IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - X

EASTERN ASSOCIATED COAL :

CORPORATION, :

Petitioner :

v. : No. 99-1038

UNITED MINE WORKERS OF AMERICA, :

DISTRICT 17, ET AL. :

- - - - - - - - - - - - - - - - - - X

Washington, D.C.

Monday, October 2, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

JOHN G. ROBERTS, JR., ESQ., Washington, D.C.; on behalf of the Petitioner.

JOHN R. MOONEY, ESQ., Washington, D.C.; on behalf of the Respondents.

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 99-1038, The Eastern Associated Coal Corporation v. United Mine Workers of America.

Mr. Roberts.

ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE PETITIONER

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

Twice the driver in this case tested positive for illegal drugs, and twice the company that employed him to drive its 25-ton vehicles in West Virginia tried to fire him. Each time an arbitrator ordered the driver reinstated. The second time the company went to court, arguing that the reinstatement award should not be enforced because it was contrary to public policy to put this driver back behind the wheel.

The district court and the court of appeals, however, rejected that argument and concluded that because reinstatement was not illegal, the public policy exception to the enforceability of contracts, quote, does not apply, unquote.

QUESTION: Mr. Roberts, did the company have any provision in the collective bargaining agreement about

what it was going to do for positive drug testing?

MR. ROBERTS: Yes. The agreement said that in the case of a positive drug test the driver was subject to sanctions up to and including termination, and the arbitrator concluded that in this case they hadn't established just cause.

That, of course, is the predicate for the application of the public policy exception in every case, the fact that the contract provides a result that is different from the one the parties are arguing for under public policy.

QUESTION: How do you read Department of Transportation regulations on this? They're quite extensive, and as I read them it doesn't expressly cover what happens for a second violation. There was a proposal to do something that I guess they didn't adopt.

MR. ROBERTS: Yes, there was a proposal, and it was just not adopted.

QUESTION: Yeah.

MR. ROBERTS: We don't know if it was because it was regarded as too strict or not strict enough.

QUESTION: So is it within the provisions of the regulations actually adopted that an employee could be restored to driving a truck under these circumstances?

MR. ROBERTS: Certainly after one positive test.

QUESTION: After a --

MR. ROBERTS: The question of a --

QUESTION: It just doesn't say.

MR. ROBERTS: No. The question of a recidivist is not addressed by the regulations at all.

QUESTION: Mm-hmm.

MR. ROBERTS: What the regulations provide -- and we agree with the Solicitor General's reading of the regulations. We don't take issue with it -- is that in a case of a positive drug test a couple of things have to happen. The driver, before he can go back to work, has to pass the minimum requirements, which is just evaluation by a substance abuse professional and pass a return-to-work test, and then whether or not the driver gets his job back is left to private ordering.

Now, if that private ordering takes the form of a contract, a collective bargaining agreement, that contract should be subject to the public policy exception just like every other contract is. There is not --

QUESTION: Why, Mr. Roberts, because you could have said expressly, you didn't have to as a contracting party rely on what a court might or might not declare to be the public policy. Could you have not said, a driver gets tested and shows up positive twice, he's out. You could have said that. You could have negotiated for that.

MR. ROBERTS: Well, we could have tried. Whether or not it would have been the result of the collective bargaining practice is another question.

QUESTION: But you didn't, you didn't do that, or we don't know.

MR. ROBERTS: The arbitrator determined that we didn't, I think is the best way to put it. Now -- but under this court's decision in Kaiser Steel, though, even if we had signed a contract that was illegal, we'd still have standing to object to that.

QUESTION: Yes, but I'm just trying to make the narrow point that an employer could bargain for a rule that says you test positive for drugs twice, and you're out, could bargain for such a rule.

MR. ROBERTS: Yes. There's no question about that. Again, all that does is pose the question under the public policy exception.

QUESTION: Well then it would make that academic or moot if you had it in the contract.

MR. ROBERTS: Well, if the union agreed to it, if it were phrased in such a way that it were not subject to an arbitrator's misinterpretation, and it's also the case that it may not be the best result.

QUESTION: There are such contracts, as I understand it --

MR. ROBERTS: Yes.

QUESTION: -- are there not?

MR. ROBERTS: Yes.

QUESTION: They'd make it explicit where the first time, second time, you're out, period.

MR. ROBERTS: Yes, there are some contracts. In other cases unions have resisted them, and in other cases perhaps the employer recognizes that an absolute rule may not be the best result.

QUESTION: So in other words, what you're seeking, then, would be a rule that says the public policy kicks in if the employer wants to discharge this person, but suppose the employer would say, we're going to give him a second chance, even a third chance, there would be no public policy to come into that picture.

MR. ROBERTS: That's right, and for a very important reason, is because the doctrine that we're talking about is a doctrine of contract law. It only applies when the question of the enforcement of a contract is at issue. That is an important limitation on the public policy role for the courts, and --

QUESTION: But in other words you are saying the bottom line rule that you're urging is that you ought to be permitted, if you so choose, to discharge this man, but if you do not so choose, then there's no -- there's

nothing that --

MR. ROBERTS: Oh, but there is something very much that constrains the company's choice in that situation, and that's tort law. The same public policy that informs the exercise of the public policy exception when the court is asked to enforce the contract restrains what the company can do on its own unilaterally.

QUESTION: Well, I want to get into that, but just before we leave this last question, if the company had a contract that said three strikes and you're out, would that contradict public -- but not two and not one, would that contradict public policy?

MR. ROBERTS: If the -- the question would come up when someone wanted to enforce a contract.

QUESTION: The contract says three strikes and you're out, not two, not one. Then on the second time the employer comes and says, well, you know, this violates public policy, we want him out.

MR. ROBERTS: Yes, it would not prevent the application of the public policy exception. The -- in every case that the question comes up, whether it's this case or the Kensington --

QUESTION: So that would be a valid argument by the employer. In other words, he --

MR. ROBERTS: It would not prevent the court --

QUESTION: There is in your view a public policy which would prohibit a three-strikes clause of the kind I describe?

MR. ROBERTS: Well, what it would prohibit, depending on the circumstances, and the Town of Newton case said this is a very fact-intensive inquiry on the court's part, when the court is asked to enforce the two strikes, and he should be fired, the fact that the contract provided three strikes doesn't act as an absolute bar. It is always the case when the public policy question comes up that the contract provides something else.

QUESTION: Well, Mr. Roberts, you've referred to the public policy exception several times. Would you state your version of the public policy exception?

MR. ROBERTS: Yes. The public policy exception is the one this Court articulated in Town of Newton, which is that courts have not only the authority but the obligation to decline to enforce contracts that are illegal or that violate public policy.

Now, to determine whether they violate public policy, what this Court did was adopt the Restatement test, one that has been developed over centuries of common law, which asks whether the interests in enforcing the agreement are outweighed in the circumstances by a public

policy harm by the enforcement of the agreement.

QUESTION: That's just kind of boiler plate.

MR. ROBERTS: Well --

QUESTION: I mean, how would you -- can you amplify it at all?

MR. ROBERTS: Certainly. The public policy in this case is the public policy against the use of illegal drugs by those in safety-sensitive positions. Now, that policy is well-defined, because Congress and the executive have said what those positions are, not the courts. Congress and the executive have said it covers these substances, not the courts, and the policy is so strong that Congress has said, we're going to test you to make sure that the policy is implemented, and Congress and the executive have said how that testing should be done, and how often. The courts --

QUESTION: How does the policy differentiate between two strikes and three strikes?

MR. ROBERTS: Well, at that point you get into the fact-intensive weighing that this Court in Town of Newton says, said has to be done. In other words, you have to look at all of the circumstances and determine whether that policy --

QUESTION: Does that mean any -- one judge might say, well, one strike's enough for me, that's the end of

the ball game?

MR. ROBERTS: Well --

QUESTION: Another judge might say, two strikes, and still another might say three strikes. How do we know which is the right number?

MR. ROBERTS: With respect to the one strike I think the regulations would prevent that in most situations, because they contemplate that in some circumstances you can be reinstated, so there should not be an absolute rule of one strike and you're out.

Now, the objection Your Honor raises is the same objection that could have been raised in the Town of Newton case. How do you tell which release dismissal agreement violates the policies underlying section 1983? It's an objection that has been raised with respect to the public policy exception since the beginning. Go back to the Muschany case and even before that.

And yet the exception has endured because the courts have recognized that if courts do not ensure that contracts do not violate public policy, no one else can.

QUESTION: Whenever the policy applies, I take it it trumps the contract.

MR. ROBERTS: Absolutely, yes.

QUESTION: What do you look to for -- now, you've talked about the DOT regulations, which obviously

have some -- are there other sources to be relied on here? You say something about the congressional -- in testing --

MR. ROBERTS: Well, one -- yes -- well, in the testing, but what the Court said in Muschany, repeated in Grace and in Misco, is, courts just don't pluck these policies out of the air. You have to look to the laws and legal precedents. You look to the testing act, the DOT regulations, the drug-free work place acts, and one thing they establish is a strong policy of deterrence.

They didn't think that by imposing this testing regime they would catch everybody who's using drugs. What they thought was, if people knew they were going to be tested and consequences were going to flow from that, people would stop using drugs.

QUESTION: Well, do you -- do we say there's a firm public policy that a repeat offender may not be restored to a job affecting public safety?

MR. ROBERTS: Yes. I think --

QUESTION: Is that the policy?

MR. ROBERTS: I think it is. Now, there may be --

QUESTION: How -- and do we look to the DOT regs as part of that determination?

MR. ROBERTS: I -- first of all, I think that's the policy as a general matter. I don't think -- again,

this is not an area where the Court adopts general categorical rules. For example, if the two tests are 15 years apart, or something like that, perhaps in that situation it doesn't make sense to say you cannot be reinstated. That of course is not the situation here.

QUESTION: Mr. Roberts, the indeterminacy of all this I think is what is bothering a lot of us, and let me put the question slightly different from the way others have done.

It seems to me that in considering a public policy exception here we are in a different -- we at this particular Court in this context are in a different position from courts simply sitting in the traditional common law circumstances in which you have two independent contracting parties, and we're in a different position because in fact we've got a labor contract here, and we have a body of law which I assume we can rely on which places tremendous value on the process of arbitration under CVA and respect for the arbitrator's agreement -- determination.

So that if we are going to provide a public policy, or recognize a public policy exception here, it seems to me that it's got to be one in which the force of the public policy thought to be inconsistent with the arbitrator's award has got to be very, very, very clear

and strong and so on. It's not the kind of, or the degree of public policy that might satisfy a traditional common law context.

Given the high degree of persuasiveness that the policy has got to have to overcome these presumptions, is there any way, practical way to administer it short of what the Court did, and that in effect is to say, look, you've got to have inconsistency with positive law?

MR. ROBERTS: Well, first of all, the application of the exception is in no way inconsistent with the deference to arbitrators. In the Grace case, which involved --

QUESTION: Well, it is if you set the strength of the policy too low. I mean, that depends on how strong the policy has got to be. If --

MR. ROBERTS: You have --

QUESTION: Go ahead.

MR. ROBERTS: You have a common law rule that authorizes and obligates courts to apply this, and the argument, as I understand it, and it is the union's argument, is that you should have an exception to that rule in the labor area because we defer to arbitrators, but we defer to arbitrators because they have expertise in the interpretation of a collective bargaining agreement. That is not the question when it comes to public policy.

As this Court --

QUESTION: Well, except that up to a point it is, because as I understand the DOT regs in effect -- I think the phrase that has been used, leave the issue of when you can fire, or whether you can fire for a repeat offense, to private ordering, so it is in fact an issue of the meaning of the contract, and the arbitrator is right smack in the middle of what the arbitrator is best at doing when the arbitrator makes a decision like this.

MR. ROBERTS: Well, no. That depends on what the collective bargaining agreement provides, and collective bargaining agreements do not shape public policy. They shape a private agreement between an employer and a union, and as this --

QUESTION: No, they don't, but the -- when the agreement -- when the private ordering addresses this subject, and the arbitrator is applying that agreement, the arbitrator is acting in sort of a quintessential arbitrator's role, so that it's quite true the arbitrator doesn't -- isn't a separate source, perhaps, of public policy, but the arbitrator's decision is entitled to the greatest deference that it's ever entitled to.

MR. ROBERTS: As this Court said in the Wright decision, the deference that is accorded arbitrators is limited by the rationale that supports it.

QUESTION: Mr. Roberts, do you agree that an arbitrator's decision arbitrating a collective bargaining agreement is somehow entitled to more weight than an arbitrator interpreting a provision under the Federal Arbitration Act?

MR. ROBERTS: No, Your Honor. I think they're both entitled to the same weight, and all that the arbitrator's decision does is tell you what the parties agreed to. They say, this interpretation is binding on the parties.

Well, that just poses the question that is presented. When you have an application of the public policy doctrine you assume that the parties have agreed to something else. In the Kensington case, Mrs. Bleaker signed an agreement limiting her -- the liability of the company to 250 francs.

QUESTION: All right, so in this case, then, to get right to the facts of it, which -- facts-intensive, we assume that the parties agreed that an appropriate remedy for a person who is found with marijuana twice, and there are extenuating circumstances, is a $10,000 fine, in effect, and rehabilitation, and reinstatement if he tests negative.

Now, how can we say that's against public policy? If you were in California the criminal law

provides the most severe penalty that could be attached to a second possession of 26 grams is a $100 fine. So here we have 30 million people in the State of California saying a $100 fine is the appropriate thing. In West Virginia, I take the highest fine would have been $1,000 under the criminal law.

And now here, the arbitrator says it's going to be $10,000 and testing negative, rehabilitation, reinstatement, so how could we say in this case it's against public policy and he has to be fired?

MR. ROBERTS: Because the criminal sanctions that Your Honor addressed don't take into account what the contract enforcement is going to bring about, and that is, putting this individual, who in the course of 15 months failed two tests for illegal drugs, behind the wheel of a 25-ton vehicle on the roads in West Virginia.

QUESTION: Yes, but how does the -- how does a court know that that individual, when he gets behind the wheel on Monday morning, is any more of a risk to the people on the road than the guy who had three martinis on Saturday night and is sober on Monday morning and gets in the truck?

MR. ROBERTS: Again --

QUESTION: How do we -- how does a court know that?

MR. ROBERTS: The court knows that because Congress told it that. Congress drew a distinction in the testing act. It said, when we test for alcohol we test when you're there performing the functions, because you have to be sober. It's all right if you're going to have a drink on Saturday night.

And it took a different approach when it came to illegal drugs. It said where --

QUESTION: Mr. Roberts, may I ask you if the arbitrator had left leeway to the employer to put this person in a nonsafety-sensitive job, then would you say, well -- what would you say about public policy then? The -- everything is the same, that he gets stopped $10,000 or whatever it was pay, and he has to go through the drug rehabilitation program, and at the end of the line the employer can put him back in a nonsafety sensitive position.

MR. ROBERTS: The issue there would be whether that undermined the deterrent effect of the testing program. In other words, if the consequence for taking drugs and putting the lives of the traveling public at risk is you get a desk job rather than you're behind the wheel, that would undermine what Congress was trying to do.

QUESTION: Would the public -- would the

argument -- in other words, you're telling me that the public policy as you perceive it would say, this person is out, even if there's a nonsafety-sensitive job that he could be given?

MR. ROBERTS: In the -- on the facts of this case, in other words a second positive test, not the first test, I think yes, although the argument for public policy would not be as strong.

QUESTION: Then why -- I'm sorry.

MR. ROBERTS: I was just going to emphasize that what Congress sought to achieve, and what the Department of Transportation is seeking to achieve, is deterrence, and if the consequences are so minimal, as in Your Honor's hypothetical, that undermines the deterrent effect. How do the other drivers who are subject to this test take it seriously, when they see someone who's failed twice --

QUESTION: $10,000 is minimal? I mean, if the Department of Transportation had adopted its reg that favors your position, I take it they would have insisted on a 60-day suspension. They didn't even adopt it, but if it had been adopted, then it would have been satisfied here.

MR. ROBERTS: Well, Your Honor, we don't know why they didn't adopt it. They may not have adopted it --

QUESTION: All right. I see, yes.

MR. ROBERTS: -- because they thought termination was --

QUESTION: Was -- that's true. What about $10,000? I mean, why is $10,000 in light -- if you went across the country, why is $10,000 a minimal -- a minimal sanction for an ordinary worker who is a driver of a truck? That sounds like a lot of money to me.

MR. ROBERTS: Because when you're dealing with a second offense, someone who failed the first drug test they had to take, then failed another one given 14 months after they were reinstated, after they had been through the rehabilitation process, we tried what the statute and the regulations provide, and it didn't work.

QUESTION: Can you tell us a little bit --

QUESTION: -- why doesn't the regulation address it, Mr. Roberts? I mean, I think that's the problem I had with your answer to Justice Ginsburg's question and the distinction that you were drawing in mine between the way Congress treated alcohol and treated drugs.

If, in fact, it is so clear that the deterrent effect would be vitiated unless there were a firing and so on, why didn't DOT provide it, and the fact that DOT didn't provide it seems to erect a caution sign in my mind in the face of a court that purports to be able to infer the clear public policy that you rest upon.

MR. ROBERTS: The assumption underlying your question is that the regulation somehow occupies the field. In other words, they addressed the full universe of situations that can arise. They plainly did not. There's --

QUESTION: Well, I'm not getting into so much a technical kind of preemption as I am a practical kind of psychology. If it was as clear as your argument seems to assume it is, why wasn't it clear enough for Congress to come out and say so in so many words?

MR. ROBERTS: I would suppose because neither Congress nor the Department ever supposed you'd have an arbitrator who would reinstate someone who failed two tests within 15 months to this type of a position. It's --

QUESTION: Mr. Roberts, could you comment on the potential civil liability of the employer? Are there cases -- let's assume an accident with a person who's previously tested positive. I take it the employer would be liable for punitive damages if he took no steps to terminate the employee. If the arbitrator orders the reinstatement, I take it that would be a defense against punitive damages. Are there any --

MR. ROBERTS: I don't want to --

QUESTION: Are there any cases on this in the

lower courts?

MR. ROBERTS: I'm not aware of any, and I don't want to limit what the company will be arguing in the future, but if you accept the interpretation that the arbitrator's decision is an interpretation of the contract, I don't know how much of a defense that's going to be.

QUESTION: It would be a matter of West Virginia law in this case, I take it, if an accident occurred in West Virginia.

MR. ROBERTS: Yes. Yes, Your Honor.

QUESTION: Well, it would be the company's own fault. They signed the contract.

MR. ROBERTS: Well, I'm sure that's what the argument --

QUESTION: They figured, you know, they traded it for some other concessions by the union and they thought this one was one they didn't care that much about.

MR. ROBERTS: I'm sure that's what the argument would be.

QUESTION: So you know, you can't feel very sorry for the company if that's what happens to them.

MR. ROBERTS: On the other hand, the contract, like every contract, is subject to the public policy exception. Now, it is an exception that is applicable

only in the rare case, but those cases do come up.

The union today is arguing that there's no role for the courts here, but in the Jones Dairy Farm case it was a union that was arguing for the public policy exception against the management rule that employees had to report unsanitary conditions only to management.

The Solicitor General is arguing against the exception today, but when it was a Federal postal worker that they were trying to fire and an arbitrator ordered him reinstated, then the Solicitor General was saying no, the court should vacate that arbitration award.

These situations come up with sufficient regularity, sometimes the shoe is on one foot and sometimes on the other, but the fact of the public policy exception has to be recognized, and the one thing that is clear, it seems, is that the lower court approach, which said this is not illegal, therefore there's no role for the public policy exception, is inconsistent with this Court's decision.

The formulation has always been the public policy exception applies to contracts that are illegal or that violate public policy, and with respect --

QUESTION: What's the criterion of violation of public policy going to be? I don't want to create a whole tort law of drug-impaired drivers that the lower Federal

courts are going to have to decide how risky it was to put this driver back on the road, how risky it was to put another driver back on the road. This is just not the kind of stuff the Federal courts are intended to be dealing with.

MR. ROBERTS: No. There are two --

QUESTION: I want a clear line. I don't think you can give us a clear line. In fact, you don't even suggest a clear line. You say every case has to be decided on its own facts.

MR. ROBERTS: Well, that's what the Court said in Town of Newton, and I think it's correct. There is not a clear line, but what the Court has said -- and there are two aspects to the question. How do you tell what the policy is, how do you tell whether it's violated.

On the policy question, what the Court has said is, it has to be well-defined, and you have to point to the laws of legal precedents. That's satisfied here. The definition of this testing program is spelled out in detail by Congress and the Department of Transportation.

QUESTION: Well, I don't agree with your expression of what the public policy is, for one thing. You say the public policy is what? You said that people who drive dangerous vehicles shouldn't be users of illegal drugs.

MR. ROBERTS: That's the policy of the testing act. Congress has said that, and that is the policy that is at issue here.

QUESTION: Yes, but DOT has indicated that at least on the first offense there can be reinstatement, and the regs are silent on the repeat offense, so what do we make of that?

MR. ROBERTS: Well, what the regs say, according to the Solicitor General, and we agree, is that it's left to private ordering, and if it's left to private ordering in the form of a contract, the public policy exception applies.

Now, that's as far as we got in the lower courts. Then the lower courts said, we're not going to look at it because it's not illegal. One reason I think it may be seen difficult to manage the application here is that the district court hasn't done it, and the court of appeals hasn't done it in this case.

QUESTION: But you agree it wouldn't be illegal, because you -- in answer to my question you said if the employer wants to keep this person on, he could. It wouldn't be violating any law or regulation.

MR. ROBERTS: That's an important limitation on this, is on the public policy exception, which is that it only applies when the courts are asked to enforce the

contract.

QUESTION: He wouldn't be violating any law or regulation, but he also wouldn't be asking the court to cooperate in his --

MR. ROBERTS: He wouldn't be making the court --

QUESTION: -- in his insouciance.

MR. ROBERTS: He wouldn't be making the court an accomplice to the violation of public policy. He would be restrained, of course, by tort law.

I'd like to reserve the remainder of my time, Your Honor.

QUESTION: Very well, Mr. Roberts.

Mr. Mooney, we'll hear from you.

The second question presented is, should arbitration awards be vacated on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer? Sometime in your argument, will you tell us your position on that?

ORAL ARGUMENT OF JOHN R. MOONEY

ON BEHALF OF THE RESPONDENTS

MR. MOONEY: Yes, Mr. Chief Justice, and may it please the Court:

We believe that the Court doesn't need to reach the unanswered question in footnote 12 of Misco because the standard that the Court announced in Misco, which was

basically affirmed in Grace, provides ample analytical framework for this Court and any court to analyze this case.

What Misco taught us is that in the 301 context, a court may refuse to enforce an arbitrator's award because it is contrary to public policy if and only if it violates an explicit public policy that is well-defined and dominant, and is ascertained by an examination of laws and legal precedents, and not general supposed notions of public interest. Only if there is an explicit conflict with the public relevant public policy can the arbitration award or contract in the 301 context be struck down.

Eastern challenges under the guise of public policy an arbitration award that was rendered pursuant to the parties' collective bargaining agreement, which reinstated an employee who had tested positive for marijuana. The policy that it uses is the policy embodied in the omnibus Transportation Employee Testing Act of 1991 and the regulations issued by the Department of Transportation pursuant to that statute.

An examination of the statute and the regulations reveals a comprehensive public policy. It is not merely deterrence. It is not merely to take employees out of driving dangerous vehicles, although we agree it is in there. It also has a statutory purpose of

rehabilitation and a return to duty for these employees.

The basic framework of the statute, as we see it, and the regs issued pursuant to that, is detection of these employees, removal from the safety-sensitive position --

QUESTION: It seems to me like saying that when you have a criminal law that provides sending a person who commits a certain crime to prison for only 10 years there are two policies involved, one that he should be punished for doing whatever he did wrong, and secondly that such people should be released after 10 years, and I don't know that that's a public policy. I mean, it's just a limitation upon the first public policy.

I don't know that I would express it to be a policy in and of itself that there should be rehabilitation of people, and that people who have violated proscriptions against the use of illegal drugs and driving dangerous vehicles, we want these people to be rehabilitated. I don't see that as a policy in and of itself. It's simply a limitation on the other policy.

MR. MOONEY: I would disagree, Justice Scalia, because the statute specifically refers to rehabilitating these employees, and that was one of the policy goals, so I don't view it as a separate policy. We would view it as part of the policy embodied in the statute and the

regulations, and of course there's not just a penal aspect to the regulations that we have here. What it does is send these employees to a substance abuse professional who must evaluate them, develop a plan, and that employee must successfully complete that plan prior to being eligible to return.

QUESTION: Let me ask you this. Do you contest that it is a clearly defined public policy that persons as to whom there is a substantial risk because of prior drug use, that they will be under the influence of drugs when driving dangerous vehicles, should not be behind the wheels of such vehicles?

MR. MOONEY: Oh, we agree with that --

QUESTION: Okay.

MR. MOONEY: -- Justice Scalia.

QUESTION: Now, what if a -- an arbitrator under an arbitration clause such as this said in his award, I really think there is a substantial risk that this person will use drugs again and perhaps drive a vehicle while he's still under the influence of drugs again. Nonetheless, despite that substantial risk, I think we should give him another chance. Would you allow a Federal district court to set aside that arbitration decision?

MR. MOONEY: Your Honor, what we would do is go back to the framework of Misco. We would take the public

policy as established. We would take that award, which includes the remedy that the arbitrator crafted, and in the balancing of all the circumstances, apparently the arbitrator in your situation still thought it was appropriate to return that employee to duty.

QUESTION: He thought so despite the fact that there was a substantial risk that he would endanger the public again by being under the influence of drugs again. He says that explicitly. I acknowledge there's a substantial risk that this will happen, but I think -- I'm a tender-hearted fellow -- he should be reinstated anyway.

MR. MOONEY: So long as he complies with the statutory and regulatory prerequisites, and so long as that remedy is within the scope of the arbitrator's commission, we believe that that arbitration award should be enforced.

QUESTION: Well, I don't know what there is left of the public policy exception if you allow an arbitrator to essentially disregard it. You acknowledge it's a public policy not to undertake that substantial risk. The arbitrator says there is that substantial risk, but you nevertheless say we're going to let the arbitrator under the contract force the employer to put the man back on the road.

MR. MOONEY: Well, Your Honor, that's what we

would posit would be the appropriate standard. That really goes to the second question, which is the unanswered question in Misco, although I doubt an arbitrator would do that, and I am not aware of any circumstance --

QUESTION: Well, suppose an arbitrator did do that for a transportation company. He says, I think this guy is going to drive around getting into an accident with earth-moving equipment, but I'm still going to send him back to his job. Do you think an award like that would draw its essence from the contract?

MR. MOONEY: If we had the question of whether it draws its essence from the contract we would go under the established guidelines since Enterprise Wheel, and perhaps that would not do that. We think the law --

QUESTION: All right. So if it would not do that -- I mean, it's an awfully odd award that a transportation company has to hire back somebody who they think is going to get into an accident.

MR. MOONEY: We don't quibble with the jurisprudence that the courts have developed ever since Enterprise Wheel. We think the courts have not had great difficulty in following that, and we recognize that some arbitration awards that have idiosyncratic developments have been struck down, vacated, or a court's refused to

enforce that.

QUESTION: Well, is it easier for the courts to say, a) that it's against public policy, or b) that it does not draw its essence from the contract? Which is the more precise doctrine?

MR. MOONEY: Well, we would view the Misco public policy exception as part of an overall deference to labor arbitration, the 301, that goes back to Lincoln Mills and then comes through the Steelworkers Trilogy, so I don't know if there's -- how you would attempt to analytically put that in a box, Justice Kennedy.

QUESTION: Well, I had thought Justice Breyer's question suggested that there might be another way to answer Justice Scalia's hypothetical by saying, oh, well, this doesn't draw its essence from the contract, and I'm asking you if that's any more precise, any more clear, any more categorically manageable from the standpoint of appellate review than the public policy is. It seems to me it might not be.

MR. MOONEY: I'm not so sure it would be more clear, but I think it would be -- your reference still goes back to the Misco analysis when someone raises public policy -- when someone is attempting to avoid compliance with their own contract by reason of invocation of the public interest, certainly we have to use the analytical

framework developed in Misco. We believe that that framework has worked, for the most part.

We think it should be affirmed just as we originally had it in Grace, and we see what happened in Grace is that the Court's explicit recognition of a public policy exception in the 301 context perhaps encouraged courts, invigorated them to look at labor arbitration awards under the public policy exception, and the Court had to come back in Misco and remind all of us what it meant in the Grace decision, and we think that the Misco standard --

QUESTION: Well --

MR. MOONEY: -- is still perfectly applicable.

QUESTION: -- let us assume that Justice Breyer's question suggests the possibility that the standard of not drawing the award from the essence of the contract gives the courts more latitude than the public policy argument to set aside arbitrators' awards. Would you agree with that?

MR. MOONEY: The difficulty I have, Justice Kennedy, is whenever you look at the question of, does it draw its essence from the contract, you must examine the contract.

QUESTION: Well, isn't another difficulty that you -- it's -- drawing its essence from the contract is

very contract-specific, whereas presumably the public policy thing might be more general?

MR. MOONEY: Well, Mr. Chief Justice, you articulated better than what I was trying to say, is that in a Enterprise Wheel case the first duty the court would look at in an arbitration award would be, what is the labor contract? Is there a just cause provision? Are there strictures on the commission of the arbitrator? That's the first line of inquiry.

Those really don't come in under the Misco analysis as directly as under the Enterprise Wheel analysis. Misco says that there must be an articulated, well-defined, dominant public policy in the laws and legal precedents, and only if that policy is violated by the award can it be struck down in the 301 context.

QUESTION: Well, why --

QUESTION: But you do acknowledge that there is a general public policy against having people who use prohibited drugs from driving dangerous vehicles.

MR. MOONEY: Justice O'Connor, we certainly do, and we look to that policy as articulated perhaps best by the policymaker itself in this area, which is the Department of Transportation. The policymaker itself has told us how that policy is to work in situations like Mr. Smith's.

QUESTION: But Mr. Roberts says that that policy is silent as to what should be done to recidivists. Now, do you agree with that or not?

MR. MOONEY: I part company with Mr. Roberts in analyzing that question. The question of repeat offenders, recidivists, was considered by the agency in its rule-making. Initially there was a proposal that would have a sanction for a second offense of a 60-day period outside the safety-sensitive position, or removal from work, suspension.

After receiving comments, the agency did not adopt that standard. What it did do is remind us that the sanction for failing the rehab program, which is in essence what happened, is the same as in alcohol testing, which is you will be removed, rehabilitated, and eligible for return to service.

QUESTION: Return to what service? That was a question that I asked Mr. Roberts, and I'm not sure what the situation is in this very case. As you understand the arbitrator's award, is there instruction that after the rehabilitation period this man is to be returned to the job of driver, or consistent with that award could the company give him work in a nonsafety-sensitive position?

MR. MOONEY: Your Honor, we would read the award as stating that Mr. Smith was to return to work on

October 20 of that year. If he had satisfactorily completed the program, as he had, to return to the safety-sensitive position, we would say he should get that position. If he has not completed that program, our reading would be that he return to employment consistent with the other provisions of the collective bargaining agreement.

QUESTION: But I think then you're going beyond the award, but you've been very candid, I think, if I understand what you said, that this award says if he passes the rehabilitation course he goes back in the driver's post.

MR. MOONEY: That's our reading of the award, Justice Ginsburg, is that Mr. Smith, once he satisfies the prerequisites contained in the statute, which is referral to the SAP, completion of that process, successful evaluation by the SAP, and then a return-to-duty test, which he has not taken -- he was ready, willing and able to take it. Once he satisfies all of those prerequisites, he should be able to return to his MEO job.

QUESTION: I read it that way, too. That's the only way to understand why he should have to be rehabilitated. He can still be a pot-head and do a desk job as far as public policy is concerned, right?

(Laughter.)

QUESTION: Why make him go through the rehabilitation if you're not looking to his driving a rig again? So I agree with you on the interpretation of the award, but I don't understand how you can think that the Secretary, by not addressing recidivists, is in effect saying recidivism doesn't matter.

It seems to me the fact that they didn't apply automatic disqualification for recidivism only means, you know, there are all sorts of circumstances that may exist, and we're not willing to say categorically that somebody can never come back, but that doesn't answer the question, certainly, whether, when you have a person whom -- in my hypothetical, the arbitrator acknowledges that there is significant risk that this person will be under the influence of drugs again behind the wheel.

When the arbitrator finds that and nonetheless puts him back behind the wheel, public policy isn't violated. I don't think the failure of the regs to address that situation is anything except silence.

MR. MOONEY: We would disagree, Justice Scalia. We believe that the agency has not precluded these employees from coming back once they've satisfied the statutory prerequisites, but the hypothetical that you posit would probably be a vehicle for the Court to address the question that it did not reach in Misco, which is

reserved in footnote 12.

QUESTION: And we're asking you how the Court should answer that question.

MR. MOONEY: We believe, as the union did in Misco, that the appropriate standard in that case, Justice Kennedy, would be that unless the contract or the award giving life to that contract violates positive law, it should be enforced, and we have several reasons for why we view that that is the appropriate standard if the court was to need to reach it.

QUESTION: But you say we shouldn't reach it because this case doesn't stretch that far, because here the arbitrator said this, then, has given me a very special reason. I believe him. I think that he's off drugs except there was this terrible thing, and I believe him, and I -- that's why I'm going to give him one more chance.

MR. MOONEY: Justice Ginsburg, we think to answer this case, there's only four places the Court needs to look. One is the Misco decision for the analytical guidelines on how to evaluate public policy challenges in the 301 context. Two, we need to look to the DOT regulations, which give us the public policy that we are looking for. Three would be the collective bargaining agreement, which authorizes an arbitrator to make these

sort of just cause decisions, and the fourth would be Arbitrator Barrett's award.

If you view the award through the prism of Misco, it's clear that the award should be enforced. We think that that's how easily this case can be resolved. But if the Court does intend to reach the second question, we believe it is important that the Court analyze this within the section 301 jurisprudence.

The policies that animate 301 have been well-established since Lincoln Mills back in 19 --

QUESTION: Why should 301 be more dominant than the Federal Arbitration Act? Both encourage great deference to arbitrators.

MR. MOONEY: Your Honor, we would view 301 as distinct. As we understand the common law notion, the courts, whatever powers they may have, had under the public policy exception, they did not act in a position in contradiction to the legislature. The legislature is the traditional body that establishes public policy.

In enacting the National Labor Relations Act, we believe that the legislature, Congress, did establish the public policy. If you look at sections 171 and 173 of title 29, it's 201 and 203 of the act, it clearly tells us that labor contracts really are something different than commercial contracts.

We are balancing public policy of collective bargaining, telling the bargaining parties that they should privately order their own affairs, and so long as what they do is lawful, we're not going to interfere with that.

QUESTION: Does the arbitrator -- is the arbitrator under an obligation, or, indeed, to your knowledge does the arbitrator as a routine matter take into account public policy?

MR. MOONEY: Your Honor, we believe that arbitrators routinely take into account those considerations, the examination of external law. As the National Academy points out on pages 18 to 20 of its submission to the Court as amicus on our behalf, this is the sort of thing that numerous arbitrators do and, indeed, Arbitrator Barrett did here.

So long as the arbitrator is staying true to his commission he can and should look at those other considerations. That's why people select the arbitrators, is they have the specialized judgment, as the Court recognized in Gateway Coal, to resolve those questions. Certainly an arbitrator can look at those external sources and use the benefit of those to craft a remedy.

QUESTION: The trouble is, you know, the Court represents the public, and that's how the Court can apply

the public policy exception. The arbitrator at best represents both the parties, so you're giving over the protection of this public policy to the parties.

MR. MOONEY: The background of our case, Justice Scalia, is that the public, the balancing of these competing interests has been drawn by the Department of Transportation. They were the agency delegated by Congress responsibility for enfurthering the testing act procedures in conformance with the goal of highway safety.

That agency draw the balance. It accommodated and acknowledged both the interest of the public and the safety of the highways and the interests of the employees in being rehabilitated and returned to service, and the interest of employers. They drew that balance. It drew that balance. Perhaps we would quibble with that, but --

QUESTION: Thank you, Mr. Mooney.

MR. MOONEY: -- we don't believe we should second guess it.

QUESTION: Mr. Stewart, we'll hear from you.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

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

The arbitrator in this case treated the

employee's drug use as a serious offense. He considered it worthy of serious punishment. With respect to those aspects of the arbitrator's decision, the petitioner really has no complaint.

Petitioner contends that the arbitrator's award is contrary to public policy only in that the arbitrator chose to impose a suspension of slightly over 3 months plus costs of the arbitration in lieu of outright discharge, and therefore the question is whether the punishment imposed by the arbitrator can reliably be said to conflict with public policy.

This Court emphasized in Misco that a court asked to vacate an arbitral award in the labor context on the basis of public policy must draw that policy from positive law, from statutes and regulations.

QUESTION: Mr. Stewart, what's the Government's position on question 2 that's presented?

MR. STEWART: We would say that there are limited circumstances under which an arbitral award can be vacated even though the award would not compel the employer to violate positive law, and to give you a hypothetical example, the Department of Transportation has a regulation that says that a driver who is convicted of driving under the influence is disqualified from operating a commercial motor vehicle for a period of 1 year.

Now, in a hypothetical case in which an employee was believed to have driven under the influence, was not convicted, but conceded at the arbitral proceeding that he had, in fact, driven while under the influence of alcohol and drugs, in such a case, if the arbitrator imposed a 3-month suspension and then put the person back behind the wheel, that would not literally compel the employer to violate positive law because there would be no conviction.

But given that there was an alternative basis for feeling highly confident that the prohibited conduct had occurred, such an award would be explicable only on the ground that the arbitrator disagreed with the policy judgment reflected in the DOT regulations.

But we do -- while we don't think that the vacatur of the award is limited to those situations in which a violation of positive law would otherwise occur, we do think that the relevant public policy must be drawn directly from positive law, and therefore the question is, is there anything in the testing act or the DOT regulations that identifies discharge as the mandatory penalty for a second drug offense or not, and in our view there's no way that the regulations or the statute can fairly be read to compel that conclusion.

QUESTION: Well, they can't compel that conclusion, but wouldn't you say it's part of the public

policy, a clear part of the public policy, that a -- that where there is a substantial possibility that a person who has been a drug user will be under the influence of drugs while driving, that person should not be put behind the wheel?

MR. STEWART: I think that's correct --

QUESTION: All right.

MR. STEWART: -- and I think the DOT reg -- but I think the DOT regulations --

QUESTION: So you would acknowledge that if the arbitrator's finding in this case could be characterized as ignoring that substantial possibility, it could be set aside?

MR. STEWART: We wouldn't say that, because in our view the DOT regulations provide an alternative basis for preventing that, that feared result from occurring. That is, regardless of whether the arbitrator orders this person reinstated, the person is not eligible under the regulations to drive a commercial vehicle until he complies with DOT's rehabilitation requirements.

And if he's evaluated by the substance abuse professional, if the substance abuse professional certifies that he has complied with the recommended course of treatment and that the employer is therefore legally free to employ him again in driving a truck, that provides

the basis for assurance that a person who poses a substantial risk will not be on the roads, and --

QUESTION: Who are these substance abuse professionals who have the unfortunate acronym SAP's?

(Laughter.)

QUESTION: Do you get a certificate as a SAP, or what --

(Laughter.)

MR. STEWART: The SAP's, as we refer to them, are not -- they're not certified by the Department of Transportation, but the regulations do specify the categories of people who are eligible to perform this service, and the regulations also make clear that the choice of a particular SAP is up to the employer unless the employer has delegated that power away through collective bargaining agreement, so the employer has the ultimate power to ensure that this important decision is not being entrusted to someone, somebody that the employer believes is insufficiently protective of the public safety.

QUESTION: Mr. Stewart, do you think that there is a difference and that public policy overrides, say, something that would just come under the FAA, a question the Chief asked, say a consumer contract that's drawn by the seller, and that's dictated the contract, and a --

adding on top of the collective bargaining contract public policy in the case of a -- of an employer-union negotiated contract?

MR. STEWART: Well, we would certainly agree with the Chief Justice that there is also a strong policy reflected in the language of the Federal Arbitration Act in favor of enforcement of arbitration agreements in the commercial context.

There is in the labor context the additional consideration of preserving industrial peace, but we don't -- I don't know that we would say that the two are different in kind.

Now, certainly in the State system it is up to a State government to determine how it wants to allocate power among the branches, and therefore State courts may assume far greater authority to devise public policy to set aside contracts that violate it even if they aren't drawing the relevant public policy from positive law. That's up to the State system.

But within the Federal system I think even whether within the FAA, or under the labor management statutes, there is a strong policy in favor of enforcement of contractual choices.

And so in 1992 to 1994 the Department of Transportation conducted an extensive rule-making, it

heard comments from a number of interested people, and its mandate from Congress was to consider both the need to protect the public safety against the ill effects of transportation employees who use drugs, and the testing act also included a congressional finding that rehabilitation is a critical component of any testing program.

And it was the Department's mandate to balance those potentially competing objectives, and specifically with respect to the problem of a recidivist drug user, the initial regulation proposed by the Department of Transportation would have mandated a 60-day disqualification period.

And I think, as Justice Breyer suggested, part of the irony of this case is that if that provision had been adopted, we think the petitioner would have no basis for challenging the arbitral award here, because if DOT had said, suspension of at least 60 days, and the arbitrator had imposed a suspension of a little over 3 months --

QUESTION: May I ask this question, following up on some of Justice Scalia's? Do you think there's a public policy that would require arbitrators in cases such as this to assess the likelihood of recidivism in the future?

MR. STEWART: I think it all depends on what powers the parties elect to confer upon the arbitrator. That is, if the collective bargaining agreement specified that the punishment for a first positive drug test will be a 30-day suspension followed by reinstatement if the individual has complied with the DOT regulations, I think there would be no room under the contract for the arbitrator to say, I'm not sufficiently confident that this person can do the job again, and therefore I'm ordering him discharged.

And conversely, if the collective bargaining agreement said, anybody who violates the drug policy twice will be dismissed, the arbitrator wouldn't have authority to determine that really the policy in favor of rehabilitation was more important and therefore he should be given another chance.

But where, as here, we have a collective bargaining agreement that gives the arbitrator very broad discretion to decide whether there is just cause in a particular case, we think the arbitrator would naturally look to public policy considerations, among others.

QUESTION: So you would say he would sometimes make the public policy determination, but not necessarily always.

MR. STEWART: And it would depend upon the

authority entrusted to him --

QUESTION: Under the agreements --

MR. STEWART: -- by the parties.

And so the Department of Transportation considered a provision that would have imposed a mandatory 60-day suspension for recidivists. It seemed clear to us that if that provision had been adopted, the 90-day-plus suspension that was imposed here couldn't be said to violate public policy, and although it's not terribly clear from the Federal Register notice exactly why the Department declined to adopt that provision, it's very clear that the Department understood that the consequence of deleting that proposed rule was to leave to the contracting parties the determination whether reinstatement would occur even after a second positive test. That is the public policy as determined by the Department of Transportation.

If there are no further questions --

QUESTION: Does the record tell us where Mr. Smith is working today, and at what job?

MR. STEWART: Not that I'm aware of.

QUESTION: Thank you, Mr. Stewart.

Mr. Roberts, you have 4 minutes left.

REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE PETITIONER

MR. ROBERTS: Thank you, Your Honor. I have just three very brief points.

First, the lower courts did not address the questions we have been discussing this morning. They adopted the position that because this award was not illegal, the public policy exception does not apply. I understand the Solicitor General's representative to agree with us that that is an incorrect statement of the standard. At the very least, then, it seems appropriate to vacate the decision and send it back for the lower courts to at least apply the correct standard.

Second, take no comfort in the certification of the substance abuse professional. My brother for the union said that he certifies that the employee successfully completed rehabilitation. That is not correct. All that the substance abuse professional certifies is that the employee properly followed the program, not that it worked, not that it was likely to work, and certainly not that the employee does not present a risk to the public, and also keep in mind that the professional obligation of the SAP is to the employee, not to the public safety. He could easily determine that it's best for this employee to be back on the job, even if that

represents a threat to public safety.

Finally, you can look through the regulations in excruciating detail. You will not find a provision addressing the problem of a recidivist. The Department may have considered some things. It didn't adopt them. It seems an awful lot of weight to place on the failure to adopt a provision to conclude that someone who violates these rules 20 times is to be treated exactly like someone who violates it one time. That is insufficient to protect public safety.

What the regulations provide is that this issue, reinstatement, is left to contract. If it is left to contract, the public policy exception applies.

In the reported cases alone, you will find examples of arbitrators ordering the reinstatement of nurses who prescribed the wrong medication and stood by while patients were dying, the helmsman of a 635-foot oil tanker who was on marijuana and ran it aground, the nuclear plant operator who diffused the safety system at the plant so he could leave early for lunch, and the pilot of a 727 who flew it while blind drunk.

The public policy exception is needed for those types of cases, and we respectfully submit that the case of a driver of a 25-ton vehicle in West Virginia who has twice failed drug tests fits in that category.

Thank you, Your Honor.

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

(Whereupon, at 12:02 p.m., the case in the above-entitled matter was submitted.)