

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EASTERN ASSOCIATED COAL :

4 CORPORATION, :

5 Petitioner :

6 v. : No. 99-1038

7 UNITED MINE WORKERS OF AMERICA, :

8 DISTRICT 17, ET AL. :

9 - - - - - X

10 Washington, D.C.

11 Monday, October 2, 2000

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 11:05 a.m.

15 APPEARANCES:

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

17 the Petitioner.

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

19 Respondents.

20 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor

21 General, Department of Justice, Washington, D.C.; on

22 behalf of the United States, as amicus curiae,

23 supporting the Respondents.

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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

1 what it was going to do for positive drug testing?

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

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

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

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

19 QUESTION: Yeah.

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

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

25 MR. ROBERTS: Certainly after one positive test.

1 QUESTION: After a --

2 MR. ROBERTS: The question of a --

3 QUESTION: It just doesn't say.

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

6 QUESTION: Mm-hmm.

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

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

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

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

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

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

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

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

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

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

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

1 MR. ROBERTS: Yes.

2 QUESTION: -- are there not?

3 MR. ROBERTS: Yes.

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

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

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

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

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

1 nothing that --

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

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

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

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

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

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

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

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

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

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

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

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

1 policy harm by the enforcement of the agreement.

2 QUESTION: That's just kind of boiler plate.

3 MR. ROBERTS: Well --

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

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

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

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

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

1 the ball game?

2 MR. ROBERTS: Well --

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

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

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

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

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

23 MR. ROBERTS: Absolutely, yes.

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

1 have some -- are there other sources to be relied on here?

2 You say something about the congressional -- in testing --

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

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

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

18 MR. ROBERTS: Yes. I think --

19 QUESTION: Is that the policy?

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

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

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

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

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

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

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

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

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

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

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

16 MR. ROBERTS: You have --

17 QUESTION: Go ahead.

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

1 As this Court --

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

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

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

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

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

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

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

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

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

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

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

11 MR. ROBERTS: Because the criminal sanctions
12 that Your Honor addressed don't take into account what the
13 contract enforcement is going to bring about, and that is,
14 putting this individual, who in the course of 15 months
15 failed two tests for illegal drugs, behind the wheel of a
16 25-ton vehicle on the roads in West Virginia.

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

23 MR. ROBERTS: Again --

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

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

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

9 QUESTION: Mr. Roberts, may I ask you if the
10 arbitrator had left leeway to the employer to put this
11 person in a nonsafety-sensitive job, then would you say,
12 well -- what would you say about public policy then?
13 The -- everything is the same, that he gets stopped
14 \$10,000 or whatever it was pay, and he has to go through
15 the drug rehabilitation program, and at the end of the
16 line the employer can put him back in a nonsafety
17 sensitive position.

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

25 QUESTION: Would the public -- would the

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

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

9 QUESTION: Then why -- I'm sorry.

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

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

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

25 QUESTION: All right. I see, yes.

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

3 QUESTION: Was -- that's true. What about
4 \$10,000? I mean, why is \$10,000 in light -- if you went
5 across the country, why is \$10,000 a minimal -- a minimal
6 sanction for an ordinary worker who is a driver of a
7 truck? That sounds like a lot of money to me.

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

14 QUESTION: Can you tell us a little bit --

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

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

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

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

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

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

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

25 QUESTION: Are there any cases on this in the

1 lower courts?

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

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

11 MR. ROBERTS: Yes. Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. ROBERTS: No. There are two --

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

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

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

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

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

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

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

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

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

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

1 contract.

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

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

6 QUESTION: -- in his insouciance.

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

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

12 QUESTION: Very well, Mr. Roberts.

13 Mr. Mooney, we'll hear from you.

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

19 ORAL ARGUMENT OF JOHN R. MOONEY

20 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

1 rehabilitation and a return to duty for these employees.

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

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

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

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

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

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

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

14 QUESTION: Okay.

15 MR. MOONEY: -- Justice Scalia.

16 QUESTION: Now, what if a -- an arbitrator under
17 an arbitration clause such as this said in his award, I
18 really think there is a substantial risk that this person
19 will use drugs again and perhaps drive a vehicle while
20 he's still under the influence of drugs again.

21 Nonetheless, despite that substantial risk, I think we
22 should give him another chance. Would you allow a Federal
23 district court to set aside that arbitration decision?

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

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

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

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

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

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

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

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

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

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

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

1 enforce that.

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

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

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

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

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

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

12 QUESTION: Well --

13 MR. MOONEY: -- is still perfectly applicable.

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

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

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

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

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

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

16 QUESTION: Well, why --

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

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

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

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

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

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

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

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

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

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

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

25 (Laughter.)

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

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

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

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

1 reserved in footnote 12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 QUESTION: Thank you, Mr. Mooney.

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

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

20 ORAL ARGUMENT OF MALCOLM L. STEWART

21 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

22 SUPPORTING THE RESPONDENTS

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

25 The arbitrator in this case treated the

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

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

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

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

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

1 Now, in a hypothetical case in which an employee
2 was believed to have driven under the influence, was not
3 convicted, but conceded at the arbitral proceeding that he
4 had, in fact, driven while under the influence of alcohol
5 and drugs, in such a case, if the arbitrator imposed a
6 3-month suspension and then put the person back behind the
7 wheel, that would not literally compel the employer to
8 violate positive law because there would be no conviction.

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

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

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

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

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

7 QUESTION: All right.

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

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

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

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

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

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

5 (Laughter.)

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

8 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. STEWART: And it would depend upon the

1 authority entrusted to him --

2 QUESTION: Under the agreements --

3 MR. STEWART: -- by the parties.

4 And so the Department of Transportation
5 considered a provision that would have imposed a mandatory
6 60-day suspension for recidivists. It seemed clear to us
7 that if that provision had been adopted, the 90-day-plus
8 suspension that was imposed here couldn't be said to
9 violate public policy, and although it's not terribly
10 clear from the Federal Register notice exactly why the
11 Department declined to adopt that provision, it's very
12 clear that the Department understood that the consequence
13 of deleting that proposed rule was to leave to the
14 contracting parties the determination whether
15 reinstatement would occur even after a second positive
16 test. That is the public policy as determined by the
17 Department of Transportation.

18 If there are no further questions --

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

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

22 QUESTION: Thank you, Mr. Stewart.

23 Mr. Roberts, you have 4 minutes left.

24

25

1 REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

2 ON BEHALF OF THE PETITIONER

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

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

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

1 represents a threat to public safety.

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

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

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

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

1 Thank you, Your Honor.

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

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

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