UNT DALLAS COLLEGE of LAW

2019 ON • THE • CUSP 2020

LAW REVIEW

"CHALLENGING ARBITRATION AWARDS FOR PROCEDURAL UNFAIRNESS"

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Employees, unions, and employers seeking to vacate an arbitrator's award in federal court are in for a tough ride. Federal courts are exceedingly clear that the grounds for vacating an award are extraordinarily narrow. An optimist could read that as, "so you're telling me there's a chance."[1] But even then, this chance of vacating an award is difficult to assess because of the high deference given to an arbitrator's judgment, compounded by a lack of clarity in the common law associated with the relevant statutes.

In 2017, Ezekiel Elliot ("Zeke") and the National Football League Players Association (NFLPA) decided to take that chance.[2] Zeke and the NFLPA sued the National Football League (NFL) seeking to vacate an arbitrator's award that upheld the NFL's suspension of Zeke.[3] He challenged the award in the Eastern District of Texas (EDTX), because the arbitration proceedings were "fundamentally unfair."[4]

This Note examines the fundamental fairness standard discussed by the EDTX and its applicability to this standard to Zeke's case. First, this Note summarizes the procedural and substantive history of Zeke's case. Second, this Note discusses the relevant statutes. Third, this Note examines cases from the Supreme Court and the Fifth and Second Circuits involving money, marijuana, sleeping on the job, professional athletes, and dangerous manufacturing equipment that frame the federal common law for vacating a labor award.[5] Fourth, this Note discusses the synthesized, minimum standards of fundamental fairness and how parties can contract for fundamental fairness within a collective bargaining agreement (CBA). Lastly, this Note analyzes Zeke's case.

I. ZEKE'S CHANCE AGAINST THE NFL

In 2016, a Columbus, Ohio district attorney declined to prosecute Zeke for domestic violence against his college girlfriend, Tiffany Thompson, because of conflicting information and insufficient evidence.[6] Despite the district attorney's findings, the NFL began its own investigation pursuant to the personal conduct policy in the parties' collective bargaining agreement (CBA).[7] The conduct policy granted the NFL the authority to suspend players for conduct detrimental to the

[1] Peter Farrelly, Bennett Yellin & Bob Farrelly, DUMB AND DUMBER (New Line Cinema 1994), (Jim Carrey's character says this when told there's a one-in-a-million chance of his getting together with the character played by Lauren Holly.).
[2] Nat'l Football League Players Ass'n v. Nat'l Football League, 270 F.Supp.3d 939 (E.D. Tex. 2017) ("The Zeke EDTX case"), *vacated*, 874 F.3d 222 (5th Cir. 2017).
[3] *Id.* at 945.
[4] *Id.* at 950.
[5] The Fifth Circuit is the focus because the writer lives in the Fifth Circuit's jurisdiction.
[6] Todd Archer, *Six-game suspension of Ezekiel Elliott upheld, but Cowboys RB eligible to play Week 1*, ESPN (Sept. 6, 2017), http://www.espn.com/nfl/story/_/id/20595771/ezekiel-elliott-dallas-cowboys-six-game-suspension-upheld.
[7] *Id.*

league, including domestic violence allegations.[8] After its investigation, the NFL commissioner suspended Zeke for suspected domestic violence, and then Zeke appealed to CBA-mandated arbitration that is heard by a single arbitrator.[9] Before the arbitrator issued the final ruling, Zeke and the NFLPA filed suit in the EDTX arguing that Zeke was not given a fundamentally fair hearing. [10]

The NFLPA argued that Zeke was not given a fair hearing due to several evidentiary issues.[11] The arbitrator denied the NFLPA's motion to compel testimony from Zeke's accuser, Ms. Thompson.[12] The arbitrator also denied the NFLPA's motion to compel the NFL to produce all of the investigative notes of the NFL's lead investigator, Ms. Kia Roberts—the only investigator who interviewed all of the witnesses, including the six interviews with Ms. Thompson.[13] But, the arbitrator ordered into evidence the notes of only two of those six interviews with Ms. Thompson.[14] The arbitrator granted the NFLPA's motion to compel testimony from Ms. Roberts, where, only then, did the NFLPA learn that Goodell and his advisors excluded her, its own lead investigator, from the NFL's meeting to decide Zeke's punishment.[15] The NFLPA also learned that in the remaining notes—not shown to Goodell—that Ms. Roberts concluded that his accuser, Ms. Thompson, was not a credible witness and recommended against a suspension.[16] Ultimately, the arbitrator denied the NFLPA's request to compel Goodell's testimony as to what evidence formed his decision.[17]

The NFLPA filed for an emergency motion for a temporary restraining order with the Eastern District of Texas.[18] Judge Amos Mazzant of the Eastern District of Texas determined that "the arbitration proceedings were fundamentally unfair."[19] He reasoned that "fundamental unfairness infected [the] case from the beginning, eventually killing any possibility that justice would be served."[20] The EDTX temporarily vacated the award and suspension, through a preliminary injunction.[21] The NFL appealed the preliminary injunction to the Fifth Circuit, and there, a three-judge panel ruled two to one that the EDTX did not have subject

[8] *Id.*
[9] *Id.; NFL Collective Bargaining Agreement*, Art. 46 § 2(b) (2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.
[10] Nat'l Football League Players Ass'n v. Nat'l Football League, 874 F.3d 222, 224 (5th Cir. 2017) ("The Zeke Fifth Circuit Case").
[11] *Id*. at 230 (Graves, J., dissenting).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *The Zeke Fifth Circuit Case*, 874 F.3d at 230 (Graves, J., dissenting).
[17] *Id.*
[18] *The Zeke EDTX Case*, 270 F.Supp.3d. at 950–51.
[19] *Id.*
[20] *Id.* at 954.
[21] *Id.* at 955.

matter jurisdiction.[22] The court reversed and remanded with instructions to enforce the award.[23]

It might be reasonable to assume that because the Fifth Circuit reversed the EDTX's decision, the fundamental fairness standard was not applicable. But, the Fifth Circuit did not reverse on the merits. In that case, Zeke filed his suit before the arbitrator issued his decision; thus, Zeke did not fully exhaust his remedies under the CBA, and therefore the court did not have jurisdiction.[24] The dissenting judge argued that in certain circumstances, federal courts may vacate an arbitrator's ruling when an arbitrator's actions impugn "the integrity of the arbitration process."[25] The majority *punted* on the issue of fundamental fairness. That issue is worth examining.

II. APPLICABLE LAW AND FUNDAMENTAL FAIRNESS

The Zeke case involved the Labor-Management Relations Act (LMRA) and the Federal Arbitration Act ("Arbitration Act" or "Act"). The LMRA, enacted in 1947, governs labor disputes between an employee-organized union and an employer.[26] The Arbitration Act, enacted in 1925, governs most federal law-related arbitration disputes unless there is a superseding law such as the LMRA or other federal law.[27] The tell-tale sign that the LMRA governs a labor-arbitration is when an employer and a union collectively bargain like the NFLPA and the NFL.

Congress enacted the Arbitration Act to limit judicial review of arbitration decisions and, by doing so, limited parties from seeking a second bite at the apple.[28] Although The Act, ironically, is not binding law in arbitration that arises from a CBA because the LMRA supersedes it, courts nevertheless rely on the Act's principles for guidance.[29] The Arbitration Act typically governs commercial disputes whereas the LMRA only governs labor disputes. But the line between the two has become blurred.[30]

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[22] *The Zeke Fifth Circuit Case*, 874 F.3d at 232.
[23] *Id.*
[24] *Id.*
[25] *Id.* at 234 (citing Ramirez-Lebron v. Int'l Shipping Agency, Inc., 593 F.3d 124, 132 (1st Cir. 2010)).
[26] Labor Management Relations Act of 1947, Pub. L. No. 109-279, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C.).
[27] Federal Arbitration Act, 9 U.S.C. §§ 1–14, 201–08 (2000); Other statutes, such as the Railway Labor Act, 45 U.S.C. §§ 151–65 (2006), may govern CBAs between unions and employers involved in transit, but essentially the same standards of review apply. *See* Am. Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 343 F.3d 401, 404–05 (5th Cir. 2003).
[28] *See generally* Hall Street Assoc. v. Mattel, Inc., 552 U.S. 576, 571–82 (2008).
[29] Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit: Round IV*, 39 TEX. TECH L. REV. 463, 476 (2007).
[30] *Id.*

A. The Labor-Management Relations Act

Section 301 of the LMRA provides the basis for judicial review of labor-arbitration.[31] This section states: "Suits for violations of contracts between an employer and a labor organization . . . may be brought in any district court of the United States."[32] Section 301 further provides that "final adjustment by a method agreed upon" is the desirable method for settling grievance disputes.[33] The Supreme Court has interpreted that to mean that if arbitration is bargained for, then arbitration, not litigation, is the preferred method for settling grievances.[34] Courts point to the underlying policy behind the LMRA—that is to limit industrial strife which interferes with the normal flow of commerce.[35] To that end, federal and state courts have stated that if there is a dispute and the parties had agreed to arbitration, then the courts must defer to the arbitrator's interpretation of that contract.[36] The LMRA has limited language regarding arbitration, so the courts look to the Arbitration Act for guidance.[37]

B. The Federal Arbitration Act and Fundamental Fairness

Congress enacted the Arbitration Act to give structure to arbitration and to curb courts from intruding into private party matters when the parties contractually agree to settle disputes outside of the court system.[38] If no court is specified in the agreement made by the parties, Section 9 grants a party the ability to apply to federal courts to review awards.[39] Section 10 allows a court to vacate an award when one of these four situations have occurred: "(1) where the award was procured by fraud, corruptions, or undue means; (2) where there was evident partiality or corruption in the arbitrators . . . ; (3) where the arbitrators were guilty of misconduct . . . which prejudiced the rights of any one of the parties; or (4) where the arbitrators exceeded their powers . . . ."[40] In *Hall*, the Supreme Court ruled that Section 10 is the only method for vacating an award when the challenge is solely based on the Act.[41] This decision discontinued the use by many of the circuits, including the Fifth Circuit, of non-statutory standards such as "arbitrary and capricious."[42]

The use of fundamental fairness though, is non-statutory; it is used in arbitration proceedings as a sub-rule of Section 10(3) to elaborate on misconduct

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[31] 29 U.S.C. § 173 (1996).
[32] 29 U.S.C. § 185 (1947).
[33] 29 U.S.C. § 173.
[34] United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 595 (1960).
[35] *Id.*
[36] *Id*.
[37] Int'l Chem. Workers Union v. Columbian Chems. Co., 331 F.3d 491, 494 (5th Cir. 2003).
[38] *Hall Street Assoc.*, 552 U.S. at 581–82.
[39] 9 U.S.C. § 9 (1947).
[40] 9 U.S.C. § 10 (2002).
[41] *See Hall Street Assoc*., 552 U.S. at 592.
[42] *See* Brabham v. A.G. Edwards & Sons, Inc., 376 F.3d 377, 379 (5th Cir. 2004).

which prejudiced the rights of one of the parties.[43] Yet, that standard did not originate within arbitration. Courts have long utilized it to discuss procedural due process in criminal and civil cases.[44] Additionally, in 1934, the United States Supreme Court stated that fundamental fairness is violated, if in the process of regulating its own court procedures, a court "offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental."[45] In 1991, the Court reasoned that imposing exemplary damages on a party was not "fundamentally unfair."[46] The phrase's history and purpose are relevant because when a court uses that specific phrase the court arguably invokes the Constitution and procedural due process. As courts grappled with issues arising out of an extrajudicial body affected by the Arbitration Act and the LMRA, the idea of fundamental fairness was introduced.

The Fifth Circuit began using fundamental fairness in this context as a way to state the minimum standard of procedural rights in arbitration.[47] In *Totem*, the Fifth Circuit cited the phrase from an arbitration dispute in the Second Circuit in determining whether vacatur was proper following a commercial arbitration.[48] *Bell Aerospace* discussed Section 10(c) in a labor dispute stating that "an arbitrator does not need to follow all the niceties of federal court but needs only to grant the parties a fundamentally fair hearing."[49] In 2003, the Fifth Circuit likewise affirmed the district court's confirmation of a labor-arbitration award holding that an arbitrator's action "did not rise to the level of misconduct" under the Arbitration Act, nor "yield a fundamentally unfair hearing under the LMRA."[50]

Courts routinely state the Act does not govern an award dispute unless the arbitrator operates outside the CBA. But, because the LMRA itself does not discuss adequate procedures for reviewing awards, courts sometimes look to Section 10 of the Act for developing common law.[51] The following Supreme Court cases help explain why circuit courts have introduced the Arbitration Act and its case law into reviews of labor-arbitration awards.

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[43] *See* Hoteles Condado Beach, La Concha and Convention Ctr. v. Union De Tronquistas Local 901, 763 F.2d 34, 42 (1st Cir. 1985).
[44] *See generally* McWilliams v. Dunn, 137 S.Ct. 1790 (2017); Lisenba v. California, 62 S.Ct. 280 (1941).
[45] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
[46] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991).
[47] Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc., 607 F.2d 649, 651 (5th Cir. 1979).
[48] *Id.*; *see* Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, Int'l Union, UAW, 500 F.2d 921, 923 (2d Cir. 1974).
[49] *Bell Aerospace Co. Div. of Textron, Inc., UAW*, 500 F.2d at 923.
[50] *Int'l Chem. Workers Union*, 331 F.3d at 497.
[51] Dawn Estes, Roland K. Johnson and Robert L. Tobey, *TXCLE Advanced Consumer & Commercial Law*, State Bar of Texas (2016).

III. U.S. SUPREME COURT HISTORY OF VACATING AN AWARD UNDER THE LMRA

In the 1960s, the Supreme Court decided a series of cases regarding the LMRA, including arbitration cases." These cases are referred to as the "Steelworkers Trilogy" and together they form the foundation for much of labor law.[52] In one of those cases, the Court discussed labor arbitration and the limited basis upon which a federal court can vacate or remand a labor award.[53] In 1987, the Court discussed the use of the Arbitration Act as guidance in deciding LMRA cases when the text of LMRA is unclear or does not include determinative language.[54] Additionally, in 2001, the Court clarified that, generally, the only appropriate remedy for procedural aberrations is to remand the impacted arbitration ruling for further arbitration.[55]

A. The Court Vacated an Award in Enterprise Wheel & Car.

Enterprise Wheel & Car discusses when vacating a labor award is proper.[56] In that case, the arbitrator decided that a ten-day suspension of employees, rather than termination, was appropriate.[57] The Court explained that a labor arbitrator is confined to the collective bargaining agreement, discussing that an arbitrator cannot "dispense his own brand of industrial justice."[58] And, a court has no choice other than to refuse to enforce an award when an "arbitrator's words manifest an infidelity" to the "interpretation and application of the collective bargaining agreement."[59] The Court held that the arbitrator acted within his discretion to fashion a substantive remedy and, therefore, vacating the award was not proper. This case provides the often-cited "industrial justice" rule as the method to vacate an award on a substantive basis only.

B. The Court Reversed on Public Policy Grounds in Misco.

Misco discussed looking to the Arbitration Act for guidance in reviewing procedural issues of labor-arbitration.[60] In that case, the CBA provided that bringing narcotics on company property was a basis for discharge.[61] On January 21, 1983, police apprehended a Misco employee—who was also covered by the CBA—and arrested him after finding marijuana his car while he was on the company parking lot.[62] Prior to this incident, the employee was also arrested when

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[52] United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); *Enter. Wheel & Car Corp*., 363 U.S. at 593; United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).
[53] *Enter. Wheel & Car Corp.*, 363 U.S. at 597.
[54] United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29, 37–38 (1987).
[55] Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001).
[56] *Enter. Wheel & Car Corp.*, 363 U.S. at 597.
[57] *Id.* at 595.
[58] *Id.* at 597.
[59] *Id.*
[60] *See Misco*, 484 U.S. 29.
[61] *Id.* at 33.
[62] *Id.*

police found marijuana in his home during a police search.[63] After learning of the arrests at his home and in the car on company property, the company fired the employee.[64] The union appealed to arbitration.[65] Shortly before arbitration began, the company learned about the drug possession in the employee's car on company property but the arbitrator refused to admit that evidence.[66] The arbitrator ruled to reinstate the employee with full back-pay, deciding that, without the evidence of the drugs in the employee's car, the company failed to prove that the employee possessed drugs on company property.[67] The district court vacated the award because the combination of dangerous machinery and narcotics was "contrary to public policy."[68] It reasoned that the arbitrator's decision to exclude the marijuana possession evidence was improper.[69] The Court of Appeals agreed with the lower Court and affirmed.[70] The Supreme Court reversed, holding that a court may vacate because of public policy issues regarding CBA language, but it must defer to an arbitrator's interpretation of a CBA and his evidentiary rulings.[71]

The Court conducted its analysis within Section 10 of the Arbitration Act and stated that if the Court applies that standard in this case, the arbitrator's error in "refusing to consider disputed evidence" was not "in bad faith or so gross to amount to affirmative misconduct."[72] In a footnote, the Court discussed how the Act does not apply to LMRA disputes, but "federal courts have looked to the Act for guidance," especially since its ruling that federal courts can create federal common law to govern suits involving CBAs.[73] "[W]hen an arbitrator's procedural aberrations rise to the level of affirmative misconduct," a "court should simply vacate the award" so that the parties may re-enter arbitration.[74]

The Supreme Court does not make an explicit statement that the Arbitration Act's language is binding in labor-arbitration, but, at a minimum, highlights its usefulness where the LMRA is unclear.

C. The Court Reversed on Grounds That the Investigator's Findings Were Irrational.

In *Major League Baseball Players Association v. Garvey*, the Supreme Court confirmed a court's ability to vacate for "procedural aberrations."[75] It ruled that a court cannot replace its fact-finding judgment over an arbitrator's; instead a

[63] *Id.*
[64] *Id.* at 34.
[65] *Id.*
[66] *Misco*, 484 U.S. at 34.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 38.
[72] *Misco*, 484 U.S. at 40.
[73] *Id.* at 40 n.9.
[74] *Id.* at at 40 n.10.
[75] *Garvey*, 532 U.S. at 510.

court must vacate the award to further arbitration proceedings.[76] In that case, the court found that Major League Baseball colluded against free-agent players.[77] The league settled and set up a $280 million fund to compensate players harmed by the collusion.[78] Steve Garvey, a Major League Baseball player allegedly harmed by the collusion, submitted a grievance for $3 million.[79] In CBA-mandated arbitration, Garvey presented an owner's written testimony supporting his claim that contradicted the owner's oral testimony in the arbitration.[80] The arbitrator decided the oral testimony was more credible than the written testimony and denied Garvey's claim.[81] Garvey appealed, the district court upheld the award, and the Ninth Circuit reversed directing judgment be entered in Garvey's favor.[82] The Supreme Court recited the precedent that courts have "no business weighing the merits of the grievance" because doing so would usurp the function of arbitration.[83] But, the Court recognized that remanding "will be appropriate when the arbitrator simply made factual findings that the reviewing court perceives as 'irrational.'"[84] The Court ruled that federal courts cannot enter judgment on behalf of either party and reversed for further arbitration proceedings.[85]

Justice Stevens dissented and acknowledged this area of the law's ambiguity and complained that the majority offered little explanation for its reasoning.[86] He discussed how the case law for determining when a LMRA arbitration award can be vacated or remanded is "not sufficiently clear."[87] Justice Stevens acknowledged that the Supreme Court's cases do not provide what standards a federal court should use when "an arbitrator's behavior is so untethered to either the agreement of the parties or the factual record to constitute an attempt to 'dispense his own brand of industrial justice.'"[88]

D. Summary of Supreme Court Precedent

The Supreme Court lays out a few guiding principles. First, it lays out that labor-arbitration disputes are governed by the LMRA, but courts may nonetheless look to the Act for guidance. Although, it's questionable how much guidance and whether the Act can or should determine the outcome of a case. Second, an arbitrator cannot rule with "his own industrial brand of justice."[89] In *Enterprise*

[76] *Id.* at 505.
[77] *Id.* at 506.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 506–07.
[81] *Garvey*, 532 U.S. at 507.
[82] *Id.*
[83] *Id.* at 509–10.
[84] *Id.* at 511.
[85] *Id.*
[86] *Id.* at 512.
[87] *Garvey*, 532 U.S. at 512.
[88] *Id.*
[89] *Id.* at 509.

Wheel & Car, the court held that an arbitrator does not rule with industrial justice if he crafts a remedy reasonable within the parameters of a CBA.[90] *Misco* discusses the version of industrial justice that violates a party's procedural rights and then clarifies that "courts have no business weighing the merits of a grievance," but may vacate an award for "procedural aberrations" that amount to "affirmative misconduct."[91] *Garvey* instructs courts that when they find "procedural aberrations," they should remand for further arbitration.[92] The procedural version of industrial justice gives way to the grey area of common law that differs between the circuits.

In this area of industrial justice, the Supreme Court commented on the circuit courts' ability to create their own common law regarding LMRA vacatur.[93] The Fifth Circuit and other circuits have used the fundamental fairness standard to add some clarity to the procedural version of industrial justice.

IV. CIRCUIT COURTS APPLYING FUNDAMENTAL FAIRNESS.

This section examines Fifth Circuit cases and a widely cited Second Circuit case applying the fundamental fairness standard. These circuit courts recognize the standard to varying degrees. Following Supreme Court precedent, circuits have more and more relied on guidance from the Arbitration Act and commercial arbitration case law to help determine LMRA cases.

A. Forsythe International

In *Forsythe*, the Fifth Circuit applied the fundamental fairness standard and held that an arbitrator does not need to hear all evidence to validate an award but must allow all parties to present their evidence and arguments.[94] In that case, a company claimed another company misrepresented multiple pieces of evidence in arbitration regarding a commercial transaction.[95] The arbitrator heard the parties' allegations but decided the misrepresented evidence was not material to the award.[96] The Fifth Circuit conceded "inattention" to the misrepresented evidence issues, but rejected "the inference of fundamental unfairness."[97] The court ruled that arbitration will risk "procedural and evidentiary shortcuts" that would not be seen in a formal trial, but that is the advantage of arbitration.[98] A failure to address all issues will not render a proceeding "'fundamentally unfair or justify disturbing the award" only an evidentiary error that "so affects the rights of a party that . . .

[90] *Enter. Wheel & Car Corp.*, 363 U.S. at 597.
[91] *Misco*, 484 U.S. at 34; *Id.* at n. 10.
[92] *Garvey*, 532 U.S. at 511.
[93] *Id.*
[94] Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex., 915 F.2d 1017 (5th Cir. 1990).
[95] *Id.* at 1019.
[96] *Id.*
[97] *Id.* at 1021.
[98] *Id.* at 1022.

[the party] was deprived of a fair hearing" may lead to vacatur.[99] This case provides one end of the spectrum, that an arbitrator need not review all evidence. The following case is the other side of that spectrum.

B. Gulf Coast Industrial Workers

In the Fifth Circuit, an arbitrator's refusal to consider material evidence and misrepresenting the submission of evidence can be "fundamentally unfair."[100] In *Gulf Coast*, an employee was terminated for refusing to consent to a drug test after marijuana had been found in his car on company property.[101] The marijuana was confirmed via a lab test.[102] The arbitrator "refuse[d] to consider evidence" of the drug test and "prevented Exxon from presenting additional evidence by misleading it into believing" that the test had been admitted into evidence.[103] The arbitrator ruled to reinstate the employee and give him back pay, then Exxon counterclaimed to vacate the award.[104] The district court vacated the award and the Fifth Circuit affirmed.[105] The Fifth Circuit cited *Forsythe* to discuss the fundamental fairness standard and used Section 10 to affirm, stating this "misconduct falls squarely within the scope of Section 10 and is grounds for vacatur."[106]

C. Tempo Shain Corporation

In the Second Circuit, denying testimony from a sole source of material information can amount to fundamental unfairness.[107] In *Tempo* Shain, a dispute between two corporations concerning the specifics of a deal gone bad, Bertek sought to bring its division former president in charge of negotiating the specifics of that deal to testify.[108] Bertek's president stated he would testify, but scheduling a time would be difficult because his wife had recently been diagnosed with cancer.[109] The arbitrators concluded that they did not need to hear the president's testimony, because they felt the lawyers "banging him with questions" would just be a "rehash of what [they had already] heard."[110] The arbitrators ruled against Bertek, and the district court affirmed.[111] The Second Circuit reasoned that the

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[99] *Id.* at 1023 (quoting Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir. 1968), *cert. denied*, 393 U.S. 954 (1968)).
[100] Gulf Coast Indus. Workers Union v. Exxon Co., 70 F.3d 847, 849 (5th Cir. 1993).
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 850.
[106] *Exxon*, 70 F.3d at 850.
[107] Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 18 (2d Cir. 1997).
[108] *Id.* at 19.
[109] *Id.*
[110] *Id.* at 18.
[111] *Id.*

refusal of the president's testimony amounted to fundamental unfairness.[112] It remanded the case with instructions to the district court for further proceeding.[113]

In *Karaha*, the Fifth Circuit distinguished *Tempo Shain*, along with a similar First Circuit case, to show when an arbitrator's denial of a party's sole material witness or sole evidence into the record justifies vacatur.[114] The Fifth Circuit clarifies that a party must be able to present comprehensive evidence such as expert opinions and cross-examine witnesses regarding material facts.[115]

D. Chemical Workers

In *Chemical Workers*, the Fifth Circuit held that an arbitrator's credibility decisions will not be the basis for vacating an award; all that is required is "a full and fair hearing consistent with the FAA and the LMRA."[116] In that case, an employee was caught sleeping on the job and promptly terminated.[117] Upon appeal, the arbitrator reduced the termination to a 14-day suspension and awarded back pay.[118] The arbitrator's sole job was to determine if proper cause existed for termination.[119] To determine the severity of punishment, the arbitrator had to distinguish between "open view" sleeping or "making-a-bed," behind a "hidden away/closed door/cloistered" sleeping.[120] The union argued it received neither a full nor fair hearing because the arbitrator refused to visit the plant, refused to admit evidence regarding a supervisor's racism, and refused to admit other credible evidence concerning the employee's supervisors.[121] The court ruled that the arbitrator properly heard all evidence and made evidentiary determinations consistent with the Arbitration Act and the LMRA.[122] The arbitrator did not act in manifest disregard of the law under the Arbitration Act, nor did he dispense his own brand of industrial justice under the LMRA.[123]

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[112] *Id.* at 21.
[113] *Tempo Shain Corp.*, 120 F.3d at 21.
[114] Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004). *Tempo Shain Corp.*, 120 F.3d at 21; *De Tronquistas Local 901*, 763 F.2d 34.
[115] *Karaha Bodas Co.*, 364 F.3d at 306.
[116] Int'l Chem. Workers Union v. Columbian Chemicals. Co., 331 F.3d 491, 496 (5th Cir. 2003).
[117] *Id.* at 493.
[118] *Id.* at 494.
[119] *Id.*
[120] *Id.*
[121] *Id.* at 496.
[122] *Int'l Chem. Workers Union*, 331 F.3d at 497.
[123] *Id.* As with most opinions, the Fifth Circuit is quick to point out that the Act is not binding on LMRA decisions but is helpful in guiding. But this opinion in interesting because the Fifth Circuit follows both statutes and ultimately finds neither are violated. Interesting questions arise: What if the Act had been violated? Why even discuss the Act if it does not apply?

E. Summary of Fundamental Fairness

The Fifth Circuit has used fundamental fairness in reviewing LMRA cases.[124] And it has used Fundamental Fairness in Arbitration Act cases. But, it has stated, consistent with the Supreme Court, that the Act does not bind the court in LMRA cases. It is unclear if the standard is consistent in both law's applications. But, *Chemical Workers* provides a recent history of discussing the Act within a LMRA case. So, while it could rule differently, Fifth Circuit precedent supports the rule that an arbitrator does not have to hear all of a party's evidence yet it cannot refuse to hear material evidence. In other words, if an arbitrator does not include material evidence that is critical to the dispute, such as a positive marijuana test or a person's testimony, then a court could vacate the award.

V. DISCUSSION OF ZEKE'S CASE AND THE CASE LAW

The chances of vacating an award are small. The following sections provide analysis on Zeke's case, including whether Zeke could have received fundamental fairness with additional provisions to the collective bargaining agreement ("CBA") for procedural protections and with further negotiations to define an arbitrator's minimum requirements.

A. Forming the CBA

If an arbitrator avoids dispensing his own brand of industrial justice, keeps within the CBA's language, and meets the very limited requirements of procedural fairness, the party requesting judicial review cannot prove a violation of the CBA and, thus, is on the wrong side of the law. At that point, the only opportunity to include a preventative measure—contract formation—has passed.

Parties desiring additional protections or avenues for judicial review should include contract provisions discussing procedural or evidentiary issues. Then, if an arbitrator does not abide by those provisions, a party can argue that the arbitrator violated the CBA and be on the right side of the LMRA. But, of course, this goes both ways. The parties at the negotiating table must then use their crystal ball to decide whether they would benefit from higher procedural protections or not.

In Zeke's case, the NFLPA could have negotiated for language which would require an arbitrator to allow parties to cross-examine key witnesses that were material to the dispute, such as the commissioner who issued the suspension. This would have allowed Zeke to argue a breach of the CBA. In the current CBA, the

[124] "Federal courts do not superintend arbitration proceedings. Our review is restricted to determining whether the procedure was fundamentally unfair." Teamsters, Chauffeurs, Warehousemen, Helpers & Food Processors, Local Union 657 v. Stanley Structures, 735 F.2d 903, 906 (5th Cir. 1984) (citing *Totem Marine Tug & Barge, Inc.*, 607 F.2d at 651).

most substantial restriction on discovery is timeliness. It says nothing about evaluating the importance or materiality of the evidence.[125]

Or, more specifically, the CBA could request that parties submit all material evidence and investigative notes supporting any player-suspension decision to the NFLPA. Again, a failure of that provision would result in a violation of the CBA. Unfortunately, this or any other Monday morning quarterbacking couldn't help Zeke, so he was forced to review the arbitrator's actions.[126]

B. Evaluating an Arbitrator's Conduct

Beyond industrial justice and operating outside the CBA, an arbitrator's action must be evaluated under a circuit court's common law. Each circuit court, including the Fifth Circuit, decides issues of procedure differently. As noted above, the Fifth Circuit has used fundamental fairness in a LMRA case, however it has not ruled in enough cases to support a full understanding of when the court would apply the fundamental fairness standard.[127] The Seventh Circuit expressly denies that the LMRA includes a "free-floating procedural fairness standard," such as the fundamental fairness standard, unless the language of a CBA was violated.[128] The Ninth and Second Circuit accept that a labor-arbitration "hearing is fundamentally fair if the minimal requirements of fairness—adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator—are met."[129]

Among the circuit courts that do allow for a fundamental fairness or "procedural aberrations" review, a labor-arbitrator should follow very simple guidelines:

- An arbitrator must allow parties to present their arguments, most of their evidence, and cannot deceive a party about the inclusion of material evidence.
- An arbitrator must allow the testimonial evidence of a sole source of material information.

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[125] NAT'L. FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT (Aug. 4, 2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.

[126] *Monday morning quarterback*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Monday-morning%20quarterback. (last visited April 20, 2020) ("Monday morning quarterback defined as "a person who criticizes the actions or decisions of others after the fact, using hindsight to assess situations and specify alternative solutions.").

[127] *The Zeke Fifth Circuit Case*, 874 F.3d at 232–34 (2017) (The majority opinion does not discuss fairness because the lower court did not have subject matter jurisdiction, but the dissenting opinion argued that the court did and discusses that the evidence could prove that the arbitrator "impugned the integrity" of the proceedings.).

[128] Lippert Tile Co. v. Int'l Union of Bricklayers & Allied Craftsmen, Dist. Council of Wis. & Its Local 5, 724 F.3d 939, 948 (7th Cir. 2013).

[129] Carpenters 46 Northern California Counties Conference Board v. Zcon Builders, 96 F.3d 410, 413 (9th Cir.1996); Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527 (2d Cir. 2016).

- Arbitrators can't fashion a remedy that does not have a reasonable basis within a CBA.

Beyond these guidelines, arbitrators have extraordinary discretion.[130] If they operate within that discretion, an award will likely stand.[131] Even if the award is vacated, *Garvey* requires that the award be remanded back to the arbitrators for further proceedings.[132]

C. Did Zeke Receive A Fundamentally Fair Hearing?

Before an evaluation of the arbitrator's conduct and judicial review in Zeke's case, it should be noted that Zeke is not a saint. If true to any extent, his role in the domestic violence allegations is deplorable. Further, between that accusation and the arbitration, he had other poor decisions that the NFL did not investigate and were not formally part of its decision.[133] So, it is hard to feel bad for punishing someone that fits the millionaire, "bad-boy" professional athlete stereotype. Perhaps, these moral judgments impacted the commissioner's, arbitrator's, or reviewing courts' opinions. But arbitrators and courts should only apply the relevant law to the relevant facts, as Judge Mazzant of the EDTX did.[134]

The Fifth Circuit held that the trial court lacked subject matter jurisdiction to review the arbitration and remanded for dismissal, without making a decision as to the merits.[135] So, the question arises: what would the Fifth Circuit have decided had it found jurisdiction? And, would the majority have agreed with the dissent, who stated that Zeke was "denied the right to present, by testimony or otherwise, any evidence relevant to the hearing"?[136] In analyzing Fifth Circuit precedent to the evidence cited only within the EDTX and Fifth Circuit's opinions, it appears that a procedural aberration occurred when the NFL excluded Ms. Robert's testimony, thus Zeke likely did not receive a fundamentally fair hearing.

For example, the decisions of *Gulf Coast* and *Chemical Workers* provide some guidance on how the Fifth Circuit may have decided Zeke's case and analyzed the exclusion of Ms. Robert's testimony.[137] In *Gulf Coast*, the Fifth Circuit affirmed

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[130] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 545 (2d Cir. 2016) (citing *Misco*, 484 U.S. at 40); Am. Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 343 F.3d 401, 405 (5th Cir. 2003).
[131] *Id.*
[132] *Garvey*, 532 U.S. at 511.
[133] Kate Hairopoulus, *Cowboys RB Ezekiel Elliott seen exposing woman's breast during Dallas St. Patrick's Day parade*, DALLAS MORNING NEWS, (Mar. 13, 2017, 2:45 PM). https://sportsday.dallasnews.com/dallas-cowboys/cowboys/2017/03/13/cowboys-rb-ezekiel-elliott-seen-exposing-womans-breast-dallas-st-patricks-day-parade.
[134] *See The Zeke EDTX Case*, 270 F.Supp.3d. 939.
[135] *The Zeke Fifth Circuit Case*, 874 F.3d at 229.
[136] *Id.* at 232.
[137] *Gulf Coast Indus. Workers Union*, 70 F.3d 847; *Int'l Chem. Workers Union*, 331 F.3d 491.

the lower court's decision to vacate an arbitration award in a LMRA case.[138] It held that Exxon did not receive fundamental fairness, because Exxon was prohibited from presenting material evidence.[139] And, in the later *Chemical Workers* case, the court utilized both the LMRA and the Act. It attached fundamental fairness to a LMRA review, not the Arbitration Act. Thus, in a future commercial or labor dispute, it could use the fundamental fairness standard for "procedural aberrations" in a LMRA case. The court could ensure fundamental fairness by reviewing whether a party had the ability to present material evidence, especially when that evidence was critical to the dispute. Then, if the court found issues of procedural fairness, it would simply remand the case for further arbitration.

Most of the arbitrator's decisions in Zeke's case were probably within his discretion, but the one glaring evidentiary issue is Zeke's inability to question NFL Commissioner Goodell. Like in *Gulf Coast*, here, the arbitrator declined to hear the reasoning of Goodell, who solely decided the suspension. Goodell, alone, knew what evidence led to his conclusion. Here, the procedures would have likely been full and fair if Zeke would have been allowed to elicit Goodell's testimony, because there *would* have been more to gain.[140] Certainly, both parties—and more importantly, the arbitrator—could infer from other evidence to explain the commissioner's decision, but it seems incredibly unjust to *not* hear the reasoning from the person responsible for issuing Zeke's suspension.

Moreover, the extra burden to provide the reasoning was not prohibitively high. If the Commissioner testified that he believed Ms. Thompson, that he relied on his investigator's notes, or that some other evidence led to his decisions, then the arbitrator would have been within his discretion to rule without fear of judicial review. Had the district court remanded that issue back to the arbitrator, like *Garvey* suggests, it would have tackled two important issues: (1) obtaining a full and fair hearing by allowing Zeke to hear the commissioner's reasoning; and (2) maintaining the integrity of arbitration for all parties, signaling that they have fundamental rights even in labor arbitration.

VI. CONCLUSION

Labor arbitration provides substantial benefits and should be an available option, but labor arbitration should have, at a minimum, fundamental rights for the protection of employers and unions alike. By negotiating binding arbitration clauses, parties seek to settle disputes outside of the court system and to save parties time and money. However, parties likely do not appreciate or realize the protections afforded to them under the law that has been fine-tuned over many centuries. For better or worse, that legal history created an expensive and time-consuming

[138] *Gulf Coast Indus. Workers Union*, 70 F.3d at 850.
[139] *Id.*
[140] *Tempo Shain Corp.*, 120 F.3d at 18 (arbitrators stated that "banging" Bertek's president with questions would not have resulted in more to gain.).

gauntlet of procedural and substantive requirements. As a remedy, Congress enacted the LMRA for unions and employers to contract with one another and streamline disputes through arbitration. Parties then have the option to craft their own procedural and evidentiary rules, adopt an arbitration association's rules, or forego them altogether. But certain procedural and evidentiary fundamental rights should not be waivable. If they do not receive a fair hearing on the evidence, nor have a decision made by an impartial arbitrator, the courts should not hesitate to remand for more arbitration to give someone like Zeke a chance, because all people should enjoy fundamental rights "so rooted in the traditions" of justice.[141]

[141] *Snyder*, 291 U.S. at 105.