No. 99-1038

In the Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
PETITIONER

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether the arbitrator's award in this case, which ordered reinstatement (after a three-month suspension) of a commercial truck driver who had twice tested positive for marijuana, should be set aside as contrary to public policy.

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INTEREST OF THE UNITED STATES

This case presents the question whether a federal court should set aside, as contrary to public policy, a labor arbitrator's decision ordering reinstatement (after a three-month suspension) of a commercial truck driver who had twice tested positive for marijuana. Congress directed the United States Department of Transportation to promulgate regulations governing the use of alcohol and illegal drugs by persons employed in the transportation industry, including commercial truck drivers. The regulations promulgated pursuant to that statutory directive address, *inter alia*, the categories of persons subject to alcohol and drug testing, the manner in which those tests will be conducted, and the consequences that follow from a failed test. The United States has a substantial interest in ensuring

that judicial review of arbitral awards under collective bargaining agreements does not undermine either DOT's regulations, or the federal labor policy favoring arbitration as the method for finally resolving disputes under collective bargaining agreements.

STATEMENT

1. In the Omnibus Transportation Employee Testing Act of 1991 (Testing Act), Pub. L. No. 102-143, Tit. V, 105 Stat. 952, Congress addressed the threat to public safety posed by drug and alcohol abuse on the part of individuals employed in the transportation industry. The Testing Act contains congressional findings that, *inter alia*, "the greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, whether on duty or off duty, by those individuals who are involved in the operation of aircraft, trains, trucks, and buses"; "the use of alcohol and illegal drugs has been demonstrated to affect significantly the performance of individuals, and has been proven to have been a critical factor in transportation accidents"; "the most effective deterrent to abuse of alcohol and use of illegal drugs is increased testing, including random testing"; and "rehabilitation is a critical component of any testing program for abuse of alcohol or use of illegal drugs, and should be made available to individuals, as appropriate." Testing Act § 2(3), (4), (5) and (7), 105 Stat. 953.

The Testing Act in its current form states that "[i]n the interest of commercial motor vehicle safety, the Secretary of Transportation shall prescribe regulations * * * that establish a program requiring motor carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of operators of commercial motor vehicles for the use of alcohol or a controlled substance." 49 U.S.C. 31306(b)(1)(A) (1994 & Supp. III 1997). The Testing Act further provides that

the Secretary "shall prescribe regulations establishing requirements for rehabilitation programs that provide for the identification and opportunity for treatment of operators of commercial motor vehicles who are found to have used alcohol or a controlled substance in violation of law or a Government regulation." 49 U.S.C. 31306(e). The Act states in addition that the Secretary "shall decide on appropriate sanctions for a commercial motor vehicle operator who is found, based on tests conducted and confirmed under this section, to have used alcohol or a controlled substance in violation of law or a Government regulation but who is not under the influence of alcohol or a controlled substance as provided in this chapter." 49 U.S.C. 31306(f).[1]

2. In response to, *inter alia*, the statutory directives described above, the Department of Transportation (DOT) has promulgated detailed regulations that require drug testing of a wide range of employees in the transportation industry. With respect to commercial drivers, the regulations state that "[e]xcept as provided in subpart F of this part [49 C.F.R. 382.601-382.605], no driver shall perform safety-sensitive functions, including driving a commercial motor vehicle, if the driver has engaged in" prohibited drug use. 49 C.F.R. 382.501(a); see also 49 C.F.R. 382.501(b) ("No employer shall permit any driver to perform safety-sensitive functions, including driving a commercial motor vehicle, if the employer has determined that the driver has violated this section."); 49 C.F.R. 382.507 ("Any employer or driver who violates the requirements of this part shall

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[1] Federal law mandates disqualification from commercial driving for at least one year of any person who is convicted of operating a commercial motor vehicle while under the influence of alcohol or a controlled substance. 49 U.S.C. 31310(b)(1)(A); 49 C.F.R. 383.51(b)(2)(i)-(ii) and (3)(i).

be subject to the penalty provisions of 49 U.S.C. section 521(b).”). Thus, if an employee tests positive for controlled substances, both the employer and the employee are subject to penalties if the employee thereafter performs a safety-sensitive function without first complying with the requirements of Subpart F of 49 C.F.R. Part 382.

In Subpart F, and Section 382.605 in particular, DOT established rehabilitation requirements that must be satisfied before an employee who has tested positive for a controlled substance may return to a safety-sensitive position. First, the driver “shall be evaluated by a substance abuse professional [SAP] who shall determine what assistance, if any, the employee needs in resolving problems associated with * * * controlled substances use.” 49 C.F.R. 382.605(b).[2] Second, “[b]efore a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part, the driver shall undergo a return-to-duty * * * controlled substances test with a verified negative result.” 49 C.F.R. 382.605(c)(1). Finally, if the driver has been “identified [by the SAP] as needing assistance in resolving problems associated with * * * controlled substances use,” 49 C.F.R. 382.605(c)(2), the SAP must determine that the driver has followed the prescribed rehabilitation program, 49 C.F.R. 382.605(c)(2)(i), and the driver must be subject to at least six unannounced drug tests during the 12 months following his return to duty, 49 C.F.R. 382.605(c)(2)(ii).

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[2] The regulations provide that “[t]he choice of substance abuse professional and assignment of costs shall be made in accordance with employer/driver agreements and employer policies.” 49 C.F.R. 382.605(d).

The DOT regulations do not establish any additional prerequisites to reinstatement for a driver who fails a drug or alcohol test on two or more occasions. A proposed rule issued by DOT for comment in December 1992 included a provision stating that "[a] driver who, during any 3-year period, is found to have a verified positive controlled substances test result twice in separate incidents, is prohibited from driving any commercial motor vehicle * * * for a period of 60 consecutive days." 57 Fed. Reg. 59,585 (1992) (proposed 49 C.F.R. 382.1107(a)(2)(i)). After considering public comments on the proposed regulations, however, the agency declined to adopt that disqualification rule. 59 Fed. Reg. 7493 (1994). The agency made clear that "[t]he only driving prohibition period for a controlled substances violation is similar to that for alcohol–-completion of rehabilitation requirements and a return-to-duty test with a negative result." *Ibid.*[3]

So long as a commercial driver satisfies the rehabilitation requirements of 49 C.F.R. 382.605, he is eligible under the regulations to perform safety-sensitive duties. See 59 Fed. Reg. at 7493; *id.* at 7503. The preamble to the regulations makes clear, however, that "[c]ompliance with the prescribed treatment and passing the test(s) will not guarantee a right of reemployment." *Ibid.* Consistent with the DOT regulations, an employer may decline to offer rehabilitation to an

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[3] DOT regulations require disqualification, for specified periods, of individuals convicted of certain offenses. See 49 C.F.R. 383.51. Those include operating a commercial motor vehicle while under the influence of alcohol or controlled substances, see 49 C.F.R. 383.51(b)(2)(i)-(ii); use of a commercial motor vehicle in the commission of a drug felony, see 49 C.F.R. 383.51(b)(2)(v); and the commission of two or more serious traffic violations within a three-year period while operating a commercial motor vehicle, see 49 C.F.R. 383.51(c).

employee who tests positive and may instead discharge every such worker. The 1994 preamble "encourage[s] those employers who can afford to provide rehabilitation to do so through established health insurance programs, since it helps their drivers, benefits morale, is often cost-effective and ultimately contributes to the success of both their business and their testing programs." *Id.* at 7502. The agency has expressly declined, however, "to mandate employer-provided rehabilitation," deciding instead that the matter "should be left to management/driver negotiation." *Ibid.*

3. The Labor-Management Relations Act of 1947 (LMRA) states the national policy that "sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees." 29 U.S.C. 171(a). The LMRA further states that "[f]inal 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).

4. James Smith, a drilling operator for petitioner Eastern Associated Coal Corporation, applied for a position as a Mobile Equipment Operator. Because the new position required a commercial driver's license, Smith was subject to alcohol and drug testing under the DOT regulations. In March 1996 Smith tested positive for marijuana. Petitioner sought to discharge him, but Smith grieved his discharge and the arbitrator ordered him reinstated, subject to a suspension of 30 days

without pay and the requirement that he participate in a substance abuse program. Smith passed four drug tests between April 1996 and January 1997, but in June 1997 he again tested positive for marijuana. On July 14, 1997, petitioner suspended Smith with the intent to discharge him. Smith and his union (the respondent in this case) contested the discharge. Pet. App. 6a-8a, 24a-26a.

The arbitrator in the second proceeding stated that "[w]hile [Smith] has been a very good employee during his 17 years with the company, it is obvious he has not been rehabilitated by the opportunity provided by the company's employee assistance program or the earlier arbitration." Pet. App. 26a. The arbitrator stated as well that "drugs have a negative impact on job performance, safety and company liability." *Id.* at 28a.

The arbitrator nevertheless ordered Smith reinstated, subject to various conditions. He explained:

> [Smith] made a very personal appeal under oath to the arbitrator concerning a personal/family problem which caused this one time lapse in drug usage. The arbitrator found this testimony creditable. If the arbitrator was misled by [Smith], the arbitrator is confident that [Smith] will make another misstep with drug use and be caught. The remedy provided here will assure that the company and union will not be required to use arbitration again for [Smith] where drugs are involved.

Pet. App. 28a. Smith's reinstatement was made subject to the conditions that (1) he would not be paid for the period of his suspension, which would last until October 20, 1997;[4] (2) the prior arbitral award would be

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[4] The date of the arbitrator's decision was August 1, 1997. Pet. App. 29a. Because Smith was suspended by petitioner on July 14,

"reinstated"; (3) Smith would reimburse the company and the union for the arbitrators' bills in both arbitral proceedings; (4) Smith would provide a signed, undated letter of resignation that petitioner may accept if Smith fails a drug test during the next five years; and (5) Smith would be subject to random drug testing during the period of his suspension, and petitioner could accept his resignation if he refused to take a drug test. *Id.* at 29a.

5. Petitioner filed suit in federal district court seeking vacatur of the arbitrator's award. The district court granted respondent's motion for summary judgment. Pet. App. 5a-21a. The court found that the arbitrator's award was "rationally inferable" from the applicable collective bargaining agreement. *Id.* at 16a. The court also rejected petitioner's contention that the award should be vacated as contrary to public policy. *Id.* at 17a-21a. The district court acknowledged that "[t]here is a plenitude of positive law to support the existence of a well defined and dominant public policy against the performance of safety sensitive jobs by employees under the influence of drugs." *Id.* at 18a. It held, however, that the award in this case did not violate that public policy. The court explained:

> [Petitioner] argues that the public policy embodied in the DOT Regulations is sufficiently well defined and dominant to support vacation of Arbitrator Barrett's award. There is no question that the DOT Regulations relied upon by [petitioner] articulate a well defined and dominant public policy against drug use by persons employed as commercial motor vehicle drivers. Nevertheless, the DOT Regulations

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1997 (*id.* at 24a), the effect of the arbitrator's decision was that Smith was suspended without pay for slightly more than three months.

> do not express an explicit, well defined public policy permanently enjoining the employment of commercial motor vehicle drivers who test positive for drug use. Specifically, the DOT Regulations do not require that employees who test positive for drug use be automatically discharged. Here, the arbitrator ordered reinstatement of Mr. Smith, subject, however, to several conditions, including continued random drug testing and mandatory resignation in the event of a future positive drug test. Because the DOT Regulations do not make it illegal to reinstate employees who test positive for drug use, it cannot be said that the DOT Regulations "specifically militate against the relief ordered by the arbitrator" in this case. Consequently, the public policy exception does not apply inasmuch as the arbitrator's award is consistent with the DOT Regulations.

Id. at 20a-21a (citation and footnote omitted).

6. The court of appeals affirmed. Pet. App. 1a-4a. The court simply recounted the facts and the procedural history of the case and stated that it "affirm[ed] on the reasoning of the district court." *Id*. at 4a.

SUMMARY OF ARGUMENT

1. Pursuant to statutory authority, the Department of Transportation (DOT) has promulgated regulations addressing the dangers posed by employee drug use within the transportation industry. Those regulations mandate drug testing of employees who perform safety-sensitive functions, and they establish prerequisites to the reinstatement of employees who test positive. A worker who tests positive must be immediately removed from safety-sensitive duties and may not resume such duties until he has been evaluated by a substance abuse professional (SAP), has successfully completed any program of rehabilitation that the SAP

prescribes, and has passed a return-to-duty drug test. DOT has made clear that employers are free to impose additional sanctions (including outright discharge) on employees who test positive, subject to any independent constraints on management discretion that the employer has voluntarily assumed.

In our view, the arbitrator's reinstatement order in this case is most plausibly construed to be contingent upon Smith's compliance with the pertinent DOT regulations—and, in particular, on his successful completion of any rehabilitation program that the SAP prescribes. So construed, the award is fully consistent with federal policy and should not be set aside by a federal court. If an employee satisfies the prerequisites to reinstatement established by the responsible executive agency, a federal court cannot properly refuse enforcement of an arbitrator's reinstatement order based on the court's belief that the conditions set forth in the regulations are insufficient to protect the public safety.

The fact that Smith failed *two* drug tests within a 16-month period does not significantly alter the analysis. Under a proposed regulatory provision put forth for public comment in December 1992, any driver who failed two drug tests within a three-year period would have been prohibited from operating a commercial motor vehicle for a period of 60 days. Even if that proposed rule had been adopted, the arbitral award in the instant case would be valid, since under the arbitrator's decision Smith was suspended for slightly more than three months. After considering public comments, DOT declined to mandate any specific period of disqualification even for recidivist drug users, concluding instead to entrust decisions regarding repeat offenders to private ordering and the sound judgment of arbitrators, subject to the rehabilitation requirements set forth in 49 C.F.R. 382.605. Smith's status as

a recidivist is surely relevant in determining the appropriate response to his positive drug test. But the text and history of the pertinent DOT regulations are inconsistent with any contention that discharge is the *only* permissible sanction for a recidivist drug offender.

2. The courts below correctly deferred to the arbitrator's judgment rather than attempting a de novo determination of the appropriate sanction for Smith's misconduct. The arbitrator's specialized training and repeated exposure to workplace disputes gives him a significant advantage (as compared to a federal judge) in resolving the pertinent remedial issues, notwithstanding the fact that the consequences of the arbitrator's decision may be felt beyond the employer's place of business. That is particularly so in light of the arbitrator's ability to see and hear the witnesses firsthand. A deferential standard also helps to ensure that the arbitrator's decision will be treated when issued as essentially final, thereby allowing the parties to put the controversy behind them. Finally, enforcing the parties' agreement to entrust workplace disputes to the arbitrator serves the national interest in industrial peace, since the employer's agreement to arbitrate has historically served as the *quid pro quo* for the union's promise not to strike.

ARGUMENT

The arbitrator's decision in this case rests on three subsidiary propositions. *First*, the arbitrator construed the collective bargaining agreement as authorizing but not mandating discharge as a sanction for employee drug use. *Second*, the arbitrator construed his own remedial powers expansively. While framing the question before him as whether the company had established "just cause" for Smith's discharge, Pet. App. 24a, the arbitrator evidently (though implicitly) understood his

task to be that of determining, not whether discharge was a *permissible* sanction under the terms of the agreement, but whether discharge was the *fairest* or *most appropriate* sanction under all the facts and circumstances. In essence, the arbitrator understood the agreement as delegating to him the sort of discretionary authority that would otherwise be exercised by company management. *Third*, the arbitrator considered all the relevant facts and concluded that a three-month suspension without pay, subject to various conditions, was a more appropriate punishment than outright discharge.

At least in this Court, petitioner does not assert that any of those arbitral rulings is wrong as a matter of contract interpretation. Petitioner does not, that is, contend that the collective bargaining agreement either (1) mandates the discharge of every covered employee who is found to have used marijuana, (2) gives management unreviewable discretion to determine the appropriate sanction for an individual who tests positive, or (3) precludes reinstatement under the facts and circumstances of this case. Rather, petitioner's argument is that the arbitral award should be vacated as contrary to public policy even assuming that the award is faithful to the intent of the contracting parties.

For the reasons that follow, that argument lacks merit. This Court has emphasized that judicial authority to vacate an arbitral award as contrary to public policy "is limited to situations where the contract as interpreted [by the arbitrator] would violate some explicit public policy that is 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." *United Paperworkers Int'l Union* v. *Misco*, 484 U.S. 29, 43 (1987) (internal quotation marks omitted). The Department of Transporta-

tion (DOT) has promulgated detailed regulations that, *inter alia*, define the prerequisites that a commercial driver must satisfy in order to resume safety-sensitive duties after testing positive for illegal drugs. So long as those requirements are satisfied, DOT's regulations leave with the employer the ultimate decision whether the employee should be reinstated, subject to any constraints on management discretion (*e.g.*, an agreement to arbitrate) that the employer has voluntarily assumed. That regulatory scheme defines (at least insofar as the federal government is concerned) the relevant "public policy" in this area. If a driver satisfies the regulatory preconditions to reinstatement, and the decisionmaker chosen by the parties concludes that reinstatement is appropriate, we see no basis on which a federal court may direct a different outcome.

A. So Long As Smith Complies With The Department Of Transportation's Rehabilitation Requirements, His Reinstatement To A Safety-Sensitive Position Is Consistent With "Public Policy" As Reflected In The Department's Regulations

1. As we explain above (see pp. 2-3, *supra*), Congress has vested the Department of Transportation (DOT) with broad authority to promulgate rules addressing the dangers posed by employee drug use within the transportation industry. In devising appropriate regulations, DOT sought to balance three important principles—each of which is firmly grounded in federal statutory law. First, the use of illegal drugs by workers in safety-sensitive positions poses a substantial threat to public safety.[5] See Omnibus Transportation

[5] The DOT regulations make clear that individuals who currently use illegal drugs or have measurable amounts of such drugs in their systems are ineligible to perform safety-sensitive functions, regardless of whether the drug use occurs on or off duty.

Employee Testing Act of 1991 (Testing Act), Pub. L. No. 102-143, Tit. V, § 2(3) and (4), 105 Stat. 953 (congressional findings); p. 2, *supra*. Second, treatment and rehabilitation of employees who use illegal drugs serves important public and private interests. See Testing Act § 2(7), 105 Stat. 953 (congressional finding); 49 U.S.C. 31306(e) (requiring DOT to "prescribe regulations establishing requirements for rehabilitation programs").[6] Third, federal labor law reflects a preference for private resolution, through the collective bargaining

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See 49 C.F.R. 382.213(a) ("No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substance."); 49 C.F.R. 382.215 ("No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive for controlled substances."). That rule does not reflect a judgment that every individual who tests positive for illegal drugs is in fact impaired. DOT has recognized that "drugs may stay in the body for some time and the presence of drugs in urine does not necessarily mean that the person was affected by the drugs on the day tested or during the performance of safety-sensitive functions." 57 Fed. Reg. at 59,393-59,394. But precisely because urine testing cannot determine whether an individual is impaired at a particular time, any commercial driver who tests positive for illegal drugs must be regarded as a *potential* threat to public safety. See *id.* at 59,396 ("It is not possible to determine, based on a chemical test, at what amount a particular drug impairs each user's performance of particular functions and thus could have safety consequences, so the mere presence of the drug must be prohibited.").

[6] Treatment and rehabilitation of such employees (as opposed to outright discharge) most obviously serves the individual's own interest in resuming gainful employment and in avoiding the risk of future criminal prosecution that inherently attends the use of illegal drugs. In addition, however, rehabilitation and treatment serves the interests of the transportation industry and the national economy by allowing a worker's specialized skills to be put to their most productive use.

process, of issues regarding workplace management. 29 U.S.C. 171(a).

The DOT regulations require testing of drivers in safety-sensitive positions in order to deter the use of illegal drugs and to detect those individuals who engage in drug use. The regulations require the immediate removal from performance of safety-sensitive duties of any individual who tests positive for illegal drugs. 49 C.F.R. 382.501. Under the rules, the driver is eligible to resume safety-sensitive duties only after he has been evaluated by a substance abuse professional (SAP), 49 C.F.R. 382.605(b); has passed a return-to-duty drug test, 49 C.F.R. 382.605(c)(1); and has successfully completed any program of rehabilitation that the SAP prescribes, 49 C.F.R. 382.605(c)(2)(i).[7] The rules do not, however, compel the employer to offer rehabilitation or to reinstate a driver who has complied with the regulatory requirements. See 59 Fed. Reg. at 7502 (availability of rehabilitation should not be mandated by rule but "should be left to management/driver negotiation"); *id*. at 7503 ("Compliance with the prescribed treatment and passing the test(s) will not guarantee a right of reemployment."). In short, the regulations establish legal prerequisites to the resumption of safety-sensitive duties by drivers who have tested positive for illegal drugs, while leaving to private ordering the determination whether such workers will in fact be reinstated.

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[7] In addition, if the SAP has concluded that the employee needs assistance in resolving problems associated with drug use, the employee "[s]hall be subject to unannounced follow-up alcohol and controlled substances tests administered by the employer following the driver's return to duty. The number and frequency of such follow-up testing shall be as directed by the [SAP], and consist of at least six tests in the first 12 months following the driver's return to duty." 49 C.F.R. 382.605(c)(2)(ii).

2. The arbitrator's decision in this case does not by its terms require compliance with DOT's rehabilitation regulations as a prerequisite to Smith's resumption of safety-sensitive duties. The award orders that Smith be "returned to work on October 20, 1997," Pet. App. 29a, and it does not explicitly make that directive contingent on Smith's evaluation by an SAP or his successful completion of any rehabilitation program that the SAP prescribes. The award states that "[d]uring [Smith's] suspension period, [Smith's] name shall remain in the company's random drug testing program." *Ibid.* It does not indicate, however, that Smith must pass a return-to-duty test, nor does it require periodic drug testing after the suspension is over, even though the former is an absolute prerequisite to resumption of safety-sensitive duties (49 C.F.R. 382.605(c)(1)), and the latter is required for any employee identified by the SAP as needing assistance in resolving drug-related problems (49 C.F.R. 382.605(c)(2)(ii)).

If the arbitral award is construed as entitling Smith to resume safety-sensitive duties without completing DOT's rehabilitation requirements, the award is (at least to that extent) invalid. The DOT regulations make clear that

> [n]o driver who has engaged in [illegal drug use] shall perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of § 382.605. No employer shall permit a driver who has engaged in [illegal drug use] to perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of § 382.605.

49 C.F.R. 382.503. An employer and union may agree to *additional* restrictions on the performance of safety-sensitive functions by workers who have tested positive, but they may not waive the minimum prerequisites to reinstatement that the regulations impose. Obligations imposed by law cannot be superseded by private contract. Thus, even if petitioner had never sought vacatur of the arbitral award, Smith could not lawfully resume his duties as a commercial driver without first satisfying the requirements of 49 C.F.R. 382.605.

3. Although the arbitrator's decision does not in terms mandate compliance with the DOT rehabilitation requirements, the award is capable of being implemented in a manner that is consistent with those rules. The award was issued on August 1, 1997, and ordered that Smith be "returned to work on October 20, 1997." Pet. App. 29a. Depending on the SAP's evaluation, any required rehabilitation program might feasibly have been completed before the end of Smith's suspension. If the rehabilitation program was still ongoing as of October 20, 1997, Smith could have been placed temporarily in a job that did not require the performance of safety-sensitive functions. The arbitrator's decision states that "[t]he company and union may agree that unusual or unforeseen circumstances justify waiving any conditions set forth above," *ibid.*, thus explicitly preserving the ability of the parties to make any necessary adjustments in the terms of the award.[8] And

[8] Under the DOT regulations, the employee and employer are both subject to penalties if a commercial driver who has tested positive for illegal drugs resumes safety-sensitive duties without satisfying the agency's rehabilitation requirements. See 49 C.F.R. 382.501, 382.507. Thus, both the union and the employer have an obvious incentive to ensure that an ambiguous arbitral award is implemented in a manner consistent with governing law.

while the award does not itself require Smith to undergo either a back-to-duty test or any follow-up testing, it also does not purport to exempt him from any drug tests that are otherwise mandated by law. Moreover, the arbitrator "reinstated" the award entered in the prior arbitral proceeding (see *ibid.*), and that earlier award required Smith to participate in a substance abuse program (see *id.* at 25a).

Because the award is readily capable of being implemented in a manner consistent with the DOT regulations, and because petitioner has not contended that the award violates the rehabilitation requirements and we see no basis for assuming that the award is intended to contradict obligations imposed by law, we believe the arbitrator's reinstatement order should be construed to be contingent upon Smith's compliance with Section 382.605, including successful completion of any rehabilitation program prescribed by the SAP. So construed, the award is consistent with federal policy as set forth in the Testing Act and the DOT regulations. The decision of the court of appeals should therefore be affirmed.

The thrust of petitioner's argument is that reinstatement of a commercial driver who has used illegal drugs is logically inconsistent with the public policy against drug use by workers in safety-sensitive positions, and with the DOT testing requirements designed to further that policy. Petitioner's argument reflects an incomplete understanding of the agency's regulatory scheme. The regulations are not silent regarding the consequences of a positive drug test. To the contrary, the rules describe in detail the conditions that an employee who tests positive must satisfy in order to be eligible to resume safety-sensitive duties, while leaving to private ordering the decision whether reinstatement is appropriate in a particular case. The regulatory

scheme fashioned by DOT—the federal agency assigned by Congress to implement the Testing Act—defines the relevant "public policy" in this area. If an employee satisfies the regulatory prerequisites to resumption of safety-sensitive duties, a federal court cannot properly refuse enforcement of an arbitrator's reinstatement order based on the court's belief that the conditions set forth in the rules are insufficient to protect the public safety.[9]

As we explain above (see pp. 5-6, 15-16, *supra*), the DOT regulations do not require employers to make rehabilitation programs available, and they do not prevent an employer from discharging workers who test positive for illegal drugs. Petitioner suggests (Br. 46-47) that if employers are permitted to impose sanctions for drug use above and beyond those mandated by the regulations, then federal courts must be free to do so as well. That is a non sequitur. DOT's statement

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[9] With respect to some categories of drug users within the transportation industry, Congress has itself mandated a specific period of disqualification from the performance of safety-sensitive duties. In the aviation industry, for example, Congress has imposed a permanent disqualification from the performance of certain safety-sensitive jobs by persons who have used drugs while on duty, or who have again used drugs after beginning or completing a rehabilitation program. See 49 U.S.C. 45103(c)(1) and (2). A commercial driver who is convicted of driving a commercial motor vehicle while under the influence of drugs is subject to a mandatory one-year disqualification. See 49 U.S.C. 31310(b)(1)(A). Congress has declined, however, to mandate a specific disqualification period for drivers in Smith's position. Rather, Congress has directed the Secretary of Transportation to "decide on appropriate sanctions for a commercial motor vehicle operator who is found * * * to have used * * * a controlled substance in violation of law or a Government regulation but who is not under the influence of * * * a controlled substance as provided in this chapter." 49 U.S.C. 31306(f).

that the availability of rehabilitation "should be left to management/driver negotiation" (59 Fed. Reg. at 7502) is itself an expression of agency *policy*. Consistent with traditional principles of economic liberty and freedom of contract, and with the national policy of encouraging resolution of workplace management issues through the collective bargaining process, see 29 U.S.C. 171(a); p. 6, *supra*, DOT chose to entrust private parties with significant discretion to determine whether reinstatement is appropriate in particular cases. If Smith satisfies the regulatory prerequisites to reinstatement, and the decisionmaker chosen by the parties concludes that reinstatement (after a three-month suspension) is appropriate, enforcement of the arbitral award could not plausibly be deemed inconsistent with any policy judgment reflected in the DOT regulations. To the contrary, a judicial decree setting the award aside would be inconsistent both with the regulatory balance struck by DOT, and with the federal labor policy (see pp. 24-25, *infra*) favoring the resolution of contract disputes through arbitration.

4. The fact that Smith failed *two* drug tests within a 16-month period does not significantly alter the analysis. Employers are free under the regulations to adopt policies requiring discharge of workers who fail two (or any other number) of drug tests within a specified period of time. DOT has declined, however, to require discharge of recidivist drug users (or any sub-category of recidivist drug users), concluding instead to entrust decisions regarding repeat offenders to private ordering and the sound judgment of arbitrators, subject to the minimum prerequisites for resumption of safety-sensitive duties set forth in 49 C.F.R. 382.605.

Contrary to petitioner's contention (Br. 46), moreover, the history of the pertinent DOT rulemaking makes clear that the absence of any provision directed

specifically at recidivist drug users reflects a deliberate agency policy choice. A proposed regulation put forth for public comment in December 1992 included a provision stating that "[a] driver who, during any 3-year period, is found to have a verified positive controlled substances test result twice in separate incidents, is prohibited from driving any commercial motor vehicle * * * for a period of 60 consecutive days." 57 Fed. Reg. at 59,585 (proposed 49 C.F.R. 382.1107(a)(2)(i)). Even if that proposed rule had been adopted, the arbitral award in the instant case would be valid, since under the arbitrator's decision Smith was suspended for slightly more than three months. After considering public comments on the proposed regulations, however, the agency declined to mandate any specific period of disqualification even for recidivist drug users. See 59 Fed. Reg. at 7493. The agency made clear that "[t]he only driving prohibition period for a controlled substances violation is similar to that for alcohol—completion of rehabilitation requirements and a return-to-duty test with a negative result." *Ibid.* There is consequently no basis for petitioner's suggestion (Br. 46) that the absence of a provision specifically directed at recidivist drug users creates a regulatory gap that a court may fill under the rubric of enforcing "public policy."[10]

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[10] DOT *has* specifically addressed the issue of recidivist *traffic* offenders, and has mandated a 60-day period of disqualification for a commercial driver who is twice convicted, within a three-year period, of "serious traffic violations" committed during the operation of a commercial vehicle. 49 C.F.R. 383.51(c)(2)(i). If Smith had incurred two reckless driving convictions (see 49 C.F.R. 383.5, defining "serious traffic violation" to include reckless driving), an arbitral award ordering him reinstated after a three-month suspension could not plausibly be challenged as violative of public policy (given the existence of a DOT regulation specifically ad-

Smith's status as a recidivist is surely relevant in determining the appropriate response to his positive drug test. The fact that Smith has twice tested positive for marijuana may affect the SAP's assessment of his prospects for rehabilitation or the nature of the rehabilitation program that the SAP prescribes. Under the arbitrator's decision, moreover, Smith was subjected to a significantly longer suspension after his second positive drug test than after his first, and to additional sanctions (*e.g.*, the requirement that he pay the costs of both arbitral proceedings) as well. And nothing in DOT's regulations would prevent petitioner from insisting, in negotiations with the union, on a contract provision permitting it to discharge every commercial driver who failed two drug tests within a specified period of time. The text and history of the pertinent DOT regulations, however, are inconsistent with any contention that discharge is the *only* legally permissible sanction for recidivist drug offenders.

Finally, we do not agree with petitioner's contention (Br. 43) that "reinstating Smith would make a mockery of the drug testing regime mandated by Congress and the DOT regulations." The DOT regulations expressly

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dressing the treatment of recidivist traffic offenders and prescribing a minimum disqualification period of 60 days). Petitioner's argument thus depends on the proposition that a commercial driver who twice tests positive for marijuana, but has not been shown to have driven while impaired or otherwise to have operated his vehicle in an improper manner, poses a greater threat to public safety than does an employee who has twice been convicted of reckless driving. Reasonable people may surely hold that view, but it is difficult to see how that comparative judgment can be regarded (particularly in the existing statutory and regulatory context) as the province of a federal court. And it is still more difficult to see how such a "public policy" can be inferred from DOT's considered *refusal* to specify a mandatory period of disqualification for recidivist drug users.

contemplate the prospect that drivers who test positive will (after completion of specified requirements) eventually be permitted to resume safety-sensitive duties. The regulations and accompanying preamble also reflect the view that the decision whether reinstatement is advisable in a particular case is appropriately left to private ordering. It is therefore difficult to see how reinstatement in accordance with the regulatory requirements, when decreed by the parties' chosen decisionmaker, could make a "mockery" of the agency's rules.

In our view, drug testing of commercial drivers serves important remedial and deterrent purposes even if a positive test (or a second positive test) does not invariably result in discharge of the offending employee. Drug testing identifies those workers who may be in need of treatment and rehabilitation, and it ensures that such workers do not resume safety-sensitive duties until they have been evaluated by an SAP and have successfully completed any rehabilitation program that the SAP prescribes. Drug testing also provides employers with relevant information and thus enables them to take whatever additional steps they deem appropriate, subject to any constraints on management discretion that the employer has voluntarily assumed. In addition, disciplinary measures imposed as a result of a positive drug test may have a substantial deterrent effect on other workers even if the penalty falls short of outright discharge. Reasonable people may disagree as to whether Smith deserved a more severe punishment than the arbitrator in this case imposed. But the three-month suspension without pay of a commercial truck driver cannot accurately be characterized as "condonation" (Pet. Br. 41) of the employee's conduct.

B. The Courts Below Correctly Declined To Exercise De Novo Review Over The Arbitrator's Decision

Petitioner also contends that, even if the choice of an appropriate punishment for a second positive drug test requires consideration of all the facts and circumstances (rather than the application of a per se rule of discharge), the courts below ought to have exercised de novo review over the arbitrator's decision. Petitioner argues (Br. 24, 27) that judicial deference to the arbitrator's judgment is inappropriate when the arbitrator's decision potentially affects persons outside the workplace. That argument lacks merit and would, if accepted, substantially disrupt the implementation of the federal labor laws.

1. In the so-called "*Steelworkers* trilogy"—*i.e.*, *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)—this Court emphasized the broad deference that courts owe to the decisions of labor arbitrators acting under collective bargaining agreements. The Court observed that the employer's agreement to arbitrate personnel disputes is frequently the *quid pro quo* for the union's agreement not to strike. See *American Mfg.*, 363 U.S. at 567; *Warrior & Gulf*, 363 U.S. at 578. The Court also explained that

> the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs

> and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Warrior & Gulf, 363 U.S. at 581.

Finally, the Court emphasized that "[w]hen an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations." *Enterprise Wheel*, 363 U.S. at 597. The Court explained that

> plenary review by a court of the merits [of the arbitrator's construction of the contract] would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. * * * [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

Id. at 599.[11]

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[11] The Court reaffirmed those principles in *Misco.* The Court observed that "the federal statutes regulating labor-management relations * * * reflect a decided preference for private settlement of labor disputes without the intervention of government." 484 U.S. at 37. It explained that "[b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *Id.*

2. Determining the appropriate sanction in cases involving employee drug use requires the decisionmaker to assess the employee's prospects for rehabilitation in light of his overall work record and the circumstances of his positive drug test(s). It also requires an understanding of the "typical" punishment for comparable offenses (in a particular shop and/or in a broader geographic area), as well as an appreciation of other workers' likely reactions to a particular sanction. Thus, while the arbitrator's authority is drawn from the agreement of the parties, his powers under the agreement typically extend beyond contract "interpretation" narrowly conceived. See *Warrior & Gulf*, 363 U.S. at 582 ("The parties expect that [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished."). The arbitrator's specialized training and repeated exposure to workplace disputes gives him a significant advantage (as compared to a federal judge) in resolving those issues, notwithstanding the fact that the consequences of the arbitrator's decision may be felt beyond the employer's place of business (as would be true for many types of employees, such as utility

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at 37-38. The Court noted as well that "where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined." *Id*. at 38.

workers, health care workers, food handlers, makers of many manufactured products, etc.).[12]

3. The arbitrator in this case placed substantial weight on his own observation of Smith's testimony. See Pet. App. 28a. In practically any context where the credibility of witnesses matters, reviewing courts give deference to the decisionmaker who has seen and heard the testimony firsthand. Under petitioner's theory, the district court in this case should have either made its own credibility determination based on a cold record, or conducted a new evidentiary hearing in order to assess Smith's credibility for itself. Neither alternative seems workable. Moreover, both variants appear inconsistent with this Court's statement in *Misco* that "[h]ad the arbitrator found that Cooper had possessed drugs on the property, yet imposed discipline short of discharge

[12] Petitioner contends (Br. 40, 42) that the arbitral award is called into question by the arbitrator's failure to make an express finding that Smith is unlikely to use drugs in the future. The arbitrator stated, however, that Smith had "made a very personal appeal under oath to the arbitrator concerning a personal/family problem which caused this one time lapse in drug usage. The arbitrator found this testimony creditable." Pet. App. 28a. Although that statement is not altogether clear, it is most naturally read to mean that the arbitrator credited Smith's characterization of his drug use as a "one time lapse," as well as Smith's explanation for his misconduct. This Court has discouraged efforts to impugn arbitral awards by exploiting ambiguities in the arbitrator's opinion. See *Enterprise Wheel*, 363 U.S. at 598 ("A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award."). As we explain above, moreover, Smith's resumption of safety-sensitive duties is contingent on his successful completion of any rehabilitation program prescribed by the SAP. That independent prerequisite to reinstatement further reduces the significance of the absence of express arbitral findings concerning the likelihood of future drug use.

because he found as a factual matter that Cooper could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened." 484 U.S. at 45.

4. Expeditious resolution of employee grievances under a collective bargaining agreement is independently desirable. The employer and union are involved in a continuing relationship, and the goal of federal labor policy is that the relationship be as harmonious as possible. Protracted litigation over individual grievances disserves that policy. Cf. *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 64 (1981) (collective bargaining "system, with its heavy emphasis on grievance, arbitration, and the 'law of the shop,' could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as six years later").

Thus, judicial deference to arbitral decisions serves an important practical purpose regardless of whether arbitrators are better than courts at determining the appropriate sanction for breaches of workplace rules. So long as arbitrators are equally good (or even passably good) at making such judgment calls, a deferential standard helps to ensure that the arbitrator's decision will be treated when issued as essentially final, thereby allowing the parties to put the controversy behind them. Petitioner's proposed rule, by contrast, would likely result in protracted litigation in a broad range of cases. Cf. *Enterprise Wheel*, 363 U.S. at 599 ("plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final").

5. As this Court emphasized in the *Steelworkers* trilogy, the significance of arbitration clauses must be assessed in the context of the collective bargaining agreement as a whole. Such clauses further the cause of industrial peace because they have historically served as the *quid pro quo* for the union's agreement not to strike. See *American Mfg.*, 363 U.S. at 567 ("There is no exception to the 'no strike' clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other."); *Warrior & Gulf*, 363 U.S. at 578 ("A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement," since "arbitration is the substitute for industrial strife."); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 54 (1974) ("The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike.").

Under petitioner's approach, however, courts would exercise de novo review over any arbitral ruling that potentially affects the health or safety of the public, even if the parties have agreed to entrust the dispute to an arbitrator. That rule would effectively render arbitration clauses unenforceable with respect to a substantial category of workplace grievances. Petitioner urges that result despite the fact that arbitration clauses have historically been central to the maintenance of industrial peace, and despite the fact that federal labor law has broadly encouraged arbitration of disputes related to the implementation of collective bargaining agreements. See 29 U.S.C. 173(d) ("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."). Petitioner's apparent dissatisfaction with the limited scope

of the public policy exception to enforceability of arbitration awards provides no justification for its proposed radical undermining of the finality of such awards, which would subvert federal labor policy and threaten substantial disruption of the collective bargaining process.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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