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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MULTICARE HEALTH SYSTEM, Plaintiff-Appellee, v. WASHINGTON STATE NURSES ASSOCIATION, Defendant-Appellant.	)	No. 16-36048 D.C. No. 3:16-cv-05053-BHS MEMORANDUM*
MULTICARE HEALTH SYSTEM, Plaintiff-Appellant, v. WASHINGTON STATE NURSES ASSOCIATION, Defendant-Appellee.	)	No. 17-35206 D.C. No. 3:16-cv-05053-BHS

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted July 10, 2018

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Seattle, Washington

Before: FERNANDEZ and NGUYEN, Circuit Judges, and RAKOFF,** District Judge.

Washington State Nurses Association ("WSNA") appeals the district court's judgment which vacated the remedies that the Arbitrator granted to WSNA arising out of a settlement agreement ("the Agreement") with MultiCare Health System ("MultiCare") (No. 16-36048). MultiCare appeals the district court's denial of its motion to remand the matter to a different arbitrator (No. 17-35206). We reverse as to No. 16-36048 and affirm as to No. 17-35206 and remand.

(1) Among other things, the Agreement provided that MultiCare would "adopt mechanisms, practices or policies that assure each [nurse] is relieved of patient care duties for a 15-minute rest period every four hours of work" and that "[i]n no case shall the mechanism used result in a violation of the staffing plan . . . ." WSNA asserted that MultiCare had violated those provisions. The Arbitrator agreed. He issued a remedial award that precluded the use of "the buddy system as a means to provide rest breaks," and also required assignment of a "reserve or float nurse" for the purpose of assuring compliance with the Agreement. MultiCare filed a complaint seeking vacatur of that award and the

**The Honorable Jed S. Rakoff, Senior United States District Judge for the Southern District of New York, sitting by designation.

district court granted that relief as to the buddy system portion of the award, but, essentially, declined to rule on the reserve or float nurse portions. WSNA asserts that the district court erred. We agree.

Arbitration for the resolution of disputes—especially those related to labor problems—is favored by public policy and as a concomitant of that, judicial review is limited. *See Phx. Newspapers, Inc. v. Phx. Mailers Union Local 752*, 989 F.2d 1077, 1080 (9th Cir. 1993). In general, a court may not vacate an arbitrator's award based upon the court's view of the merits or because the court disagrees with the remedies selected by the arbitrator. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36–38, 108 S. Ct. 364, 370–71, 98 L. Ed. 2d 286 (1987); *Sw. Reg'l Council of Carpenters v. Drywall Dynamics, Inc.*, 823 F.3d 524, 531–33 (9th Cir. 2016). In fact, "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." *United Paperworkers*, 484 U.S. at 38, 108 S. Ct. at 371. Certainly, an award will not be confirmed if it does not "draw its essence from the contract" but instead "simply reflect[s] the arbitrator's own notions of industrial justice." *Id.*; *see also United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 1361, 4 L. Ed. 2d 1424 (1960); *Stead Motors of Walnut Creek v.*

Auto. Machinists Lodge No. 1173, 886 F.2d 1200, 1205–06 & n.6 (9th Cir. 1989) (en banc). However, "[d]eference is the rule; rare indeed is the exception." *Stead Motors*, 886 F.2d at 1209; *see also United Steelworkers*, 363 U.S. at 597–98, 80 S. Ct. at 1361; *Sprewell v. Golden State Warriors*, 266 F.3d 979, 986–87 (9th Cir. 2001); *Ass'n of W. Pulp & Paper Workers, Local 78 v. Rexam Graphic, Inc.*, 221 F.3d 1085, 1091 (9th Cir. 2000); *SFIC Props., Inc. v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. Lodge 94*, 103 F.3d 923, 924–26 (9th Cir. 1996).

The district court erred in the application of those principles when it determined that the essence of the Agreement did not allow the Arbitrator to exclude use of the buddy system. The Arbitrator did find that MultiCare wanted the Agreement to specifically permit use of the buddy system. However, he also found that WSNA opposed inclusion of that specific provision, and it was left out. By contrast, the Agreement did provide that whatever method was used, nurses were to have their fifteen-minute breaks and that the staffing plan could not be violated. The Arbitrator determined that, as a matter of fact, the buddy system was unable to meet those conditions in practice and was "nonviable." Indeed, the buddy system violated the very purpose (essence) of the Agreement. The district court erred when it overruled the Arbitrator's decision to enjoin the practice that violated the Agreement.

(2) MultiCare also objected to the Arbitrator's remedy which directed assignment of "a reserve or float" nurse to assure compliance with the Agreement. While the district court considered that objection, it declined to rule on it because it had vacated the award on the buddy system ground.

As we see it, however, the same principles guide us as to that portion of the award. MultiCare was opposed to any requirement "that would mandate increased staffing," and no requirement for increases was included in the Agreement. However, no possibilities for meeting the terms of the Agreement were suggested to the Arbitrator other than MultiCare's rigid demand that it keep the buddy system. WSNA suggested some kind of relief system, but MultiCare opposed that. As it is, the Arbitrator did not order an increase in the number of staff nursing positions. The district court opined that "increased staffing" was itself an ambiguous phrase that should have been considered by the Arbitrator. If it is an ambiguous phrase, the Arbitrator implicitly resolved the ambiguity when he made his award. In any event, if the basis of an award is ambiguous, that does not permit a district court to vacate the award itself. *See W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 764, 103 S. Ct. 2177, 2182, 76 L. Ed. 2d 298 (1983); *United Steelworkers*, 363 U.S. at 598, 80 S. Ct. at 1361; *Edward Hines Lumber Co. of Or. v. Lumber &*

Sawmill Workers Local No. 2588, 764 F.2d 631, 634 (9th Cir. 1985). Again, we see no basis for overturning the Arbitrator's award.

(3) We agree with the district court that MultiCare has not shown that the Arbitrator exhibited any bias, partiality, or other wrongdoing that would support an order reassigning this case to a different arbitrator for any further proceedings that might be required.

We REVERSE the district court's order to vacate the award made by the Arbitrator (No. 16-36048) and REMAND with instructions to confirm the award. We AFFIRM the district court's refusal to direct assignment of the matter to a different arbitrator (No. 17-35206).

Costs are to be taxed against MultiCare Health System.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk