UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-3702
Summary Calendar

AMAX METALS RECOVERY, INC.,

Plaintiff-Appellant,

VERSUS

UNITED STEELWORKERS OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana

CA 90 236 M

(May 10, 1993)

Before WISDOM, JOLLY, and JONES, Circuit Judges.

PER CURIAM:*

This case involves an appeal from a district court's decision to enforce an arbitration award. The appellant argues that the arbitrator exceeded his authority by looking outside the parties' written agreement to resolve the issue before him. Consequently,

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* Local Rule 47.5.1 provides:
"The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."
Pursuant to that rule, the court has determined that this opinion should not be published.

the appellant argues that the district court erred in deferring to the arbitrators findings. We hold that the district court correctly deferred to the findings of the arbitrator. In so holding we affirm the district court's finding that the arbitrator did not exceed his authority when he interpreted the agreement to permit reference to past practices.

I.

Amax Metals Recovery, Inc., the appellant, and the United Steelworkers of America, the appellee, entered into a collective bargaining agreement in 1975. The agreement provides in part

> the Company shall have all the rights it would have had were this Agreement not in effect; provided that any exercise of these rights expressly restricted by the provisions of this Agreement shall be subject to the provisions of the grievance procedure provided for in this Agreement....
>
> The Arbitrator shall interpret and apply the express provisions of this Agreement to the facts of the particular grievance involved, and shall have no power to add to, modify or amend any part of this Agreement.[2]

According to Amax, during the negotiations which resulted in this agreement, the parties discussed the meaning of the term "express provisions". Allegedly, they agreed that this term limited the parties rights to the terms included in the agreement as drafted, eliminating the union's right to assert past practices against Amax.[3]

When a dispute arose concerning payment for meal breaks, the

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[2] Record Excerpts, Tab 8, p.4. The second paragraph of the language quoted is hereinafter referred to as "the no modification clause".

[3] The arbitrator took notice of Amax's rendition of these facts yet made no factual findings on the matter.

parties submitted the grievance to arbitration. The Union claimed that Amax was bound to continue payment for meal breaks when the employees worked overtime. Amax countered arguing that the agreement prevented the Union from asserting a past practice against it. The issue as put to the arbitrator was whether a past practice is enforceable under the parties' agreement. The arbitrator found that Amax had orally agreed to pay for these breaks in certain overtime situations. Specifically, the arbitrator found that the parties past practice of paying for these breaks which developed years after the written collective bargaining agreement was adopted, could serve to bind Amax under the agreement.

Interpreting the language of the written agreement as quoted above, the arbitrator found that this language did not prevent him from enforcing past practices that developed after the agreement was signed in 1975. The arbitrator stated that "[a]t most, it would be reasonable to argue that ... the Union signed away its right to claim past practices in existence prior to the effective date of the initial agreement in 1975".[4] He continued, finding "no basis ... to conclude that the Union agreed to prospectively forego the right to assert the existence of past practices arising during the term of the parties' agreement".[5]

Based on this interpretation of the contract language in addition to finding that a past practice had developed, the

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[4] Record Excerpts, Tab 8, p.8.

[5] Id.

arbitrator resolved the grievance in favor of the Union. He ordered Amax to reinstate the practice of paying for the meal breaks and to pay back pay for those breaks it had denied pay. Amax appealed this decision to the Eastern District of Louisiana, and the court upheld the arbitration award. The court relied on what it characterized as well settled precedent requiring it to affirm the award. The court conducted a deferential review of the arbitrator's findings and held that the arbitrator had not erred by enforcing a past practice. Specifically, the court held that the arbitrator did not exceed his authority by doing so. Further, the court held that the "no modification" clause in the agreement did not restrict the arbitrator from interpreting the agreement to allow the enforcement of past practices.

Amax appeals the district court's holding, arguing that the district court erred in upholding the award because the arbitrator (1) had no authority to arbitrate the dispute, (2) exceeded his authority by referring to and enforcing a past practice, (3) issued an award that contradicted the express language of the agreement ;and (4) failed to draw his award from the essence of the contract. We reject these arguments and therefore affirm the decision of the district court upholding the arbitration award.

II.

Contrary to the argument made by Amax, an arbitrator's ruling is entitled to considerable deference upon judicial review.[6] When

[6] Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n, 889 F.2d 599, 602 (5th Cir. 1989), cert. denied 498 U.S. 853 (1990). Amax argues for a de novo review of the

reviewing the subject matter jurisdiction of the arbitrator, however, we review de novo. We turn to this issue first.

The agreement provided for arbitration of all grievances.[7] It defines "grievance" as "any disagreement between the Company and the Union or any of the employees".[8] Under this definition, the dispute between the Amax and the Union over whether its employees were entitled to meal break pay constitutes a grievance. Consequently, the issue was correctly submitted to arbitration and fell squarely in the subject matter jurisdiction of the arbitrator.

We turn next to Amax's remaining arguments. Although Amax frames its argument as three separate issues, all three boil down to one basic contention. Amax contends that the language of the no modification cause clearly and unambiguously forecloses the arbitrator from including past practices in his analysis. It maintains that the arbitrator exceeded his authority as granted by the agreement by looking outside the "express" terms of the agreement. Consequently, Amax argues that the award was not drawn from the essence of the contract and is contrary to the express terms of the agreement.

The Supreme Court has long recognized the necessity of imposing only a considerably deferential review on arbitration

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arbitrator's ruling.

[7] Record Excerpts, Tab 8, p.5-6.

[8] Id.

awards.[9] The Court, however, did not prescribe this deference blindly. The award will be upheld only if it "draws its essence from the collective bargaining agreement".[10] This Court has interpreted this phrase to require that the award be "rationally inferable" in "some logical way" from the agreement.[11] Under this standard, the award in this case must be upheld. Although we might have interpreted the agreement differently, the arbitrator's interpretation is at least rationally inferable from the agreement. His conclusion that the term "express" did not preclude the inclusion of past practices is logical.

This Court has long acknowledged the arbitrator's right to look beyond the written language of collective bargaining agreements when the agreement is ambiguous or silent as to a particular point.[12] As the arbitrator found, the agreement was silent as to pay for mealtime breaks. Further the agreement was silent or at best ambiguous with regards to the applicability of past practices. While Amax does not dispute this rule, it maintains that the no modification clause clearly prohibits

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[9] The Steel Workers Trilogy, United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 566-68 (1960), United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960), United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 594, 599 (1960).

[10] Steelworkers, 363 U.S. at 597.

[11] International Chemical Workers Union v. Day & Zimmermann, Inc., 791 F.2d 366, 369 (5th Cir. 1986), cert. denied 479 U.S. 884 (1986).

[12] Manville Forest Products, Corp. v. United Paperworkers Intern. Union, 831 F.2d 72, 75 (5th Cir. 1987); Delta Queen, 889 F.2d at 602.

reference to outside sources. This is not the case.

This Court has held that the existence of a no modification clause does not limit the arbitrator to the written terms of the agreement.[13] Amax attempts to distinguish this holding on the grounds that the arbitrator in that case looked outside the agreement for guidance in interpreting the terms of the written agreement itself, whereas here, Amax argues, the arbitrator looked outside the agreement to create a totally new obligation. Amax fails to recognize that the arbitrator did not look outside the agreement to resolve the issue of whether past practices could be asserted against Amax-- he looked to the agreement itself and concluded that the agreement as written did not preclude reference to past practices. Surely the interpretation of the express agreement was within the authority delegated to the arbitrator.

In United Paperworkers Int'l Union v. Misco,[14] the Supreme Court held that the arbitrator may not ignore the plain language of the contract. Yet, in Misco, the Court further held that a court could not reject an award on the ground that the arbitrator misread the contract. The Court stated "[a]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of this authority, that a court is convinced the arbitrator committed serious error does not suffice to overturn his decision".[15] Thus, although we might interpret the provisions of the

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[13] Manville, 831 F.2d at 76; Steelworkers, 363 U.S. at 578-83.

[14] 484 U.S. 29 (1987).

[15] Id. at 38.

agreement to prohibit the inclusion of past practices, we will not supplant our interpretation of the contract for that of the arbitrator.

One final point in Amax's argument must also be addressed. Amax relies on a line of cases in which this Court reversed several arbitration awards on the grounds that the arbitrator exceeded his authority and granted an award contrary to the express terms of the agreement.[16] These cases uniformly address an arbitrator's analysis of whether an employee was discharged for just cause. In each of the cases, the agreement clearly limited the arbitrator's authority. These cases are not grounded on boiler-plate no modification clauses, rather they are grounded on express limitations in the arbitrator's authority. For example, in Delta Queen, the agreement provided that if the arbitrator found just cause for an employee's discharge, his authority ended and the responsibility for discipline shifted to the employer. In spite of this language, the arbitrator reinstated an employee after specifically finding that he had been discharged for just cause. This Court affirmed the district court's decision to vacate the award based on the fact that the arbitrator had clearly gone beyond his authority in fashioning the award.

The present case does not resemble this line of cases. Here

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[16] Delta Queen, 889 F.2d 599; E.I. DuPont de Nemours and Co. v. Local 900 of International Chemical Workers Union AFL-CIO, 968 F.2d 456 (5th Cir. 1992); United States Postal Service v. American Postal Workers Union, AFL-CIO, 922 F.2d 256 (5th Cir. 1991), cert. denied ___ U.S. ___, 112 S.Ct. 297 (1991); see also International Brotherhood of Electrical Workers. Local 429 v. Toshiba America, Inc., 879 F.2d 208 (6th Cir 1989).

the arbitrator clearly had the authority to interpret the collective bargaining agreement. This is, in fact, just what he did. In addition, his award does not contradict the express terms of the agreement. The agreement nowhere provides that past practices will not be asserted against Amax. Although this may in fact be what Amax attempted to attain in bargaining for the language in the agreement, it did not so clearly state it as to require this Court to reverse the arbitrator's adverse finding. Merely restricting the arbitrator to interpreting the "express" terms of the agreement does not require that the arbitrator so interpret those provisions as excluding past practices that developed after the agreement was signed.

III.

For the foregoing reasons, we AFFIRM the district court's decision to uphold the arbitration award.