

NOT FOR PRINT PUBLICATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

EASTERN ASSOCIATED COAL CORP. et al.,

Plaintiffs,

v.

CIVIL ACTION NO. 2:03-2430

**DISTRICT 17, UNITED MINE WORKERS
OF AMERICA, et al.,**

Defendants.

ORDER

Pending before the court are the plaintiff's and defendant's cross motions for summary judgment. After reviewing the motions, memoranda of law, and exhibits, the court **DENIES** the plaintiff's motion for summary judgment and **GRANTS** the defendant's motion for summary judgment.

I. Standard of Review

To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In considering a motion for summary judgment, the court will not "weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Instead, the court will draw any permissible inference from the underlying facts in the light most

favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

Although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some "concrete evidence from which a reasonable juror could return a verdict in his [or her] favor." *Anderson*, 477 U.S. at 256. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere "scintilla of evidence" in support of his or her position. *Anderson*, 477 U.S. at 252.

II. Background

A. Grievance History

The plaintiffs, Eastern Associated Coal Corporation and Charles Coal Company, Inc., joint venturers, on behalf of Colony Bay Coal Company (Colony Bay), seek to vacate the October 4, 2003 arbitration award rendered by Arbitrator Barrett. The defendant, the United Mine Workers of America, District 17, Local Union No. 9177 (the Union), represents Colony Bay's hourly classified employees and seeks to enforce the arbitrator's award. Both parties contend that there are no remaining factual issues and argue that this dispute is ripe for summary judgment.

The parties to this dispute are bound by the National Bituminous Coal Wage Agreement of 2002 (NBCWA). The NBCWA provides for a dispute resolution process that culminates in arbitration. According to the terms of the NBCWA, "[t]he arbitrator's decision shall be final and shall govern only the dispute before him." The grievance at issue in the instant dispute was filed

against Colony Bay on February 6, 2003, by union member Eddie Kincaid. This grievance alleged that Colony Bay was in violation of the NBCWA because the company had hired an outside contractor, Charlie's Pumping Service, to use a vacuum truck to remove iron sludge from the two portal ponds on EACC property and the "Padded Pond" on Colony Bay property. At the arbitration hearing held in July 2003, Colony Bay argued that it hired the outside contractor because it believed the ponds were environmental ponds and it considered the cleaning of such ponds to be repair and maintenance work under Article IA(g)(2) of the NBCWA. This work normally falls within the jurisdiction of classified employees. There is an exception, however, where the company does not own the equipment necessary to perform the work. Thus, Colony Bay argued that because it did not own or have access to a vacuum truck, its decision to hire Charlie's Pumping Service to perform the work was permissible under the exceptions to Article IA(g)(2). The Union, by contrast, argued that the cleaning of the ponds is part of the coal production process and therefore constitutes the removal of coal waste under Article IA(a) of the NBCWA. Because this section of the NBCWA does not contain the exception discussed above, any work described in this section is within the work jurisdiction of the classified employees.

On October 4, 2003, Arbitrator Barrett issued the decision that is the subject of the instant dispute. In this decision, Arbitrator Barrett sustained the grievance on the basis of arbitral *res judicata* and on the merits of the Union's claim. Specifically, Arbitrator Barrett concluded that two prior arbitral decisions, Parkinson and Gundermann, did have precedential effect on the instant dispute while another arbitral decision, Minnich, did not "constitute *Res Judicata* and, in addition, is plainly and palpably erroneous." Despite the fact that the precedent he deemed applicable seemed to determine the disputes at issue, Arbitrator Barrett went on to discuss the merits of the claim in an

effort to avoid “further controversy.” Arbitrator Barrett examined the statutory language of IA(a), taking special note of the phrase “work of the type customarily related to all of the above” and concluding that such a term indicates “the intent of IA(a) to deal with that work which is the consequence of or affects (sic) of coal production.” Barretts’ decision includes references to other arbitration decisions which come to a similar conclusion—that the cleaning of the ponds at issue falls within the definition of the work described in Article IA(a) of the NBCWA. Arbitrator Barrett’s decision also discusses why the pond work does not fit within the definition of Article IA(g)(2), distinguishing several arbitration decisions cited by Colony Bay.

B. Argument for Summary Judgment

In its motion for summary judgment, Plaintiff Colony Bay asks this court to vacate Arbitrator Barrett’s decision. Although Colony Bay acknowledges that federal court review of such decisions is limited, it argues that this dispute presents two of the limited circumstances that would warrant vacatur by this court. Specifically, plaintiff argues that Arbitrator Barrett’s decision: (1) reflects his own notions of right and wrong and (2) fails to draw its essence from the contract. To support these contentions, Colony Bay argues that Arbitrator Barrett’s award is based on his own notions of right and wrong because he misapplies the principles of arbitral *res judicata*. Plaintiff further argues that his award fails to draw its essence from the contract because he ignores the plain meaning of the mandatory contractual language of Articles IA(a) and IA(g) of the NBCWA and because portions of his remedy are not authorized by the contract.

In contrast, the defendant Union argues that “this case is straightforward, garden variety type labor arbitration award which the *Steelworkers Trilogy* and its progeny requires this Court to afford great deference. Even the most casual reading of his award establishes that, in rendering his award,

Arbitrator Barrett considered the plain language of the contract and thoroughly analyzed the common law of the shop and the history of the parties.” The defendant points out that Colony Bay and the Union bargained and contracted for exactly this type of arbitration decision and agreed in the NBCWA that such decisions would be final and binding upon all parties. Thus, the defendant argues that “subsequent dissatisfaction with the rendered award is simply not legally sufficient to seek vacatur of the award, or to allow Plaintiff a ‘second bite’ at the arbitral apple by re-litigating this case in this Court.”

III. Analysis

Federal courts have the authority to review the decisions of labor arbitrators pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, but this review is severely limited—it is “among the narrowest known to the law.” *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 91 (1978). In three cases known as the *Steelworkers Trilogy*, the Supreme Court warned that “courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract.” *United Paperworkers Int’l Union v. Misco, Inc.* 484 U.S. 29, 36 (1987). In *United Paperworkers Int’l Union v. Misco*, the Supreme Court held that:

[t]he arbitrator’s award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator’s own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Id. at 38. Thus, federal courts may only overturn an arbitrator’s award if it “violates well-settled and

prevailing public policy, fails to draw its essence from the collective bargaining agreement or reflects the arbitrator's own notions of right and wrong." *Mounlaineer Gas Co. v. Oil, Chem. & Atom. Workers Int'l Union*, 76 F.3d 606, 608 (4th Cir. 1996); *Misco*, 484 U.S. at 38. In the instant case, the plaintiff does not allege that enforcement of the award would violate public policy. Thus, the court will consider the two remaining objections in turn.

A. Plain Meaning of Mandatory Contractual Language

Plaintiff argues that Arbitrator Barrett's decision does not draw its essence from the NBCWA because Arbitrator Barrett ignored the plain meaning of the mandatory contractual language of Articles IA(a) and IA(g) of the NBCWA. Specifically, the plaintiff takes issue with Arbitrator Barrett's determination that the pond work in question constituted the removal of coal waste under Section IA(a). Plaintiff argues that Barrett ignored the plain meaning of that section, "adding further weight to the notion that his award is based on his own notions of right and wrong and does not draw its essence from the collective bargaining agreement." Instead, the plaintiff interprets Article IA(a) to mean that "coal waste" is only produced by the production process and that "environmental ponds like the ones in this case, are not connected in any way to the coal production process." According to the plaintiff, Barrett should have classified the pond work as repair and maintenance work under Article IA(g)(2).

Clearly, the plaintiff's argument that Arbitrator Barrett's decision does not draw its essence from the NBCWA rests in large part on a dispute over the proper interpretation of the terms of the contract. As noted above, this court is not permitted to evaluate which party's interpretation is more legally sound or which conclusion the court would have drawn. Instead, the court need only determine whether the arbitrator's decision drew its essence from the contract. *See Crigger v.*

Members of Local Union 6028 of District 29, United Mine Workers of America, 500 F.2d 1218 (4th Cir. 1974) (concluding that the "district court correctly concluded that it could not review the merits of the umpire's award; instead, review was limited to the narrower issues of whether the umpire's decision 'drew its essence' from the Agreement"). As noted earlier, the Supreme Court in *Misco* outlined a federal court's role in determining of whether or not a decision draws its essence from the agreement. The *Misco* Court noted:

Courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. . . . As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced that he committed serious error does not suffice to overturn his decision. Of course, decisions procured by the parties through fraud or through the arbitrator's dishonesty need not be enforced.

461 U.S. at 38.

Thus, this court may not consider the merits of Arbitrator Barrett's award despite the fact that the plaintiff alleges that the arbitrator has misinterpreted the contract. The plaintiff has not alleged any fraud or dishonesty on the part of the Arbitrator and thus, "as long as the arbitrator is even arguably construing or applying the contract" the court may not overturn his decision. In the *Steelworker Trilogy*, the Supreme Court further warned that when the "judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960).

In *District 17, UMWA. v. Island Creek Coal Co.*, 179 F.3d 133 (4th Cir. 1999), the Fourth Circuit upheld a district court's determination that the arbitrator's decision drew its essence from the

collective bargaining agreement. In coming to this conclusion, the Fourth Circuit noted that "it is clear from his ruling that Arbitrator Ross did not ignore the language of the NBCWA. In fact, his reliance on applicable arbitral precedent indicates that he made every effort to interpret and apply the NBCWA according to its own provisions." *In Eagle Energy Inc. v. District 17, UMWA*, this court further defined the "drew its essence" standard. In *Eagle Energy*, the court upheld an arbitrator's decision and determined that it drew its essence from the contract because "the arbitrator carefully set forth and examined the parties' contentions, evaluated and weighed conflicting evidence, and held in favor of the Unions While this Court might not necessarily have reached the same conclusion, labor policy and other considerations require the court to stay its hand."

Clinchfield Coal Co. v. District 28, UMWA, 720 F.2d 1365 (4th Cir. 1983), a rare case in which a court did vacate an arbitrator's award, further defines what an arbitral decision must include to "draw its essence" from the contract. In that case, the *Clinchfield* court determined that where "an arbitrator fails to discuss critical contract terminology, which terminology might reasonably require an opposite result, the award cannot be considered to draw its essence from the contract." *Id.* In *Mountaineer Gas*, the Fourth Circuit again vacated an arbitrator's decision, this time based on the fact that "the arbitrator's role clearly prohibited him from amending, adding to, or subtracting from the CBA." 76 F.3d at 606. In this case, the arbitrator chose not to apply a mandatory provision of the contract which defined the relationship between the parties. This case was not a case of contract interpretation, as there was no ambiguity in the provision and no doubt that it applied to the dispute. The arbitrator, however, chose not to apply the very contract that defined his authority and thus, the court determined that his decision failed to draw its essence from the contract and impermissibly "amended, added to, or subtracted from the CBA." *Id.* at 610.

Thus, a decision draws its essence from the contract at issue if it discusses "critical contract terminology," does not ignore the relevant terms of the contract, evaluates the parties arguments' and the conflicting evidence, and does not amend or change the relevant contract. It is important to note that none of these cases consider the merits of the arbitrators' decisions—a decision is said to draw its essence from the contract as long as the arbitrator contemplates and applies the contract, even if the court would not have come to the same conclusion. As the Fourth Circuit noted in *Remmey v. Paine Webber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1996), "above all, we must determine only whether the arbitrator did his job—not whether he did it well, correctly, or reasonably, but simply whether he did it."

Arbitrator Barrett did not "ignore the language of the NBCWA" and applied what he concluded to be "applicable arbitral precedent." Arbitrator Barrett's lengthy opinion included reference to precedent, analysis of the contract provisions, and an application of the customs of the industry. Before making his decision, Barrett "examined the parties' contentions" and "evaluated the conflicting evidence." Accordingly, the court **FINDS** that Barrett's classification of the work did not ignore the language of the contract and drew its essence from the applicable portions of the NBCWA. Regardless of whether this court would have come to the same conclusion, it must uphold the arbitrator's decision based upon the Fourth Circuit's clear policy of deference to arbitral decisions. *See e.g. Mountaineer Gas Co.*, 76 F.3d at 608 (stating that "in labor arbitration cases, it is recognized that a reviewing court generally defers to the arbitrator's reasoning"); *Island Creek Coal Co. v. District 28, UMWA*, 29 F.3d 126 (4th Cir. 1994) (noting that "an arbitrator's award is entitled to special judicial deference on judicial review."); *Richmond, Fredericksburg & Potomac R.R. Co. v. Trans. Communs. Int'l Union*, 973 F.2d 276, 278 (4th Cir. 1992) (concluding that "judicial review

of an arbitration award is 'among the narrowest known to the law'').

B. *Res Judicata* and "Personal Notions of Right and Wrong"

In its motion for summary judgment, plaintiff Colony Bay also argues that "[a]lthough it is generally up to the arbitrator to decide whether *res judicata* applies to a particular case, Arbitrator Barrett misapplied the principles of *res judicata* in the instant case." Plaintiff argues that "this case presents a situation where the Court should intervene and vacate his erroneous legal conclusion." Thus, it is the plaintiff's contention that this court should set aside Arbitrator Barrett's decision because he did not follow Arbitrator Minnich's earlier decision and his failure to do so indicated that Barrett was applying his own "personal notions of right and wrong."

Around the same time the grievance was filed in this case, Arbitrator Minnich decided a very similar issue and ruled that the cleaning of environmental ponds constitutes "repair and maintenance" work under Article IA(g) of the NBCWA and is therefore subject to a "lack of available equipment" exception under that provision. Thus, Arbitrator Minnich ruled that Colony Bay had acted within its rights when it contracted Charlie's Pumping Service to do the pond work. In so doing, Arbitrator Minnich determined that the earlier decisions in Parkinson and Gundermann did not constitute *res judicata* because they did not consider the same issue. Despite the similarities between the grievances at issue in the Minnich decision and the instant dispute, Arbitrator Barrett rejected the decision of Arbitrator Minnich and applied the earlier decisions of Arbitrators Parkinson and Gundermann. Barrett determined that Arbitrator Minnich had erroneously failed to apply the earlier decisions in Parkinson and Gundermann. Faced with what he termed "dueling *res judicatas*," Arbitrator Barrett cited ARB. Dec. 78-24 which describes arbitral *res judicata* and the exceptions thereto. As Arbitrator Barrett noted, "78-24 goes on to prescribe what it terms as 'exceptional circumstances' involving

'narrow and limited circumstances' for releasing an arbitrator from being bound to a prior award to which *Res Judicata* would otherwise apply." (Arb. Dec. 5-7). ARB. Dec. 78-24 specifically provides:

Where the arbitrator is clearly and convincingly persuaded by the evidence and the arguments of the parties before him that a prior award is so plainly and palpably erroneous that it should not be applied, he may refuse to apply the principle of *res judicata*.

However, unless clearly and convincingly persuaded that:

- (a) the previous award was clearly an instance of bad judgment; or
- (b) the decision is made without the benefit of some important and relevant facts; or
- (c) the decision was based upon an obvious and substantial error of fact or law, or a Decision of the Board has intervened with which the prior award conflicts; or
- (d) a full and fair hearing was not afforded in the prior case

the arbitrator is bound to apply the prior award even if he would not have decided the prior case in that fashion. The burden to establish one of the exceptional circumstances is on the party resisting the application of the prior award and that burden is met only by clear and convincing evidence and argument.

In his decision, Arbitrator Barrett found that Arbitrator Minnich's decision was based upon an "obvious and substantial error of fact or law" and that "without mentioning support specific to arbitration decisions, Arbitrator Minnich ruled that environmental ponds are not within IA(a) because they are not linked to the coal preparation plant and, in fact, continue to operate regardless of whether coal production and processing is occurring." Arbitrator Barrett further noted that "she has not stated anything that even purports to show that Parkinson or Gundermann were based on an obvious and substantial error of fact or law. It is not sufficient for her to merely disagree."

As the Supreme Court noted in *W.R. Grace & Co. v. Local Union 759, International Union*

of the *United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757 (1983), [“b]ecause the authority of arbitrators is a subject of collective bargaining, just as is any other contractual provision, the scope of the arbitrator’s authority is itself a question of contract interpretation that the parties have delegated to the arbitrator.” *Id.* at 765. In *W.R. Grace*, the arbitrator concluded that an earlier arbitrator’s decision lacked precedential force because that arbitrator had acted outside of his jurisdiction. The *W.R. Grace* Court held that the later arbitrator’s decision was an interpretation under the contract that drew its essence from the provisions of the collective-bargaining agreement. *Id.* Thus, the *W.R. Grace* Court noted that “[r]egardless of what our view might be of the correctness of Barrett’s contractual interpretation, the Company and the Union bargained for that interpretation. A federal court may not second-guess it.” *Id.*; *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 599.

The Fourth Circuit has also dealt with the limits on federal court review of arbitral *res judicata* determinations. In *Little Six Corporation v. United Mine Workers of America*, 701 F.2d 26 (4th Cir. 1983), the Fourth Circuit examined its own role in determining the preclusive effect of prior arbitration decisions. The court first conducted a review of other circuits, noting a Third Circuit case which stated that “it is the function of the arbitrator, not the court, to decide whether the ‘same question or issue’ had been the subject of [previous] arbitration.” *Id.* at 28, quoting *Local 103, Int’l Union of Elec., Radio and Mach. Workers v. RCA Corp.*, 516 F.2d 1336, 1339 (3d. Cir. 1975). The Court also noted the Fifth Circuit determination that “whether [a prior] award can be given an effect akin to *res judicata* or *stare decisis* with regard to future disputes . . . neither the district court nor this court should decide. If the parties do not agree, that issue itself is a proper subject for arbitration.” *New Orleans S.S. Ass’n v. General Longshore Workers*, 626 F.2d 455, 468 (5th Cir. 1980). The

Fourth Circuit ultimately concluded that “there is solid, well-reasoned case law holding that the preclusive effect of a prior arbitral award is itself a question for arbitration.” *Id.* at 29.

Accordingly, this court **FINDS** that its review of Arbitrator Barrett’s *res judicata* determinations is limited to an analysis of whether these decisions drew their essence from the contract. The court finds no merit in the plaintiff’s contention that Arbitrator Barrett’s decision did not draw its essence from the contract. Because the court finds that Arbitrator Barrett’s decision drew its essence from the NBCWA and was not based on his own personal notions of right and wrong, the court is bound to uphold his decision. Accordingly, the court **DENIES** plaintiff’s motion for summary judgment and **GRANTS** defendant’s motion for summary judgment. The court’s inquiry must go one step further, as the plaintiff has argued that “[c]ven if this Court holds that the merits of Arbitrator Barrett’s decision were grounded in the NBCWA, there is no question that a portion of his remedy is not.”

C. Arbitrator’s Award of Relief

Plaintiff Colony Bay argues that Arbitrator Barrett’s remedy “should have stopped at sustaining the Union’s grievance and awarding wages and benefits. Instead, Arbitrator Barrett proceeded to order Colony Bay to ‘cease and desist’ from its alleged non-compliance with the contract.” Arbitrator Barrett’s award went on to provide that should the union “successfully prove that the Employer has not ceased or desisted, this Arbitrator believes that the Arbitrator in such matter should be allowed, given the repeated similar situations over a long period of time, to consider requests by the Union to recover such direct costs and damages it has incurred as the result of such conduct.”

Colony Bay first argues that Barrett exceeded his authority and the terms of the NBCWA by

including the “cease and desist” language in the award. As support for its contention, Colony Bay cites Article XXIII(c)(4) of the 2002 NBCWA. This Article states: “the arbitrator’s decision shall be final and shall govern only the dispute before him.” Colony Bay argues that Barrett’s decision violates this Article because his award attempts “to govern not only the dispute before him, but future disputes as well.”

In *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 at 597, the Supreme Court considered the role of arbitrators in fashioning appropriate remedies and noted that:

[W]hen an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations.

As noted earlier, the Supreme Court has also held that “[b]ecause the authority of arbitrators is a subject of collective bargaining, just as is any other contractual provision, the scope of the arbitrator’s authority is itself a question of contract interpretation that the parties have delegated to the arbitrator.” *W.R. Grace & Co. V. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757 (1983). Thus, the court **FINDS** that the arbitrator’s interpretation of his authority to award a variety of relief under the contract is subject to the same judicial deference as is his interpretations of the other terms of the contract. Accordingly, the court **FINDS** no indication that Arbitrator Barrett’s “cease and desist” relief did not draw its essence from the contract. The court finds *Island Creek Coal Company v. District 28 UMWA* helpful on this point. 29 F.3d at 126. In *Island Creek*, the Fourth Circuit affirmed a district court’s decision to uphold the portion of an arbitrator’s award which included a “cease and desist order.” Although *Island Creek*

focused mainly on the impermissible punitive damages that were awarded in that case, both the district court and the Fourth Circuit upheld the cease and desist portion of the award. The parties in that case were also bound by the NBCWA, although it was an earlier version than the one at issue in the present controversy.

The court also **FINDS** that there is no indication that Arbitrator Barrett is attempting to govern future disputes in violation of Article XXIII(c)(4) of the 2002 NBCWA. Although Barrett's relief may be prospective in nature, there is no indication that Barrett intends to retain jurisdiction over any potential future violations—in fact, Barrett's award actually acknowledges that future disputes will be resolved by other arbitrators. His award goes on to note that if the Employer does not cease and desist and another conflict arises “this Arbitrator believes *that the Arbitrator in that matter* should be allowed . . . to consider requests by the Union to recover such direct costs and damages as it has incurred. . .” (emphasis added).

Plaintiff Colony Bay also argues that the second portion of the award should be vacated. This portion provides that should the union “successfully prove that the Employer has not ceased or desisted, this Arbitrator believes that the Arbitrator in such matter should be allowed, given the repeated similar situations over a long period of time, to consider requests by the Union to recover such direct costs and damages it has incurred as the result of such conduct.” Colony Bay argues that “by threatening to award costs to the Union in the future, Arbitrator Barrett is clearly stating that Colony Bay will be punished if it fails to view his decision as binding on all future disputes involving the cleaning of ponds.” Colony Bay is correct that “absent an express provision in the collective bargaining agreement, the law of [the Fourth Circuit] does not permit an arbitrator to impose a punitive award or punitive damages.” *Island Creek*, 29 F.3d at 129. The plaintiff is mistaken,

however, in its conclusion that Arbitrator Barrett's award includes such impermissible punitive damages. The language of this portion of the award is merely non-binding precatory language—a recommendation to future arbitrators who may deal with these same parties and issues. Arbitrator Barrett merely notes that he “believes” that future arbitrators “should be allowed” to award costs. As the defendant argues, “contrary to the argument of Plaintiff, this award does not dispense with future arbitrations or result in punitive damages. Instead it merely suggests that future arbitrators, after finding a violation, consider the Company’s blatant and continuing pattern of violating the extant collective bargaining agreement in fashioning a remedy.” The court agrees with the defendant Union and FINDS that this portion of the award is merely a recommendation that future arbitrators take notice of the long history of conflict present between the two parties.

IV. Conclusion

Accordingly, the court FINDS that both Arbitrator Barrett's decision and award of relief draw their essence from the NBCWA. In so doing, the court DENIES the plaintiff's motion for summary judgment and declines to vacate the arbitration decision at issue in this case. The court FINDS that the arbitration decision draws its essence from the NBCWA and that the award does not include impermissible punitive damages. Thus, the court GRANTS the defendant's motion for summary judgment.

The court DIRECTS the Clerk to send a copy of this Order to counsel of record and any unrepresented party and DIRECTS the Clerk to post this unpublished opinion at <http://www.wvwd.uscourts.gov>.

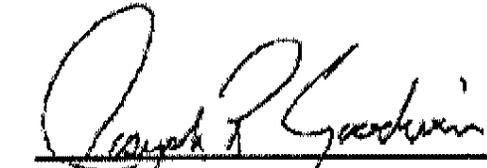
ENTER: November 5, 2004

Albert F. Sebok
Charleston, WV

For Plaintiff

Charles F. Donnelly
Charleston, WV

For Defendant



JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE