

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 94-60716
Summary Calendar

GULF COAST INDUSTRIAL WORKERS UNION,
Plaintiff-Counter
Defendant-Appellant,

versus

EXXON CHEMICAL AMERICAS,
Defendant-Counter
Claimant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-G-94-69)

(April 21, 1995)

Before SMITH, EMILIO M. GARZA, PARKER, Circuit Judges.

PER CURIAM:*

The plaintiff appeals the district court's summary judgment in favor of the defendant. The district court held that the arbitration award the plaintiff sought to enforce had to be vacated because the arbitrator had exceeded his authority under the collective bargaining agreement. We affirm.

I. FACTS

Gulf Coast Industrial Workers Union (Union), a labor

* Local Rule 47.5 provides:
"The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."
Pursuant to that Rule, the Court has determined that this opinion should not be published.

organization, filed suit against Exxon Chemicals Americas (Exxon), the operator of a chemical facility, alleging that Exxon had materially breached their collective bargaining agreement (CBA) by refusing to comply with an arbitration award ordering Exxon to reinstate its former employee, Russell Paull, to full employment at the chemical facility.

Paull was employed by Exxon as a process technician in January 1987. On November 22, 1992, Paull was scheduled to "slide"¹ to the position of First-Line Supervisor in the Chemical Extraction area during the evening shift. Paull arrived at the plant at approximately 6:00 p.m. and reported to Mr. Watts, whom he was to relieve from his supervisory duties. Watts advised Paull that he detected the smell of alcohol on Paull and that reasonable cause existed for an alcohol test under the company's Alcohol and Drug Use Policy. Paull explained that he had consumed a few bottles of non-alcoholic beer prior to coming to work. However, Watts insisted that Paull undergo testing.

The plant superintendent was advised of the situation and advised Paull that the alcohol test was required. Paull continued to insist that the smell was due to his consumption of non-alcoholic beer. Paull was taken by Watts and a union representative to the hospital where a blood sample was obtained. The test revealed a blood alcohol content of .043%. A blood alcohol level of .04% is considered a positive test result under

1 "Sliding" is a process whereby a wage employee assumes supervisory responsibilities on a temporary basis. R. 2, 164.

Exxon's Alcohol and Drug Policy.

After being informed of the positive test results, Paull admitted for the first time that he had consumed four bottles of regular beer prior to reporting to work. Paull was terminated by Exxon as a result of the violation of the Alcohol and Drug Policy.

The Union filed a grievance in which it asserted that Paull was subjected to an unjust termination. The Union by-passed the steps of the grievance procedure and advised Exxon of its intent to arbitrate the dispute in accord with the terms of the CBA. The question presented to the arbitrator was: "[w]hether just cause existed under the Contract to discipline Grievant? If not, what is the appropriate remedy?"

The following pertinent provisions were contained in the CBA and other policy documents of Exxon dealing with alcohol use by employees. Article Fifteen of the CBA between the parties provides:

The Arbitrator shall have the authority only to interpret and apply the provisions of this agreement and shall not have authority to alter or add to it in any way. The decision of the arbitrator shall be final and binding on the Company and the Union for the duration of this agreement.

Article Twenty-Six (B) of the CBA provides: "[t]he Company shall have the right to discipline and discharge employees for just cause. The commission of the offenses listed in Schedule C [of the CBA] shall be just cause to render an employee liable to discharge on first offense." The Schedule C offenses for which an employee may be discharged without notice include: "[i]ntroduction,

possession, or use of intoxicating liquors on the property of the Company, or proceeding to work under the influence of liquor."

Also submitted to the arbitrator was Exxon's Statement of Policy regarding employees' use of alcohol and drugs, which included the following provisions:

Being unfit for work because of the use of drugs or alcohol is strictly prohibited and is grounds for termination of employment.

. . . .

The Corporation may also require employees to submit to medical evaluation or alcohol or drug testing where cause exists to suspect alcohol or drug use. . . . A positive test result or refusal to submit to a drug or alcohol test is grounds for disciplinary action, including termination.

The Baytown Chemical Plant issued the following pertinent guidelines regarding alcohol and drug use:

An employee must not report to work mentally or physically unfit for work due to the consumption of alcohol or controlled substances. Being mentally or physically unfit for work because of the effects of alcohol or controlled substances while on the premises of the Exxon Chemical Americas' Baytown Chemical Plant is cause for termination of employment.

The Working Rules for employees provide:

DISMISSAL, SUMMARY

Following is the list of offense for which an employee may be discharged without notice.

. . . .

12. Introducing, possessing, or being under the influence of narcotics, dangerous drugs, or intoxicants, such as alcoholic beverages and certain drugs, while in the plants. Reporting to work mentally and physically unfit.

Paull signed documents acknowledging that he was aware of

these policies. The arbitrator determined that Paull was aware of Exxon's policy prohibiting an employee from being under the influence of alcohol in the work place and that a positive test for alcohol consumption could result in his termination. The arbitrator also stated that the parties had stipulated that Paull's test results showed a blood alcohol concentration that exceeded the prohibited blood alcohol concentration. The arbitrator concluded that Paull had violated Exxon's Alcohol and Drug Use Policy and the Alcohol Use Guidelines.

However, the arbitrator further determined that these policies do not require termination as the only remedy that can be ordered. The arbitrator relied on language in the policies providing that "appropriate disciplinary action will be taken," and indicating that disciplinary action included termination. The arbitrator noted that Paull had no prior disciplinary violations and had a good work record. The arbitrator ordered that Paull be reinstated to full employment with restored lost seniority, but not to a safety-sensitive position. The arbitrator did not grant Paull backpay.

The Union filed suit because Exxon refused to comply with the arbitration award. Exxon answered the complaint and filed a counterclaim, arguing that the arbitrator exceeded his authority by ordering Paull's reinstatement. The parties filed cross-motions for summary judgment in the district court.

The district court determined that the arbitrator had exceeded his authority because the CBA established that proceeding to work

under the influence of alcohol establishes just cause for discharging an employee. The district court also determined that the arbitrator had implicitly found "just cause" for the discharge. The district court did not reach the issue whether the arbitrator's decision violated the public policy mandating employers to provide a drug and alcohol-free workplace. The district court denied the plaintiff's motion for summary judgment, granted Exxon's motion, and dismissed the Union's complaint.

II. DISCUSSION

The Union argues that the district court did not have the authority to vacate the arbitrator's award if the arbitrator's decision drew "its essence from the collective bargaining agreement," even if the arbitrator misconstrued the contract. The Union further argues that Exxon advised the arbitrator that the basis for Paull's discharge was his violation of the Drug and Alcohol Policy, provided the arbitrator with documentation of the policy, and advised the arbitrator that such policy was to be read in conjunction with the CBA. The Union contends that the policy documents provided for a varied range of disciplinary action, including termination and, thus, that the arbitrator acted in accord with what the parties authorized him to do.

The Union also argues that Paull was not charged with a violation of Schedule C, but was specifically charged with a violation of the Drug and Alcohol Policy. The Union argues that the district court erred in finding that the arbitrator implicitly found just cause for the discharge because he explicitly found that

there was not just cause based on the circumstances for discharge.

"An arbitrator's award will not be disturbed if his decision 'draws its essence from the collective bargaining agreement,' and is not based on the arbitrator's 'own brand of industrial justice.'" *E.I. DuPont de Nemours and Co. v. Local 900 of Intern. Chemical Workers Union*, 968 F.2d 456, 458 (5th Cir. 1992) (citation omitted). However, the court may "scrutinize the award to ensure that the arbitrator acted in conformity with the jurisdictional prerequisites of the collective bargaining agreement." *Id.* (internal quotation and citation omitted). The district court may vacate an arbitrator's award if it finds that the arbitrator exceeded its arbitral authority provided for in the agreement. *Id.* This court reviews the district court's ruling that an arbitration award was not grounded in the agreement de novo. *Id.*

The Union argues that other arbitrators who have considered the same contract provisions involved herein determined that the commission of a schedule C offense does not necessarily mandate discharge. See *Exxon Chemical Americas and Gulf Coast Industrial Workers Union*, FMCS No. 89-22792 at 12-13 (Feb. 12, 1990) (finding that the violation of any Schedule C offenses listed in the CBA does not automatically establish just cause for discharge); *Exxon Chemical Americas Baytown Chemical Plant and Gulf Coast Industrial Workers Union*, FMCS No. 94-01858 at 11 n.1 (Nov. 2, 1994) (arbitrator's authority under the Exxon/Gulf Coast CBA includes the right to review the penalty imposed and not merely a determination whether an offense has been committed).

Contrary to these arbitration decisions, this court has determined that an arbitrator who is restricted by the CBA to determining: whether "just cause" exists for discharge and to formulating a remedy only in the event that no just cause is found, is not authorized to impose a less drastic penalty on an employee if a violation has been found to have occurred. In *DuPont*, the issue presented to the arbitrator was the same issue presented herein. 968 F.2d at 459. "Were the Grievants discharged for just cause under the contract? If not, what is the appropriate remedy?" *Id.* The arbitrator determined that the employees used marijuana while on the company premises although they were aware that it was grounds for discharge. *Id.* at 458. Although the arbitrator implicitly found a rule violation constituting just cause for termination, he fashioned a remedy other than discharge. *Id.* *DuPont* construed the question presented to the arbitrator as authorizing him to fashion a remedy only in the event that the grievants were discharged without just cause and determined that the arbitrator had exceeded his authority. *Id.* at 459.

In *Container Products, Inc. v. United Steelworkers of America and its Local 5651*, 873 F.2d 818 (5th Cir. 1989), the arbitrator made an implicit finding of just cause for dismissal but ordered the reinstatement of the employee. The CBA specifically stated that the arbitrator would not have jurisdiction to modify the degree of discipline imposed by the company if the arbitrator determined the employee was discharged for proper cause. *Id.* at 818-19. The court affirmed the district court's order vacating the

award based on the finding that the arbitrator had exceeded his authority.

In *Delta Queen Steamboat Co. v. District 2 Marine Engineers Beneficial Ass'n.*, 889 F.2d 599, 601 (5th Cir. 1989), cert. denied, 498 U.S. 853 (1990), the arbitrator reinstated a ship captain although he found that the captain was guilty of gross carelessness in violation of company rules. The company relied on a provision in the CBA providing that the "right to discipline and discharge for proper cause are [sic] . . . the sole responsibility of the Company." *Id.* The court found that the agreement proscribed the arbitrator from reinstating the discharged employee. *Id.* at 604.

The Union argues in its reply brief that, in a more recent case, the court upheld the arbitrator's fashioning a remedy although the CBA provided that an employee who tests positive "shall be subject to immediate discharge." See *Kerr-McGee Chemical Corp. v. United Steelworkers of America*, 800 F. Supp. 1405 (N.D. Miss. 1992), *aff'd*, 988 F.2d 1214 (5th Cir. 1993)(Table). The Union fails to point out that *Kerr-McGee* distinguished its holding from *DuPont*. *Id.* at 1410 n.7. In *Kerr-McGee*, the arbitrator determined that there was no just cause to fire the employee because of the ambiguity in the contract regarding the establishment of just cause. *Id.* In the absence of a finding of just cause, the arbitrator was clearly authorized to fashion a remedy. Thus, *Kerr-McGee* is not applicable herein.

The arbitrator found that Paull had violated Exxon's Alcohol

and Drug Use Policy and Alcohol Use Guidelines because he tested positive for being under the influence of a prohibited amount of alcohol. Although the arbitrator did not specifically find that Paull's conduct constituted "just cause" for termination, the arbitrator's factual findings constitute an implicit finding that just cause existed for Paull's termination under the CBA. See *Container Products, Inc.*, 873 F.2d at 819 (the court may examine the record as a whole to determine if the arbitrator implicitly found the existence of just cause for dismissal).

Thus, the remaining issue is whether the arbitrator was authorized to fashion a different remedy despite have made a "just cause" finding. The CBA between the parties expressly states that the arbitrator "shall" have the authority only to interpret and apply the provisions of that agreement and "shall not have the authority to alter or add to it in any way." The CBA provides that Exxon "shall have the right to discipline and discharge employees for just cause." These provisions, like those cited in the cases above, reserve to Exxon the right to discipline and discharge employees. Based on these provisions, and the arbitrator's implicit finding of just cause, the arbitrator exceeded its authority in altering the disciplinary action taken against Paull.

The Union's argument that the arbitrator was authorized to fashion a remedy because Exxon's policies and guidelines on alcohol use do not mandate termination is without merit. "[W]hile an arbitrator's decision is accorded considerable judicial deference to the extent it touches the merits of the controversy, his

jurisdiction nevertheless is shaped by the underlying collective bargaining agreement." *Delta Queen Steamboat Co.*, 889 F.2d at 602. "[The arbitrator] may look beyond the written contract when interpreting a collective bargaining agreement if the instrument is ambiguous or silent upon a precise question." *Id.* If the arbitrator "exceeds the express limitations of his contractual mandate, judicial deference is at an end." *Id.*

The arbitrator was not authorized to look beyond the CBA because that document expressly gave Exxon the right to discipline and discharge an employee for cause. Further, the mere fact that Exxon may have instituted policies which provide Exxon with the discretion to impose a less stringent penalty on its employee for certain conduct does not authorize the arbitrator to exercise that same discretion. *See Delta Queen Steamboat Co.*, 889 F.2d at 602 (arbitrator is not free to usurp the discretion delegated to the employer in the CBA). The district court did not err in determining that the arbitrator exceeded his authority under the CBA in imposing a less drastic disciplinary penalty on Paull.

Exxon argues that the district court's decision can be affirmed on the alternative ground that the arbitrator violated public policy in reinstating Paull. Because it is clear that the arbitrator exceeded his contractual authority in reinstating Paull, this court need not address whether the reinstatement was a violation of clearly established public policy.

III. CONCLUSION

For the reasons given above, the judgment of the district

court is AFFIRMED.