EMPLOYEE-FRIENDLY[1] LABOR ARBITRATION AWARDS UNDER ATTACK

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Introduction

Under New York and federal law, the decisions of arbitrators are not supposed to be subject to substantive review by courts. The court's role is best understood as one of a guardian of the integrity of the arbitral process, charged with reviewing the process by which the award was made and empowered to vacate it if the arbitrator was corrupt, biased, or made an award that he or she had no power to make.[2]

While paying lip service to these constrictions on their authority, courts reviewing the awards of arbitrators in labor disputes have increasingly begun revisiting the substance of the arbitrator's decision. For example, in a recent case involving the New York City Transit Authority ("TA") and one of its employees (the *"Grissett"* case),[3] New York's Appellate Division, Second Department, vacated an arbitral decision decreasing the penalty imposed by the TA on its subway conductor employee from termination to reinstatement without back pay. The *Grissett* court engaged in exactly the sort of judicial hair-splitting that the Court of Appeals warned could lead to an inappropriate examination of the merits. The *Grissett* Court found that while the arbitrator had the power to reduce the penalty imposed where he found compelling evidence, the evidence, according to the court, did not rise to that level.[4]

The *Grissett* case does not stand alone. Rather, it is merely one of a host of cases in which employees have seen victory taken from their grasp by a court's intervention in – and evisceration of – an arbitral award even partially favorable to an employee.[5] Disturbingly, this recent trend among New York courts also fits within a larger nationwide pattern of state courts intervening to overturn labor arbitration awards favoring employees, but declining to interfere with arbitral awards that favor employers.

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This article analyzes *Grissett* as an example of this trend, in which courts acknowledge the broad substantive authority of arbitrators and the limited role of courts, but nonetheless revisit the substance of the arbitral award, supplanting the arbitrator's factual and contractual determinations with their own.

Tried and True: The Virtues of Labor Arbitration

Although the roots of labor arbitration in the United States reach back to the early 1800s, it was not until the 1920s that states began to protect arbitration as a form of voluntary alternative dispute resolution.[6] Federal regulation began with the 1925 Federal Arbitration Act ("FAA").[7] The FAA, like New York law, protects arbitral awards from judicial review except in rare instances of procedural defects.

The use of grievance arbitration blossomed during World War II, when the National War Labor Board utilized it as the final step to resolve disputes between unions and employers unable to agree on a contract.[8] Arbitration was thought to provide a timely and cost-effective means of settling labor conflicts without strikes or lockouts.[9] Although the War's exigencies necessitated arbitration, its use continued – and flourished – even after the War's end. By 1944, 73% of collective bargaining agreements had arbitration clauses and by the 1980s that number had skyrocketed to more than 95%.[10]

Safe From Second-Guessing: The Limited Scope of Judicial Review of Arbitral Awards

In the arbitration arena, New York law (like federal law) relegates courts to caretakers of procedure, authorized only to review the process by which an award is rendered and barred from reconsidering the substance of the decision. Accordingly, the only grounds upon which a court may vacate or modify an award, as set out in Section 7511 of the Civil Practice Law and Rules, are:

1. if it was based on fraud, corruption, or misconduct;
2. if an arbitrator appointed to be neutral was actually partial;
3. if the arbitrator "exceeded his power" in making the award, or the award was so flawed that it was not a final resolution; or
4. if there were a procedural defect.[11]

Sections 10 and 11 of the FAA are the federal counterpart to these state provisions and contain substantively similar provisions.[12] Notably, the substance of the arbitrator's decision-making, beginning with the evidence considered to the law applied, is beyond the scope of judicial review.

Arbitrators are unfettered by the constraints to which courts are subject – from the substantive law to the rules of evidence and procedural requirements.[13] Rather, an arbitrator is bound to obey only the dictates of his conscience and the

contract from which he draws his authority, and which he is charged with interpreting. "He may do justice as he sees fit, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement." [14]

Under the state Taylor Law and its local analogue, the New York City Collective Bargaining Law, which governs public employee unions, arbitration is the chosen means of settling labor disputes at the macro level, when negotiations between unions and employers over the terms and conditions of employment break down, and at the micro level, when an individual employee has a grievance. [15]

Labor Arbitration Awards Under Attack: He Can't Do That, Can He?

One argument often used to attack a labor arbitration award is that although the matter before the arbitrator is within his power to decide, the award rendered exceeds the limitations on his authority. The flaw in this argument is that once it has been determined that a matter is arbitrable, the scope of the arbitration clause is a substantive question for the arbitrator himself to determine.

When answering the question of whether the matter is one designated for resolution by an arbitrator, the United States Supreme Court has recognized a strong presumption in favor of arbitrability. While "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not so agreed to submit," in order to be "consistent with congressional policy in favor of . . . arbitration, the judicial inquiry [] must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made."[16]

Thus, a determination that a matter was beyond the bounds of the arbitrator's authority should only be made in the rare case when there is no possible interpretation of the arbitration clause within which the particular grievance could fit. "An order to arbitrate the 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."[17] The Court went on to find that an arbitration clause in a collective bargaining agreement that excluded matters that were "strictly a function of management" from arbitration, did not mean that the arbitrator lacked authority to resolve a grievance:

> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.[18]

The Supreme Court recognized that permitting a court to determine the scope of an arbitrator's powers cracked open a "back door" to substantive interpretation of the arbitration clause, which

could easily widen into substantive review of the arbitral award itself. Similarly, the New York Court of Appeals has long favored arbitration and echoed the Supreme Court's concern in *In re Board of Educ. of Watertown City School Dist.*, 93 N.Y.2d 132, 141 (1999), where it found that because "the merits of the grievance are not the courts' concern" and "[i]t is the arbitrator who weighs the merits of the claim," courts are limited in their review of the scope of the arbitrator's authority under the arbitration clause.[19] The Court of Appeals held that when answering the threshold question of whether a matter is properly before an arbitrator, New York courts, like federal courts, should err on the side of finding in the affirmative. As the Court of Appeals once explained:

> While some case records contain enough information for a court to make a penetrating analysis of the scope of the substantive provisions of the CBA, an undertaking of that kind is not the function of the court. A judicial inquiry of that sort would involve an inapt flirtation with the merits, or an inappropriate use of the judicial scalpel to split the hairs that mark the perimeters of contractual provisions.[20]

Thus, when faced with a labor arbitration clause and an issue of whether subject matter is arbitral, courts should merely "determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA."[21] Once the court finds this minimal relationship, the matter is arbitrable and any "more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them," is itself a question for the arbitrator.[22] Thus, so long as the arbitrator has the power to resolve the matter before him, "the only question is whether his interpretation is completely irrational."[23] In sum, once the court has made a threshold determination of arbitrability, the only way it can then vacate the award is if the arbitrator were completely irrational in making it.

Labor Arbitration: Recent Trend

Despite widespread reliance on arbitration to settle labor disputes and a long history of state and federal decisions expounding the limited scope of court review, state courts have recently shown a disturbing willingness to review and vacate arbitration awards that favor employees over employers. According to a nationwide study conducted by Professor Michael LeRoy, a labor and employment law scholar, which reviewed 443 federal and state court rulings on arbitration awards from 1975 to 2007, "Court review is becoming an insurance program that protects employers from costly awards."[24] LeRoy's data presents a stark contrast between the fate of an arbitral award in court based on whether the employer or the employee prevailed in the arbitration. Nationwide, state appellate courts confirmed arbitration awards in favor of employees only 56.4% of the time but confirmed arbitration awards in favor of employers 86.7% of the time. Federal appellate courts, following the FAA's strictly circumscribed standard of judicial review and heeding the warnings of the Supreme Court, offered employees significantly more protection and upheld 85% of employee victories and 85.7% of employer wins.

LeRoy ascribes this discrepancy to the fact that federal courts, following the FAA's narrow standards of judicial review, have no room to exercise discretion and are precluded from interfering in arbitral awards except in the rare instances that fit within the five cases outlined in Section 10 of the FAA.[25] State courts, on the other hand, are generally interpreting

diverse local statutes and increasingly incorporating common law standards.[26]

In New York, however, state law, at least as written, reflects the restrictive provisions of the FAA and the sections giving courts authority to vacate awards beyond the arbitrator's power are identical. Thus, LeRoy's explanation fails to explain the discrepancy with respect to New York state court decisions.

New York courts have determined that such "[a]n excess of power . . . occurs only where the arbitrator's award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power."[27] Thus, as the Court of Appeals has explained, when confronted with an argument that a decision is beyond the arbitrator's authority, the court "should merely determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA . . . If there is, the court should rule the matter arbitrable, and the arbitrator will make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them."[28] The question of the scope of the arbitration clause is itself a substantive matter to be determined by the arbitrator.

Nevertheless, the nationwide trend documented by LeRoy is apparent in New York. But rather than relying on employer-friendly law, courts are fashioning it themselves – refitting existing law with a more employer-friendly interpretation. Even though the scope of the arbitration clause is a substantive determination ostensibly protected from judicial review, New York courts have inserted themselves into the substance of the arbitral decision by interpreting the scope of the arbitrator's authority and using that determination as a springboard to review the entire arbitral award. This has resulted in decisions with a fundamental disconnect, where the court acknowledges the strict limits of judicial review in the arbitral arena in one paragraph, but then proceeds to review the scope of the arbitrator's authority in the next. The court first determines that the arbitrator had the authority to render an award, but then reexamines the substance of the case before the arbitrator and substitutes its own determination. This flies in the face of black letter law and the public policy favoring arbitration as a speedy and cost-efficient means of dispute resolution.

The *Grissett* Case

Subway conductor Jack Grissett allegedly assaulted a customer who had asked him about service delays. Their conversation deteriorated into an exchange of insults and, eventually, a physical altercation. Upset by an insult about his deceased father, Grissett allegedly grabbed the customer's neck. The TA held two disciplinary hearings and ultimately decided to terminate Grissett's 21-year-career, citing its policy of "zero tolerance" for violence and Grissett's record, which consisted of one previous suspension, for five days in 1991. As required by the CBA, an arbitrator heard Grissett's case as the final step in the process.

The relevant CBA provision provides that if the arbitrator agrees with the TA that the underlying offense has been committed, he must sustain the penalty imposed by the TA *unless* presented with "credible evidence that the action by the [TA] is clearly excessive in light of the employee's record and past precedent in similar cases." Moreover, the CBA provides that this exception should "be used rarely and only to prevent a clear injustice."[29]

The arbitration provision carves out a narrow exception whereby an arbitrator can check the TA's authority, reducing the penalty imposed by the TA if, in the arbitrator's informed opinion, it was too

draconian. Of course, under New York law, the interpretation of the arbitration clause is itself a substantive matter to be determined by the arbitrator. Thus, so long as the arbitrator determines that his award fits within the exception as he defines it, the award is within his power to make and seemingly is beyond the scope of a court's procedural review.

In *Grissett*, the arbitrator agreed with the TA that Grissett had committed an assault, but found that the penalty imposed by the TA, was "clearly excessive," because of Grissett's long employment history and because he had not been disciplined in the past 11 years. Grissett's case, the arbitrator concluded, "was worthy of the exception" carved out by the CBA.[30] The TA challenged the award in court, arguing that the arbitrator had substantively exceeded his authority by modifying the penalty while affirming the substantive charge. The TA argued that the arbitrator had been wrong to determine that the evidence presented was sufficient to merit invoking the exception. The TA did not, crucially, argue that the matter was beyond the scope of the arbitration clause, but challenged the substance of the arbitrator's decision. By admitting that the matter was within the scope of the arbitration clause, the TA ceded the threshold issue of arbitrability and could argue only that the arbitrator had exceeded his authority under the law, which should occur "only where the arbitrator's award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power."[31]

Justice Bruce Balter, apparently ignoring the extremely narrow scope of judicial review of an arbitral award, agreed that the TA had met this heavy burden and vacated the arbitrator's order.

The TWU appealed Justice Balter's decision to the Second Department as an impermissible incursion on the arbitral award. Almost a year after hearing the case, a closely divided Second Department issued its own decision upholding the lower court. Justice Howard Miller, writing for the three judges in the majority, endorsed Justice Balter's holding that the arbitrator's award exceeded the scope of his authority. While acknowledging that New York law bars courts from reviewing the substance of an award that an arbitrator has the authority to make, Justice Miller proceeded to do just that. Engaging in a substantive review, Justice Miller analyzed in minute detail the evidence presented to the arbitrator and the arbitral award itself. According to Justice Miller, even though the matter before the arbitrator was within the scope of his authority to decide, the decision he rendered exceeded it:

> The CBA does not grant the arbitrator the power to fashion any penalty he finds appropriate under the circumstances. Rather, assuming he sustains the underlying charge, he is directed to uphold the TA's action unless credible evidence is presented demonstrating that it is clearly excessive in light of the employee's record and past precedent in similar cases. Furthermore, the exception is to be used rarely and only to prevent a clear injustice. Thus, the arbitrator's authority on the penalty issue is limited.[32]

Thus, once the arbitrator determined that Grissett had in fact assaulted the customer, he was bound to accept the TA's penalty unless it fit into the exception, and was "clearly excessive in light of the employee's record and past precedent in similar cases." To do otherwise, the majority found, would

be to make an arbitral award that "clearly exceeds a specifically enumerated limitation on the arbitrator's power."[33]

It is at this point in its analysis that the court makes a stark departure from the law as written. Having determined that the contract permitted, *albeit* under limited circumstances, the reduction of the penalty, the court was supposed to defer to the arbitrator's interpretation of that limited exception. Instead, the court stepped into the arbitrator's shoes, reexamined the evidence submitted and rendered its own opinion. The court essentially vacated the award because, if presented with the same evidence that the arbitrator was, the judges comprising the majority would have found that the penalty imposed was not "clearly excessive."

The dissenters, led by Justice William E. McCarthy, spotlighted the discrepancy between what the majority said and what it did:

> [E]ven if the arbitrator misapplied the precedent submitted by the TA and relied upon by the TA and the TWU, or erred in distinguishing the cases . . . vacatur of that portion of the arbitrator's award reducing the penalty would still not be warranted since even an award predicated on factual errors or the misapplication of substantive legal principles must not be disturbed.[34]

As Justice McCarthy explained, because the arbitrator made the requisite link between his award and the arbitration provision, the substance of his decision should be beyond the court's limited reach. In short, because the arbitrator said his award was within the exception carved out by the CBA provision, it was. Whether the circumstances of Grissett's case actually "warranted invocation of the 'rare' exception of reducing the penalty is for the arbitrator to determine, not for the courts."[35] As Justice McCarthy acknowledged, the determination of the arbitrator's power is a substantive matter for the arbitrator, not the court. Accordingly, even if the arbitrator did violate the express limitation in the CBA and improperly determine that the exception should be invoked, "vacatur of the award would still be improper" because that decision – whether to invoke the limitation or not – is a substantive question for the arbitrator and not one within the confines of the court's procedural review. Thus, because "the record does not support a finding that the arbitrator's determination was irrational . . . and the arbitrator's invocation of the exception met the requirements set forth in the pertinent CBA provision," no matter what the court thought of the decision, it was entitled to the full protections afforded by law.

The TWU is appealing the Second Department decision to the Court of Appeals.

Looking Forward

Grissett has ominous implications for arbitral awards vindicating employee rights. The TA has a long history of seeking *vacatur* of arbitral awards on the grounds that the arbitrator exceeded his or her authority.[36] Prior to *Grissett*, courts, including the Second Department, have been skeptical of this line of attack and, applying the law as written, have rejected it as an impermissible intrusion on the arbitrator's authority.[37] For example, in a 1987 case both strikingly similar to, and arguably even more extreme than *Grissett*, the Second Department confirmed an arbitral award ordering that a transit worker who allegedly struck another worker with a metal pipe be reinstated despite a TA determination that he be terminated.[38] Under an arbitration clause with similar language to that at issue in *Grissett*, the Second Department rebuffed the TA's attempted

collateral attack that the award was beyond the arbitrator's power and agreed that the lower court had "improperly substituted its judgment for that of the arbitrator."[39] As the court itself acknowledged, "[a]lthough a different construction could have been accorded to the subject provision of the agreement . . . it cannot be stated that the arbitrator gave a completely irrational construction to the provision in dispute and, in effect, exceeded her authority by making a new contract for the parties."[40]

Looking forward, reviewing the *Grissett* case presents an opportunity for the Court of Appeals to weigh in on the subject – hopefully to reaffirm the standard for review of arbitral awards and to reinstate the protections of the law as written – arbitral awards validating the employee's position may be subject to judicial attack. By exposing the disjunction between what courts are saying and what they are doing, the Court of Appeals could reign in lower courts and reinforce the provisions protecting arbitral awards.

Until the Court of Appeals acts, however, unions, as stewards of the grievance arbitration process, should be conscious when submitting their pleadings and evidence to an arbitrator, that even after an arbitral award has been rendered, a court may revisit the decision. Arguments should be made, then, to appeal not only to the arbitrator but also the court. Additionally, employees and arbitrators alike should take care to frame their arguments and decisions in terms that invoke their authority as clearly, and broadly, as possible.

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1. "Employee-Friendly" awards are, in the vernacular, matters in which the arbitrator vindicates the employee's rights against improper employer action. Even the phrase "employee-friendly," connoting some gift to the employee rather than recognition of an occupational right, arguably bespeaks part of the concern. The disturbing trend discussed in this article pertains not only to reversals of these types of employee victories, but also, as explained herein, to those portions of decisions that, while generally upholding an employer's actions, allowed some employee benefit.
2. N.Y. C.P.L.R. 7511 (b) (Consol. 2009).
3. *In re New York City Transit Authority v. Transport Workers Union of America, Local 100,* 871 N.Y.S.2d 276 (2d Dept. 2008) [hereinafter *Grissett*].
4. *See In re Board of Educ. of Watertown City School Dist.,* 93 N.Y.2d 132, 136-37 (1999) [hereinafter *Watertown City School Dist.*]
5. *See, e.g., In re New York City Transit Authority v. Transport Workers Union of America*, 306 A.D.2d 486, 487 (2d Dept. 2003) (vacating arbitral board's modification of penalty imposed as beyond the scope of the board's power under a collective bargaining agreement, which "provided that where the Board sustains a charge involving assault, the penalty imposed [] must be affirmed unless there is presented to the board credible evidence that the action by the [TA] is clearly excessive" because there was "no proof that action by the TA was clearly excessive was presented to the Board [and] [t]herefore, its reliance upon the exceptions was irrational and cannot be sustained"); *In re New York City Transit Authority v. Transport Workers Union of America*, 239 A.D.2d 421 (2d Dept. 1997) (holding that arbitration board, which upheld substantive charges but decreased penalty, exceeded the scope of its authority under arbitration clause of collective bargaining agreement, under which penalty imposed could only be modified in two circumstances which the court determined did not apply).
6. Theodore J. St. Antoine, *The Law of Arbitration* 1, in *Labor Arbitration Under Fire* (James L. Stern & Joyce M. Najita, eds. 1997). The FAA is codified at 9 U.S.C. § 10 (2008).
7. *Id*.
8. *Id*. at 2.
9. Thomas E. Carbonneau & Philip J. McConnaughay, *Handbook on Labor Arbitration*, 4 (American Arbitration Association 2007).
10. St. Antoine, *supra* note 6 at 2.
11. CPLR 7511(b), which sets forth when judicial review of an arbitral award is permitted under New York law, tracks the language of the FAA.
12. *Hall Street Associates, L.L.C., v. Mattel Inc.*, No. 06-989 March 25, 2009 (holding that sections 10 and 11 of the FAA are the exclusive grounds upon which a court may disturb an arbitral award); *see* Thomas E.L. Dewey & Kara Siegel, *Room for Error: 'Hall Street' and the Shrinking Scope of Judicial Review of Arbitral Awards*, 5/15/2008 N.Y.L.J. 24 (col. 5).
13. *See* Dewey & Siegel, *supra* (noting that parties who have

agreed to arbitrate a commercial dispute cannot challenge an award, even if it shows manifest disregard of the law).

14. *Silverman v. Cooper*, 61 N.Y.2d 299, 308 (1984).
15. *Watertown City School Dist.*, 93 N.Y.2d at 136-37.
16. *United Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 547, 582 (1960).
17. *Id.* at 582-83.
18. *Id.* at 584-85.
19. *Watertown City School Dist.*, 93 N.Y.2d at 142.
20. *Id.* at 143.
21. *Id.*
22. *Id.*
23. *Id.* at 583. *See, e.g., In re New York City Transit Authority v. Transport Workers' Union of America, Local 100, AFL-CIO*, 6 N.Y.3d 332, 336 (2005) (finding that because the parties agreed that the matter was arbitral, a court could only vacate the arbitrator's award as being beyond the scope of his authority if it violated a strong public policy, was irrational, or clearly exceeded a specific limitation on his authority); *Local Division 1179, Amalgamated Transit Union, AFL-CIO v. Green Bus Lines*, 50 N.Y.2d 1007, 1008-1009 (1980) ("When an arbitrator has been empowered to interpret a contract, the resulting award is not subject to vacatur unless it is totally irrational. Parties who agree to refer contract disputes to arbitration must recognize that arbitrators may do justice and the award may well reflect the spirit rather than the letter of the agreement. Courts may not overturn an award because they believe the arbitrator has misconstrued the apparent, or even the obvious, meaning of the contract.") (citations and quotations omitted); *Rochester City School District v. Rochester Teachers Ass'n*, 41 N.Y.2d 578, 582 (1977) (explaining that "when the arbitrator has been authorized to resolve disputes regarding the interpretation of the contract, we have held that his determination will only be set aside [as exceeding his power] if it is completely irrational") (citations and quotations omitted).
24. Marcia Coyle, *Tilt Toward Employers Seen in State Arbitration Rulings*, 4/24/2008 N.Y.L.J. 5 (col. 3).
25. 9 U.S.C. § 10 (2008). Pursuant to Section 10, a federal district court may only vacate an arbitral award in the following circumstances: (1) the award was procured by fraud, corruption, or other "undue means"; (2) the arbitrator was partial or corrupt; (3) the arbitrator was guilty of misconduct because he refused to postpone a hearing or refused to hear pertinent and material evidence; or (4) the arbitrator exceeded his power, or the award was so imperfectly executed that there was no final determination.
26. Coyle, *supra* note 24.
27. *See generally Grissett*, 871 N.Y.S.2d 276.
28. *Watertown City School Dist.*, 93 N.Y.2d at 143.
29. Article II, Section 2.1 (C)(19)(c) of the CBA between the TWU and the TA.
30. *Grissett*, 871 N.Y.S. 2d 276.
31. *Id.* (citations and quotations omitted).
32. *Id.*
33. *Id.* (citations omitted).
34. *Id.*
35. *Id.*
36. *See, e.g., In re New York City Transit Authority v. Transport Workers Union of America, Local 100, AFL-CIO,* 6 N.Y.3d 332 (2005) (explaining that it was within the scope of the arbitrator's authority to interpret and apply the collective bargaining agreement's provision and upholding his determination that an employee did not refuse to provide a urine sample, but was physically unable to do so and therefore not subject to discipline); *In re New York City Transit Authority v. Transport Workers Union of America, Local 100, AFL-CIO,* 306 A.D.2d 486 (2d Dept. 2003) (holding that arbitration board exceeded its authority when it upheld charges but modified penalty because there was "no proof that the action by the TA was clearly excessive" and its decision to modify the penalty was therefore "irrational"); *In re New York City Transit Authority v. Transport Workers Union of America,* 239 A.D.2d 421 (2d Dept. 1997) (finding that arbitration board exceeded its authority because it upheld charges but decreased penalty).
37. *In re New York City Transit Authority v. Transport Workers Union of America, Local 100, AFL-CIO,* 127 A.D.2d 596 (2d Dept. 1987) (finding that lower court "improperly substituted its judgment for that of the arbitrator" in vacating his award reducing penalty from termination to reinstatement for employee who slept while on duty and was under the influence of alcohol during work because "it cannot be stated that the arbitrator gave a completely irrational construction to the provision in dispute"); *Hall v. New York City Transit Authority,* 131 A.D.2d 726 (2d Dept. 1987).
38. *Hall,* 131 A.D.2d 726.
39. *Id.*
40. *Id.*

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TRANSIT WORKERS UNION VICTORIOUS: REGAINS DUES-CHECKOFF AND VINDICATES FREE SPEECH RIGHTS

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Introduction

The New York City Transit Workers Union ("TWU") labored mightily under the loss of its dues-checkoff right, a penalty imposed as a result of the 2005 strike. Recently, however, the Union won not only reinstatement of dues-checkoff, but also vindication of the constitutionally-guaranteed free speech rights of its leadership to advocate in the Union's best interests – whether that be by urging members to reject a stingy contract or fighting for legislation – and defeated an attempted incursion by the trial court that would have compelled Union leaders to make individual affirmations that the Union had no right to strike.

As we initially discussed in the Spring 2008 issue of *Stroock Reports – Public Employee Law*, the TWU first lost its dues checkoff after a three-day strike in December 2005. When it moved for reinstatement, however, State Supreme Court Justice Bruce Balter (who had replaced Justice Theodore Jones upon Jones' elevation to the Court of Appeals) not only denied the TWU's motion, but also imposed *new* requirements, unprecedented since adoption of the Taylor Law, that the Union's president and board members submit affidavits unequivocally stating that the TWU lacked the right to strike against government entities. Since then, the Appelate Division, Second Department, considered the Union's free speech arguments, finding that Justice Balter had gone too far and infringed on the First Amendment rights of the TWU's leadership because, unlike previous courts that had required unions merely to acknowledge the Taylor Law's no-strike provision, this court had sought to compel speech by the Union leaders as individuals. Following the Second Department's decision in late November 2008, the Union re-submitted its no-strike pledge to Justice Balter, who was compelled by the Second Department's holding, at long last, to reinstate its dues-checkoff.

This article examines the significance of the Second Department's decision drawing the line between requiring a public sector union to recognize the law within which it operates and compelling speech by union leaders.

Background

In December 2005, Justice Jones barred the TWU from engaging in a strike in violation of the Taylor Law, under which public employees must make a no-strike pledge and are banned from striking against any government entity.[1] Nevertheless, seven days later the TWU called a strike that lasted for three days and brought New York City's vast public transportation system to a halt. Justice Jones found the TWU guilty of criminal contempt for willfully violating the injunction and set a significant fine for each day the TWU remained on strike.

Seven months later, the Metropolitan Transportation Authority ("MTA") asked the court to determine the total fine against the Union based on the length of the strike and to suspend its right to dues-checkoff. Although the Taylor Law allows for authorized public employee unions to have membership dues deducted automatically from the paychecks of members,[2] the Public Employment Relations Board ("PERB"), the agency that administers the Taylor Law, may suspend dues-checkoff upon a finding that a Union has violated the Taylor Law's no-strike provision.[3]

Justice Jones agreed with the MTA and ordered that, beginning on June 1, 2007, the TWU's dues-checkoff be suspended. Justice Jones' order stated that the TWU could seek reinstatement three months later, but only if it made "a showing of good prerequisite compliance with the mandates of the Taylor Law, and submission of an affirmation that it no longer asserts the right to strike against any government."[4] Losing its dues-checkoff for the minimum period required by Judge Jones's order, from June to August, cost the TWU some $1.1 million.[5]

The Limits of No-Strike Pledges

Under the Taylor Law, a public employee union seeking reinstatement of dues-checkoff need submit a no-strike affidavit. (Some unions questioned the value and efficacy of the Taylor Law because of its no-strike provision.) The law, in effect, imposes a catch-22 by conditioning a union's right to be the certified representative of public employees, including the right to dues- checkoff, on its making a no-strike pledge.[6] Generally, these affidavits echo the Taylor Law's no-strike language that the union "does not assert the right to strike against any government, to participate or assist in any such strike, or to impose an obligation to conduct, assist or participate in such a strike."[7] While the law requires that public employee unions make a no-strike pledge, the requirement only obligates the union to acknowledge the present state of the law, leaving the union and its leaders free to advocate for a change in the law.

Following the precedent set by other public employee unions, the TWU returned to court in October 2007 with an affidavit from the Union by its president describing how the Union had complied with the Taylor Law since the strike and making the required statement that

> The Union fully recognizes whether there is a right to strike is a matter determined by law. The law is clear. The Taylor Law bars strikes against NYCTA/MaBSTOA and other government employers. The Union does not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such a strike.[8]

But Justice Balter was not satisfied and found

that the Union's efforts were "patently insufficient" to show the compliance required by Justice Jones' order. Because the TWU affidavit "merely parrot[ed] the statutory language in order to comply verbatim" with the earlier order, Justice Balter deemed it "nothing more than a general acknowledgement that the Taylor Law prohibits [the TWU] from striking; [and] . . . lacks credibility and renders the motion inadequate."

Acting apparently independently of any request by the MTA, Justice Balter imposed new and more extensive requirements for the TWU to meet before it could regain its dues-checkoff. (Indeed, aware of the cost already suffered by the Union, the MTA had supported reinstatement ostensisbly to promote a measure of labor harmony, a position that was not shared by the city.)[9] Under Justice Balter's order, however, the TWU would have to submit no-strike affidavits not only from the Union, but also from each individual member of the board "which state in unequivocal terms that [the Union] lacks the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such a strike."[10] Only such a showing, he held, would be evidence of the Union's "complete and unequivocal good faith compliance."[11] Essentially, Justice Balter sought to force individual Union leaders to disavow the Union's right to strike, stretching well beyond the narrow bounds of previous no-strike pledges that merely acknowledged the Taylor Law's no-strike provision.

The Second Department's Decision

The Second Department held that Justice Balter ventured beyond established precedent in seeking to compel pledges by individual Union leaders. Although the Union itself could be compelled to make a no-strike pledge, the Second Department decided Justice Balter "improvidently exercised [his] discretion in requiring that each member of the Union's Executive Board submit an affidavit containing the same statement that the Union does not assert the right to violate the Taylor Law."[12] Rather, the appellate court found, it would satisfy the law's requirements, and be enough for the TWU to win reinstatement of its dues-checkoff, if the Union fulfilled the requirements of Justice Jones' original order and "submit[ted] a duly-authorized affirmation stating unequivocally that the Union does not assert the right to strike."[13]

The key distinction is that Justice Jones required that the Union acknowledge that the law precludes a public employee union from striking. Justice Balter, however, sought to compel the board members to speak as individuals and make a blanket statement disavowing the Union's right to strike. In effect, Justice Balter sought to force the Union's leadership to pledge themselves to the idea that an authorized public employee union lacks the right to strike, a clear expansion of the no-strike pledge and an infringement of the First Amendment's free speech guarantee, which protects not only "the right to speak," but also "the right to refrain from speaking at all."[14] As the TWU argued in its appellate briefs, forcing the individual board members to submit no-strike statements would violate their own personal constitutional rights. Compelling the Union to speak, however, does not raise the same constitutional issues because it is bound by the Taylor Law and is only being asked to acknowledge the law.[15] As the First Department explained in *Rogoff v. Anderson*,[16] the precedent the Second Department followed, because the Taylor Law's requirement of a no-strike affirmation by public employee unions pass-

es constitutional muster, merely stating that the law is legal does not implicate free speech rights. The *Rogoff* court found that it was "reasonable" to require a union "to declare or maintain that it has no right to do that which is declared illegal or prohibited by law," but no more.[17]

Conclusion

The Second Department's rejection of Justice Balter's heightened requirements returns the law to its previous *status quo*, and puts it in line with other federal compelled speech cases. Thus, although a no-strike affirmation may be required of public employee unions without violating the First Amendment, individual union representatives may not be required to make such pledges. The court's decision saves union leaders from being left on the horns of a dilemma – forced either to make a statement that may violate their beliefs (and the union's own ideological underpinnings), or threaten the union's well-being by ignoring the practical necessity of dues-checkoff for union operations. Moreover, although unions may be required to acknowledge the existence of the laws that govern them, the Second Department's decision allows their First Amendment rights as advocates to remain unhindered. By quashing this attempted expansion of the no-strike pledge, the Second Department affirmed that the Taylor Law does not open a back door whereby the Union or its leaders may be compelled to support a law that some of them fought – and continue to fight – against. Crucially, when arguing for a change in the law or advocating on behalf of their members, unions remain protected by the First Amendment's Free Speech guarantee.

1. Specifically, the Taylor Law requires that any employee organization that seeks to be the exclusive representative of public employees pledge that it does "not assert the right to strike against any government." N.Y. Civ. Serv. Law § 207(3)(b) (McKinney 1999).
2. *Id.* at § 208 ("A public employer shall extend to an employee organization certified or recognized pursuant to this article . . . membership dues deduction.").
3. *Id.* at § 210 (3).
4. *New York City Transit Authority v. Transport Workers Union of America*, 2006 N.Y. Misc. LEXIS 4046 (May 12, 2006) (*aff'd* 832 N.Y.S.2d 213 (2d Dept. 2007)).
5. William Neuman, *M.T.A. Asks for Restoration of Automatic Dues Payment,* N.Y. Times, Nov. 2, 2007; William Neuman, *Transit Union Leader Vows No More Strikes,* N.Y. Times, Nov. 8. 2008 (noting that "[t]he union has been hobbled by the loss of automatic dues collection, and its revenues appear to have fallen by millions of dollars").
6. The law specifically requires that an organization seeking to be recognized as representing public employees must make an "affirmation . . . that it does not assert the right to strike against any government, to assist or participate in such strike, or to impose an obligation to conduct, assist or participate in such strike." N.Y. Civ. Serv. Law § 207 (3).
7. *Id.* For example, in *New York State Inspection Security and Law Enforcement Employees v. New York State Public Employee Relations Board*, a federal court found that it was constitutional to require that a union reaffirm that it has no right to strike against any government under the Taylor Law. 629 F.Supp. 33 (N.D.N.Y. 1984).
8. *New York City Transit Authority v. Transport Workers Union of America,* 852 N.Y.S.2d 632, 633 (Sup. Ct. 2007). The MTA acknowledged that the affirmations were not a pledge that it would not strike in the future, but nevertheless accepted them as fulfilling compliance with the law and the MTA's own need for a working relationship with the Union. *See supra* note 5.
9. *See supra* note 5 and accompanying text. New York City agencies and officials, however, took a harder line and urged Justice Balter to maintain the penalty.
10. *New York City Transit Authority v. Transport Workers Union of America,* 852 N.Y.S. 2d at 634.
11. *Id.*
12. *New York City Transit Authority v. Transport Workers Union of America,* 866 N.Y.S.2d 684, 686 (2d Dept. 2008).
13. *Id.*

14. *Wooley v. Maynard,* 430 U.S. 705, 714 (1977).
15. *See Rogoff v. Anderson,* 34 A.D.2d 154, 157 (1st Dept. 1970) (citations omitted).
16. *Id.*
17. *Id.* at 156.

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APPELLATE DIVISION, FIRST DEPARTMENT: NEW YORK CITY HAS NO AUTOMATIC RIGHT TO APPEAL FROM A TRO

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Background

Dealing a blow to one of New York City's favorite procedural ploys, the Appellate Division, First Department, held in *Weingarten v. Bd. of Ed. of the City School District of NYC*[1] that the City of New York has no automatic right to appeal from a temporary restraining order ("TRO") entered against it. This decision ends – at least for now – a practice the City has long employed to render emergency injunctive relief obtained by unions ineffectual merely by mailing a Notice of Appeal that purports to invoke the automatic stay provision provided for by New York Law.[2] In effect, New York City and others employing this practice have been able to leapfrog New York's Supreme Courts and appear directly before the Appellate Division, in effect giving it an immediate second hearing. This decision ensures that the City cannot simply shunt the lower court aside, but need to continue to litigate the entitlement to a more permanent injunction before the judge who ruled against the City in the first instance.

This stratagem has been especially problematic in circumstances in which a litigant seeks to enjoin governmental action immediately – before the government has a chance to undertake the offending action. By holding there is no automatic right to appeal from a TRO, the *Weingarten* decision reinforces the authority of the Supreme Courts to issue effective emergency relief in the form of a TRO against a governmental entity. In *Weingarten*, the First Department implicitly draws a line between *ex parte* motions made after notfication of such motion to opposing counsel and those made "on notice."

Case History

The *Weingarten* decision stemmed from an application for a TRO to the Supreme Court, New York County, on behalf of the United Federation of Teachers ("UFT"), after the UFT discovered, on the eve of a religious holiday, that the Board of Education of the City School District of the City of New York ("BOE") was not properly considering applications for religious leave to observe the holiday. Prior to making the application, the UFT notified the BOE's counsel of its intention to seek a TRO, as required by the

rules of the New York Supreme Court.[3] As regularly occurs in such circumstances, counsel for the BOE met the UFT's counsel at the courthouse, and received a copy of the UFT's application shortly before counsel for both parties appeared before the court. Due to the extremely expedited nature of an application for a TRO, the BOE did not have an opportunity to submit to the judge any formal opposition. However, since they were present when the UFT made the application, the judge allowed the BOE's counsel to make an oral opposition on the record and to submit a single exhibit.

After a conference on the matter, Justice Carol Edmead granted the UFT's application for a TRO, preventing the BOE from disciplining certain UFT members who would be absent the following day in observance of the holiday. Several hours later, the BOE served by mail a Notice of Appeal, which not only appealed the issuance of the TRO, but also purported to invoke an automatic stay. Given the timing, a stay would have nullified the TRO, for as a practical matter, teachers would need to be advised of their rights before interim relief could be sought from the Appellate Division.

Scope of Appealable Orders

Although case law in the First Department was clear that there is no right of appeal from an "*ex parte*" order, the First Department had not yet had occasion to pass on the interaction of that rule with the court rules that requires notification to a governmental entity before making an application for a TRO against it. There are two issues unique to TROs that have called into question whether they are entirely *ex parte* in nature. First, New York Law prevents *ex parte* orders from being issued against a public officer, board or municipal corporation of the state to restrain the performance of "statutory duties."[4] However, this does not mean that a TRO against the government is always prohibited or always automatically converted into a preliminary injunction (which is not an *ex parte* order by nature). This provision merely prohibits the issuance of a TRO affecting the enforcement of a statute in advance of the statute itself being challenged, and does not prevent a court from restraining government officials from acting contrary to any statute or regulation or from performing acts of a mere discretionary nature.

Second, court rules require that to obtain a TRO, the moving party must submit an affirmation upon application demonstrating that they have notified their adversary of the time, date and place that the application will be made in a manner sufficient to permit their adversary an opportunity to appear in response.[5] The government seemed to take the position that this notification was sufficient to make the TRO "on notice," such that it was appealable as of right. UFT counsel argued the type of notice necessary to make an order appealable is notice that triggers, and allows time for a written response from the opposing party (and often a reply from the moving party), in advance of both parties appearing before the court.[6] Such type of notice goes beyond simply advising the other party of an intention to apply for a TRO on an emergency basis.

Prior to *Weingarten*, the Second and Third Departments had addressed the issue of whether a TRO constitutes an appealable order. In *Schulz v. State*,[7] the Third Department held that a TRO was not an appealable order, even where the government was notified of the application and was heard orally prior to granting the application.

In *Congregation Yetev Lev D'Satmar, Inc. v. Kahana*,[8] the Second Department dismissed an appeal from an order to show cause granting a temporary restraining order, holding, without discussion, that no appeal lies from an "*ex parte*" order.

However, caselaw in the First Department appeared to the contrary. The City relied on *Pikus v. Dudley*,[9] in which respondents, by formal motion on notice to petitioners, had moved to vacate the TRO, petitioners filed opposition papers, and the trial court denied the motion to vacate and continued the TRO essentially unchanged. When the respondent appealed directly from the TRO, the First Department held that as the TRO was continued unchanged, the respondent's appeal was the same as an appeal from the order declining to vacate the TRO.

The City relied on a superficial interpretation of *Pikus* to argue that its invocation of the automatic stay was a valid practice since the First Department had previously entertained an appeal of a TRO. However, the UFT successfully dissected *Pikus* to demonstrate clear differences between the procedural posture in *Pikus* – appealing from the denial of a motion to vacate, which is itself appealable as of right – and the plain vanilla procedure employed by the City of automatically appealing the grant of a TRO. By its decision in *Weingarten*, the First Department has now aligned itself with the law of the Second and Third Departments.

Implications of the Decision

In ruling that the appeal was "dismissed as no appeal lies as of right from an *ex parte* order," the First Department solidified the notion that the government can no longer circumvent a TRO by immediately filing an appeal with the Appellate Division. By complying with the notification obligations required by the court rules and alerting the government of an intention to seek a TRO, giving the governmental representatives an opportunity to argue at the hearing, an otherwise *ex parte* application is not automatically converted into an appealable motion on notice. The government must first continue its opposition at the trial court (which has initially ruled in the Union's favor), upon consideration of the preliminary injunction itself (or on a motion to vacate the TRO to the trial court). Like everyone else, the government must wait its turn, and allow the litigation to run its course before leapfrogging to the Appellate Division.

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1. *Weingarten v. Bd. of Ed. of the City School District of NYC*, No. 104080/08 (1st Dep't 2008) (order dismissing appeal).
2. CPLR § 5519(a)(1).
3. Uniform Civil Rules for the Supreme and County Court, 22 N.Y.C.R.R. § 202.7(f).
4. CPLR § 6313(a).
5. 22 N.Y.C.R.R. § 202.7(f).
6. CPLR § 5701(a)(2).
7. 198 A.D. 2d 624, 626 (3rd Dep't 1993).
8. 308 A.D. 2d 447 (2d Dep't 2003).
9. *Pikus v. Dudley,* 90 A.D. 2d 700 (1st Dep't 1982).

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