TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES SUPREME COURT

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, et al.,	)	
Petitioners,	)	
v.	)	No. 86-651
MISCO, INC.	)	

Pages: 1 through 50

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v.	)	No. 86-651
MISCO, INC	)	

Washington, D.C.

Tuesday, October 13, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:55 p.m.

APPEARANCES:

DAVID SILBERMAN, ESQ., Washington, D.C.; on behalf of the Petitioners.

A. RICHARD GEAR, ESQ., Shreveport, Louisiana; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(1:55 p.m.)

CHIEF JUSTICE REHNQUIST: Mr. Silberman, you may begin whenever you are ready.

ORAL ARGUMENT OF DAVID SILBERMAN

ON BEHALF OF PETITIONERS

MR. SILBERMAN: Thank you, Mr. Chief Justice, and may it please the Court:

This is an action that was commenced by the Respondent Employer under section 301 of the Labor Management Relations Act of 1947, in an attempt to overturn an arbitration award that was rendered pursuant to the collective bargaining agreement between the Petitioner Union and the Employer.

The question that is presented to this Court is whether the courts are free in such an action to relieve one party to a lawful collective bargaining agreement, as that agreement has been interpreted by the arbitrator, to relieve a party of his obligations under the contract on the theory that there is some public policy against enforcing that lawful contract.

The facts out of which that question arises can be briefly summarized, and in light of the conclusory labels that have been tossed around in the briefs, are of some particular importance here.

In February of 1983, the company discharged an employee by the name of Isiah Cooper. The stated ground for the discharge was that Mr. Cooper had been seen possessing a marijuana cigarette in a car in the company's parking lot. And the company maintained that that established a violation of a work rule promulgated against the company, which rule prohibits an employee from bringing marijuana onto company premises or using marijuana or alcohol.

The union filed a grievance alleging that the discharge was without just cause and therefore in breach of contract. And that grievance was submitted to arbitration and the auspices of the Federal Mediation Conciliation Service.

The arbitrator found as a matter of fact that the company had failed to prove a violation of the work rule in the manner respected: the employee was not guilty of either bringing that marijuana cigarette onto company property or smoking that cigarette.

The arbitrator noted that the company at the hearing had attempted to defend the discharge on a new ground by claiming that there was evidence that tracings of marijuana had been found in a plastic bag in the employee's car. But the arbitrator said that he would not consider that evidence.

He explained that the just cause provision of the contract was to be interpreted in accordance with the ordinary meaning of that phrase, "in industrial relations," and just

cause prohibits an employee from introducing new grounds that were not raised at the time of the discharge or at any time in the grievance procedure.

So having therefore found that the only question that was before him -- the company had failed to make out its proof -- the arbitrator ordered the employee reinstated with back pay, and this lawsuit followed.

The employer succeeded in persuading the lower courts to vacate the arbitration award. Now it is important to note that neither the District Court nor the Court of Appeals quarreled with the job that the arbitrator had done as the interpreter of the contract.

That is, they accepted the validity of his conclusion that the employer here had promised that it would not discharge an employee unless it was able to prove the grounds on which the discharge was based.

The court also did not question the fact that the employer was perfectly free to enter into that promise; there is nothing in the law to prohibit it. And he was free in this instance to live up to his promise; there was nothing in the law that makes it unlawful for him to take this employee back.

But the courts nonetheless concluded that it was against public policy for them to hold the employer to his promise, and the particular public policy they cited is "the public policy against the operation of dangerous machinery by

persons under the influence of drugs or alcohol."

Now it is our principal submission here that in arrogating to itself this kind of power, to refuse to enforce a lawful collective bargaining agreement, the lower courts have overstepped the limits of their authority under Section 301 of --

QUESTION: You don't say that there isn't any public policy exception, you just say it is a good deal narrower than the Fifth Circuit thought it was?

MR. SILBERMAN: That's correct, Mr. Chief Justice. We say that insofar as the court is saying, that even though this is a lawful agreement, there is a public policy against enforcing this perfectly lawful agreement.

We don't think the court's authority goes that far, and we think the proper role --

QUESTION: Mr. Silberman, if the finding had been that indeed this employee had had a marijuana cigarette out in the parking lot of the employer's premises, and had been smoking it, and the arbitrator had further concluded that he should be restored to his job, could the public policy exception apply there to justify saying, that's an improper remedy?

MR. SILBERMAN: Your Honor, we believe not. As we understand the public policy exception, the rule is the one stated by Judge Easterbrook in his opinion in the E. I. DuPont

case in the Seventh Circuit, and it is a rule that constrains the court to enforce positive law and not to introduce its own notions in that way.

And we think that the rule that Judge --

QUESTION: Do you think that there conceivably could be a valid recognizable public policy to the effect that employees will not, if they are under the influence of drugs or alcohol, be allowed to work with dangerous machines?

What about the Occupational Safety and Health Act and so forth?

MR. SILBERMAN: Certainly there could be a public policy in the sense that a legislature could say that people who have committed this wrong should not be employed in that category of jobs, and we certainly have no quarrel with the notion that there could be a public policy in that sense.

We do believe, however, that if the legislature has not gone that far and has stated a public policy at the general level of, for example, the Occupational Safety and Health Act, that it is not consistent with the labor relations system, and it is not appropriate for the courts to attempt to elaborate upon that policy by trying to decide whether that policy would or would not be served or disserved --

QUESTION: So that an employee, an airline pilot, who drinks, should be nevertheless allowed to fly if the arbitrator so decides?

MR. SILBERMAN: Fortunately, that is precise instance where there is a Federal Aviation Administration which decides are or are not entitled to fly, if there is an FAA regulation, and there is indeed a regulation covering pilots who have been using alcohol.

So that if the FAA says that this person should not be flying, then clearly an arbitrator's award that puts that person back to work would not be entitled to enforcement.

But it is precisely our point that if the FAA has said that, yes, it's okay for this person to fly, and the employer has promised that he will take this person back -- at least the arbitrator has told us that's what his promise means -- that the court should not put themselves in the business of trying to -- of second guessing the FAA and substituting their view of what is sound for the party's view or the FAA's view.

QUESTION: If I understand Judge Easterbrook's thesis, it is that the arbitrator does nothing but give content to the words of the contract, and if the contract, as worded by the arbitrator, would not, if it had been written that way, be contrary to law, neither is the arbitrator's decision.

So that, in the instance that you just cited, if a contract is not unlawful, which does not provide for the firing of someone who smokes marijuana in the parking lot, if such a contract without that provision is lawful, then the arbitrator's statement, that you can't fire this fellow for

smoking marijuana in the parking lot, is also lawful.

MR. SILBERMAN: That's precisely how I understand Judge Easterbrook's approach, Justice Scalia. And we do think that that approach makes particularly good sense, I should add, in the context of a just cause discharge kind of case.

Because in that kind of case, the very question that is being decided is, what is the appropriate punishment or penalty for a particular individual who has committed a particular kind of wrong. And there is a variety of factors that one might want to take into account in making that judgment, and that is precisely what arbitrators do.

And unless --

QUESTION: There is still a good deal of room between that and saying you do nothing but enforce the statutes that are on the book. That is to say, there are some things which you can't write into a contract, they will not be enforced even there is not provision of law which says that they are unlawful.

I mean, there is a long line of contracts cases refusing to enforce contracts as being contrary to public policy. Not because they violate any explicit statute, but because what they permit or encourage would violate a statute.

So what Judge Easterbrook said does not go so far as to say that only when there is an explicit statute making this conduct unlawful is it bad.

MR. SILBERMAN: I think Judge Easterbrook does go precisely that far, and we do think that that is indeed the appropriate in the particular 301 context in which we find ourselves here.

QUESTION: What if the fellow had been a truck driver and was found two or three times to have been driving while under the influence of marijuana? And let's say that violates Louisiana law. The arbitrator says, take him back, that is my interpretation of the contract.

Now I suppose there is nothing in Louisiana law that says you are forbidden to re-employ someone who has been three times convicted of driving under marijuana unless his license is revoked, and let's say this fellow's license hasn't been revoked.

Now do you think a District Court must enforce that award?

MR. SILBERMAN: Yes, we do, Mr. Chief Justice. We believe that if there is nothing in Louisiana law and the state is perfectly free, as you suggest, the state does license truck drivers, and it's the state's responsibility to decide whether somebody should not be on the road.

But if the employer has the lawful discretion to employ this person, and the employer has agreed by contract that it will continue to employ that person, we think it is not an appropriate role for the courts to second guess and overturn

the employer's promise in that regard.

QUESTION: Then there really isn't any sort of public policy -- room for a court's public policy determinations under 301, in your view, as there traditionally has been in the law of contracts. Because certainly the public policy exception in the law of contracts is much broader than you say.

MR. SILBERMAN: I would say two things in response, Chief Justice Rehnquist. The first is, as we understand the common law notion, the common law notion itself always assumed that whatever common law powers the judges exercise was subject to the subordinate power of a legislature to establish public policy.

So that in so far as we are right in suggesting, if the Congress did that, when it enacted the National Labor Relations Act and when it created this system of collective bargaining and of grievance arbitration, we think our position is entirely consistent with the principle of the common law doctrine, although I certainly do concede that in a particular case a common law judge would have exercised a broader authority.

We also would note that this Court has made clear in other 301 cases that ordinary contract principles do not fit very well to this peculiar 301 context, and should not be binding in fashioning the federal law of labor contracts.

QUESTION: Would you adhere to your view even in

circumstances when the employer might be a public employer charged with a specific mandate or duty to provide a certain service? For example, to provide transportation to young school children, and therefore have to re-employ a school bus driver who has been found to have been smoking marijuana.

MR. SILBERMAN: Section 301 does not apply to public employers. The policies on which we are arguing are policies that only apply in private sector labor relations.

Now it seems to us that there are really two critical aspects of the National Labor Relations Act --

QUESTION: What about a school bus driver for a private school? I mean, change Justice O'Connor's hypothetical to a school bus driver for a private school. Would you give 301 application there?

MR. SILBERMAN: Our answer does not change. That is right. We would say in that case that if the employer is free to employ that person, public authorities have not seen fit to disqualify that individual, and if the arbitrator has concluded -- taking into account all the circumstances -- that this is not somebody that has done such a wrong that he should be taken from his job completely and totally and absolutely, that there is no basis in principle for the courts to second guess that kind of judgment.

And what the courts wind up doing if they do so is really substituting their judgment as to what is the sound way

of treating people for either public laws judgment or the party's judgment, and that this system --

QUESTION: Of course, that's what common law courts did, was to occasionally substitute their judgment for the party's judgment. You say, in this case, Congress thought about all of this and decided that there should be no public policy exception to labor contracts?

MR. SILBERMAN: We say that the principle in --

QUESTION: What evidence do you have that Congress thought about this?

MR. SILBERMAN: I think what we say is slightly different than that, Mr. Chief Justice. What we say is that the policies that the Congress enacted leave no room, that it would run at cross purposes with the statute, it would fundamentally undermine the statute if the courts were to exercise that kind of power.

And it seems to us there are two interrelated aspects of labor policy that really bear on this question. One is the policy of favoring free collective bargaining, of private autonomy and decision making. When Congress enacted the National Labor Relations Act, it decided that instead of creating a set of substantive rules to regulate work places, that the best way to protect employees and to further labor peace, was to encourage the parties to really make their own charter for industrial relations.

And so Congress imposed the duty to bargain, and it delimited the subjects of bargaining. And then it said to the parties that so long as the agreement you make is a lawful agreement, you are free to make that agreement and our role is to enforce the agreement, because we think that that is the way for the most conducive set of labor relations.

QUESTION: Is that any different from what the law says with regard to any contract? It favors private disposition of their affairs. You can say the same thing about an ordinary non-labor contract: we will enforce what the parties themselves provide, up to a point.

MR. SILBERMAN: I think the difference is this, Justice Scalia. In the ordinary contract context there is a principle of freedom of contract, but there is not a duty to bargain, for example, outside of the labor relations context.

Congress here commanded bargaining because it viewed contracting -- not just it thought it was good for parties to do whatever they wanted, but it thought that this system of self-government was the best way to further a set of public concerns, and was preferable to imposing a set of government regulations on the work place.

So that we think that the philosophy of the NLRA goes quite beyond the philosophy of the law of contracts, and that the most concrete manifestation of that is the duty to bargain, which is unique to the labor relations context, and which, of

course, is codified in Section 885.

The other aspect of labor relations policy is this encouragement of private dispute resolution, of arbitration instead of litigation, and as this Court explained in the Steelworkers trilogy, that reflects Congress's understanding that it is unrealistic to expect the parties at one time to sit down and develop a set of rules that will govern every situation that arises in this ongoing relationship.

And Congress said, that instead of encouraging you to run to the courts to resolve these matters, or moreover, instead of your resolving these matters through an ad hoc adjustment of economic forces, what we think the best way to deal with these is for you to get somebody who you trust, who you the parties trust, and empower him to elaborate on your contract and develop a set of rules, and we will do our best to enforce that system and uphold that system.

QUESTION: Can he adopt the public policy principle and say he will not interpret any provision of the contract to be contrary to sound public policy? And if he does that, can the courts enforce it?

MR. SILBERMAN: The question of what the role of the arbitrator and public law is is a complex question. At the threshold, Justice Scalia, as National Academy develops in its brief amicus curiae, in a discharge case the issue that is entrusted to the arbitrator, the just cause issue necessarily

asks the arbitrator to take into account the variety of public policies.

Arbitrators treat cases that involve employees who are dangerous very differently than they treat an employee who has thrown a spitball in the plant, and they do so because they have an understanding of public policy and that the party has expected those kinds of considerations.

Certainly, arbitrators can do that, they should do that, they do do that. And it would be part of our submission, the reason why in this case we think it is especially inappropriate to authorize the courts into this area, is that there is no principle by which a judge can say that in this particular case, this individual has done something so serious that he shouldn't be put back to work.

It requires a very particularized judgment. You want to know what he did, were there any extenuating circumstances, what's his past record, what is his likelihood of repetition: that's precisely the question the arbitrator asks.

And the arbitrator does so because the parties have empowered him to do so because they trust him to render their judgment for them, if you will. And if the courts get involved in this area, what the courts are going to wind up doing is simply redoing what the arbitrator has done, and substituting not some rule of law that they can apply in any kind of neutral way, but their best judgment for the arbitrator's judgment and

ultimately, for the parties' judgment.

And we suggest that there is no basis for taking from the parties their right to make their own decisions on, at what point is somebody sufficiently dangerous or sufficiently harmful or sufficiently evil that he shouldn't go back to work, and substituting a court's resolution of that.

A resolution which, as I say, can't be animated by any kind of principle.

QUESTION: Mr. Silberman, there are examples in case law where courts have overturned decisions of arbitrators for a variety of reasons, including sometimes gross misjudgment. Aren't there examples of that found in the case law around the country?

MR. SILBERMAN: Certainly since this Court's decision in Enterprise Wheel, the courts have been empowered to ask, has the arbitrator gone about his job of interpreting the contract or is he substituting his own brand of industrial justice.

There is not doubt that there are cases in which the courts have found that the arbitrator was not carrying out his mission and have therefore overturned, and we obviously don't quarrel with that.

And as I said at the outset, the Court of Appeals here did not suggest that the arbitrator had done that, and indeed, the arbitrators award here draws upon the general understanding of the just cause concept.

Beyond that, there are very few cases, or at least very few cases prior to the last couple of years, in which a court would overturn an arbitrators award on public policy grounds, except in a situation where we, and we think Judge Easterbrook, acknowledge the propriety of doing that.

That is, where public law says that you can't enforce this award. Where the arbitrator has ordered the employer to commit an unlawful act.

QUESTION: Do you think that your questions presented include or subsume an issue about what the arbitrator found with respect to whether the employee was actually smoking marijuana?

MR. SILBERMAN: I'm not quite sure I understand the question, Justice White. What we did, as I recall, in our questions --

QUESTION: Well, the arbitrator found, in effect, there wasn't cause they hadn't proved that he was smoking marijuana.

MR. SILBERMAN: Because they hadn't proved either that he was smoking marijuana or that he had brought marijuana on the plant premises. They hadn't proved a violation of the rule.

QUESTION: That's right. But that wasn't the basis for the Court of Appeals judgment in this case.

MR. SILBERMAN: Well, the Court of Appeals said --

QUESTION: And the only issue you've brought here is the public policy issue.

MR. SILBERMAN: The Court of Appeals did base its judgment precisely on the public policy issue.

QUESTION: I know, and that's the only issue you bring here.

MR. SILBERMAN: Correct, and we --

QUESTION: Are we free to dispose of the case and say, well, the Court of Appeals really ignored what the arbitrator found?

MR. SILBERMAN: I think so, Justice White. As I recall --

QUESTION: You think so what?

MR. SILBERMAN: That you are free to do so.

QUESTION: Well, you didn't ask us to.

MR. SILBERMAN: I think we did.

QUESTION: Not in the questions presented.

MR. SILBERMAN: I think we did. My recollection of the questions presented is that there --

QUESTION: Of course, I can't find the questions presented in your brief. You should have had them there, but they are not.

MR. SILBERMAN: I was having the same difficulty.

QUESTION: Exactly.

MR. SILBERMAN: Fortunately they are in the petition

for cert., where they also should have been in ours. We first posed the question that I have been arguing to you, as to the principled limit of the public policy exception.

The second question we raised was if you disagree with us and say that there is this kind of authority, was it appropriately exercised in this case?

QUESTION: But you are still just talking about public policy. You would never get to that issue if you said, the arbitrator found that he was never smoking marijuana. That at least there wasn't any proof of it, or that he even brought it on the property.

That's the end of it. There isn't any cause.

MR. SILBERMAN: Well, the Court of Appeals says that because of the evidence -- the arbitrator also found that the company had proffered evidence of these gleanings of marijuana in the Grievant's car.

QUESTION: That may be so, but the arbitrator didn't find it.

MR. SILBERMAN: The arbitrator did acknowledge the existence of that evidence.

QUESTION: No, but he didn't find that there was cause to discharge. He found there wasn't any.

MR. SILBERMAN: Correct. He found that that's not relevant. What the Court of Appeals said is that as a matter of public policy, he is not free to do that.

So that we think you can go on --

QUESTION: Well, but I don't think you brought that issue here.

MR. SILBERMAN: I understand. That certainly was our intent in framing the second question. We had thought we had framed it in sufficiently general terms to enable you to consider the question, which is briefed in our brief and in Respondents' brief, of whether, assuming that there is a power of the type claimed her, its exercise in this case was appropriate.

We obviously think it was not, for the reason you state, Justice White, that on the facts there was not basis for it, but moreover, on the principles basis I have been suggesting, the courts don't have authority to do that.

We think it would do grave damage to the labor policies I have discussed if the courts were free to do that. Because what the courts do when they say, we're not going to enforce a lawful contract, is, first, the courts get back into the business of substantively regulating the work place in precisely the way Congress said we're not going to do in this area.

QUESTION: Of course, Mr. Silberman, what bothers me is that there is more than just the workplace here: there is the safety of other people also.

Now there have been some hypotheticals thrown at you.

What if this were a driver of a Greyhound bus? Smoking marijuana is all right?

MR. SILBERMAN: Justice Blackmun, we are certainly not suggesting that smoking marijuana is all right or even that a school newspaper couldn't put an article against smoking marijuana. What we are suggesting is, first, that certainly the Interstate Commerce Commission knows people who license bus drivers are perfectly free to make the judgment as to whether somebody who does that should not be allowed to drive a bus.

QUESTION: And you say the same thing about a D.C. taxicab driver?

MR. SILBERMAN: I think so, yes, although I would not look to the ICC for help in that regard. But yes, I mean, at first, that the public --

QUESTION: And you'll be the next fare?

MR. SILBERMAN: If I can get a cab after court this afternoon, Your Honor.

We do say that, yes, the public authorities have the power and the right, if they wish, to say that this person is not suited drive. And we say that the arbitrator has that authority.

He is going to take into account what the employer has done, why he has done it, is this somebody who was under enormous pressure at home in a way that is not likely to occur again, is this somebody who has since been through

rehabilitation and to whom there is no likelihood of it recurring again, is this somebody who was entrapped in a way and that this is not something likely to occur again, or is this somebody who is very much likely to do it again?

And the arbitrators take all those factors into account, and they make a judgment as to what is the appropriate disposition. That judgment reflects, in essence, the parties' judgment. The parties have said, we want you to do that for us rather than leaving that to the employer to decide.

QUESTION: What I am saying is that there is somebody more than the parties involved.

MR. SILBERMAN: We suggest that the public authorities are also there to protect the public, and that the parties themselves are not going to agree to an irrational system like that.

Ultimately we suggest what Justice Trainor said in the California Supreme Court in probably one of the earliest public policy cases, and that is the case of Black v. Cutter Laboratories, where a claim was made that it was against public policy for an arbitrator to reinstate a communist, in the 1950's.

And Justice Trainor said, that it's a rash assumption that Congress and the legislature have been inept in their consideration of the problem or are incapable of meeting it, or that astride the unruly horse of public policy, the courts are

better able to meet that problem. And that is our submission as well.

QUESTION: Was that the prevailing opinion in the Black case?

MR. SILBERMAN: No, that was the dissenting opinion, although I believe the opinion has prevailed in the verdict of history.

With the Court's permission, I would like to reserve the balance of my time. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Silberman. Mr. Gear, we will hear now from you.

ORAL ARGUMENT OF A. RICHARD GEAR

ON BEHALF OF RESPONDENT

MR. GEAR: Mr. Chief Justice and may it please the Court:

Just a small point, but the evidence of the extra marijuana found in the car was not offered as a separate basis for discharge, that was there and it was offered to corroborate the fact that the grievance was smoking marijuana, because our view of the evidence was that he went to own car with the other two guys, they rolled a marijuana cigarette from the stash that he had in his car --

QUESTION: Didn't the arbitrator say that there had been a failure of proof that this employee was smoking marijuana?

MR. GEAR: He did find that, sir, but he also --

QUESTION: Well, were the courts free to disregard that?

MR. GEAR: But, the --

QUESTION: Were they or not?

MR. GEAR: The court is not free to disregard that, but the Fifth Circuit found, and the arbitrator did find that the officers found this extra quantity of marijuana in the Grievant's car. And the basis --

QUESTION: I know, but the arbitrator didn't think that was -- since the employer didn't know that, he construed the collective bargaining agreement, in effect, as not saying that this wasn't cause for discharge.

MR. GEAR: That's what the arbitrator did, Your Honor.

QUESTION: Was the court really free to overturn that construction?

MR. GEAR: Well the problem was, that we argued in our brief to the arbitrator, that reinstatement was inappropriate because of this after discovered marijuana. We did not offer this after discovered marijuana as a separate basis for discharge. We offered it as a basis for the refusal to reinstate this man.

The Fifth Circuit --

QUESTION: As a remedy --

MR. GEAR: As a remedy problem. The arbitrator did find that the officers in question found this marijuana in the car and that it was examined by the laboratory in Monroe, Louisiana, and it was found to be marijuana.

He made a finding as to that. He credited the officers. Now despite this finding, he ignored our request to impose no reinstatement because of this after discovered marijuana as a basis of public policy.

He ignored our request, didn't make a finding in his decision about it. And in those circumstances, I think that -- regardless of abstract theories about what the courts can do with arbitrated decisions -- the Fifth Circuit can go in and say, Mr. Arbitrator, you ignored this issue that was presented by the company, and you have ignored this after discovered evidence, and on the basis of that, we're going to exercise our discretion to implement the public policy exception.

QUESTION: But the same limits don't apply to an arbitrator's judgment about what a remedy should be, as he isn't entitled to the same deference that he is when he construes the contract.

MR. GEAR: No, I think the courts would give the arbitrator the same deference they would normally give him, but then you've got --

QUESTION: On remedy as well as --

MR. GEAR: On remedy, and I think that Enterprise

Wheel --

QUESTION: Well, they didn't give any deference here.

MR. GEAR: But he didn't make a finding as to our remedy. He ignored our argument --

QUESTION: Well, he did: he said reinstate.

MR. GEAR: But he didn't address the question in his decision.

QUESTION: I know it. He credited the notion that this marijuana was found in the car.

MR. GEAR: That's correct.

QUESTION: And he ordered reinstatement.

MR. GEAR: You can view it that way --

QUESTION: And rejected your argument.

MR. GEAR: But he didn't even address our argument.

QUESTION: Well, he rejected it. You made it.

MR. GEAR: I understand what you are saying. I understand what you are saying.

QUESTION: Well, wouldn't it be more consistent with ordinary judicial review of arbitration if the Fifth Circuit felt that he had ignored a submission or ignored -- to send it back to the arbitrator rather than for the Fifth Circuit to simply make the finding itself?

MR. GEAR: That has happened in some cases; I have seen cases do that. I think that in this case it was such a blatant -- reinstatement of this individual -- violation of

public policy, and the arbitrator had ignored the after discovered evidence, that they went ahead and decided the issue.

We do not suggest and no party suggested at the hearing that the matter be remanded to the arbitrator, I should mention.

QUESTION: Mr. Gear, when you say it was a blatant violation of public policy, on what facts do you conclude that it was blatant? If you limit yourself -- one way to look at the case is just take the one sentence on page 58 of the arbitrator's report, the only thing the company has proven was that the Grievant was sitting in the back seat of a car in which there was found a lit marijuana cigarette in the front seat ashtray, a front seat just moments before vacated by another company employee.

Now if -- and I understand you take a different -- if that were the only fact, would you still make the public policy argument?

MR. GEAR: No, I wouldn't.

QUESTION: So your argument depends on the fact that there was also marijuana found in the back seat?

MR. GEAR: Absolutely.

QUESTION: And does it further require you to draw the inference from that that this employee was smoking marijuana?

MR. GEAR: Yes.

QUESTION: And that nobody has found that?

MR. GEAR: It doesn't require it, but the rule prohibited possession of marijuana in addition to smoking marijuana, so the fact that it was in his car indicated that possession --

QUESTION: No, but, marijuana was found in the back seat of his car. A lighted cigarette was found in another employees car.

MR. GEAR: That is correct.

QUESTION: And he was sitting in the back seat of that car.

MR. GEAR: That is correct.

QUESTION: So which is the blatant public policy violation? The fact that there was some marijuana in the back seat of his car or the -- his sitting in this car is totally irrelevant then, isn't it?

MR. GEAR: I would agree.

QUESTION: So that the asserted basis for the discharge is no longer relied on.

MR. GEAR: Because the after discovered evidence established very clearly that he was in violation of the plant rule prohibiting possession of marijuana on the premises, and that he operated the paper mill device called a slitter-rewinder that has large circular blades about the size of

cymbals that are razor sharp.

QUESTION: I understand what the equipment is.

QUESTION: The company fired him because they thought there was ample proof that he had been smoking marijuana in that car.

MR. GEAR: That's correct.

QUESTION: And that's what the arbitrator rejected.

MR. GEAR: That's correct.

QUESTION: Would the arbitrator automatically sustain a dismissal for violation of a plant rule even if he had considered and credited all your evidence?

MR. GEAR: He wouldn't automatically sustain one, no.

QUESTION: He normally --

MR. GEAR: I think he would, but in this case, again, we are dealing in an industry that, in Louisiana, has the highest workman's compensation rating in terms of premium cost in the whole state.

It is the highest industry; it has more accidents. The very machine that the Grievant operated had had ten or fifteen accidents in the four years preceding this case, and the Grievant had, in the past six months before his discharge, been put on probation twice because of judgmental errors that were not atypical of a marijuana smoker.

And further, the employer had noticed that it had a drug problem. They found marijuana cigarette butts around the

plant. They tried to find the individuals involved but couldn't. The production supervisor even lived in a trailer on the premises to try to make surprise visits to the plant during the night shift where the problem was and where the Grievant worked, and he couldn't find the problem.

So the company had meetings with employees trying to convince the employees that safety and drugs were a matter of great concern to the company and their health and safety.

The arbitrator's decision to reinstate this individual, to us, in the face of these compelling considerations at the plant in question is against public policy. There are several public policy grounds that the courts can rely upon to utilize the public policy exception in the field of drug abuse and safety in the work place.

The country is really in a crusade against drugs at present. President Reagan has, in his speech and executive order, 12456, inaugurated a campaign against drug use and a prohibition of drug use in the federal government.

He has claimed that illegal drug users are not suitable to be federal employees, and that safety and health in the federal workplace is a concern of the government. This is a policy that is exemplified by the executive order.

The studies of the effect of drugs in the American workplace have shown that probably an estimate of $26 billion a year is lost, in lost productivity and health care costs,

because of drugs in the workplace. Sixteen billion of that is lost productivity.

Drug abusers in the workplace are twice as likely to be injured, and are one third as likely to be absent as straight, non-drug users in the workplace.

QUESTION: Would you say that a contract violated public policy and was unenforceable to that extent if it failed to provide for the dismissal of an employee who had marijuana on the premises in any industry?

MR. GEAR: I don't think that you can say that an employer's failure to adopt a rule is a violation of public policy, no.

QUESTION: Well, then why is it a violation of public policy here, not to have such a rule, which is all the arbitrator said. The arbitrator said, this contract does not have such a rule. Now maybe another contract --

MR. GEAR: In fact, the contract did such have a rule, but an employer can fire an employee for drug usage without having a specific rule in question. I think a lot of arbitrators have upheld discharges where there was not a rule, where drug use was involved.

So that the existence of the rule isn't critical. It helps the case, certainly, but it's not going to necessarily determine the case from the arbitrator's point of view.

QUESTION: Are you saying any factually finding that

is erroneous, relating to marijuana use, by an arbitrator, is contrary to public policy?

MR. GEAR: No, I'm not saying --

QUESTION: I am trying to get the nub of what it is in this thing that is contrary to public policy.

MR. GEAR: In this case, it was clear the individual was in possession of drugs on company premises. We have a safety rule, a rule that prohibits possession of drugs on the premises. We have an extremely hazardous piece of equipment, the worst piece of equipment in the plant for injury.

QUESTION: All right, but the arbitrator obviously didn't agree. He thought the evidence was inadmissable or he didn't believe the evidence, one or the other. So you really are saying that what's contrary to public policy is not accepting evidence of this degree.

MR. GEAR: Well, it's just that the clear evidence of drug usage by this individual in a safety problem industry, and his reinstatement, is against the public policy is what we believe --

QUESTION: I suppose what you are saying is what really violated public policy was ordering him back on the job?

MR. GEAR: Absolutely.

QUESTION: It's like his ordering a drug addict back on the job.

MR. GEAR: Exactly right. Now he could have provided

merely for back pay, and we could have lived with that, but we can't live with him back on the job operating --

QUESTION: And you say that the Court of Appeals was justified in relying on the evidence of marijuana in the back seat of his car to conclude that he was a drug user who should not be ordered back on the job.

MR. GEAR: Absolutely.

QUESTION: That just means that the Court of Appeals disagrees with the arbitrator as a fact finder, on the facts.

MR. GEAR: It means they disagreed with his remedy deriving from the facts that he found.

QUESTION: Another way, what you are saying is, if the arbitrator said it for any other thing, it would have been all right, but if it's drugs, it's bad.

MR. GEAR: If -- I have not thought about it much outside the drug concept.

QUESTION: For example, if he had been charged with murder -- for another employee it was wrong. That would be all right.

MR. GEAR: I'm not saying that. I would think that there might be a sever public policy against the reinstatement of a violent individual to the American workplace.

QUESTION: Who is going to set up which crimes are against public policy or not?

MR. GEAR: I think the courts are going to have to do

that, which is why we are here.

QUESTION: I take it you want us to do that?

MR. GEAR: Yes, sir.

QUESTION: Mr. Gear, I want to be sure. The marijuana that was in his car, as I recall, was residue in the scale. Wasn't that right? There's not anything indicating there was enough marijuana to be smoked.

MR. GEAR: There was enough marijuana. I saw the sample. It was about --

QUESTION: Well, the record doesn't tell us that.

MR. GEAR: I know, but the --

QUESTION: What the Court of Appeals said -- now you want us to go beyond what the Court of Appeals found. The Court of Appeals found there was a scales case containing marijuana residue.

MR. GEAR: With marijuana residue and certainly marijuana residue can be smoked. There was sufficient marijuana --

QUESTION: We don't know how much, and it could have been just a trace, couldn't it?

MR. GEAR: It was not just a trace, I assure you.

QUESTION: Well, the record that comes to us, it could have been just a trace, and is that enough for your position? If it were just a trace, would it nevertheless follow that he must be discharged?

MR. GEAR: Particularly with the background of the drug problems at this plant, I --

QUESTION: Well --

MR. GEAR: The Fifth Circuit commented that de minimus is sufficient to violate the rule against possession of marijuana, particularly in a state where you have criminal laws prohibiting the possession of marijuana. That would be sufficient to go to trial on.

QUESTION: I understand that, but it would be true that even if he went to trial, found guilty, and served his sentence and all, the public policy rule for which you contend is, that if in a dangerous industry -- and I agree with you it's a dangerous industry -- an employee's car is found to have contained a residue of marijuana, he must be fired.

MR. GEAR: I would agree with that.

QUESTION: As a matter of public policy.

MR. GEAR: I would agree with that -- on the plant premises.

QUESTION: And even if the contract provided, we will not fire people unless we find more than six ounces of marijuana. If the contract said that -- like the arbitrator said, here, this isn't enough -- you'd say that contract is against public policy and they must contain in the contract a provision requiring discharge on these circumstances.

MR. GEAR: If the contract said that, I would have

difficulty --

QUESTION: Why? Public policy overrides the contract. That's your whole case.

MR. GEAR: I understand what you are saying, but the public policy is, regardless of the small residue in his car that was found, he is probably going to do it again.

QUESTION: Probably going to do what again?

MR. GEAR: Probably going to be using marijuana on the job again. You have a drug user --

QUESTION: Is there any finding he ever did use marijuana on the job?

MR. GEAR: No.

QUESTION: How can you say probably be doing it again if you don't have the first violation?

MR. GEAR: But that's obviously the basis of the policy against drug use in the workplace, the probability of continued usage. There is no testimony that he used it once and never would again. I might point that out to you.

QUESTION: There is not testimony he used it once, is there?

MR. GEAR: There is testimony that he was found with two and a half ounces at his home.

QUESTION: But is there testimony that he ever used it?

MR. GEAR: No.

QUESTION: Did the Court of Appeals overturn this because they concluded that he was a drug user?

MR. GEAR: I would suspect so.

QUESTION: Well, you suspect it. Did they say that?

MR. GEAR: They concluded that the possession of this small amount in violation of the company's rules in a safety intense industry was sufficient basis to set it aside using the public policy exception of W. R. Grace.

QUESTION: Do you think that their finding to that effect is open here under the questions that were presented by the Petitioner? Or do we just address the public policy issue? Is that all?

MR. GEAR: Well, if the Petitioner didn't address it and put it before the Court, I don't think it's open. We have both discussed it somewhat in our briefs. I have it as a backstop argument that the arbitrator did exceed the bounds of the contract and that his award was irrational, in the event that you were to rule against us on the public policy question.

QUESTION: Was public policy argued to the arbitrator?

MR. GEAR: I argued it in my brief that --

QUESTION: To the arbitrator?

MR. GEAR: Yes. And he didn't rule on that argument. That's what concerns me and why we are here today, also.

QUESTION: What if they found a case of beer in the

back seat and a drunk passenger in the front seat? Would public policy require his discharge?

MR. GEAR: In that industry, the safety industry, the rule against possession prohibited also the possession of whisky or alcoholic beverages on the premises, and that would have been sufficient.

QUESTION: It would have been a mandatory discharge if he had beer in the car?

MR. GEAR: Yes.

QUESTION: Including near beer?

MR. GEAR: I'm not sure about near beer.

It is our position that the public policy exception of W. R. Grace will have very little meaning if an award is limited to the violation of a positive law. The language of W. R. Grace -- written by Justice Blackmun, I believe -- indicates that the courts, in defining public policy, can refer to the laws and the legal precedence.

This to me means more than merely a violation of positive law that is involved. W. R. Grace spoke of other factors and looked at other matters of policy when they made their decision in W. R. Grace.

The Court was correct earlier in that traditionally, in the review of contracts outside of the labor field for violations of public policy, that the courts have not merely set aside those contracts when a positive law has been

involved.

The courts have looked to general considerations of public policy. The Crocker case, the Muschany case, the Sprott case, even, involving the Confederate cotton, was not decided on the basis of a specific law that held that the individual that tried to get the money for his cotton was in fact violating a positive law.

To me, we really don't need a positive law to infer a public policy against drug use in the workplace, and particularly in the hazardous industries. The hazardous industry in this case is not so publicly involved as the hazardous industries in the airline, railway, the common carrier industry.

In an amicus curiae brief --

QUESTION: Mr. Gear, let me ask you one other question. There is a positive law prohibiting drug use in the work place. There is a positive law prohibiting drug use.

MR. GEAR: There is a positive law --

QUESTION: So if you can prove drug use in the workplace, you have proved a violation not only of public policy but positive law.

MR. GEAR: Louisiana statutes prohibit the possession of marijuana. It's a six months fine for first offense and up to 20 years for the third offense.

QUESTION: So a fortiori if you've got it in

possession when you're working one of these slitting machines.

MR. GEAR: Then you've violated a positive law.

QUESTION: But there's nothing -- the arbitrator doesn't offend that sort of law, because if the guy is going to use marijuana, he offends it as much as if he has been fired as if he is still working.

The fact that he is going to use marijuana, it doesn't seem to me it increases the violation of that statute to say that he may be using marijuana at work if all you are relying on is a statute that says it's illegal to use marijuana anywhere.

QUESTION: And one of the penalties for violating that statute isn't to be fired, is it?

MR. GEAR: Of course not, but --

QUESTION: And you don't put the employer in jail, you put him in jail.

MR. GEAR: That's correct, but we're not going to find a law in this country, to my knowledge, that says the possession of marijuana shall bar one from employment.

QUESTION: But ordering the employer to reinstate him, arguably -- if you order an employer to put back to work, in an industry like this, a drug user, aren't you violating a federal statute about a safe workplace?

MR. GEAR: You are violating the Occupational Safety and Health Act --

QUESTION: Exactly.

MR. GEAR: -- the employer's duty to --

QUESTION: That's the employer doing that, so you are ordering the employer to do something to public policy.

MR. GEAR: You are ordering the employer to violate the federal obligation to provide a safe workplace, and a Louisiana statute also exists imposing a duty to provide a safe workplace on the employer. That's 23:13 of the Louisiana revised statute.

QUESTION: But the question is, is that what this order was?

MR. GEAR: Sir?

QUESTION: Is that what this order was, though, to put back to work a drug user?

MR. GEAR: It was to put back to work an individual that was found in the back seat of a car where an amount of marijuana smoke existed, that had marijuana found on the premises of the employer's plant in violation of the company's rule, and I think it would put back to work a drug possessor or probably drug user.

I just don't think an employer and the public can risk that in a safety intensive industry.

QUESTION: What's really contrary to public policy here is to refuse to be persuaded by that degree of evidence that this fellow was a drug user.

MR. GEAR: For the arbitrator to refuse to be persuaded?

I don't know the answer to that.

QUESTION: But the Court of Appeals obviously, you say, concluded that he was a drug user, and that's why they said it was contrary to public policy.

MR. GEAR: They concluded that he was a drug possessor. I believe that's clear.

QUESTION: Supposing it were a liquor -- supposing the evidence shows someone saw "x" drinking liquor in a car, and there was liquor spilled in the back seat, and "y" had been sitting in the car, but there is no who actually saw "y" drinking liquor.

Do you think that a fact finder is compelled to conclude that "y" was drinking liquor just because "x" was and there was liquor in the car?

MR. GEAR: No, I don't think so, but there are cases that hold, in the area particularly, that constructive possession can be based upon similar facts to that.

QUESTION: It's a bit of a jump first from use, then to possession, then to constructive possession. You get pretty far out.

MR. GEAR: I don't think so. Not in the Louisiana criminal decisions. I don't think so, because they have held constructive possession when an individual has been seen in the

company of folks smoking marijuana and with marijuana on the ground near him.

QUESTION: Well, it is one thing to uphold a conviction based upon a conclusion to that effect by the finder of fact, but it is another thing to say the finder of fact must draw that inference.

MR. GEAR: I would agree. The finder of fact in our case, though, did find that the individual possessed marijuana in his car, based upon the police search, though. So we have a finding of fact we can rely on in this case.

QUESTION: And the Court of Appeals said that, based on that evidence, the remedy was inappropriate --

MR. GEAR: That's correct.

QUESTION: -- because it was contrary to public policy to order back to work anybody whose car contains traces of marijuana.

MR. GEAR: That's correct, Your Honor. And of course, S. D. Warren's court in the First Circuit held, also in a paper mill, also in very similar problems of marijuana usage that the public policy was not served by the arbitrator's reinstatement of drug users in that situation, on essential identical grounds to the Misco case.

The Fifth Circuit held the same thing in the context of the drinking truck driver in the over the road trucking industry. So I think the courts are moving towards this. The

unions arguments that the floodgates will open in the event that the courts find a flexible public policy exception, I think that argument is not appropriate.

We have Rule 11 sanctions if employers seek to set aside arbitration awards without sufficient basis. I think that is a good stop. I think that the courts exercise judicial restraint in utilizing the public policy exception and overlooking arbitration decisions.

As Justice O'Connor pointed out, the unions and employers already are able to appeal to the courts arbitration decision which exceed the bounds of the arbitrator's power in the contract.

This is nothing new. I don't think that a flexible public policy exception will deter or interfere with the national labor relations policy to any extent. Really, I think what we are looking at today is, we can have a narrow positive law exception as urged by the Petitioner which doesn't protect, say, the public with the reinstatement of a dope user to operate the control room of a nuclear power plant, or puts him the control room of a refinery or some other hazardous industry, or we can be reasonable and use a common sense approach and determine that public policy is more flexible in the area of drugs and alcohol abuse.

QUESTION: Mr. Gear, isn't there another protection that is available? Can't the employers get a provision in the

contract that entitles them to discharge somebody who has ever been in possession of marijuana or something like that?

MR. GEAR: They can bargain for a provision, or they can just implement work rules if they have the authority under the contract to do so, that says that the discharge of an individual for possession of marijuana is a dischargeable --

QUESTION: The arbitrator could have interpreted the word cause in this case as including finding marijuana in somebody's car on the premises.

MR. GEAR: Well, he could have, but he didn't accept that evidence.

QUESTION: But he could have without any rule or anything else.

MR. GEAR: He had the view that the employer has to know exactly every piece of evidence in support of the discharge at the moment of the discharge, and would not receive the corroborating evidence which we found just a week before the arbitration hearing by going through the police records that this fellow had in fact some marijuana in his car.

The arbitrator said that if you don't know it at the time of discharge, it's all over.

QUESTION: It may be for back pay, but he also said it was all over for reinstatement.

MR. GEAR: Well, he reinstated him, certainly. I think it all gets back down to a common sense view of the

national labor relations policy and the public policy exception. We submit that the courts view below of the flexible public policy exception is the correct view, and we appreciate the Court's time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gear. Mr. Silberman, you have three minutes remaining.

ORAL ARGUMENT OF DAVID SILBERMAN

ON BEHALF OF PETITIONERS -- REBUTTAL

MR. SILBERMAN: Your Honor, unless the Court has any further questions, I have nothing I wish to add.

QUESTION: I have one question. I am going to give you the hardest case I can think of and see whether you'll adhere to your principle.

MR. SILBERMAN: The answer is yes, Justice Scalia.

QUESTION: Well, I want to see how your principle works out. Let's assume that there's a state law that prevents the employment of anyone that has a history of child molestation in a day care center.

And there's a contract with the union; the contract says anyone can be fired for a history of child molestation. But the contract also says that any disciplining for any matter that involves moral opprobrium shall only be made on the testimony of three witnesses to the event.

Now there is one individual -- it is clear on the basis of a lot evidence, photographic, documentary, and

everything else, the fellow has a long history of child molestation, but in no one of these instances were there three eye witnesses to the event.

And the thing goes to arbitration, the arbitrator says, that's the way the contract reads, you don't have the three witnesses, that's not the evidence the contract requires, you can't be fired.

A court would have to enforce that?

MR. SILBERMAN: No, I don't think our principle reaches that conclusion.

QUESTION: Why doesn't it?

MR. SILBERMAN: Because if -- I need to break that hypothetical down into two possible scenarios. One is where the arbitrator has made factual findings which says that this guy is guilty of these acts, but that I don't have the authority to sustain the discharge --

QUESTION: No, he hasn't made the finding, but the court that reviews the thing can see that that is absolutely the case. But he hasn't found that, he has just said, you didn't meet the procedural rules, just as the arbitrator here said.

But the point is that those procedural rules make it so difficult for the employer to enforce the public policy that the argument is a contract with that unrealistic a condition for dismissing somebody for the reason the law requires is

contrary to public policy. You would not allow that?

MR. SILBERMAN: No, I think that if -- as I understand the hypothetical -- there is a prohibition on employing a particular individual and a procedural rule in a contract which leads an arbitrator to order the employment of an individual who public law says is not to be employed, then it is entirely consistent with -- our principle would say that award is against public policy because it is ordering the employer to do something he is not permitted to do.

Even though the contract itself was lawful, the remedy -- the order there ordered the employer to do something he is not permitted to do.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Silberman. The case is submitted.

(Whereupon, at 2:47 p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-651

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HEARING DATE: October 13, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States of America.

Date: Ocotber 13, 1987

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