Kluwer Arbitration Blog

Nat'l Railroad Passenger Corp. v Fraternal Ord. of Police, Lodge 189: Has the D.C. Circuit Opened the Door for Challenges under the Public Policy Exception?

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On April 28, 2017, the Court of Appeals for the District of Columbia Circuit (in a majority decision) affirmed the district court's decision to set aside an award issued by a sole arbitrator finding that the award violated public policy. The award was rendered in the context of mandatory arbitration of statutory claims under the Railway Labor Act. The award was later challenged with the District of Columbia district courts pursuant to the same statute. The judicial review process was therefore not conducted under the Federal Arbitration Act ("FAA").

The dispute concerned an action brought by the Fraternal Order of Police, a labor union, on behalf of an employee of the National Railroad Passenger Corporation (known as "Amtrak") who was fired for misconduct on December 3, 2012. The union sought arbitration pursuant to the grievance procedure contained in the collective bargaining agreement alleging that the employee had been fired without just cause. The arbitrator did not reach the merits of the claim but ruled that the Amtrak Inspector General's investigator had not fully complied with Rule 50 of the collective bargaining agreement procedures relating to the conduct and control of interrogations of employees. Among others, Rule 50 of the agreement provided that an investigator must record the interview with the employee and if the employee is suspected of criminal activity, the investigator must give *Miranda* warnings. During the investigation of the fired employee, the investigator failed to record the interrogatory as well as to give the employee his *Miranda* warnings. Therefore, the arbitrator found that the investigation had not fully complied with the provision of the collective bargaining agreement and ruled that Amtrak must reinstate, with backpay and lost seniority, the employee fired for misconduct. Subsequently, Amtrak sought the seating aside of the award with the District of Columbia district courts.

The district court vacated the award finding that Amtrak Inspector General could not legally be governed by Rule 50 of the collective bargaining agreement. Section 153 First (q) of the Railway Labor Act establishes that a ground on which a court may set aside an award is that a particular contractual provision at issue is contrary to "law or public policy." The district court relied on the decision of *U.S. Dep't of Homeland Security v FLRA (DHS)* to find that the award was contrary to public policy. In *DHS*, the court held that under the Inspector General Act of 1978 public sector unions and agencies can neither add to nor subtract an Inspector General from its investigatory authority through collective bargaining. 751 F.3d 655, 671 (D.C. Cir. 2014). The district court found that the arbitrator's application of Rule 50 was contrary to the precedent in *DHS* and vacated

the award.

The Court of Appeals affirmed the lower court's ruling. According to Senior Circuit Judge Randolph, who authored the decision, the provision of the collective bargaining agreement was contrary to the law because the arbitrator's application of Rule 50 to the Inspector General's investigation had the effect of subtracting him of his investigatory authority. Hence, the district court was right in refusing to enforce the award based on that provision.

The decision was accompanied by a strong dissent of Judge Pillard who expressed that the limited scope of judicial review of awards did not grant the district court legal basis to vacate the arbitrator's award. While Judge Pillard agreed with the majority on that the reasoning of the arbitrator's opinion failed to anticipate the court's decision in *DHS,* she was of the opinion that it exceeded the court's judicial review power to scrutinize whether an arbitrator's reasoning conflicted with public policy since that power is limited to determining whether the award itself –rather than an arbitrator's reasoning- creates an explicit conflict with the law.

Judge Pillard also stressed the U.S. Supreme Court and the Circuit's historical narrow approach to the public policy exception as a ground to vacate awards in the U.S. In this sense, she showed concern on a future use of the majority's reasoning to actions seeking to set aside awards initiated under the FAA. She supported this concern on the Circuit's prior precedent which equated the judicial review standard of FAA actions with mandatory arbitration of statutory claims. *Cole v. Burns Int'l Sec. Servs.,* 105 F.3d 1465, 1486 (D.C. Cir. 1997).

The Circuit has previously ruled on cases involving the judicial review of awards and the public policy exception. For instance, in *Teamsters Local Union No. 61 v United Parcel Serv., Inc.*, the Court of Appeals held that the public policy exception is extremely narrow and applies only when the public policy emanates from clear statutory or case law, not from general considerations of supposed public interests. 272 F.3d 600, 606-07 (D.C. Cir. 2001). Notwithstanding, this decision might open the door for actions seeking to challenge an award where the losing party disagrees with the arbitrator's reasoning.

While the appellant announced it will appeal the Circuit's decision with the U.S. Supreme Court, public records reveal that such appeal has not been filed so far. The parties have 90 days after entry of the judgment to file a petition for a writ of certiorari with the Clerk of the U.S. Supreme Court.

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