Judicial Review in Section 301 Labor Arbitration Prospective Application Claims: The Effect of Communications Workers

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INTRODUCTION

In 1960, the Supreme Court established federal labor arbitration policy in three cases known as the *Steelworkers Trilogy*. Under the *Trilogy*, the contractual promise to arbitrate disputes over the meaning and application of a collective bargaining agreement limits the role of the federal judiciary in reviewing the labor-management relationship, as the merits of a party's grievance are to be determined by the arbitrator. The arbitrator's findings and award are to be enforced by a court, in the absence of a judicial determination that the award does not "draw[] its essence from the collective bargaining agreement." As part of her award an arbitrator may grant coercive relief, intending that the award have a prospective effect. In granting such relief, the arbitrator seeks to prevent similar conduct in the future, conduct that she

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2. See *American Mfg. Co.*, 363 U.S. at 568. In the *Trilogy*, the Court developed its policy of judicial deference to arbitration based on similar Congressional intent. See id. at 566. Section 203 of the Labor Management Relations Act, also known as the Taft-Hartley Amendments to the National Labor Relations Act, provides: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d) (1982).

3. See *American Mfg. Co.*, 363 U.S. at 568. A court usurps the role of the arbitrator when it interprets a substantive portion of the collective bargaining agreement in an attempt to determine the parties' rights and duties under the agreement. See id. at 569.

Arbitration is preferred to litigation or other confrontational attempts at conflict resolution because it relieves the parties of their adversarial tendencies. See id. at 567; *International Ass'n of Machinists & Aerospace Workers v. General Elec. Co.*, 865 F.2d 902, 903 (7th Cir. 1989). The arbitration clause is the *quid pro quo* for a "no-strike" clause in a collective bargaining agreement. See *American Mfg. Co.*, 363 U.S. at 567. "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." *Warrior & Gulf Navigation Co.*, 363 U.S. at 578. Consequently, arbitrators, selected by the parties for their experience and knowledge of the bargaining relationship, should resolve all arbitrable disputes under the collective bargaining agreement. See id. at 582-83.


Although an arbitrator's award must draw its essence from the collective bargaining agreement, an arbitrator is to be given great deference in fashioning remedies. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

has determined violates the collective bargaining agreement. If such conduct occurs after the award, the aggrieved party may file a claim pursuant to section 301 of the Labor Management Relations Act ("LMRA") in federal district court seeking to enforce the prior arbitration award in the new dispute.

To enforce an award in a new dispute, a court must determine that the second dispute is factually similar to the first. There are currently several schools of thought regarding the measure of factual identity necessary in prospective application claims. The Court of Appeals for the Seventh Circuit requires that a party requesting prospective application demonstrate that the new dispute is "substantially identical" to prior disputes. The Court of Appeals for the Third Circuit has held that a court must defer prospective application to an arbitrator unless it can say with "positive assurance" that the prior dispute is factually similar to the present dispute. The Fifth Circuit's material factual identity standard requires a party to demonstrate that the facts in the present dispute are not materially different from those that gave rise to the prior dispute.

This Note argues in favor of the material factual identity standard based on the Supreme Court's reaffirmance, in AT&T Technologies, Inc. v. Communications Workers, of the judiciary's role in interpreting collective bargaining agreements. Part I reviews the Court's reliance on the law of contract in the collective bargaining relationship and the resulting expansion of the judicial role in labor arbitration after Communications Workers. Part II examines the requirement that a party bringing a prospective application claim demonstrate that the prior award clearly and unambiguously provides for prospective application. Having found such arbitral intent, a court must determine whether there is the requisite factual identity between the two disputes to warrant prospective application. Part III examines the split on the measure of factual identity, concluding...

6. See Ethyl Corp., 644 F.2d at 1047; Rockwell Int'l Corp., 670 F. Supp. at 918. Coercive relief is often granted where management has breached its promises under the agreement, damaging the union and its membership. See, e.g., Ethyl Corp., 644 F.2d at 1047 (management placed supervisory and salaried personnel in hourly-rated positions); Rockwell Int'l Corp., 670 F. Supp. at 918 (management hired non-union employees to perform work reserved for union employees under collective bargaining agreement).

7. Section 301 provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in [a] district court of the United States. . . .


8. See Ethyl Corp., 644 F.2d at 1047.


that the Fifth Circuit’s material factual identity standard is most appropriate.

I. THE ROLE OF THE JUDICIARY IN THE LABOR ARBITRATION SYSTEM: THE LAW OF CONTRACT

The bargaining relationship is usually based on a collective bargaining agreement, which is a contract. The parties to a collective bargaining agreement may limit their duty to arbitrate disputes, just as the parties to a contract may limit their duties under that contract. Based on their conflicting interpretations of the agreement’s arbitration provisions, the parties may disagree as to which disputes are arbitrable. Unless the parties clearly provide otherwise, a court, not an arbitrator, settles any dispute concerning arbitrability, for arbitrators are not permitted to determine their own jurisdiction.

In Steelworkers v. Warrior & Gulf Navigation Co., the Supreme Court held that judicial resolution of arbitrability disputes should be governed by a presumption of arbitrability. A dispute should be remanded to arbitration unless the court can say “with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”

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For examples of narrow arbitration provisions, see Oil, Chem. & Atomic Workers Int’l Union, Local 7-1 v. Amoco Oil Co., 883 F.2d 581, 585 (7th Cir. 1989) (clause limited arbitration to issues directly involving or arising from prior arbitration proceeding); International Ass’n of Machinists & Aerospace Workers v. General Elec. Co., 865 F.2d 902, 904 (7th Cir. 1989) (“unusually narrow” arbitration limitations); Lehigh Portland Cement Co. v. Cement, Lime, Gypsum, & Allied Workers Division, Int’l Bhd. of Boilermakers, 849 F.2d 820, 824 (3d Cir. 1988) (arbitration clause limited initiation of arbitration proceedings solely to union grievances; therefore, employer could bring grievances directly to federal district court); International Ass’n of Machinists & Aerospace Workers v. Republic Airlines, Inc., 829 F.2d 658, 659 (8th Cir. 1987) (arbitration clause prohibited rearbitration of issues previously settled through arbitration).

15. See Warrior & Gulf Navigation Co., 363 U.S. at 582-83.

16. Id.
In 1986, the Supreme Court reevaluated its emphasis on the "pre-
sumption of arbitrability." In *AT&T Technologies, Inc. v. Communica-
tions Workers*, the Court deemphasized the "presumption of arbitrability" in favor of a more comprehensive judicial investigation of arbitrability disputes based on contract interpretation. Rather than presume that the parties to a collective bargaining agreement intend to arbitrate the dispute, courts are to interpret the substantive portions of the agreement to determine whether the parties intended to submit the dispute to an arbitrator.

In the *Trilogy*, the Court took exception to the view that the collective bargaining agreements are simply contracts. In *Warrior & Gulf*, the Supreme Court stated that the collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." The current Court has not repudiated the *Warrior & Gulf* Court's perspective on collective bargaining agreements. In *Communications Workers*, however, the Court reemphasized the contractual nature of the collective bargaining agreement and expanded the permissible level of judicial scrutiny of the agreement based on traditional notions of contract law. Because

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19. See id. at 651.
20. See id.; Teamsters Local 315 v. Union Oil Co., 856 F.2d 1307, 1310 (9th Cir. 1988), cert. denied, 109 S.Ct. 869 (1989); see also Note, supra note 17, at 1313 (after *Communications Workers*, "courts must decide arbitrability issues even at the risk of in-
volve in the merits").
22. Id.
24. The Supreme Court has reviewed the judicial role in enforcement claims in a similar manner. Under the *Trilogy*, should a party refuse to conform to an arbitration award, the opposing party may bring suit under section 301 of the Labor Management Relations Act to enforce the arbitrator's award. See 29 U.S.C. § 185(a) (1982). A court must enforce the award as long as it draws its essence from the collective bargaining agreement. See United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). A court may, however, vacate an award upon evidence of fraud or dishonesty involving the arbi-
25. A court should be less deferential when an award has public policy implications. In W.R. Grace & Co. v. Local 759, International Union of Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757 (1983), the Supreme Court held that a court should not enforce a collective bargaining agreement provision that conflicts with public policy. See *id.* at 766. If a contract, as interpreted by an arbitrator in her award, violates "some explicit public policy" it should not be enforced. See *id.* "Such . . . public policy . . . must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Id.* at 766 (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)). When such a violation is alleged, a court should determine whether the award violates a statutory or constitutional
management usually initiates arbitrability disputes, the federal judiciary's expanded role in such disputes gives management a potent weapon in its struggles with labor.

II. THE PROSPECTIVE APPLICATION OF LABOR ARBITRATION AWARDS

An arbitrator may limit the conduct of the parties by providing coercive relief, such as a cease and desist order. If such an order is granted, and the party subject to the order commits a similar violation of the collective bargaining agreement, a court may be called upon under section 301 of the LMRA to enforce the arbitrator's award in the new right. See Heinsz, Judicial Review of Labor Arbitration Awards: The Enterprise Wheel Goes Around and Around, 52 Mo. L. Rev. 243, 261 (1987).

The policy of vacating or refusing enforcement of arbitral awards repugnant to public policy is grounded in the common law of contract. See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987). It is the court's function to protect the public interest and, consequently, a court should "abrogate private agreements" that violate that interest. See id. After Grace, the federal judiciary should review enforcement claims with an eye to external principles of contract law. In Grace, the majority cited both the Uniform Commercial Code and the Restatement Second of Contracts in its analysis of the parties' relationship. See W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 768 n.12, 769 n.13 (1983). Although it rejected the plaintiff's claim, the Grace Court recognized management's cause of action, opening the federal judiciary to a further wave of section 301 activity. See Heinsz, supra, at 266; Wayland, Stephens & Franklin, Misco: Its Impact on Arbitration Awards, 39 Lab. L.J. 813, 816 (Dec. 1988).

24. See M. Grossman, The Question of Arbitrability 4 (1984); see also Gould, Judicial Review of Labor Arbitration Awards — Thirty Years of the Steelworkers Trilogy: The Aftermath of AT&T and Misco, 64 Notre Dame L. Rev. 464, 483 (1989) (union initiates most grievances and contends for arbitrability in most arbitrability disputes); Note, supra note 17, at 1315 (Communications Workers analysis equated to an "unshackling of management"). The exception to the proposition would naturally be where the union has gone out on strike and management brings a section 301 action to enjoin the strike and enforce the union's promise to arbitrate. See M. Grossman, supra, at 4. The union then might refuse to arbitrate, contending that the dispute is not arbitrable under the collective bargaining agreement. See id.

25. See Note, supra note 17, at 1318-19.

As a result of the Court's analysis in Communications Workers, there has been a dramatic increase in arbitrability litigation. See Gould, supra note 24, at 472, 475. Contractual interpretation is a question of law. See International Ass'n of Machinists & Aerospace Workers v. General Elec. Co., 865 F.2d 902, 905 (7th Cir. 1989). Therefore, appellate review is plenary. See id. (accepting the proposition, but noting that "it is not obvious why the old practice of plenary ('de novo') appellate review of contract interpretation should persist"). Consequently, the circuit courts have had to review more arbitrability disputes as well.

26. See Oil, Chem. & Atomic Workers Int'l Union, Local 4-16000 v. Ethyl Corp., 644 F.2d 1044, 1047 (5th Cir. Unit A May 1981); International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Rockwell Int'l Corp., 670 F. Supp. 917, 918 (N.D. Okla. 1987); see also M. Hill & A. Sinicropi, Remedies in Arbitration 174 (1981) ("If the parties [to an arbitration proceeding] specifically request a cease-and-desist order . . . the better weight of authority is to incorporate such a 'remedy' into the award if the facts so warrant.").

27. Section 301 provides:

Suits for violation of contracts between an employer and a labor organization
A. Intent of the Arbitrator

An arbitration award may be enforced only as written. Absent language indicating the arbitrator's clear and unambiguous intention to prevent similar conduct by the offending party, the prior award will not be applied prospectively. If prospective enforcement would require interpretation of the arbitrator's award, the dispute should be remanded to the arbitrator for clarification.

Prospective enforcement of an arbitration award lacking prospective intent usurps the arbitrator's role in violation of the principles of judicial deference set forth in the Trilogy. Expanding the scope of an award by representing employees in an industry affecting commerce may be brought in a district court of the United States.


28. In the wake of the arbitration policy adopted in the Trilogy, a court must not determine the rights of the parties under the collective bargaining agreement, with the lone exception of the parties' rights under the agreement's arbitration provisions. See United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960). Therefore, it might appear as if the Court has repudiated prospective application of arbitration awards. However, if a court refuses to apply the prior award prospectively, it undermines the importance the Trilogy places on the arbitral system as a method of keeping industrial peace. See Oil, Chem. & Atomic Workers Int'l Union, Local 4-16000 v. Ethyl Corp., 644 F.2d 1044, 1048-49, 1049 n.8 (5th Cir. Unit A May 1981); see also Boston Shipping Ass'n v. International Longshoremen's Ass'n, 659 F.2d 1, 4 (1st Cir. 1981) (petitioner argued that permitting union to ignore prior award would "make the arbitration a sham and trivialize arbitral dispute resolution").

If an arbitrator is given the flexibility to govern the labor-management relationship, in conformity with the mandate of the collective bargaining agreement, a court should enforce his award when appropriate. See United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). "Once [a cease and desist order] is issued, if the breaching party continues to ignore the order, the award may be enforced in a subsequent court proceeding." M. Hill & A. Sincerpopi, supra note 26, at 174.

29. See Oil, Chem. & Atomic Workers Int'l Union, Local 4-367 v. Rohm & Haas, Texas Inc., 677 F.2d 492, 494 (5th Cir. 1982).

30. See Derwin v. General Dynamics Corp., 719 F.2d 484, 491 (1st Cir. 1983); Rohm & Haas, 677 F.2d at 495; see also United Mine Workers Dist. No. 5 v. Consolidation Coal Co., 666 F.2d 806, 811 (3d Cir. 1981) (court must be able to say with positive assurance that arbitrator intended award have prospective effect). The Seventh Circuit has developed a similar analysis. The court requires a party seeking prospective application to demonstrate that it had sought coercive relief in the prior arbitration. See United Elec. Radio & Mach. Workers v. Honeywell Inc., 522 F.2d 1221, 1226 (7th Cir. 1975). If the party did not request coercive relief in the prior arbitration proceeding, the court should deny prospective enforcement and remand the dispute to arbitration. See id. If the party requested coercive relief but was rejected, the court should find that the arbitrator did not intend his award to have a prospective effect, and, therefore, the claim should be denied. See Local 1545, United Mine Workers v. Inland Steel Coal Co., 876 F.2d 1288, 1295 (7th Cir. 1989).


32. See Oil, Chem. & Atomic Workers Int'l Union, Local 4-367 v. Rohm & Haas, Texas Inc., 677 F.2d 492, 494 (5th Cir. 1982).
applying it to future disputes makes that award "precedential." An award's precedential effect, its worth in a stare decisis or res judicata sense, must be determined by an arbitrator and not a court. Therefore, a court must distinguish a suit to enforce a prior award prospectively from an attempt to preclude a party's grievance from arbitration based on notions of res judicata or stare decisis. In the former instance, a party seeks to enforce a prior arbitration award in a subsequent dispute. In the latter context, a party whose position was vindicated in a prior award seeks to prevent another arbitration involving an interpretation of the same clause of the collective bargaining agreement. Where a party seeks judicial assistance in granting an award res judicata or stare decisis effect, a court should reject the claim and return the parties to arbitration in order to avoid infringing on the arbitrator's role. A party can present before the arbitrator the same argument it would before a judge, that the prior arbitration award should have res judicata or stare decisis effect on the present proceedings.


39. See United Tel. Co., 738 F.2d at 1572; Little Six Corp., 701 F.2d at 29. The
In *Boston Shipping Association v. International Longshoremen's Association*, the First Circuit provided an alternative to the arbitral intent requirement. Chief Judge Coffin held that a prior arbitration award should have prospective effect even though it was not "expressly directed at future 'like' violations." Because the dispute did not arise from a "discrete historical incident but rather the definition of a physical location, . . . the award was inherently prospective." The First Circuit's approach suggests that in order to have a prospective effect, a prior award need not be clearly directed at future violations of the collective bargaining agreement.

By holding that an award is "inherently prospective" when it is silent as to its prospective effect, the First Circuit infringed on the arbitrator's role and thereby ignored the Trilogy's mandate of deference to the arbitral system. Precedential effect should not be imposed upon an arbitration award when neither that award nor the collective bargaining agreement under which it was rendered contains language supporting such an imposition.

The processing of even frivolous claims through arbitration may have a therapeutic effect on the labor-management relationship, a result that judicial response may not be able to render. See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960); *Boston Shipping Ass'n v. International Longshoremen's Ass'n*, 659 F.2d 1, 3 (1st Cir. 1981).

Arbitrators themselves are not required to conform to a prior arbitrator's interpretation of a collective bargaining agreement unless language in a collective bargaining agreement requires conformity. See *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 280 (1st Cir. 1983); *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478, 483-84 (3d Cir. 1981); *Westinghouse Elevators of P. R., Inc. v. SIU*, 583 F.2d 1184, 1187 (1st Cir. 1978); *Riverboat Casino, Inc. v. Local Joint Executive Bd.*, 578 F.2d 250, 251 (9th Cir. 1978); see also *F. Elkouri & E.A. Elkouri, How Arbitration Works* 430-33 (1985) (detailing use of "persuasive" prior awards as precedent by arbitrators). An arbitrator is free to depart from the holding of a prior award if rigid adherence to that award would impair the flexibility of the arbitral process. See *Courier-Citizen Co.*, 702 F.2d at 280.

41. 659 F.2d 1 (1st Cir. 1981). In *Boston Shipping*, a 1980 arbitration proceeding had resolved a dispute concerning the dimensions of Berth 13 at the Castle Island terminal facility, a determination that affected manning requirements under Article 12 of the parties' 1977-1980 collective bargaining agreement. See *id.* at 2.

42. See *id.* at 4.

43. *Id.*

44. *Id.*

45. See *id.*

46. See *Midwest Lodge No. 2063, Int'l Ass'n of Machinists & Aerospace Workers v. Admiral Div. of Magic Chef, Inc.*, 587 F. Supp. 1563, 1566 (C.D. Ill. 1984) (dismissing the "inherently prospective" doctrine, because "[i]n the absence of language in the prior arbitration award directing prospective application, the issue of whether the award should be applied is appropriately one for an arbitrator to decide").

47. See *International Bhd. of Elec. Workers, Local 199 v. United Tel. Co.*, 738 F.2d 1564, 1571 (11th Cir. 1984); *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 280 (1st Cir. 1983); *Oil, Chem. & Atomic Workers Int'l Union, Local 4-367 v. Rohm & Haas, Texas Inc.*, 677 F.2d 492, 494 (5th Cir. 1982); *New Orleans S.S. Ass'n v. General Longshore Workers, Local 1418, 626 F.2d 455, 468 (5th Cir. 1980), aff'd on other grounds sub nom. Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n, 457 U.S. 702 (1982); *supra* notes 32-34 and accompanying text.
The dangers of the “inherently prospective” doctrine become apparent by reviewing lower court responses. In *Baldwin Piano & Organ Co. v. International Chemical Workers*, a prior arbitration award had determined the seniority rights of union members. Due to an arbitration provision rendering all arbitral decisions “final and binding,” *Baldwin* held that the prior award was “inherently prospective.” The court went further, holding that it could not rule as to the award’s prospective effect, and deferred that question to the arbitrator. The company, however, would not be allowed to contest the arbitrator’s interpretation of the contract, nor could it argue for a different construction of the contract in a subsequent arbitration proceeding. Thus, the decision essentially prohibited any further arbitration involving the seniority provisions of the collective bargaining agreement.

The result in *Baldwin Piano* clearly infringes on the *Trilogy’s* policy of deference to arbitration. As noted in the *Trilogy*, the flexibility of the arbitral process preserves the tranquility of the labor-management relationship. Limiting labor or management’s ability to invoke arbitration on *res judicata* or *stare decisis* grounds sacrifices this essential flexibility.

**B. The Effect of the Intent Requirement on Labor and Management**

A judicial aversion to prospective application, absent language indicating such judicial action was the intent of the arbitrator, has a beneficial practical effect on the labor-management relationship. The parties should submit all issues that they wish to have resolved to the arbitrator. If labor or management desires prospective enforcement, they should argue for a coercive remedy during the initial arbitration proceeding. If labor and management wish to limit an arbitrator’s power to grant such coercive remedies, they may do so through their collective

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49. See id. at 1271.
50. Id.
51. See id. at 1272. The court stated: “It is, of course, unresolved at this stage of the matter in federal court whether the provisions of the contract have been violated by Baldwin or a grievant employee. These questions are not to be determined by this court; they must be remanded to the arbitrator for disposition.” Id.
52. See id.
56. See Oil, Chem. & Atomic Workers Int’l Union, Local 4-367 v. Rohm & Haas, Texas Inc., 677 F.2d 492, 494 (5th Cir. 1982) (district court opinion in appendix to case).
bargaining agreement and its arbitration clause.\textsuperscript{58}

Prospective application of an award under these circumstances recognizes the intentions of both the parties and the arbitrator reviewing their relationship. The arbitrator will have fashioned an appropriate coercive remedy based on her findings of fact and her interpretation of the collective bargaining agreement.\textsuperscript{59} More importantly, an unwillingness to apply prospectively an award lacking prospective intent will motivate the parties to raise before an arbitrator the prospect of a coercive remedy should they desire such relief.\textsuperscript{60} Under these circumstances, a court affirms rather than usurps the arbitrator's role in labor arbitration.\textsuperscript{61}

III. FACTUAL IDENTITY

Judicial investigation does not end with a determination of an arbitrator's prospective intent. Some measure of factual identity must be found between the dispute that gave rise to the prior arbitration award and the dispute in the case at bar.\textsuperscript{62} There is widespread disagreement concerning the proper measure of factual identity in prospective application claims.\textsuperscript{63}

A. Substantial Identity Standard

The Seventh Circuit presented its substantial identity standard in \textit{United Electrical Radio and Machine Workers v. Honeywell Inc.}\textsuperscript{64} Under the \textit{Honeywell} standard, the moving party must demonstrate that the factual basis of the prior arbitration award is "substantially identical" to the grievance in the case at bar.\textsuperscript{65} The Seventh Circuit refused prospective

\textsuperscript{58}. See M. Hill & A. Sinicropi, supra note 26, at 6; see also \textit{Inland Steel Coal Co.}, 876 F.2d at 1295 (language in arbitration clause stating that arbitrator's decision "shall govern only the dispute before him" limited arbitrator's authority to grant coercive remedies).

\textsuperscript{59}. See M. Hill & A. Sinicropi, supra note 26, at 22-23.

\textsuperscript{60}. See, e.g., \textit{Inland Steel Coal Co.}, 876 F.2d at 1295 (court refused to prospectively apply prior award where plaintiff did not request coercive relief in prior proceeding); \textit{Norfolk & Western Ry. Co.}, 754 F.2d at 526 (same).

\textsuperscript{61}. See \textit{International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Rockwell Int'l Corp.}, 670 F. Supp. 917, 920 (N.D. Okla. 1987). \textit{But see Howan, supra} note 53, at 77-79 (arguing that prospective application, no matter what standard is applied in the analysis, necessarily infringes on the role of the arbitrator under the \textit{Trilogy}).

\textsuperscript{62}. See \textit{Local 1545, United Mine Workers v. Inland Steel Coal Co.}, 876 F.2d 1288, 1295 (7th Cir. 1989); \textit{United Mine Workers Dist. No. 5 v. Consolidation Coal Co.}, 666 F.2d 806, 811 (3d Cir. 1981); \textit{Oil, Chem. & Atomic Workers Int'l Union, Local 4-16000 v. Ethyl Corp.}, 644 F.2d 1044, 1050 (5th Cir. Unit A May 1981); \textit{United Elec. Radio & Mach. Workers v. Honeywell Inc.}, 522 F.2d 1221, 1226 (7th Cir. 1975).

\textsuperscript{63}. \textit{See Inland Steel}, 876 F.2d at 1293-94.

\textsuperscript{64}. 522 F.2d 1221 (7th Cir. 1975).

\textsuperscript{65}. \textit{See id.} at 1226.

In \textit{Honeywell}, the union brought a section 301 action against defendant company seeking prospective application of a 1973 arbitration award. \textit{See id.} at 1224. The award found management's placement of non-unit personnel in positions normally occupied by unit employees in violation of the collective bargaining agreement. \textit{See id.} at 1223-24.
application in *Honeywell*, finding that the union had "failed to allege at least three circumstances which would be basic to any judicial relief from a contractual duty to arbitrate." First, the union failed to aggregate its grievances, which challenged management's right to subcontract work, in one arbitration proceeding. Second, the union neglected to request coercive relief in the prior arbitration proceedings. Finally, the union did not allege that the four prior disputes were "substantially identical" to the grievances in the case at bar. Under this test, the moving party must demonstrate "that the factual basis of the [prior] awards in its favor [are] so nearly identical to the facts of the pending grievances that [management's] conduct constitutes wilful and persistent disregard of the arbitration awards."

The substantial identity standard is faulty in two respects. First, the standard is ambiguous. The Seventh Circuit made no effort to specify exactly what constitutes "substantially identical" factual scenarios. The ambiguity in the *Honeywell* analysis was a result of the nature of its review; the Seventh Circuit court did not apply its standard to the facts of the case at bar. Because the union failed to allege any factual identity in its petition for reversal of the district court's order, *Honeywell* did not provide a mode of analysis that might clarify its standard. It simply held that the union failed to allege substantial factual identity, factual identity sufficient to constitute wilful and persistent disregard of a prior arbitration award.

The Seventh Circuit's recent evaluation of the substantial identity standard in *Local 1545, United Mine Workers v. Inland Steel Coal Co.*
failed to resolve the confusion. In *Inland Steel*, the union alleged facts that met the substantial identity standard.\(^75\) The Seventh Circuit held, however, that the union had failed to allege facts sufficient to support a finding that management’s conduct constituted willful and persistent disregard of the prior awards.\(^76\) But under *Honeywell*, having satisfied the substantial identity standard, the union would have triggered a judicial determination that management had willfully and persistently disregarded the prior award.\(^77\) The result in *Inland Steel* demonstrates that the substantial identity standard breeds confusion and inconsistent results.\(^78\)

Second, “substantial identity” impliedly provides for an overly strict standard of review. Although the Seventh Circuit has not provided a mode of analysis under its standard, it did give an example of conduct that would not be “substantially similar.” In its example in *Honeywell*, the court indicated that a change in the employee or type of product involved in the current dispute would warrant a denial of prospective application of the prior award.\(^79\) A change in the type of product or in the employee bringing the grievance, however, should not warrant a refusal to enforce a prior award that was intended by its author to apply prospectively. In the latter case, an arbitrator has already interpreted a clause in the collective bargaining agreement so that the parties understand their respective rights and duties under that clause. The arbitrator’s coercive remedy states that those rights and duties are to apply prospectively during the term of the parties’ collective bargaining relationship. An immaterial factual discrepancy changes neither the arbitrator’s interpretation of the collective bargaining agreement nor his grant

\(^75\) See id. at 1295-96.

\(^76\) See id.


\(^78\) It is interesting to note that on three separate occasions since the Seventh Circuit adopted its standard in *Honeywell*, district courts within the Seventh Circuit completely ignored the *Honeywell* analysis when reviewing prospective application claims. See Local 1545, United Mine Workers v. Inland Steel Coal Co., 876 F.2d 1288, 1294 (7th Cir. 1989) (relying on the Third Circuit’s “with positive assurance” standard); District 12, United Mine Workers v. Peabody Coal Co., 602 F. Supp. 240, 243 (S.D. Ill. 1983) (same); Midwest Lodge No. 2063, Int'l Ass'n of Machinists & Aerospace Workers v. Admiral Div. of Magic Chef, Inc., 587 F. Supp. 1563, 1566-67 (C.D. Ill. 1984) (same).

\(^79\) See United Elec. Radio & Mach. Workers v. Honeywell Inc., 522 F.2d 1221, 1227 (7th Cir. 1975). The court stated:

> A[n arbitration award] holding that the Company may not subcontract the work of toolroom employees does not answer the question of whether the construction of Tool # 1 is a task normally performed by the bargaining unit. Nor, would a holding that the manufacture of Tool # 1 may not be subcontracted tell the Company that it could not assign the manufacture of Tool # 2 to workers outside the bargaining unit unless it was clear that Tool # 1 and Tool # 2 differed from one another only in a manner or manners insignificant in determining the applicability of Article I [of the collective bargaining agreement].

*Id.*
of prospective effect. Conduct that merely differs in form from the actions that were the subject of the prior arbitration award should not justify refusing prospective application. The Seventh Circuit's intimation that such a change would warrant dismissal suggests that the Seventh Circuit's standard would be unreasonably strict.

This flaw is further evidenced by the court's mistaken impression that prospective application is similar to res judicata, which requires "strict factual identity" for application. A decision applying a "strict factual identity" standard denies prospective enforcement unless the exact dispute that gave rise to the prior arbitration duplicates itself. Such a standard effectively eliminates any possibility of prospective application. The Seventh Circuit's requirement of substantial factual identity tips precariously close to "strict factual identity" and should not be applied.

B. "Positive Assurance" Standard

The Third Circuit announced its "positive assurance" standard in United Mine Workers District No. 5 v. Consolidation Coal Co. Under the standard, a court should deny enforcement and return the parties to arbitration unless it holds with "positive assurance" that the prior award was intended to cover the dispute at hand. Consolidation Coal approached prospective application as an issue of arbitrability, noting that the Trilogy required deference to the arbitral system.

The "positive assurance" standard incorporates both requirements of prospective application analysis: arbitral intent and factual identity. First, the judge must be able to say with positive assurance that the arbitrator intended his award have a prospective effect. Second, the court

81. See Honeywell, 522 F.2d at 1228.
82. See id.
83. See Ethyl Corp., 644 F.2d at 1054.
84. See generally id. at 1054-55 ("strict factual identity standard" is too slippery, and is not "proper path on which to proceed" in prospective application claims).
85. 666 F.2d 806 (3d Cir. 1981).
86. See id. at 811.
87. See id. The court stated the standard as follows: Federal courts are bound to exercise the utmost restraint to avoid intruding on the bargained-for method of dispute resolution and when enforcement of an arbitration award . . . is sought under Section 301, the court must be able to say "with positive assurance" that the award . . . was intended to cover the dispute. If the court has any doubt, the parties should be returned to their grievance procedure and arbitration, for it is an arbitrator, and not the court, who is to decide whether the same issue has already been resolved in an earlier proceeding.
must be able to say with positive assurance that the new dispute was intended to be the subject of the arbitrator's grant of prospective relief. Therefore, the court must determine the factual similarity between the past and present disputes and be able to say with positive assurance that they are sufficiently similar to apply the prior award prospectively.

In Consolidation Coal, the Third Circuit took great care to recognize the Trilogy's policy of judicial deference to the parties' bargained-for method of dispute resolution. The opinion adopted the language of Warrior & Gulf and its presumption of arbitrability in formulating its "positive assurance" standard. Under Warrior & Gulf there is a presumption that all disputes are arbitrable. Therefore, under the Third Circuit's "positive assurance" standard, there is a presumption that a prior award is not intended to apply prospectively, and that the facts of the case at bar are different from those that gave rise to the earlier grievance. Absent a court's positive assurance that these presumptions have been overcome, the parties must be returned to arbitration.

Warrior & Gulf's "positive assurance" standard, however, has lost favor in the Supreme Court. In Communications Workers, the Court withdrew its reliance on the Warrior & Gulf presumption of arbitrability. A court is to resolve arbitrability disputes by interpreting the arbitration clause and other substantive portions of the collective bargaining agreement.

Similarly, a judicial analysis of prospective application claims should not be tainted by a presumption that a prior award does not clearly indicate its prospective effect. In addition, there should be no presumption that two factual scenarios are different. Instead, there should be more

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89. See United Mine Workers Dist. No. 5 v. Consolidation Coal Co., 666 F.2d 806, 811 (3d Cir. 1981).


91. See Consolidation Coal Co., 666 F.2d at 811.

92. See id. at 811 (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)); supra note 15 and accompanying text. In Warrior & Gulf, the Supreme Court stated that "[a]n order to arbitrate [a] particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." Warrior & Gulf Navigation Co., 363 U.S. at 582-83.


94. See id.

95. See AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 651 (1986); supra notes 17-25 and accompanying text.

96. See Communications Workers, 475 U.S. at 651.
flexibility in resolving prospective application disputes, in accordance with the greater role afforded the federal judiciary in arbitrability disputes under *Communications Workers.* Because the Third Circuit's standard effectively constricts the court's role, it should not be regarded as the proper mode of judicial analysis of these claims.

C. Material Factual Identity Standard

The Fifth Circuit announced its material factual identity standard in *Oil, Chemical & Atomic Workers Int'l Union Local 4-16000 v. Ethyl Corp.* Under the *Ethyl* standard, the relevant provision of the collective bargaining agreement is applied to the facts at hand to determine whether the current conduct is arguably permissible under the agreement. If it is not even arguable that the current facts fall outside a prohibition or within an exemption of the article of the collective bargaining agreement at issue, the defendant's conduct is held not to differ materially from its prior conduct. If the defendant's conduct is not materially different from the conduct that gave rise to the prior dispute, the defendant is in violation of the prior arbitration award and ignoring the arbitrator's coercive order.

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97. *See id.*

98. 644 F.2d 1044 (5th Cir. Unit A May 1981).

In *Ethyl*, the union brought suit claiming that management had violated a 1974 arbitration award prohibiting further "like" violations of Article XI of the collective bargaining agreement. *See id.* at 1047. Management allegedly violated the award by placing supervisory and salaried employees in hourly-rated positions. *See id.* The arbitrator had awarded the union coercive relief in a prior dispute, ordering the company to desist therefrom after similar conduct. *See id.* at 1048. Having found the requisite arbitral intent, the court focused on a comparison of factual scenarios to determine the propriety of prospective application. A court "must devise a standard which enables [the court] to assess whether the company is simply committing a 'like violation' of the previous award, but which stops short of forcing [the court] to reach a decision as to whether the current [conduct] actually violates [the collective bargaining agreement]." *Id.* at 1050.

99. *See id.* at 1050.

100. *See id.* at 1051.

101. *See id.* The court presented the standard as follows:

[In cases seeking enforcement of a prior arbitration award that expressly forbade 'like' violations of a prohibition contained in the collective bargaining agreement, we feel the test that best accommodates the interests of the Union and management is whether or not the current conduct is arguably permissible under the relevant provision collective bargaining agreement [sic]. If . . . it is not even arguable that the current facts fall outside the prohibition or within an exemption of the article in question, then a court can safely conclude that the defendant's conduct does not differ materially from the previously condemned actions and thus, that the defendant is committing a 'like' violation of the bargaining agreement, in violation of the prior arbitration award. However, if the evidence indicates that a defendant has an arguable position in claiming that the current action does not violate the article in question—that the current conduct is materially different from the previously condemned conduct—then the defendant is not clearly sidestepping the prior arbitration award. In such a case, the question whether the disputed conduct actually violates the collective bargaining agreement (although a court has found it is at least arguable that it does not) should then be deferred to an arbitrator.
Under the material factual identity standard, the plaintiff must first demonstrate that the defendant's current conduct inarguably falls within the same prohibition in the article of the collective bargaining agreement relied upon in the earlier arbitration award. If the conduct is not inarguably within the scope of the contractual prohibition, then the defendant is not clearly in violation of the award. The case should then be remanded to an arbitrator. If the plaintiff meets this initial burden, the defendant must then demonstrate that his conduct falls within an exception to or an express exemption from the contractual prohibition. If the defendant cannot meet this burden, the court should enforce the prior award prospectively. Thus, the court will have determined that defendant's present conduct does not differ materially from its prior conduct. If defendant succeeds in meeting its burden, plaintiff must prove, once again beyond argument, that "the cited exception is a mere pretext or is . . . otherwise inapplicable to the present situation." Plaintiffs who meet this burden should receive a prospective enforcement decree. Plaintiffs who do not meet this burden will have their complaint dismissed.

The Fifth Circuit's material factual identity standard is the appropriate mode of analysis for resolving factual identity in prospective application claims. In light of the Supreme Court's decision in Communications Workers, the Fifth Circuit's focus on contractual matters is wholly appropriate in determining factual identity. In Communications Workers, the Supreme Court encouraged contract interpretation in resolving arbitrability disputes. The Communications Workers analysis requires application of the facts of a labor dispute to the collective bargaining agreement to determine the parties' duty to arbitrate that dispute. Similarly, under the Fifth Circuit's standard, a court should interpret the collective bargaining agreement to determine whether the facts in the present dispute are "materially different" from the facts of

Id. (emphasis original).

102. See id.
103. See id.
104. See id. at 1051-52.
105. See id. at 1052.
106. See id.
107. See id.
108. Id.
109. See id.
110. See id.
113. See id.
If the plaintiff meets his burden of proof, demonstrating that the current conduct falls within that prohibition, the conduct violates the prior arbitration award. The Fifth Circuit’s reliance on the collective bargaining agreement accords with the Supreme Court’s reaffirmance of the judicial role in interpreting collective bargaining agreements in Communications Workers.

The Fifth Circuit’s material factual identity standard is superior to the Seventh Circuit’s standard because it details a method of analysis for prospective application claims. The Fifth Circuit clearly delineates the burdens placed on the respective parties at trial. In Honeywell, by contrast, the Seventh Circuit made no effort to detail its mode of analysis; it simply held that the dispute in the case at bar was not “substantially identical” to the prior dispute. By providing a detailed standard of review, the Fifth Circuit has avoided the problems that the Seventh Circuit’s approach has caused.

The Fifth Circuit’s material factual identity standard is also preferable to the Third Circuit’s “positive assurance” standard. The material factual identity standard is a strict standard, as it requires the moving party to demonstrate that the facts in question are inarguably within a prohibi-

114. See Oil, Chem. & Atomic Workers Int’l Union, Local 4-16000 v. Ethyl Corp., 644 F.2d 1044, 1051 (5th Cir. Unit A May 1981). But see Boston Shipping Ass’n v. International Longshoremen’s Ass’n, 659 F.2d 1, 4 (1st Cir. 1981). The First Circuit adopts the Fifth Circuit’s standard and interprets it as though the Fifth Circuit did not require any interpretation of the applicable clause of the collective bargaining agreement. See id. This interpretation of the Ethyl holding renders the material factual identity standard less stringent than it actually is. Under Ethyl, a court must interpret the agreement in an effort to measure factual identity. In Ethyl, the court plainly stated that “a court cannot assess whether the current conduct actually constitutes a ‘like’ violation of the collective bargaining agreement without examining the collective bargaining agreement itself.” Ethyl Corp., 644 F.2d at 1051. This necessary measurement determines whether a party is violating a prior arbitration award that provided for its prospective effect. Thus, it appears that the First Circuit is incorrectly applying the Fifth Circuit’s material factual identity standard.


In a suit for prospective application the court is to determine whether the provisions of the collective bargaining agreement that were at issue in the prior dispute govern the facts of the present dispute. See Baldwin Piano & Organ Co. v. International Chem. Workers, 564 F. Supp. 1262, 1272 (N.D. Miss. 1983). If they are, the court applies the arbitrator’s interpretation of the clause in question prospectively, as the arbitrator had intended. See Ethyl Corp., 644 F.2d at 1051.

116. See AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 651 (1986); see also Note, supra note 17, at 1314 (“the Court’s strong reaffirmation of the quintessentially judicial nature of arbitrability determinations, with its concomitant deemphasis of the presumption of arbitrability, suggests that courts should and will scrutinize contracts more attentively than in the past”).

117. See Ethyl Corp., 644 F.2d at 1052-53; supra notes 102-110 and accompanying text.

tion of the collective bargaining agreement. The material factual identity standard, however, is not as strict as the “positive assurance” standard. The “positive assurance” standard requires a plaintiff to overcome a presumption against prospective application. The material factual identity standard, on the other hand, allows a court the flexibility to determine for itself, based on the collective bargaining agreement, whether the defendant is sidestepping the prior arbitration award. The plaintiff’s primary burden is to prove that the defendant’s current conduct is inarguably within a prohibition of the relevant provision of the collective bargaining agreement. Having met this burden, absent an effective evidentiary rebuttal by the defendant, the plaintiff should receive prospective application. Under the material factual identity standard, a court should not presume that the dispute is not inarguably within the contractual prohibition. Rather, the plaintiff’s evidence should be weighed free from any presumption invalidating its worth. The Court’s reevaluation of the “positive assurance” standard in Communications Workers, coupled with its reliance on contract interpretation in the same case, demonstrates that the Fifth Circuit’s flexible standard is more appropriate than the Third Circuit’s presumption against prospective application.

CONCLUSION

If the federal judiciary is to apply the law in the area of labor arbitration in a consistent manner, it must adopt the material factual identity standard in prospective application claims. The Supreme Court’s contractual perspective and the expanded scope of review of arbitrability disputes resulting from Communications Workers have provided management with an advantage in arbitrability disputes. A union’s claim for prospective enforcement of a prior arbitration award should be reviewed from a similar perspective. The federal judiciary should provide a flexible standard for prospective application claims, and base prospective application analysis on the interpretation of the parties’ collective bargaining agreement. Management’s arbitrability disputes should not be granted plenary review while a union’s attempts to deter management

119. See Ethyl Corp., 644 F.2d at 1051-52.
121. See United Mine Workers Dist. No. 5 v. Consolidation Coal Co., 666 F.2d 806, 811 (3d Cir. 1981); supra notes 91-92 and accompanying text.
123. See id. at 1052.
124. See id.
recidivism are limited by the imposition of a presumption against the union's cause of action. To ensure equal treatment of management and labor under the law, the material factual identity standard should be applied in prospective enforcement proceedings.

Seth Michael Popper