, had the Arbitrator found some ambiguity in the contract, she was not at liberty to impose her "own notions of industrial justice." Id. (quoting Misco , 484 U.S. at 38, 108 S.Ct. 364). Rather, she was obligated to look to the "existing common law of the particular plant or industry, for it is an integral part of the contract." Clinchfield Coal , 720 F.2d at 1368 (quoting Norfolk Shipbuilding , 671 F.2d at 800).

The Company provided the Arbitrator with numerous arbitral decisions defining construction work, including several that specifically concluded installation of roof support systems, such as the pumpable crib pillars at issue, was construction work, not repair or maintenance.[6] Some of those decisions also held that the definition of construction in the coal industry was a matter of res judicata.[7] The union provided no contrary precedent, and the Arbitrator cited none.[8]

[6] The list of cases provided by the Company in support is quite lengthy and need not be fully cited here. Those cases are collected at dkt. no. 18 at 13–14 n. 3; dkt. no. 18–1 at 1–108; dkt. no. 18–2 at 1–103; dkt. no. 16–2 at 8–54. These decisions are important in the instant case not only because they discuss the definition of construction work, but also for their precedential value.

7 See, e.g. , Case No. D–20001AG–11, ARB No. 98–06–99–0258, McElroy Coal Co. v. Local Union 1638, District 6 (July 17, 2000) (Harr, Arb.) (finding that definition of construction within industry was matter of res judicata); Case No. D–881AI–2, ARB No. 84–2–87–146, Greenwich Collieries Co. v. UMWA Local Union 1609, District 2 , (Jan. 15, 1988) (Joseph, Arb.) (finding "arbitral consensus" that when new items are installed it constitutes construction).

8 In point of fact, in a previous arbitration, the Union had conceded that installation of pumpable crib pillars was construction work. Dkt. No. 18–1 at 34, 42.

Those past arbitral decisions clearly define the differences between construction and repair and maintenance work. Indeed, for decades arbitrators have concluded that

> [i]n the usual sense, construction work ... is work which brings something new to the mine which had not existed prior to the performance of the work in question. On the other hand, repair and maintenance that is work which—by definition—involves repairing existing equipment or servicing existing machinery or facilities in order to keep them in good working order. Generally speaking, repair and maintenance work does not involve introducing new material into the mine or the erection or fabrication of facilities which have not previously been part of the mine facilities.

Consol–McElroy Coal Co. v. UMWA Local Union 1638, District 6 , Case No. D–971AI–9, (Dec. 3, 1997)(Nicholas, Arb.); see also , Consol—McElroy Coal Co. v. UMWA Local Union 1638, District 6 , Case No. D–971AI–8, (Sept. 22, 1997) (Hammer, Arb.) (noting that repair and maintenance generally refers to the upkeep or restoration of equipment and machinery, while construction involves erecting, fabricating or installing mine or mine related facilities).

Several arbitral decisions specifically address whether roof supports are construction work. In Consol–Consol–McElroy Coal Co. v. UMWA Local Union 1638, District 6 , Case No. D–971AI–9, (Dec. 3, 1997) (Nicholas, Arb.), for example, Arbitrator Samuel Nicholas held that the installation of steel arches to support the roof of a mine was construction work. Finding that the steel arches had never been present in the mine prior to their installation, he concluded that their installation constituted construction work. Id.

Arbitrator Nicholas used the same reasoning in another case in which he decided that installation of supplemental roof supports, specifically, "pizza jacks," was construction work rather than maintenance work. Pittsburg & Midway Coal–North River Mine v. UMWA Local Union 1926, District 20 , Case No. D–20051AI–5 (Oct. 12, 2005) ("Clearly, and as other arbitrators have said, you cannot repair something into existence." (citing Island Creek Coal Co., Hamilton # 2 Mine , 84–23–87–49–ICC at 9 (1997) (Phelan, Arb.))).

Several arbitral decisions specifically address the installation of concrete roof support pillars using collapsible forms hung from the ceiling similar to the pumpable crib bags used by the Company in this case. In one such case, Arbitrator Lynn Wagner found that hanging the collapsible forms was a component of the concrete pillar installation process, and thus construction work. Consol–Loveridge Mine v. UMWA Local 9909 in District 31 , Case No. D–20081AG–1 (Mar. 3, 2008) (Wagner, Arb.) (also noting that "the Arbitrator lacks the contractual authority to ignore such binding ARB decisions and to, in effect, rewrite the Contract to conform with the Union's position").

Finally, in a decision directly on point, Arbitrator Elliot Shaller addressed a grievance over the identical pumpable crib bags installed by the same

contractor involved here.[9] The decision in The Marshall Cty. Coal Co. v. United Mine Workers of America, Local 1638 , Case No. 11–31–15–101 (July 27, 2015) (Shaller, Arb.), began by acknowledging the "ample arbitral precedent ... construing the term [‘construction’] in a uniform way." Id. at 18. Arbitrator Shaller reiterated the definition of construction work as "involving the erection, fabrication or installation of new mine or mine-related facilities or additions," and noted in its distinction from repair and maintenance work. Id. He also *806 recognized that the industry's definitions and distinctions were "so well settled that in a case involving this mine Arbitrator Don Harr ruled that the prior authority required him to apply the principle of arbitral res judicata pursuant to ARB 78–24 (February 19, 1980.)" Id. at 14. After discussing much of the same precedent cited by the Company in this case, he concluded that the "installation of permanent roof control support in an area in which it did not exist ... mak[es] it ‘construction.’ " Id. at 23.

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9 The facts in the Marshal Cty. Coal case are on all fours with the facts in this case. Nonetheless, Arbitrator Widgeon refused to address it because, although the Company submitted the decision to her on July 27, 2015, she stated that she had closed the record earlier that same day. Nonetheless, it is persuasive in its reasoning, and informative in its compilation of prior arbitral precedent, which was clearly available to the Arbitrator.

These decisions establish that, under the "industrial common law—the practices of the industry and the shop—[which] is equally a part of the collective bargaining agreement although not expressed in it," the work in question in this case was construction work. United Steelworkers of America v. Warrior & Gulf Nav. Co. , 363 U.S. 574, 581–82, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) ; see also Clinchfield Coal Co. v. District 28, United Mine Workers of America , 556 F.Supp. 522, 530 (W.D.Va. 1983), aff'd , 720 F.2d 1365 (4th Cir. 1983) (citing Warrior & Gulf); Clinchfield Coal Co. v. UMWA, Dist. 28 , 567 F.Supp. 1431, 1434 (W.D. Va. 1983), aff'd , 736 F.2d 998 (4th Cir. 1984) (applying principle that past decisions by the Arbitration Review Board under the National Bituminous Coal Wage Agreements constituted part of the common law of the shop).

Certainly, by ignoring this overwhelming precedent, if not the plain language of the CBA, the Arbitrator substituted her own "notion of industrial justice" when she concluded, without any support beyond the Union's argument, that the installation of the pillars was maintenance of the roof rather than construction of something new brought into the mine. Indeed, her conclusion that "there was previously something there: coal" contradicts the prevailing definition in the coal industry that construction work entails "bringing something to the mine that was not there before." Dkt. no. 4 at 4.

Not only does her conclusion misread the arbitral precedent, it is illogical. The defining characteristic of construction work is not whether there was something previously in the location of the construction, but whether the construction "brings something new to the mine which had not existed prior to the performance of the work in question." See Consol–McElroy Coal Co. , Case No. D–971AI–9. Moreover, by concluding that work cannot be considered construction where coal previously was located, the Arbitrator effectively rendered all work below the surface to be repair and maintenance work—regardless of its true nature.[10]

10 Nor does the Arbitrator's conclusion that the installation of the pumpable crib pillars was maintenance of the roof make practical sense. One could not credibly argue that an underground pipe is maintaining the earth above it, or that the foundation walls of a building are maintaining the earthen walls surrounding it. Of course, deeming the work maintenance was the only way the Union could have recovered given its

> concession that union employees were working no less than five days per week.
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Clearly, the installation of the pumpable crib bags, indeed the installation of the finished support pillars in toto , is construction work. Not only does this conclusion comport with the overwhelming arbitral precedent and the plain language of the CBA, and is consistent with the Court's objective of "ensur[ing] that commercial arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties." PPG Indus. , 587 F.3d at 654 (quoting First Options of Chicago, Inc. v. Kaplan , 514 U.S. 938, 947, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)).

807 *807 Past arbitral decisions, which are "equally a part of the collective bargaining agreement although not expressed in it," remove any doubt that the work in question here was construction work. United Steelworkers of America v. Warrior & Gulf Nav. Co. , 363 U.S. 574, 581–82, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). To allow the Arbitrator to ignore such consistent arbitral precedent would eviscerate the holdings of Warrior & Gulf and Clinchfield that explicitly incorporate such precedent into the CBA. 363 U.S. at 581–82, 80 S.Ct. 1347 ; 556 F.Supp. at 530 Because the arbitral precedent forms the common law of the shop, which necessarily is part of their CBA, the parties should be able to rely on such precedent to guide their actions, which is exactly what the Company did in this case. See id. at 582, 80 S.Ct. 1347.

In conclusion, despite the extremely narrow scope of judicial review of arbitration decisions, the Arbitrator's Decision in this case "fail[ed] to draw its essence from the collective bargaining agreement," instead "reflect[ing] the arbitrator's own notions of right and wrong." Mountaineer , 76 F.3d at 608 (citing Misco , 484 U.S. at 38, 108 S.Ct. 364). Accordingly, the Court **VACATES** the Arbitrator's award **WITH PREJUDICE**.

B. The Damages Award in the Arbitrator's Supplemental Decision

Having concluded that the work at issue was construction work, the Court need not decide whether the amount of damages calculated in the Arbitrator's Supplemental Decision (dkt. no. 4–1) was arbitrary or capricious. Nonetheless, because the Company has presented this argument in its motion for summary judgment, the Court will turn briefly to the issue.

Had the work in question been maintenance work, it would have been under the exclusive jurisdiction of the union employees, and the Arbitrator would have been fully within her authority to award the damages she did. See Brown & Pipkins, LLC v. Service Employees Int'l Union , 2017 WL 280733, at *7, 846 F.3d 716 (4th Cir. 2017) (noting that "we give arbitrators wide latitude to formulate remedies" (citing Enterprise Wheel , 363 U.S. at 597, 80 S.Ct. 1358)). This includes her finding that, even though the employees were working five days a week, they would have been able to procure overtime to perform the work. See Consolidation Coal Co. v. United Mine Workers of America Dist. 31, Local Union 1702 , 2013 WL 4758601, at *5 (N.D.W.Va. 2013) (noting that it was "within the scope of the arbitrator's authority" to award damages, including finding that the work would have eventually been done by union employees on overtime).

Therefore, to the extent it was necessary for the Arbitrator to calculate an award of damages to the Union, which the Court concludes it was not, the Arbitrator's Supplemental Decision clearly weighed the competing labor time estimates and, regardless of whether there may have been a more accurate formula, her calculation should remain undisturbed. Had the work in question actually been repair or maintenance, the amount of the Arbitrator's award would have drawn its essence from the CBA, and there would be no basis to overturn the calculation. See Baltimore Regional

Joint Bd. v. Webster Clothes, Inc. , 596 F.2d 95, 98 (4th Cir. 1979) ("[The Arbitrator's] award is legitimate only so long as it draws its essence from the collective bargaining agreement ...." (quoting Enterprise Wheel , 363 U.S. at 597, 80 S.Ct. 1358)).

V. CONCLUSION

For the reasons discussed, the Court **DENIES** the Union's motion for summary judgment (dkt. no. 808 13), **GRANTS** the Company's *808 motion for summary judgment (dkt. no. 15), **VACATES** the Arbitrator's award, and **ORDERS** this case stricken from the Court's active docket.

It is so **ORDERED**.

The Court directs the Clerk to transmit copies of this Memorandum Opinion and Order to counsel of record and to enter a separate judgment order.

No. 15-3668
United States Court of Appeals For the Seventh Circuit

Unite Here Local 1 v. Hyatt Corp.

862 F.3d 588 (7th Cir. 2017)
Decided Jul 6, 2017

No. 15-3668

07-06-2017

UNITE HERE LOCAL 1, Plaintiff-Appellee, v. HYATT CORPORATION, doing business as Hyatt Regency Chicago, Defendant-Appellant.

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Rovner, Circuit Judge.

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Before Wood, Chief Judge, and Kanne and Rovner, Circuit Judges.

Rovner, Circuit Judge.

Defendant Hyatt Corporation, doing business as Hyatt Regency Chicago ("Hyatt" or the "hotel"), appeals the district court's entry of judgment on the pleadings in favor of plaintiff Unite Here Local 1 ("Local 1"), confirming the decisions of two arbitrators in Local 1's favor. *Unite Here, Local 1 v. Hyatt Corp.* , 2015 WL 7077329 (N.D. Ill. Nov. 13, 2015). Hyatt contends that the matter is either moot or does not present an appropriate case for confirmation of the awards, and that the district court's decision to confirm the awards needlessly interjects the court into an ongoing set of disputes between itself and Local 1 that should be resolved by way of further arbitration. We disagree and affirm the judgment. The district court's modest action in confirming the awards places the court's contempt power behind the prospective relief ordered by the arbitrators, while reserving the merits of any pending or future grievances for arbitration. Indeed, Local 1 has conceded that any contempt petition would be based solely on the outcome of arbitrations post-dating the district court's confirmation order. Consequently, we are not convinced that the court's decision to confirm the two awards in any

way undermines the parties' agreement to resolve their disputes through arbitration. We therefore affirm the district court's decision.

I.

The Hyatt Regency Chicago is a convention hotel with over 2,000 guest rooms, five ballrooms, and between 80 and 100 meeting and event rooms. It employs approximately 1,200 people, 850 of whom are hourly employees belonging to the union. Local 1 represents the members of the bargaining unit, who include door and bell
591 attendants; switchboard operators; room, *591 house, and public area housekeeping attendants; linen throwers and attendants; food and beverage hostesses, servers, bussers, cooks, bartenders, and cafeteria attendants; convention housemen; and various other workers. The size of the hotel's facilities and workforce enable it to host up to 10,000 guests at a time and thus to handle some of the city's largest professional conclaves and other gatherings.

Hyatt and Local 1 are parties to a longstanding collective bargaining agreement, the current version of which is effective from September 1, 2013 through August 31, 2018 (the "CBA" or "agreement"). Section 56 of that agreement prohibits the hotel's 140 managerial employees from performing work normally performed by bargaining-unit employees absent an emergency. R.1-1 at 48.[1] Section 46 of the CBA sets forth a multi-step grievance procedure for the resolution of disputes between the parties, and section 45 provides for the arbitration of any disputes over the interpretation or alleged violations of any terms of the agreement not resolved by the grievance procedure. In the second half of 2013 and the first part of 2014, there were a number of incidents in which managers performed bargaining-unit work in circumstances that Local 1 did not regard as emergencies. The union took two sets of grievances on that subject to arbitration in the Fall of 2014, both of which resulted in awards in Local 1's favor.

1 Section 56 states in full: "Supervisory personnel shall not perform work normally performed by bargaining-unit employees except in cases of emergency." R. 1-1 at 48.

In an award dated February 2, 2015, arbitrator George R. Fleischli found that Hyatt had violated section 56 by permitting managers to perform work normally done by housemen in the convention services department of the hotel. Housemen perform the tasks necessary to set up meeting rooms and ball rooms for the particular types of events scheduled for those rooms: they bring the appropriate types of tables into the rooms, arrange chairs around them, place linens on the tables if necessary, establish water and refreshment stations, and set up any podiums, stages, or dance floors that might be required. When an event has concluded, they then break down the room and set it up for the next event. Local 1 alleged that on some 17 occasions from September 2013 through June 2014, supervisors took on tasks that they should have left to housemen, including: setting up tables, replacing tables that had already been set up, straightening or adjusting chairs, placing drinking glasses on tables, setting up or moving special "highboy" cocktail tables, breaking down tables, stacking chairs, cleaning up trash, and so forth.

As a threshold matter, arbitrator Fleischli rejected the hotel's dual contentions that there was an established practice of "shared work" between housemen and supervisors that envisioned them both working side by side as necessary to set up and break down event rooms and, relatedly, that the individuals supervising housemen were "working supervisors" whose job responsibilities included pitching in as necessary to complete tasks. The evidence, in the arbitrator's view, simply did not support the existence of a consistent practice in either respect. (In the concluding section of his decision, he did allow that there had been lax enforcement of section 56 in the convention services department of the hotel

for many years which had effectively permitted supervisors in that department to violate the rule unchecked.)

On examining the terms of section 56, arbitrator Fleischli concluded that it was not self-evident what constituted an "emergency" that would
592 permit supervisors to *592 step in and perform tasks that were otherwise assigned to housemen. He rejected Hyatt's contention that the term should be defined simply as a set of unforeseen circumstances. Having weighed the parties' competing arguments on this point, Fleischli concluded that an "emergency" was properly defined as unforeseen circumstances that require immediate action, including in particular the need for the hands-on intervention of supervisors when bargaining-unit members are not reasonably available to take care of the urgent task at hand.

Ultimately, arbitrator Fleischli found that the union's grievances were arbitrable (*i.e.* , properly preserved and presented for decision) as to five of the incidents cited, and he concluded that Hyatt had violated section 56 in three of those incidents. The proven violations were relatively minor, in his view, but at least in the first two of the incidents, they were not de minimis. Fleischli declined to order make-whole relief in the form of backpay given the history of lax enforcement of section 56 in the department, but he did order Hyatt to cease and desist from further violations of section 56 and to take such steps as were necessary to ensure that hotel managers complied with the provision in the future.

In a second award dated March 1, 2015, arbitrator Ann S. Kenis likewise found that Hyatt had violated section 56 on multiple occasions. Arbitrator Kenis addressed a broader range of circumstances than had her colleague. She was presented with two grievances. The first involved supervisors doing work normally performed by bell attendants (also know as bellmen), including the receipt and storage of guest luggage, retrieving checked bags for guests, and loading luggage into guest vehicles. These incidents occurred in the Fall of 2013. The second, more general grievance involved bargaining-unit employees from multiple hotel departments and was based on supervisors performing any number of tasks (beginning on or about March 13, 2014 and continuing thereafter), including: cleaning (*e.g.* , mopping or sweeping floors, using mechanical ride-on "chariots" to clean ballroom or public area carpets, cleaning the front doors of the hotel, and emptying trash cans in public areas); serving guests in the hotel restaurants, café, and employee cafeteria (*e.g.* , seating guests, pouring drinks, making coffee, bussing tables, stocking the buffet, handing out condiments, working the cash register, wiping counters); transporting food, beverages, and dishes to and from ballroom banquets; loading soiled linens into the hotel laundry chute; and helping to clear rooms after events (*e.g.* , picking up trash, removing special items like ice sculptures, and so on).

Upon review of the evidence and the parties' arguments as to the proper construction of section 56, arbitrator Kenis agreed with arbitrator Fleischli as to certain key points. First, she found insufficient evidence to support Hyatt's contention as to a practice of shared work responsibilities between bargaining-unit employees and their supervisors or as to a practice of "working supervisors" who routinely pitched in to help the line employees they supervised. Second, she agreed with her colleague that the term "emergency" connotes more than just unforeseen circumstances, as Hyatt had suggested. Kenis noted that in the arbitration context, another arbitrator's interpretation of "emergency" was neither conclusive nor binding upon her. Yet, she believed that she should not disregard arbitrator Fleischli's reasoning absent substantially altered circumstances, which Hyatt had not established. In that regard, arbitrator Kenis noted that although Hyatt had attempted to convince her that there was
593 a longstanding, uniform *593 practice of managers doing bargaining-unit work whenever unforeseen

circumstances presented themselves, she regarded the hotel's proof on that point as being even weaker than the evidence presented to arbitrator Fleischli. Arbitrator Kenis therefore adopted her colleague's definition of emergency.

Turning to the evidence presented to her, arbitrator Kenis found that there were only a few genuine emergencies involving unforeseen circumstances coupled with a need for immediate action: One involved a pipe leaking water into a ballroom; the second involved a large professional conference and a shortage of staff members to handle all tasks despite management's efforts to summon additional workers; and the third involved scraping gum from pavement at the entrance to the hotel immediately prior to a VIP's arrival. Beyond those incidents, Hyatt had either failed to establish that there was a genuine emergency requiring immediate action as it claimed, or the facts showed that supervisors were simply pitching in to perform mundane, bargaining-unit tasks as a matter of course (in some instances, for hours at a time) without first ascertaining whether there was a bargaining-unit employee available to handle the task in question.

Arbitrator Kenis thus concluded that Hyatt had transgressed section 56 in all but the isolated instances in which she found there had been a true emergency. She rejected the hotel's suggestion that the violations were de minimis, reasoning that even if that characterization applied to certain individual incidents, "there is a cumulative pattern shown on this record that requires a remedy." R. 1-3 at 50. In this respect, she viewed the evidentiary record as being significantly different from the one presented to arbitrator Fleischli. Arbitrator Kenis therefore concluded that make-whole relief in the form of backpay (at an overtime rate) was appropriate to compensate the union for the time supervisors had spent performing bargaining-unit tasks. Like arbitrator Fleischli, she also ordered Hyatt to cease and desist from future violations of section 56.

Hyatt allowed 90 days to pass without filing a petition to vacate either of the awards in federal court;[2] the union, however, pursuant to section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), filed a petition in the district court to confirm the two awards. In its complaint, the union alleged that Hyatt "has failed and refused and continues to fail and refuse to comply with or otherwise be bound by" the Fleischli and Kenis awards. R. 1 at 3 ¶¶ 16, 18. In support of that contention, Local 1 cited some 41 examples of managers allegedly performing bargaining-unit work in February through May of 2015, after the two arbitrators had ordered Hyatt to cease and desist from further violations of section 56. R. 1 at 3–7 ¶ 19. (These incidents constitute the same alleged 41 violations of section 56 pending between the parties, and working their way through the contractual grievance and arbitration procedure, that we refer to elsewhere in this opinion.)*594 The parties filed cross-motions for judgment on the pleadings, and Judge Gettleman ultimately granted judgment on the pleadings in favor of Local 1.[3] Among other things, he noted that Hyatt had not timely challenged the awards, rendering them final and beyond review. 2015 WL 7077329, at *2 n.1. In any case, he reasoned, the awards drew their essence from the CBA and were therefore valid. *Id.* , at *2. He rejected Hyatt's contention that confirmation of the awards was foreclosed by this court's decisions in *United Elec. Radio & Mach. Workers of Am. v. Honeywell, Inc.* , 522 F.2d 1221, 1225-27 (7th Cir. 1975), and *Local 1545, United Mine Workers of Am. v. Inland Steel Coal Co.* , 876 F.2d 1288, 1294-97 (7th Cir. 1989). He pointed out that the unions in those cases were attempting to bypass the arbitration process and give prospective effect to arbitration awards that contained only backward-looking, make-whole remedies. This court held that a union could do this only if it met certain criteria. The arbitration awards in this case, by contrast, expressly granted prospective relief in the form of cease-and-desist orders. "Nothing in *Honeywell* or *Inland Steel*

suggests that an arbitration award granting prospective relief cannot be confirmed," Judge Gettleman reasoned. "Indeed, they both suggest just the opposite." 2015 WL 7077329, at *3 (N.D. Ill. Nov. 13, 2015).

[2] The limitations period for filing a motion to vacate an arbitration award is borrowed from state law, and the Illinois Uniform Arbitration Act specifies a period of 90 days for such a request. 710 Ill. Comp. Stat. 5/12(b) ; *see, e.g.*, *Int'l Union of Operating Eng'rs, Local 150, AFL-CIO v. Centor Contractors, Inc.*, 831 F.2d 1309, 1311–12 (7th Cir. 1987). An action to confirm an arbitration award, on the other hand, is subject to a much more generous limitations period of five years in Illinois. *See* 735 Ill. Comp. Stat. 5/13-205 ; *Peregrine Fin. Grp., Inc. v. Futronix Trading Ltd.*, 401 Ill.App.3d 659, 341 Ill.Dec. 147, 929 N.E.2d 1226, 1227–28 (2010).

[3] Hyatt's motion alternatively asked the court to compel arbitration of the new disputes regarding section 56, a request that the district court denied. In the course of briefing the motions for judgment on the pleadings, Hyatt also asked the court to convert Local 1's motion into one for summary judgment pursuant to Federal Rule of Civil Procedure 12(d). The court likewise denied that request, finding it unnecessary to resort to matters outside of the pleadings in order to resolve the motion.

Hyatt filed a motion to stay the district court's judgment pending appeal. Hyatt raised two principal concerns about the court's order of confirmation. First, to the extent the order was viewed as an injunction (in that it confirmed the cease and desist commands entered by the arbitrators), the order gave Hyatt no notice of the duties imposed on it—*i.e.* , no description of the particular acts from which Hyatt was obligated to refrain. Essentially, the court, like the arbitrators, had merely told Hyatt, "Do not violate the contract." Hyatt was concerned that the lack of specifics placed it at undue risk of contempt sanctions. Second, in Hyatt's view, confirmation of the two awards had given the union the means to bypass the grievance and arbitration procedure set forth in the CBA by enabling the union to seek contempt sanctions for new violations of section 56. Rather than seeking a determination from an arbitrator as to new grievances, the union could simply seek a contempt finding from the district court. Given the nature of the hotel's business—including the variety of events it hosted, guest demands, and the unforeseen circumstances that may occur—Hyatt anticipated that the parties might be in front of the court on a regular basis.

At the hearing on Hyatt's motion, both the district court and the union contradicted the twin premises of the request for a stay. The district court pointed out that it had entered no injunction. It had done no more than confirm the two arbitration awards. To the extent Hyatt believed the cease and desist aspects of those awards gave it insufficient guidance as to what specific acts were prohibited, that would be a matter for the court to consider at a later contempt proceeding. Secondly, the court rejected the notion that confirmation gave the union license to bypass arbitration and bring future grievances directly to court by way of a
595 contempt petition. The *595 union's counsel expressly agreed with the court: Any pending and future grievances would be resolved by way of arbitration, she represented. The union had no immediate plans to file a contempt petition, and any such petition would be based on the outcome of future arbitrations post-dating the confirmation of the Fleischli and Kenis awards. R. 54.

With those points having been clarified, Hyatt withdrew its stay motion without prejudice. It proceeded with this appeal, contending that the court erred in confirming the awards.

II.

We review the district court's decision to enter judgment on the pleadings in favor of Local 1 de novo. *E.g.* , *Gill v. City of Milwaukee* , 850 F.3d 335, 339 (7th Cir. 2017). Judgment on the pleadings is appropriate when there are no disputed issues of material fact and it is clear that the moving party, in this case Local 1, is entitled to judgment as a matter of law. *E.g.* , *Nat'l Fidelity Life Ins. Co. v. Karaganis* , 811 F.2d 357, 358 (7th Cir. 1987). In reviewing the judgment, we, like the district court, are confined to the matters presented in the pleadings, and we must consider those pleadings in the light most favorable to Hyatt. *Id.*

Section 301 of the LMRA grants federal courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce," § 185(a),[4] and this jurisdiction is understood to include a request to enforce (or vacate) an award entered as a result of the procedure specified in a collective bargaining agreement for the arbitration of grievances. *See United Steelworkers of Am. v. Enter. Wheel & Car Corp.* , 363 U.S. 593, 595–96, 80 S.Ct. 1358, 1360, 4 L.Ed.2d 1424 (1960) ; *Evans v. Einhorn,* 855 F.2d 1245, 1253 (7th Cir. 1988) (per curiam).

[4] The grant of jurisdiction is not exclusive: state courts have concurrent jurisdiction over section 301 suits. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962).

The Supreme Court has repeatedly recognized the central role that arbitration plays in national labor policy:

> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to a collective bargaining agreement.

United Steelworkers of Am. v. Warrior & Gulf Navigation Co. , 363 U.S. 574, 581, 80 S.Ct. 1347, 1352, 4 L.Ed.2d 1409 (1960) ; *see also United Steelworkers of Am. v. Am. Mfg. Co.* , 363 U.S. 564, 566–69, 80 S.Ct. 1343, 1346–47, 4 L.Ed.2d 1403 (1960) ; *Enter. Wheel & Car* , 363 U.S. at 596, 80 S.Ct. at 1360. More fundamentally, arbitration supplies the parties with a constructive means of resolving their disputes: "It, rather than a strike, is the terminal point of a disagreement." *Warrior & Gulf Navigation* , 363 U.S. at 581, 80 S.Ct. at 1352. When Congress conferred jurisdiction on the federal judiciary over disputes arising under collective bargaining agreements, it meant for us to support and reinforce, rather than displace, the arbitration process:

596 *596

> Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, [section 301] does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.

Textile Workers Union of Am. v. Lincoln Mills of Ala. , 353 U.S. 448, 455, 77 S.Ct. 912, 917, 1 L.Ed.2d 972 (1957) ; *see also Am. Mfg. Co.* , 363 U.S. at 569, 80 S.Ct. at 1347 (forbidding courts from independently evaluating merits of grievances under guise of interpreting contractual grievance procedure); *Enter. Wheel & Car* , 363 U.S. at 596, 80 S.Ct. at 1360 ("The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."). Thus, where appropriate, courts will compel the arbitration of disputes that the parties have contractually committed to arbitration, *e.g.* , *Lincoln Mills* , 353 U.S. at 456–59, 77 S.Ct. at 917–19, and, as relevant here, enforce awards resulting from arbitration as a means of affording parties complete relief, *see Enter. Wheel & Car* , 363 U.S. at 595–96 & n.1, 80 S.Ct. at 1360 & n.1 (citing *Textile Workers Union of Am. v. Cone Mills Corp.* , 268 F.2d 920 (4th Cir. 1959)); *id.* at 599, 80 S.Ct. at 1362 ; *Evans* , 855 F.2d at 1253. Confirmation of an arbitration award places the weight of a court's contempt power behind the award, *see* , *e.g.* , *Chrysler Motors Corp. v. Int'l Union, Allied Indus. Workers of Am., AFL-CIO* , 909 F.2d 248, 249–50 (7th Cir. 1990), giving the prevailing party a means of enforcement that an arbitrator would typically lack. *See Lincoln Mills* , 353 U.S. at 455, 456, 77 S.Ct. at 917 (congressional purpose in enacting section 301 "to provide the necessary legal remedies" and "place[ ] sanctions behind agreements to arbitrate grievance disputes").

Against the backdrop of ongoing disputes over supervisors doing bargaining-unit work, Local 1 sought confirmation of the Fleischli and Kenis awards in order to preserve its ability to seek contempt sanctions if Hyatt, contrary to the arbitrators' cease and desist directives, committed additional violations of section 56. As we turn to the merits of that request, a few prefatory remarks are in order.

This case differs from the usual proceeding seeking to confirm or vacate an arbitration award in that it involves awards ordering open-ended prospective relief, as opposed to backward-looking make-whole relief, such as an award of lost wages, *e.g.* , *Dexter Axle Co. v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. 90, Lodge 1315* , 418 F.3d 762 (7th Cir. 2005), or finite forward-looking relief, such as the reinstatement of an employee whom the arbitrator has found to have been wrongfully discharged, *e.g.* , *Chrysler Motors Corp. v. Int'l Union, Allied Indus. Workers of Am., AFL-CIO* , 959 F.2d 685 (7th Cir. 1992). In both of the cases at issue here, the arbitrators ordered Hyatt to cease and desist from further violations of the CBA term they had interpreted and applied. Hyatt equates confirmation of that kind of order with prospective enforcement of an arbitration award in a manner that will disrupt, and potentially supplant, the grievance-and-arbitration procedure that the parties have incorporated into their agreement. When a party asks that an award be enforced prospectively, it is typically asking the court to apply the arbitrator's holding to a later dispute that has not been submitted to arbitration. Often the specific relief requested is the entry of declaratory or injunctive relief that dictates the resolution of the new dispute in harmony with the
597 arbitrator's prior ruling. *597 *E.g.* , *Honeywell* , *supra* , 522 F.2d at 1224–25. That type of relief places the court in the position of regulating the parties' conduct directly in lieu of having a second arbitrator resolve the merits of the later dispute. The prospective enforcement of arbitration awards is thus a matter that we approach with great caution, as evidenced by our decisions in *Honeywell* and *Inland Steel Coal* . *See Honeywell* , 522 F.2d at 1225 (noting extraordinary nature of request to prospectively enforce prior arbitration award to unarbitrated disputes); *Inland Steel* , 876 F.2d at 1293–94 (surveying high bars other circuits have posted to prospective enforcement); *see also Consol. Coal Co. v. United Mine Workers of Am., Dist. 12, Local Union 1545* , 213 F.3d 404, 406 (7th Cir. 2000) ("courts are reluctant to issue

labor injunctions"); *AG Commc'n Sys. Corp. v. Int'l Bhd. of Elec. Workers, Local Union No. 21* , 2005 WL 731026, at *10 n.7 (N.D. Ill. Mar. 28, 2005) (noting that "AGCS has not pointed to any cases in which the Seventh Circuit has prospectively applied an arbitration award as a bar to future grievances"). Specifically, courts have expressed a concern that prospective enforcement of an arbitration award will effectively nullify the parties' agreement to resolve their disputes by way of arbitration. *See Inland Steel Coal* , 876 F.2d at 1296 ; *Honeywell* , 522 F.2d at 1225. The premise of Hyatt's challenge to the district court's decision is that confirmation of the Fleischli and Kenis awards will produce that very result, in that confirmation invites the union to bring future disputes under section 56 directly to the court by way of a contempt petition, such that the court will be required to pass on such fact-intensive (and industry-specific) questions as whether there was an emergency justifying hotel managers in performing bargaining-unit work in particular instances—questions of the sort that normally would and should be resolved by an arbitrator. If that were the course of action that the union envisioned in requesting confirmation of the awards, then we would agree that confirmation presents the potential concerns about prospective enforcement that prior cases have expressed. But the precise relief that Local 1 has sought is more modest than Hyatt's challenge would suggest.

As below and again in its brief on appeal, the union has disavowed any attempt to bypass arbitration as to the additional 41 purported violations of section 56 pending between itself and Hyatt. Local 1 represents that it will arbitrate not only those incidents, but any future grievances post-dating the court's confirmation order. Only if Local 1 prevails in arbitrations concerning the latter set of grievances might the union seek contempt sanctions. In short, before Local 1 seeks contempt sanctions, the merits of any grievances underlying the contempt petition will have already been arbitrated; the court's role will be limited to deciding whether the union is entitled to the additional remedy of contempt sanctions based on the arbitrator's (or arbitrators') findings. That is the understanding on which the district court granted confirmation, and that is the understanding on which we evaluate the court's decision to confirm the Fleischli and Kenis awards.

The issue as presented to us is therefore a narrow one, as is our holding. As we explain below, the facts of this case readily distinguish it from the cases Hyatt relies upon to show that confirmation of the two awards was improper as a matter of law. We need not find more than that in order to sustain the district court's decision. Our holding today is naturally dependent on the particular facts and arguments presented to us. As in prior decisions, we abstain from an effort to look beyond the circumstances of this case and
598 articulate a *598 comprehensive standard as to when prospective enforcement of an arbitration award might or might not be warranted, and what types of relief might be appropriate when it is. *See Inland Steel Coal* , 876 F.2d at 1296 ; *Honeywell* , 522 F.2d at 1225.[5]

[5] Confirmation of the Fleischli and Kenis awards was decided on the pleadings, and Hyatt (despite one isolated reference in its briefs to the district court's "discretion, " *see* Hyatt opening brief at 8) has framed its appeal as presenting errors of law rather than of discretion in confirming the awards. We address its arguments on these terms. To the extent one might treat as two distinct issues the question whether a labor arbitration award is *eligible* for confirmation, in the sense that it meets the usual criteria for confirmation, *see infra* at 600–01, and the question whether it *should* be confirmed as a prudential matter, we have not been asked to draw such distinctions and to consider whether they are subject to different standards of review. We leave such matters for another day.

Hyatt initially attacks the judgment on the ground that there was and is no Article III case or controversy for a court to resolve. *See* U.S. CONST. art. III, § 2. Hyatt points out that it did not challenge either of the two arbitration awards and that once the time for doing so had passed, the awards were final and binding. *See McKinney Restoration Co. v. Ill. Dist. Council No. 1 of Int'l Union of Bricklayers & Allied Craftworkers, AFL-CIO* , 392 F.3d 867, 869 (7th Cir. 2004) (citing, inter alia, *Int'l Union of Operating Eng'rs, Local 150, AFL-CIO v. Centor Contractors, Inc.* , *supra* n.2, 831 F.2d at 1311); *see also Wm. Charles Constr. Co. v. Teamsters Local Union 627* , 827 F.3d 672, 678 (7th Cir. 2016) ("A failure to challenge an arbitration award within the applicable limitations period renders the award nearly impervious to attack."). Hyatt purports to accept both awards as valid and binding upon itself.[6] Consequently, Hyatt reasons, confirmation of the awards would accomplish nothing. If, as Local 1 represents, it is not seeking preemptive relief as to the additional disputes now being resolved through the grievance and arbitration process, then, in Hyatt's view, the union is not asking for anything that Hyatt has not already given it by accepting the first two awards without challenge. *Cf. Derwin v. Gen. Dynamics Corp.* , 719 F.2d 484, 491 (1st Cir. 1983) (questioning wisdom of court placing its imprimatur on arbitration award in "a factual vacuum").

6 In support of that representation, Hyatt submitted the affidavit of its director of labor relations detailing various steps that the company has taken in order to comply with the arbitrators' directive that it cease and desist failing to comply with section 56. The affidavit was one of the extra-pleadings materials that the district court declined to consider when it denied Hyatt's request to convert the union's motion for judgment on the pleadings into a motion for summary judgment.

We are satisfied that there is a live controversy between the parties. Hyatt's decision to forego a challenge to either award may render both awards final, but that does not mean that confirmation of the awards can provide nothing of value to the union. *Cf. Ozinga v. Price* , 855 F.3d 730, 734 (7th Cir. 2017) (case becomes moot when the source of the plaintiff's prospective injury has been removed and there is no longer any effective relief that the court can order) (collecting cases). Confirmation renders the awards judicially enforceable by way of contempt sanctions, as both parties recognize. Indeed, much of Hyatt's briefing is devoted to arguing why it is inappropriate to make that weapon available to the union. And although Hyatt purports to accept the awards as binding, there is plainly a live dispute about whether Hyatt is in fact acting in compliance with the awards. The 41 pending alleged violations of section 56 demonstrate that *599 there is an ongoing controversy about the use of managers to perform bargaining-unit work.[7] Of course, the parties agree that the merits of those disputes must be resolved through the contractual grievance and arbitration process. But the existence of the additional disputes demonstrates that the parties remain at odds as to what section 56 means and whether Hyatt is complying with the section. That is sufficient to distinguish this case from others in which courts have dismissed a request to confirm an arbitration award for want of a "live and actual dispute between the parties." *See Chicago Reg. Council of Carpenters v. Onsite Woodwork Corp.* , 2012 WL 6189635, at *4 (N.D. Ill. Dec. 12, 2012) (collecting cases); *cf. Buffalo Forge Co. v. United Steelworkers of Am., AFL-CIO* , 428 U.S. 397, 403 n.8, 96 S.Ct. 3141, 3146 n.8, 49 L.Ed.2d 1022 (1976) ; *CSX Transp., Inc. v. Bhd. of Maint. of Way Employees* , 327 F.3d 1309, 1319–20 (11th Cir. 2003) ; *cf.* 13C C. Wright, A. Miller, & E. Cooper, FED. PRAC. & PROC. § 3533.3.1, at 116 (3d ed. 2008) (noting that "[l]abor disputes ... provide clear illustration of the private disputes that are preserved from mootness by the prospect of future repetition"). The Fleischli and Kenis

awards are relevant to those disputes in that they address what constitutes a genuine emergency permitting managers to perform such work; the awards also expressly impose an obligation on Hyatt to comply with their holdings by ordering the company to cease further violations. Confirmation gives teeth to these awards by exposing Hyatt to the prospect of contempt sanctions if it does not comply under circumstances sufficiently similar to those resolved by the two arbitrators. Absent confirmation, the union has no remedy in litigation if Hyatt chooses to ignore them: the awards are not binding in future arbitrations (although arbitrator Kenis elected to follow arbitrator Fleischli's reasoning, she recognized that she was not necessarily obliged to do so),[8] and the union would not have the option of seeking contempt sanctions from the district court. Whether and when such sanctions might be appropriate obviously is a question that the district court would have to resolve when presented with a request to find Hyatt in contempt. The only question that we need to answer for purposes of our jurisdiction is whether there remains a live
600 *600 case or controversy between the parties, and we have concluded that there is.[9]

[7] In its answer to the complaint, Hyatt professed ignorance as to the factual allegations underlying these additional purported violations (R. 9 at 11 ¶ 19), but the appellate briefs make clear that there is no dispute as to the fact that Local 1 has raised these alleged violations with Hyatt and that the parties have initiated the contractual grievance process to address the incidents in question.

[8] Generally speaking, the matter of a prior arbitration's preclusive effect on a later arbitration is one for the arbitrator himself or herself to address, as arbitrator Kenis's award itself reflects. *See Trustmark Ins. Co. v. John Hancock Life Ins. Co. (U.S.A.)*, 631 F.3d 869, 874 (7th Cir. 2011) ("Arbitrators are entitled to decide for themselves those procedural questions that arise on the way to a final disposition, including the preclusive effect (if any) of an earlier award."); *Lindland v. U.S.A. Wrestling Ass'n*, 230 F.3d 1036, 1039 (7th Cir. 2000) ("[a]rbitrators need not follow judicial notions of issue and claim preclusion"); *Consol. Coal Co.*, *supra*, 213 F.3d at 407 (preclusive effect of prior arbitrations is matter of contract rather than law: "If the parties to the collective bargaining agreement want the first arbitrator's interpretation of a provision of the agreement or resolution of a dispute arising under the agreement to have preclusive effect, they can so provide; and whether they do so or not, the question of the preclusive force of the first arbitration is, like any other defense, itself an issue for a subsequent arbitrator to decide.") *Indep. Lift Truck Builders Union v. NACCO Materials Handling Grp., Inc.*, 202 F.3d 965, 968 (7th Cir. 2000) ("the preclusive effect of the first arbitrator's decision is an issue for a later arbitrator to consider") (internal quotation marks and citations omitted).

[9] Recognizing that there is a live controversy between the parties as to Hyatt's compliance with the two arbitration awards does not require us to resolve a disputed point of fact and assume that Hyatt is indeed violating the awards. We assume only that there is an ongoing dispute as to Hyatt's compliance with section 56 and the two awards, and the existence of that dispute is confirmed by the 41 pending alleged violations.

We should note at this point that nearly all of the circumstances material to the union's right to confirmation of the two arbitration awards are undisputed. There is no dispute that Hyatt and Local 1 are parties to a collective bargaining agreement; that the agreement sets forth a grievance and arbitration procedure for resolution of disputes between the parties; that disagreements

over the proper understanding and application of section 56 of the agreement are within the scope of the parties' agreement to arbitrate their disputes; that the parties did in fact engage in arbitration over instances in which managers performed tasks normally performed by bargaining-unit members; that those arbitrations culminated in the two awards at issue here; that the arbitrators examined the relevant provisions of the CBA in rendering their decisions; and that Hyatt did not timely pursue a challenge to either of the two awards. So, although there are, to be sure, some points of contention between the parties—in particular, whether Hyatt is in good faith endeavoring to comply with the awards and with section 56—they dispute no point relevant to the validity of the two awards.

Judicial review of a labor arbitration award typically is confined to the narrow question of whether the arbitrator's reasoning draws its essence from the parties' agreement. *Enter. Wheel & Car Corp.* , 363 U.S. at 597, 80 S.Ct. at 1361 ; *see also W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.* , 461 U.S. 757, 764, 103 S.Ct. 2177, 2182, 76 L.Ed.2d 298 (1983) ; *U.S. Soccer Fed'n, Inc. v. U.S. Nat'l Soccer Team Players Ass'n* , 838 F.3d 826, 831–32 (7th Cir. 2016). By not pursuing a petition to vacate the awards, Hyatt waived even that limited review. *See* , *e.g.* , *Teamsters Local No. 579 v. B & M Transit, Inc.* , 882 F.2d 274, 276–78 (7th Cir.1989). Notwithstanding the waiver, Judge Gettleman, in view of the fact that Hyatt challenged the propriety of confirmation, examined the two awards and was satisfied that both drew their essence from the agreement. 2015 WL 7077329, at *2. Hyatt does not contend otherwise on appeal. On the threshold question of whether the awards were eligible for confirmation, then, there was no error in the district court's decision to grant judgment on the pleadings in Local 1's favor.

Hyatt contends nonetheless that it is inappropriate for a court to intervene in the ongoing dispute between itself and the union by confirming the awards and thereby laying the groundwork for contempt sanctions. The contractual dispute resolution process should be allowed to resolve the additional alleged violations of section 56, Hyatt argues, without the court placing a finger on the scale by giving the union leverage to seek contempt sanctions against Hyatt if it can convince the court that Hyatt has not complied with the cease and desist directives issued by the two arbitrators who resolved the initial grievances. For this argument, it relies on the line of cases we noted at the outset of our analysis which have cautioned against courts preempting the contractual grievance process by prospectively enforcing arbitration awards entered in a union's favor when there are ongoing disputes between
601 *601 the parties that would otherwise be resolved by way of further arbitration.

But we are not convinced that this is what the union has asked the court to do here. In the Fleischli and Kenis awards, Local 1 secured not only the backward-looking determination that Hyatt had violated section 56 on the particular facts confronting the arbitrators in those proceedings, but an articulation of a standard as to what constitutes a legitimate emergency, coupled with forward-looking relief ordering Hyatt to cease and desist from further violations. Whether the awards are clear enough to place Hyatt on notice of what actions, in what circumstances, are prohibited, *see Stotler & Co. v. Able* , 870 F.2d 1158, 1163 (7th Cir. 1989), is a separate matter to be resolved in a future contempt proceeding (if such a proceeding takes place). Yet we do not think that simple confirmation of the two awards is barred on the rationale that Hyatt has articulated.

To begin, this is not a case, like *Honeywell* , in which we concluded that the union was attempting to bypass the arbitration process by seeking declaratory and injunctive relief from the district

court that it could have sought from arbitrators but had not. At issue in *Honeywell* was the employer's purported ongoing failure to comply with a contractual provision barring (with limited exceptions) supervisors, foremen, and workers outside of the bargaining unit from engaging in work normally performed by unit members. The union already had prevailed in four arbitrations on that subject and the arbitrators had granted make-whole relief to the affected employees; but none of the awards had granted prospective relief to the union. The union, alleging that there were many other instances of the employer violating the provision—some number of which were still working their way through the contractual grievance process—filed a complaint asking the district court to enter declaratory relief that the employer was violating the collective bargaining agreement and injunctive relief requiring the employer to adhere to the contractual provisions regarding the proper assignment of work. We concluded that the union's complaint failed to state a cause of action for such extraordinary relief.

At the outset of our analysis, we noted the unusual nature of the union's case:

> The claim which the Union seeks to establish here is not the ordinary one. While there are numerous reported cases of parties seeking to force or enjoin arbitration or to enforce an arbitration award, it is most unusual to find a party seeking the right to bypass arbitration procedures which it is contractually bound to follow and which are concededly applicable to the particular incidents generating disputes. Although we do not foreclose the possibility that there might exist particularly egregious circumstances which, if alleged, might state a cause of action for relief from a contractual duty to arbitrate, it is our opinion that the allegations of the complaint before us are not sufficient to state such a cause of action.

522 F.2d at 1225.

We went on to identify at least three reasons why it would be inappropriate for the court to entertain the relief requested by the union. First, there was no showing that the union had sought to aggregate its multiple grievances into a single arbitration proceeding. *Id.* at 1226. Such aggregation would permit the union to establish that the employer was engaging in a course of conduct violating the contractual provision in question; and such a showing in turn might support the sort of broad declaratory and injunctive relief the union was seeking. *Id.* Second, in the four grievances *602 already taken to arbitration, the union had not asked the arbitrators themselves to grant declaratory and injunctive relief. *Id.* "[S]uch relief is not inherently beyond the capacity of an arbitrator to grant," *id.* , and there were any number of examples of courts sustaining arbitration awards granting such prospective relief, *id.* at 1226–27 (collecting authorities).[10] Third, the union had not alleged that "the factual basis of the four arbitration awards [already resolved] in its favor [was] so nearly identical to the facts of the pending grievances [not yet presented for arbitration] that the Company's conduct constitutes wilful and persistent disregard of the arbitration awards." *Id.* at 1227 ; *see id.* at 1226. To the contrary, "[e]ach [pending] grievance appears to arise out of entirely different facts." *Id.* at 1227. Thus, it was not at all clear that arbitrators were likely to resolve the additional grievances in the union's favor, or that any prospective relief the court might enter would answer the fact-specific questions posed by those grievances. *Id.* at 1227–28.

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10 *See also* R. Schoonhoven, Fairweather's Prac. & Proc. in Labor Arbitration § 15X, at 494–96 (4th ed. 1999) (summarizing various forms of injunctive relief arbitrators may enter, including cease and desist orders, and collecting cases).

Although the factual backdrop to this case certainly is similar to that in *Honeywell* , the limited nature of the relief sought and obtained by the union from the district court is not. In this case, the union was not attempting to bypass the arbitration process in order to obtain prospective relief that it could have, but did not, ask an arbitrator to enter. In both of the two arbitrations at issue here, the union asked for and was granted forward-looking cease and desist orders by the arbitrators. Also, in resolving the particular grievances presented to them, the arbitrators necessarily had to articulate what constitutes an emergency permitting a manager to perform bargaining-unit work. The awards thus gave the parties at least some guidance on what was and was not permitted, and it was in that context that Hyatt was ordered to refrain from further violations of section 56 in the future. Moreover, in seeking confirmation of the awards, the union did not ask for, and the district court did not grant, the sort of broad declaratory and injunctive relief that its counterpart asked for in *Honeywell* . Local 1 asked only that the court confirm the two arbitration awards entered in its favor, period. Although confirmation opens the door to a contempt proceeding at a later date, nothing that the district court did prejudges the outcome of such a proceeding. The union agrees that any unresolved disputes must wend their way through the contractual dispute resolution process, and that any request for contempt sanctions will be premised on future arbitration awards arising from grievances that post-date the district court's confirmation order. There is, therefore, no attempt to bypass the arbitration process, and we can discern no concrete impact that confirmation of these two awards will have on the outcome of that process.

Nor is this a case comparable to *Inland Steel Coal* . The union in that case had prevailed in successive arbitrations challenging the employer's decision to send workers home early in two instances, occurring five years apart, despite the availability of so-called "dead work" to occupy the workers. In both cases, the arbitrator had ordered compensatory relief only; in the second case, the union had asked for but did not obtain a cease and desist order from the arbitrator. When the employer sent workers home early for a third time five years after the second incident, the union filed
603 suit seeking specific enforcement *603 of the two arbitration awards—in other words, the union asked the court to apply those awards prospectively to resolve the new dispute between the parties rather than having an arbitrator do so.

The district court denied relief to the union, and we affirmed that decision. We noted first that neither of the arbitrators had included language in their awards directed to future action by the employer, "strongly" suggesting to us "that the arbitrators did not want the awards to apply prospectively," a conclusion reinforced by language in the collective bargaining agreement confining an arbitrator's authority to the particular dispute before him. 876 F.2d at 1295. And although the union had made a case for the notion that facts underlying the employer's latest transgression were substantially the same as those presented in the prior arbitrations, it had not alleged that the company's conduct amounted to "wilful and persistent disregard" of the prior awards. *Id.* at 1295–96. And "[a]s a matter of law, we do not believe that three isolated incidents of sending workers home early when ‘dead work’ is available over a ten year period constitutes ‘wilful and persistent disregard of the arbitration awards.’ " *Id.* at 1296. Likewise, we were not convinced that judicial intervention was necessary to bring an end to repetitive grievances and arbitrations over the same point, given the limited number of disputes involved. "In submitting [the third] grievance to an arbitrator, the union is free to argue that it has already submitted this same dispute to arbitration. In that way, the arbitrator can consider the fact that the dispute was previously arbitrated and decide for himself if he

believes that declaratory and injunctive relief is warranted by the facts of the case." *Id.* (citation omitted).

Here, again, the union is simply seeking to confirm prospective relief that it has already litigated and obtained from two arbitrators. The serial disputes between Hyatt and the union as to managers performing bargaining-unit work demonstrates that this is not, in contrast to *Inland Steel* , an isolated problem. So confirming the two prior awards may prove to have some utility. And, at the same time, Local 1 is not asking for a court to enforce the two awards preemptively so as to dispose of the merits of the additional disputes in a judicial forum; the union agrees that those disputes should instead be resolved through the contractual grievance and arbitration procedure.

In short, the circumstances of this case do not trigger the barriers to prospective enforcement articulated in *Honeywell* or *Inland Steel Coal* . Local 1 is not asking for the court to award forward-looking relief not already awarded in arbitration, nor is it seeking to bypass or preempt further arbitration between the parties. To be clear, we are not saying that a union's request to confirm a cease and desist award in its favor must always be as circumscribed as Local 1's is in this case. Our decision in *Honeywell* does not wholly foreclose the possibility that there might be circumstances in which a court properly could prospectively enforce an award in such a way as to preempt further arbitration on the same question. 522 F.2d at 1225, 1228. But we leave consideration of when that course of action might be appropriate for another case.

Hyatt pursues another challenge to confirmation that is based on prudential concerns. It likens this case to those that confronted the First Circuit in *Derwin v. Gen. Dynamics Corp.* , *supra* , and which led that court to caution against confirming a labor arbitration in a "vacuum." 719 F.2d at 491.

The union and the employer in *Derwin* had recurring disputes over the time off *604 owed to union stewards from their regular work so that they might investigate grievances and handle related union matters. The collective bargaining agreement specified an off-the-job pass system for this purpose, and the employer in turn had adopted a set of guidelines on the subject that the union opposed. An arbitrator upheld the guidelines and articulated certain principles regarding appropriate practices with respect to the passes. Three years after the arbitration award, when the employer and the union found themselves in the midst of some 17 grievances over the employer's failure to issue passes to stewards, the union filed suit seeking confirmation of the award. The district court dismissed the suit as untimely. The appellate court disagreed on that point but nonetheless upheld the judgment.

In the First Circuit's view, confirmation of the award was "unwarranted." *Id.* at 490. Although the union was seeking confirmation simpliciter, without contemporaneously asking for any declaratory, injunctive, or other prospective relief with respect to pending grievances, the court was concerned that such "paper" confirmation of the award (*id.*), because it opened the door to subsequent contempt proceedings, posed the risk of aggravating the parties' ongoing disagreement rather than facilitating its resolution. Where the parties have agreed to arbitrate their disputes, the court noted, established labor policy restricts the role of the federal judiciary; and courts had traditionally treated with skepticism requests to confirm a prior arbitration award in order to render the award binding in the context of a later, factually similar dispute. *Id.* at 491. "Only where an arbitral award is both clearly intended to have prospective effect and there is no colorable basis for denying the applicability of the existing award to a dispute at hand, will a court order compliance with the award rather than require the parties to proceed anew through the contract grievance procedure." *Id.* The union was asking the court to

effectively bifurcate a typical enforcement proceeding by seeking to confirm the award in a vacuum and reserve concrete questions about the propriety of enforcement (*i.e.* , translating the award into specific relief that might directly resolve the parties' ongoing disputes) for a later date. The court questioned the wisdom of that approach, fearing that confirmation of the award would merely give the parties something more to argue about. *Id.* at 491–92. The court, in its parting words, noted that the substantive law regarding section 301(a) subsumes the prudential values of Article III of the Constitution, which counsel against the confirmation of arbitration awards in the absence of a concrete dispute. While acknowledging the district court's authority to confirm the award and decide later whether the parties' disagreement should be resolved by a judge or an arbitrator, the court was not persuaded of the wisdom of that approach. "[W]e see no point to such spinning of the wheels...." *Id.* at 493.

Derwin , having been decided by a sister circuit, amounts to persuasive but not binding authority in this circuit. Although there are certain similarities between this case and *Derwin* , there are also significant differences. Given those differences, we do not believe that *Derwin* demonstrates any legal error in the district court's decision to confirm the awards at issue here.

First, as was not the case in *Derwin* , the two arbitrators here not only attempted to give the parties guidance on how to apply the relevant provision of the collective bargaining agreement but specifically ordered Hyatt to refrain from repeating the types of actions the arbitrators had found to be in violation of the agreement. The arbitrators plainly thought that section 56 of the
605 *605 CBA and their own rationale as to the violations was clear enough to grant the union's request for prospective, "cease and desist" relief. In this respect, confirmation of the awards serves to reinforce the scope of relief awarded by the arbitrators rather than broadening the awards in a way that the arbitrators themselves did not intend.

Second, Local 1 is not seeking confirmation in order to gain any particular advantage with respect to the many additional disputes pending between the parties, which by contrast *was* the evident (if unspoken) aim of the union in *Derwin* . The First Circuit plainly understood the union to be seeking confirmation in order to enable the court itself to resolve additional grievances that would otherwise be submitted to arbitration. *See id.* at 491. Local 1, by contrast, has conceded that it must arbitrate any grievances pre-and post-dating the district court's confirmation decision. Nothing in the union's request for confirmation suggested that it was asking the court to insert itself into the arbitration process or in any way restrict the authority of arbitrators to resolve the merits of future arbitrations as they see fit. Confirmation simply preserves the possibility of additional relief in the form of contempt sanctions if and when the union prevails in future arbitrations (and can make an appropriate case for such sanctions).

This case *is* like *Derwin* in that Local 1 is pursuing a bifurcated approach to enforcement of the arbitration awards: it has asked the court to do nothing more than confirm the awards now, and is reserving the matter of enforcement, through a contempt proceeding, for a future date. In that sense, the union asked the court to confirm the awards in a "vacuum," as *Derwin* put it. The court thus has not yet had the opportunity to evaluate whether and how the two awards might bear on any pending or future disputes on the same subject. The union may or may not have a case to make for contempt sanctions if and when those disputes result in findings by an arbitrator (or multiple arbitrators) that Hyatt has persisted in practices that violate section 56. If the union does seek contempt sanctions, the court will necessarily have to consider, among other factors, whether the circumstances of the later violations are similar enough to those found by arbitrators Fleischli and Kenis to warrant the inference that Hyatt has deliberately defied the cease and desist directives of those two arbitrators. No one can know at this

point whether there will be such a contempt proceeding and what the merits of the union's case for contempt sanctions might be. In that limited sense, this is merely a "paper" confirmation.

But we are not as convinced as the First Circuit was that confirmation in this context amounts to unwarranted busy work on the part of the court. Two arbitrators have already had an opportunity to consider a fairly substantial range of alleged violations of section 56, to articulate what constitutes an emergency permitting managers to perform bargaining-unit work, and to decide that Hyatt should be ordered to cease and desist from further violations of section 56. The foundation for confirmation is thus significantly stronger than it was in the cases we have just discussed. And although the matter of enforcing the awards (through a potential contempt proceeding) has been severed from the matter of confirmation, this bifurcation ensures that the merits of additional grievances are reserved for arbitration and that any contempt petition will in no way preempt or disturb that contractual dispute-resolution process. Again, given Local 1's concession, any contempt request will be premised on grievances that post-date confirmation of the awards. To our mind, this
606 grants maximum deference to *606 the contractual grievance and arbitration mechanism by granting judicial confirmation to what has already been resolved by the arbitrators and keeping the court's hands off of the matters that have not yet been resolved. It also affords Hyatt ample opportunity to conform its practices to the CBA and to the Fleischli and Kenis awards.

As we have said, the question whether the Fleischli and Kenis awards should be enforced through a contempt finding is a question to be taken up at a later date, if and when additional grievances have been arbitrated in the union's favor and the union makes a case for contempt sanctions. Nothing about the union's request for confirmation has asked the district court or this court to prejudge the merits of any such request, and the district court's own remarks confirm that it has not prematurely reached any conclusion as to the propriety of any such sanctions.

Hyatt has given us no reason to believe that confirmation of the Fleischli and Kenis awards now will in any way tie the hands of arbitrators in future proceedings as to grievances arising from the 41 pending alleged violations and any additional grievances beyond those. *See* n.8, *supra.* In any case, it is far from clear that postponing confirmation of these awards to a later date would make any difference insofar as Hyatt's position is concerned; its objection to confirmation at times appears absolutist. Hyatt goes so far as to suggest in the briefing that the proper remedy for Local 1 to pursue, if it believes that Hyatt is not complying with the Fleischli and Kenis awards, is to call a strike of its members. (Section 7 of the CBA provides that there shall not be strikes so long as Hyatt follows the grievance procedure and abides by the results of that procedure. R. 1-1 at 11 § 7(A).) That is a remarkable position at odds with both the spirit of the arbitration provision of the CBA and longstanding labor policy favoring the peaceable resolution of labor disputes through arbitration.

In sum, although Local 1's request to confirm the two awards can be understood to seek prospective enforcement of the awards in that it opens the door to a contempt proceeding at a later date, given the relative modesty of the union's confirmation request and its concession that any pending and future disputes regarding the application of section 56 must first be arbitrated and resolved in the union's favor before it pursues a request for contempt sanctions, we find nothing improper in the district court's decision to confirm the awards. Hyatt has asked us to remand the case to the district court so that the judgment can be amended to expressly reflect that any postjudgment disputes over section 56 indeed must be arbitrated before Local 1 invokes them as the basis for a contempt petition. We find that step to be unnecessary, given that the union has unequivocally voiced its intent

to arbitrate any such disputes, the district court resolved the case with that declaration in mind, and we have affirmed the district court's decision on that same understanding.

III.

The district court committed no error in granting Local 1's motion for judgment on the pleadings and confirming the two arbitration awards at issue in this case. There was no dispute of fact material to confirmation of the awards that precluded judgment on the pleadings, and none of the concerns we have cited as rendering prospective enforcement of a labor arbitration award improper was present.

AFFIRMED