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Competence-Corrections: Fifth Circuit in the US Says Arbitrators Decide What "Correction" Means

Catherine Bratic · Wednesday, July 29th, 2020 · Young ITA

Awards are final—mostly. Many institutional rules allow arbitrators to correct clerical errors in their awards, but prohibit revisions to the merits of their decisions. The U.S. Court of Appeals for the Fifth Circuit signaled in a recent case that it will defer to arbitrators in interpreting institutional rules regarding the scope of their correction authority, even if their interpretation appears to be wrong.

The Arbitrator's "Correction"

Communications Workers of America., AFL-CIO v. Southwestern Bell Telephone Company, 953 F.3d 822 (5th Cir. 2020) involved a dispute between the Communications Workers of America ("CWA") union and Southwestern Bell, the employer of the union's members. CWA alleged that Southwestern Bell had violated a collective bargaining agreement by assigning certain activities to one group of employees.

The sole arbitrator, acting under the AAA Labor Rules, issued a final award determining that Southwestern Bell had violated the collective bargaining agreement. *Id.* at 825. He noted that two settlement agreements gave the company the right to assign "all work" to the employees in question. *Id.* Despite this, he relied in large part on a factual exhibit that he said established a "clear practice" requiring the union and the employer to agree in writing on changes to the employees' job duties, which they had not done for that reassignment. *Id.* That exhibit was a key part of the sole arbitrator's decision: he stated explicitly that he "would be inclined to find that no violation of the Agreement occurred" if not for that exhibit. *Id.*

Southwestern Bell moved for "reconsideration" by the arbitrator under AAA Labor Rule 40, explaining that the exhibit the arbitrator relied on was a summary prepared by a different union and related to a different collective bargaining agreement. *Id.*

The arbitrator, persuaded he had made an error, determined that he could revise his final award under AAA Labor Rule 40, which states:

> "Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical,

> typographic, technical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided."

The arbitrator issued a new award classifying his reliance on the exhibit as a "technical error" and holding that Southwestern Bell had not violated the collective bargaining agreement. *Id.*

The Fifth Circuit's Decision

CWA and Southwestern Bell filed cross-motions to vacate and confirm, respectively, the revised final award. The district court granted confirmation, and CWA appealed. *Commc'ns Workers of Am., AFL-CIO v. Sw. Bell Tel. Co.*, No. 1:18-CV-271-LY, 2019 WL 6037274 (W.D. Tex. July 9, 2019).

The Fifth Circuit upheld the confirmation, deferring to the arbitrator's interpretation that he acted within the scope of Rule 40 in revising his original award. The court commented that this interpretation was "debatable," in light of Rule 40's instruction that an arbitrator should not "redetermine the merits of any claim." *Id.* at 830. However, it noted that Rule 47 of the AAA Labor Rules authorized the arbitrator to "interpret and apply these rules insofar as they relate to the arbitrator's powers and duties." *Id.* at 827. Summarizing its precedent for deferential review of awards, the Fifth Circuit stated that U.S. Federal Arbitration Act, which governs confirmation and enforcement of awards by U.S. courts, requires confirmation of the award "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, … [e]ven if an arbitrator committed serious error." *Id.* at 826. Although the Fifth Circuit acknowledged that the arbitrator's revision here went "a step beyond" the typical correction of clerical errors, it held that "[w]e have never measured an arbitrator's powers by the magnitude of the change created by the arbitrator's corrections." *Id.* at 830.

The court distinguished other cases in which it vacated awards because arbitrators exceeded their authority. In those cases, the arbitrators had ignored contractual terms altogether rather than addressing them and potentially misapplying them. *See, e.g.*, *Hous. Lighting & Power Co. v. Int'l Bhd. of Elec. Workers, Local Union No. 66*, 71 F.3d 179, 184 (5th Cir. 1995).

Implications

While many other jurisdictions enshrine competence-competence in their national arbitration laws, in the U.S., the scope of the tribunal's power to determine its own jurisdiction still depends on the language of the parties' arbitration agreement, including any institutional rules incorporated into that agreement. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010); *First Options Inc. v. Kaplan*, 514 U.S. 938 (1995).

When parties adopt institutional rules permitting the tribunal to determine the scope of its own jurisdiction as well as to decide on the interpretation of those rules, U.S. courts have repeatedly confirmed arbitrators' power to clarify or correct their awards pursuant to those rules. *See, e.g.*, *Barranco v. 3D Sys. Corp.*, 734 F. App'x 885, 889 (4th Cir. 2018); *United Bhd. of Carpenters & Joiners of Am. v. Tappan Zee Constructors, LLC*, 804 F.3d 270, 276 (2d Cir. 2015); *T.Co Metals,*

LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 347 (2d Cir. 2010). Although this case presented an extreme — and arguably impermissible — correction, the Fifth Circuit was persuaded that the arbitrator had at least attempted to apply the institutional rules. In its decision, the Fifth Circuit repeatedly emphasized that its broad deference to arbitral awards must leave room for the arbitrator to commit legal and factual errors, as well as to misapply the parties' agreement.

However, even where agreements permit arbitrators to correct their awards and interpret the scope of their own authority, they are only entitled to deference if they are indeed interpreting the rules and agreement at issue. The Eleventh Circuit notably reached an opposite conclusion in the very similar case of *International Brotherhood of Electrical Workers, Local Union 824 v. Verizon Fla., LLC*, 803 F.3d 1241 (11th Cir. 2015), rejecting an arbitrator's attempt to revise his award. In contrast to the Fifth Circuit's decision in *Communications Workers*, the Eleventh Circuit noted that the arbitrator had not even stated that he believed he was acting within the scope of his correction authority. In other words, the arbitrator had made no decision on the scope of his correction authority to which the Eleventh Circuit could defer.

If parties have not explicitly delegated authority to the arbitrator to decide the scope of her power under the applicable rules, courts will scrutinize the arbitrator's reasoning more closely. In *Smith v. Transport Workers Union of America, AFL-CIO Air Transport Local 556*, the Fifth Circuit held that the tribunal's modification of its award was impermissible. 374 F.3d 372 (2004). While the tribunal stated that its modification was "consistent with the arbitration agreement of the parties and the intention of the drafter of the award," the Fifth Circuit analyzed the arbitration agreement de novo and found that the tribunal had exceeded its power. *Id.* at 374. The court refused to defer to the tribunal's interpretation of the arbitration agreement, stating that "we view the real question as a matter of contract interpretation and one for the courts, since it involves the question of the arbitrators' authority." *Id.*

In summary, parties arbitrating in the U.S. can decide whether courts or arbitrators should be primarily responsible for determining the scope of arbitrators' powers under applicable institutional rules. Delegating this power to arbitrators has the advantage of limiting post-hoc review of the arbitral award by an enforcing court. However, as *Communications Workers* shows, it also requires the parties to accept the risk that the arbitrator errs in determining her powers, as it limits courts' ability to correct such mistakes.

If parties want to delegate this question to arbitrators, they should do so clearly in their arbitration agreements. In a related context, the Supreme Court has held that parties seeking to delegate the question of arbitrability to arbitrators must do so through "clear and unmistakable" evidence. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019). The Supreme Court has so far declined to say whether the mere incorporation of institutional rules meets this test. Until that debate is resolved, parties should make any delegations of authority explicitly in their arbitration agreements to avoid any unintended results regarding the scope of the arbitrator's powers.

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