

No. 38341-1-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

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DIVISION II

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STATE OF WASHINGTON

BY *[Signature]*
DEPUTY

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION,
LOCAL 23,

Plaintiff/Appellant

v.

PORT OF TACOMA and INTERNATIONAL LONGSHORE
AND WAREHOUSE UNION, LOCAL 22,

Defendants/Respondents

Respondent
BRIEF OF DEFENDANT/~~APPELLANT~~ INTERNATIONAL
LONGSHORE AND WAREHOUSE UNION, LOCAL 22

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INTRODUCTION AND SUMMARY

The question in this appeal is which group of employees is entitled to perform “rail car coordinator” (“RCC”) work at the Port of Tacoma – those who are employed by the Port and have historically performed the work since the 1970’s, or those who are not employed by the Port and have never done RCC work.

This appeal involves the intersection between two competing legal principles. The first, championed by the private sector appellant ILWU, Local 23, is that an arbitration decision must be enforced even if the court disagrees with the factual or legal rulings by the arbitrator. The second principle, asserted by the Port and the public sector respondent ILWU, Local 22, is the statutory mandate that a dispute like the one found in this case must be resolved by the Public Employment Relations Commission (“PERC”).

At first blush, the appeal seems to present a close question as to which of the two principles prevails. Fortunately, the courts and the Public Employment Relations Commission have anticipated this dilemma by adopting a “public policy exception” to the “hands off” mandate for review of arbitration awards. Under the public policy exception, a court may not enforce an arbitrator’s ruling if it conflicts with a “well-defined and dominant” public policy that can

be identified “by reference to the laws and legal precedents.”¹

In this case, the “well-defined and dominant” policy that can be identified in the laws and legal precedents is the one that requires deference to the PERC where the subject matter is within its jurisdiction. Thus, Local 23’s appeal must fail because the legislature has enacted a clear policy that such disputes must be resolved by the PERC, even though that result requires rejection of a lawsuit seeking enforcement of an arbitration award.

In addition, the “doctrine of unconscionability” requires a court to refuse enforcement of an arbitration award where the circumstances surrounding the arbitration award are unfair and prejudice the party opposing enforcement. Here, the fact that ILWU, Local 22 was not a party to the arbitration, even though its members have performed the work at issue for decades, is unconscionable.

ISSUES BEFORE THE COURT

Local 22 joins in the Port of Tacoma’s statement of issue number one. In addition, Local 22 states two additional issues:

1. Whether enforcement of the arbitrator’s award is against public policy.
2. Whether enforcement of the arbitrator’s award is barred under

¹ Brief of Appellant, at 15, citing and partially quoting, *W. R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 103 S.Ct. 2177, 76 L.Ed.2d 298 (1967) and *Muschany v. United States*, 324 U.S. 49, 66, 65 S.Ct. 442, 89 L.Ed. 744 (1945).

the doctrine of unconscionability.

COUNTER STATEMENT OF THE CASE

ILWU, Local 22 joins in the Port of Tacoma's Counter Statement of the Case, and supplements that information with additional facts relating to Local 22's involvement.

ILWU, Local 22 was not a party to the arbitration. CP 38, 45. Local 22 was a party to the PERC proceeding. CP 19.

ILWU, Local 23 filed its appeal to superior court without including ILWU, Local 22 as a party. Local 22 moved to intervene. CP 80-85. The court granted intervention. CP 151. Local 22 then filed a memorandum supporting the Port's motion to dismiss the lawsuit. CP 157-62.

In its Statement of the Case, Local 23 asserts that "the arbitrator specifically rejected the Port's arguments that the work was already being performed and had historically been performed by Local 22. . ." Brief of Appellant at 3. This is not correct. That fact is asserted nowhere in either of the arbitrator's rulings. CP 38-43, 45-47. Indeed, in its substantive presentation to the arbitrator, Local 23 did not even attempt to claim that Local 22 members were not performing Rail Car Coordinator work or that they had not historically done so. CP 39-40.

Moreover, the PERC decision – *Port of Tacoma*, Decision 10093 (2008) -- found that the rail car coordinators have always been public sector employees in the Port Workers Division and that the work has been essentially the same since the 1970's. CP 24, 27, 32-33.

The chronology of events is as follows:

- February 27, 2008: Port of Tacoma files a petition with PERC regarding the status of the employees classified as rail car coordinators. CP 19.
- March 3, 2008: Arbitrator Randy C. Vekich conducted an arbitration hearing on Local 23's grievance. CP 38. A "bench award" was issued that day. CP 42.
- March 31, 2008: Vekich issued an "Interim Ruling." CP 38-43.
- April 15, 2008: PERC conducted a hearing on the Port's petition. CP 20.
- April 18, 2008: Arbitrator Vekich holds another hearing on Local 23's grievance. CP 45.
- April 28, 2008: Vekich's issues another Interim Ruling.

CP 45-47.

June 6, 2008: PERC issued Decision 10093 (PORT)
(2008). CP 19-36

June 26, 2008: The deadline for Local 23 to file an
appeal of the PERC decision expires.
WAC 391-25-660. Local 23 did not
appeal.

ARGUMENT

I. The Public Employment Relations Commission Has Subject
Matter Jurisdiction Over This Dispute.

With regard to this issue, ILWU, Local 22 joins in the
argument of the Port of Tacoma in Section C.1. of its brief. This
includes joinder in the argument that the Legislature has clearly
delegated to PERC the obligation to address issues regarding the
question of which employees should perform certain work. Local 22
also joins in the Port's argument that long-standing PERC precedent
dictates that competing claims between two unions as to whose
members are to perform certain work must be decided by the PERC.

II. Dismissal Of Local 23's Complaint To Enforce and Confirm Arbitration Award Was Appropriate Because the Trial Court Lacked Subject Matter Jurisdiction

ILWU, Local 22 joins in the arguments of Port of Tacoma with regard to this issue, found at Section C.2. of its brief.

III. Dismissal Of Local 23's Complaint Should Be Affirmed Because Enforcement Of the Arbitrator's Award Is Against Public Policy.

In the case at bar, the dispute is whether positions in the public sector Local 22 bargaining unit should perform Rail Car Coordinator work, as they have for decades, or whether the private sector Local 23 members should be given that work. Appellant Local 23 believes this dispute is a matter of contract to be resolved by an arbitrator; Local 22 and the Port think it is a matter of state law to be resolved by the Public Employment Relations Commission.

It is true, as appellant Local 23 argues,² that a court's review of arbitration decisions is normally limited. However, the court's decision to enforce an arbitration award must be consistent with public policy. In this case, the trial court's decision to dismiss the action to enforce the arbitration award was appropriate. There is a well-defined public policy contained in Washington law and legal decisions that requires PERC, not arbitrators, to handle disputes

² Brief of Appellant, at 7.

regarding allocation of work between unions.

In its brief, Local 23 acknowledges that “a court may not enforce a collective bargaining agreement that is contrary to public policy.”³ Local 23 further admits that this public policy exception extends to judicial enforcement of arbitrators’ awards, and that the determination whether a public policy exception exists is “ultimately one for resolution by the courts”, not the arbitrator.⁴

The public policy exception to enforcement of contracts has existed at least since 1945, when the U. S. Supreme Court stated that a War Department contract could be disavowed on the grounds of public policy if there was a “plain indication of that policy through long government practice or statutory enactments. . .”⁵ In 1948 the Court also held that the public policy exception required a court to refrain from enforcing racially restrictive covenants where the Civil Rights Act of 1866 prohibited such covenants.⁶

In *W. R. Grace & Co. v. Rubber Workers*,⁷ cited and discussed by appellant Local 23 in its brief at pages 13-19, the

³ Id. at 15, quoting *W. R. Grace & Co. v. Local Union 759*, 461 U.S. at 766.

⁴ Id. at 15, citing, *International Brotherhood of Teamsters v. Washington Employers, Inc.*, 557 F.2d 1345, 1350 (9th Cir. 1977). See, gen’lly, *The Developing Labor Law: The Board, the Courts and the National Labor Relations Act*, Ch. 17III.C., at 1420-23 (5th Ed. 2006); Elkouri & Elkouri, *How Arbitration Works*, Sec. 21.7.B. at 850-51, 1344-46 (6th Ed. 2003).

⁵ *Muschany*, 314 U.S., at 66.

⁶ *Hurd v. Hodge*, 334 U.S., at 34-35.

⁷ 461 U. S. 757 (1983).

employer was caught in a conflict between its obligation under an EEOC conciliation agreement and its obligation under the employer's and union's collective bargaining agreement. One obligation had to give way -- the need to enforce a collective bargaining agreement or the public policy of "obedience to judicial orders."⁸ The Supreme Court agreed that the public policy exception applied, but enforced the arbitration award after determining that enforcement would not jeopardize the public policy. It found that "enforcement of the collective bargaining agreement as interpreted by [arbitrator] Barrett does not compromise this public policy."⁹

In *United Paperworkers v. Misco, Inc.*,¹⁰ the court of appeals, citing the public policy against allowing employees to operate machinery under the influence of drugs, refused to enforce an arbitrator's award reinstating an employee who had been fired for use of controlled substances at work.¹¹ The Supreme Court reversed, noting that the lower courts had never considered what laws might establish a "well-defined and dominant" policy.¹² The Court set forth guidelines for determining when an arbitration award could not be enforced because it violated a public policy. First, the

⁸ *R.W. Grace & Co. v. Rubber Workers*, 461 U. S., at 766.

⁹ *Id.* at 767.

¹⁰ 484 U. S. 29 (1987).

¹¹ 484 U. S., at 35-36.

¹² *Id.*, at 44.

court must decide whether the public policy is “explicit,” “well-defined and dominant.” It must be reflected in “laws or legal precedents.” In other words, the policy must be ascertainable “by reference to the laws or precedents and not from general considerations of supposed public interest.” And, of course, those laws or precedents must conflict with the enforcement of an arbitration award.¹³

In *ILWU Local 32 v. PMA*, the court dismissed a union suit to enforce an arbitration award because a decision of the National Labor Relations Board resolving competing union claims for work superceded an arbitrator’s award. It stated, “the ‘supremacy doctrine’ bars an arbitrator from making an award inconsistent with a NLRB determination.”¹⁴

Auto Workers Local 1519 v. Rockwell International Corp.,¹⁵ involved a situation much like this case. A work assignment dispute existed between the Teamsters, the United Auto Workers and the employer Rockwell. The National Labor Relations Board (NLRB) conducted a §10(k) proceeding, which is comparable to a PERC unit clarification proceeding.¹⁶ The UAW and Rockwell also engaged in

¹³ *Id.*, at 42-43.

¹⁴ 773 F.3d 1012, 1016-19 (9th Cir. 1985).

¹⁵ 619 F.2d 580 (6th Cir. 1980)

¹⁶ *The Developing Labor Law*, Ch. 24.II. at 1936-37.

an arbitration to resolve the dispute. The arbitration proceedings did not include the Teamsters.¹⁷ The court held that the NLRB determination on the dispute took precedence over the arbitration award: “Once the NLRB decides a work assignment dispute, its determination takes precedence over a contrary arbitrator’s award.”¹⁸ “Both the legislative history of the LMRA and the case law on this issue support a finding that a NLRB §10(k) determination is to take priority over a contrary arbitrator’s award in the dispute.”¹⁹

The public policy exception has recently been used in Washington to avoid enforcing an arbitration award. In *Kitsap County Deputy Sheriff’s Guild v. Kitsap County*,²⁰ the court unanimously vacated an arbitration award, concluding that the arbitrator’s reinstatement of a police officer who was fired for untruthfulness and erratic behavior violated a specific public policy found in Washington law.²¹ The court said:

“[A]s with any contract, a court may not enforce a collective-bargaining agreement that is contrary to public policy. [citing *W. R. Grace* and *E. Associated Coal Corp.*] If the contract as interpreted by an arbitrator violates some explicit, well-defined, and dominant public policy, we are not required to enforce

¹⁷ 619 F.2d at 583.

¹⁸ *Id.*

¹⁹ *Id.*, at 584.

²⁰ 140 Wn. App. 516, 524-26, 165 P.3d 1266 (Div. II, 2007).

²¹ 140 Wn. App., at 525, citing RCW 36.28.010.

it. [citing *W. R. Grace, Hurd v. Lodge*, and *Muschany*.]²²”

The public policy in the case at bar is the Legislature’s determination that this type of dispute should be addressed by the Public Employment Relations Commission:

The intent and purpose of this chapter is to promote the continuing improvement of the relationship between public sector employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in matters concerning their employment relations with public employers.

RCW 41.56.010 (emphasis added).

This policy applies to the Port of Tacoma by way of RCW 53.18.015:

Port districts and their employees shall be covered by the provisions of chapter 41.56 RCW except as provided otherwise in this chapter.

Regulations have been adopted stating that the PERC handles “Disputes concerning the allocation of employees or positions claimed by two or more bargaining units.” WAC 391-35-020(1)(b). These are called “unit clarification petitions.” This authority extends to all public sector employers and employees; the PERC handles disputes regarding unit clarifications “under all

²² *Id.*, at 524, citations omitted.

chapters of the Revised Code of Washington (RCW) administered by the commission. . . .” WAC 391-35-001. This includes port districts under RCW 53.18.

The policy requiring PERC to resolve unit clarifications is reinforced by unambiguous legal precedents. The PERC has held that competing claims by two unions as to which members will perform the work must be addressed to the PERC, not an arbitrator. *Seattle School District*, Decision 5220, at 11 (PECB 1995) (“the Commission does not defer ‘unit’ matters to arbitrators, and is not bound to consider or accept decisions issued by arbitrators on such matters”); *Port of Seattle*, Decision 6181, at 14-15 (PORT 1998) (“The Commission does not defer ‘unit’ matters to arbitrators or give weight to decisions issued by arbitrators on such matters.”).

Thus, the network of laws and regulations, and of legal precedents, reflects a public policy that unit clarification disputes, such as the one at issue here, are to be resolved on a “uniform basis” by the Public Employment Relations Commission.

IV. The Doctrine Of Unconscionability Bars Enforcement of the Arbitrator’s Award.

In *Ingle v. Circuit City Stores*, the Ninth Circuit Court of Appeals observed that courts may decline to enforce arbitration

agreements when grounds “exist at law or in equity for the revocation of any contract.”²³ A court may refuse to enforce an unconscionable arbitration agreement because “unconscionability is a generally applicable defense to contracts.”²⁴ “Unconscionability is ‘an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.’”²⁵

The doctrine of unconscionability in the context of arbitration was adopted in Washington in *Mendez v. Palm Harbor Homes, Inc.*²⁶ There, the court held that a party to a contractually agreed obligation to arbitrate could not force the other party to arbitrate where the costs of the arbitration were prohibitive.²⁷ The court concluded that a legal right need not be enforced if to do so was inequitable under the circumstances: “[e]quity includes the power to prevent the enforcement of a legal right when to do so would be inequitable under the circumstances.”²⁸ The court also said “[u]nder

²³ 328 F.3d 1165, 1170 (9th Cir. 2003), *citing*, the Federal Arbitration Act, 9 U.S.C., Sec. 2 (2000).

²⁴ *Id.*, at 1171.

²⁵ *Id.*, quoting, *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486 (1982) and *citing*, *Restatement (Second) of Contracts*, §208 (1981).

²⁶ 111 Wn.App. 446 (Div. III, 2002). The unconscionability doctrine as it relates to arbitration is discussed in detail in *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 345-52, 103 P.3d 773 (2004).

²⁷ 111 Wn.App. at 450.

²⁸ *Mendez*, 111 Wn.App. at 460, *citing*, *Thisius v. Sealander*, 26 Wn.2d 810, 818, 175 P.2d 619 (1946).

the proper ‘conditions and circumstances’ warranting equity, ‘equity will assume jurisdiction for all purposes and give such relief as may be required.’²⁹

Here, the circumstances are unconscionable because the arbitration award in Local 23’s favor was obtained without Local 22’s participation as a party to the arbitration. The arbitrator acknowledged that Local 23 and the Port of Tacoma were the only parties to the arbitration.³⁰ When the Port requested that the arbitration be delayed until the PERC could take action in a proceeding where all parties could participate, the arbitrator refused.³¹ Local 22 simply had no say in the matter.

If the arbitration award is enforced, a non-party to the arbitration will be injured. This is unconscionable. Therefore, the court should not enforce the arbitration award.

CONCLUSION

The court of appeals should affirm the dismissal of ILWU, Local 23’s Complaint to Enforce and Confirm Arbitration Award.

²⁹ 11 Wn.App., at 460, quoting in part, *Income Props. Inv. Corp., v. Trefethen*, 155 Wash. 493, 506, 284 P. 782 (1930).

³⁰ Clerk’s Papers 38, 45.

³¹ *Id.* 39, 41, 42.

RESPECTFULLY SUBMITTED this 12th day of January, 2009.

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COURT OF APPEALS
DIVISION II

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