Nos. 05-2574/05-3553/06-4256

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AMERITECH CORPORATION d/b/a SBC MIDWEST, Plaintiff-Appellant, v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 21, AFL-CIO Defendant-Appellee.	)	Appeal from the United States District Court Northern District of Illinois Eastern Division No. 04 C 6149 Hon. Samuel Der-Yeghiayan

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BRIEF FOR PLAINTIFF-APPELLANT AMERITECH CORPORATION

Michael A. Warner, Jr.
FRANCZEK SULLIVAN P.C.
300 South Wacker Drive
Chicago, Illinois 60606
(312) 986-0300

Stephen J. Sferra
LITTLER, MENDELSON, P.C.
Erieview Tower
1301 East Ninth Street
Cleveland, Ohio 44114
(216) 696-7600

Stephen M. Shapiro
Timothy S. Bishop
Jeffrey W. Sarles
MAYER, BROWN, ROWE & MAW LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Attorneys for Plaintiff-Appellant

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Appellate Court No: 05-2574/05-3553/06-4256

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Ameritech Corporation n/k/a AT&T Teleholdings, Inc. f/k/a SBC Midwest

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer, Brown, Rowe & Maw LLP; Franczek Sullivan P.C.; Duvin, Cahn & Hutton; Littler Mendelson, P.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

AT&T Teleholdings, Inc., which is wholly owned by AT&T Corp.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: _____ Date: 02/07/07

Attorney's Printed Name: Stephen M. Shapiro

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. R. 3(c). Yes X No _.

Address: Mayer, Brown, Rowe & Maw LLP, 71 South Wacker Drive, Chicago, Illinois 60606

Phone Number: (312) 782-0600 Fax Number: (312) 701-7711

E-Mail Address: sshapiro@mayerbrownrowe.com

Attorney's Signature:_____ Date: 02/07/07

Attorney's Printed Name: Timothy S. Bishop

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. R. 3(c). Yes _ No X .

Address: Mayer, Brown, Rowe & Maw LLP, 71 South Wacker Drive, Chicago, Illinois 60606

Phone Number: (312) 782-0600 Fax Number: (312) 701-7711

E-Mail Address: tbishop@mayerbrown.com

Attorney's Signature:_____ Date: 02/07/07

Attorney's Printed Name: Jeffrey W. Sarles

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. R. 3(c). Yes _ No X .

Address: Mayer, Brown, Rowe & Maw LLP, 71 South Wacker Drive, Chicago, Illinois 60606

Phone Number: (312) 782-0600 Fax Number: (312) 701-7711

E-Mail Address: jsarles@mayerbrownrowe.com

Attorney's Signature:_____ Date: 02/07/07

Attorney's Printed Name: Michael A. Warner, Jr.

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. R. 3(c). Yes No X .

Address: Franczek Sullivan P.C., 300 South Wacker Drive, Suite 3400, Chicago, Illinois 60606

Phone Number: (312) 986-0300 Fax Number: (312) 986-9192

E-Mail Address: maw@franczek.com

Attorney's Signature:_____ Date: 02/07/07

Attorney's Printed Name: Stephen J. Sferra

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. R. 3(c). Yes _ No X .

Address: Littler Mendelson, P.C., Erieview Tower, 1301 E. Ninth Street, Cleveland, Ohio 44114

Phone Number: (216) 696-7600 Fax Number: (216) 696-2038

E-Mail Address: ssferra@duvin.com

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over plaintiff-appellant's claim seeking to vacate an arbitration award pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 185(c). See *Ethyl Corp.* v. *United Steelworkers of Am.*, 768 F.2d 180, 184 (7th Cir. 1985). The district court entered summary judgment for defendant-appellee on May 9, 2005. Plaintiff-appellant timely filed its notice of appeal on May 27, 2005.

The district court also had jurisdiction to consider plaintiff-appellant's motion for relief from judgment under Fed. R. Civ. P. 60(b). *Boyko* v. *Anderson*, 185 F.3d 672, 675 (7th Cir. 1999). The district court denied that motion on November 29, 2006, and plaintiff-appellant timely filed its notice of appeal on December 7, 2006. This Court has jurisdiction over these consolidated appeals pursuant to 28 U.S.C. § 1291.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Circuit Rule 34(f), plaintiff-appellant respectfully requests oral argument. These consolidated appeals raise complex issues of substantial importance with respect to multiple and overlapping labor arbitration awards and their enforcement by district courts. Oral argument will enable the parties adequately to address these issues and respond to the Court's questions and concerns.

ISSUES PRESENTED FOR REVIEW

Plaintiff-appellant Ameritech Corporation (the "Company") and defendant-appellee International Brotherhood of Electrical Workers, Local 21 (the "Union") are parties to a collective bargaining agreement (the "Agreement" or "CBA"). Paragraph 1.03 of the Agreement recognizes the Company's continuing right to hire subcontractors to perform work that has been "customarily contracted out." There is only one limit on this right: "If such work to be contracted out will cause layoffs, or part-timing or prevent the rehiring of [laid-off] employees with seniority standing, such contracting out of work will be reviewed by the Company with the Union and allotted on the basis of what the Company is equipped to perform and what the employees represented by the Union are able and trained to perform."

In this case, arbitrator Richard Kasher ordered the Company to engage in the process of reviewing and allotting subcontracted work to laid-off Union employees without finding that such subcontracting had caused the layoffs or would prevent the rehiring of those employees, as expressly required by paragraph 1.03. Arbitrator Kasher subsequently issued a letter stating that the review and allotment process should include subcontracting work outside the bargaining unit. The parties disputed the effect of the Kasher award and agreed to submit the matter

to arbitrator Robert Perkovich, who concluded that the review and allotment process could not be invoked because there was no evidence that subcontracting had prevented rehiring. The Union nevertheless maintains that the Kasher award and letter remain enforceable.

The questions presented are:

(1) Does arbitrator Kasher's award fail to draw its essence from the Agreement and exceed the bounds of his contractual authority because it ignores the Company's right to subcontract absent a finding that subcontracting would cause layoffs or prevent the rehiring of Union employees?

(2) Does arbitrator Kasher's post-award letter fail to draw its essence from the Agreement and exceed the bounds of his contractual authority because it requires the Company to review and allot work to laid-off employees even though that work is outside the scope of the Agreement and the Union's bargaining unit?

(3) Now that arbitrator Perkovich has resolved the parties' dispute by denying any right to review and allotment, should the district court's judgment enforcing arbitrator Kasher's award be vacated?

STATEMENT OF THE CASE

The Company seeks to vacate an arbitration award by Richard Kasher. This award was the second to address the Company's layoff of

Union personnel in December 2002. In the first award (SA12-SA31), which preceded the layoff, arbitrator John Flagler ruled that the Agreement's express language requires a showing that subcontracting would cause layoffs or prevent rehiring of laid-off employees before the Company's right to subcontract could be restricted.[1] Because he found that the proposed layoff was caused by unprecedented adverse business and economic conditions—not by subcontracting—Flagler concluded that he could not order the Company to review and allot subcontracting work to laid-off Union employees.

Nevertheless, in a second award (SA32-SA71), arbitrator Kasher ordered the commencement of the review and allotment process without considering or applying the causation prerequisite to that remedy. In a subsequent letter (SA71a-SA71b), Kasher extended his award to include subcontracting work outside the scope of the Union's bargaining unit.

The Company filed a complaint asking the district court to vacate the Kasher award. The Union responded with a counterclaim asking the court to declare that the Company was not in compliance with the award and to order compliance. On cross-motions for summary judgment, the court granted the Union's motions for summary judgment on both its

[1] Material in the Required Appendix bound with this brief is cited as A__. Material in the Separate Appendix is cited as SA__. Other record material is cited by docket sheet number as R__.

counterclaim and the Company's claims. A1-A9. The Union subsequently moved the district court, on two occasions, for an order enforcing the judgment and holding the Company in contempt, while the Company moved on each occasion for a stay pending appeal. The district court denied all these motions. A11-A14.

The Company appealed the district court's summary judgment to this Court (No. 05-2574), and the Union appealed the denial of its motions for enforcement and contempt (No. 05-3553). After consolidating the two appeals, this Court suspended briefing pending a settlement conference, and the parties agreed to have the meaning of paragraph 1.03 finally determined in a third arbitration. In that proceeding, arbitrator Robert Perkovich followed arbitrator Flagler's interpretation of the Agreement and concluded that the Company was not required to engage in review and allotment because no evidence had been presented to show that subcontracting had prevented the rehiring of laid-off employees. SA82-96. In light of the Perkovich award, the Company filed a motion under Fed. R. Civ. P. 60(b) asking the district court to vacate its judgment. The court denied the motion (A15), and the Company again appealed (No. 06-4256). This Court then consolidated that appeal with the two previously consolidated appeals.

STATEMENT OF FACTS

Although judicial review of arbitral awards is narrow, the following facts show that, under Seventh Circuit and Supreme Court authority, the Kasher award and the district court judgment enforcing it must be vacated.

The collective bargaining agreement

This dispute over the Company's right to subcontract following a layoff arises under the parties' collective bargaining agreement, which is the product of careful negotiation and compromise between the Company, the Union, and their predecessors. As relevant here, the Agreement contains provisions addressing the scope of the bargaining unit, the Company's right to subcontract, the parties' rights in the event of a layoff, and the arbitration of disputes.

With respect to the bargaining unit, "[t]he Company recognizes the Union as the exclusive bargaining agent" for employees in parts of Illinois and Indiana "whose occupations are represented by the Union and whose titles and classifications" are listed in appendices to the Agreement. SA2 ¶ 1.01. The Agreement "covers the work customarily performed" by these employees, which generally involves delivery, maintenance, and marketing of telecommunications services. *Id.* ¶ 1.03; R1, Tab A, Appx. B.

The Agreement also confirms the Company's right to continue using outside contractors to perform certain work that also may be performed by bargaining unit employees. Paragraph 1.03, headed "Contracting Out," which is at the core of the parties' dispute, provides in pertinent part:

> However, during the tenure of this Agreement, the Company may continue to contract out such work as is now customarily contracted out and has been customarily contracted out by [the Company and its predecessors] under the previous collective bargaining agreements covering bargaining units represented by [the Union and its predecessors]. *If such work to be contracted out will cause layoffs, or part-timing or prevent the rehiring of employees with seniority standing*, such contracting out of work will be reviewed by the Company with the Union and allotted on the basis of what the Company is equipped to perform and what the employees represented by the Union are able and trained to perform.

SA2 ¶ 1.03 (emphasis added).

This provision, which has been a part of the Agreement since 1947, "represents a broad grant of authority for the [C]ompany to assign work to bargaining unit employees" and "to also contract out the same work" if it has customarily done so. SA17, SA28. There are important business reasons for this authority to subcontract. The Company uses subcontractors to perform jobs for which its employees are not conveniently located or properly trained and equipped, and it requires subcontractors to assume the risk of damaging utility lines or causing

harm to private parties. SA83; R3, Tab 1, at 26. That subcontracting authority is subject to only one condition: that such subcontracting will not result in layoffs or prevent the rehiring of laid-off employees. If that condition is satisfied—and only if that condition is satisfied—the Company must engage in a review and allotment process with the Union. SA2 ¶ 1.03.

The Agreement establishes an internal grievance procedure for addressing differences between the Company and the Union regarding the interpretation or application of the Agreement. SA5-SA9 ¶¶ 13.10-13.15. If this procedure does not resolve the dispute, the Agreement provides for arbitration. SA9-SA11 ¶¶ 13.17-13.28. "The right to invoke arbitration" extends "to matters which involve * * * [t]he interpretation or application of any of the terms or provisions of this Agreement, unless excluded by specific provisions of this Agreement." SA9 ¶ 13.16.

The Agreement also sets express limits on the arbitrator's authority. It provides that "[t]he arbitrator shall have no authority to add to, subtract from, or change any of the terms of this Agreement." SA10 ¶ 13.22. In addition, "[t]he hearing and decision of the arbitrator shall be confined to the issue or issues presented and the arbitrator shall not, as part of any decision, impose upon the Parties any obligation to arbitrate a subject which has not been agreed upon in this Agreement as a topic

for arbitration." *Id.* ¶ 13.19. The arbitrator's decision is "final and binding upon the Parties" but remains "subject to law" (*id.* ¶ 13.20), including the law providing for judicial review in appropriate cases. See pp. 27-32, *infra*.

The 2002 layoff

These provisions of the Agreement were called into play in September 2002, when the Company announced the first layoff in its history. The undisputed facts show that this layoff was caused not by subcontracting, but "exclusively by compelling business and economic conditions of a type never before experienced" by the Company. SA14. During this time, the telecommunications industry was "struggling to survive one of the great business busts in history." *Ibid.* In the year prior to September 2002, the Company's parent, SBC, saw its market capitalization drop $70 billion—a loss of more than 30% of its market value. *Ibid.* SBC's revenues from its core wireline business were down $1 billion in the first half of 2002 compared to 2001. *Ibid.* In Illinois, the Company's wireline revenues dropped 16% during the first six months of 2002. *Ibid.*

Federal Communications Commission regulations that imposed heavy burdens on the Bell operating companies, along with rate limits imposed by state public utility commissions, accelerated the erosion of

the Company's business. SA14. Because these regulations required the Company to grant competitors access to its network at artificially low prices, the Company lost 2,900,000 retail access lines to competitors in the midwest region by the third quarter of 2002. *Ibid.*; see *AT&T Commc'ns of Illinois, Inc.* v. *Illinois Bell Tel. Co.*, 349 F.3d 402, 404-408 (7th Cir. 2003).

Given this significant loss of customers and revenue, the Company sharply decreased its 2003 budget for infrastructure construction and maintenance. SA15. In addition, the loss of lines reduced the work available for installation and repair technicians. SA14. The Company determined that these developments required it to eliminate 755 positions in three job title groups that would have performed the work: installation and repair and cable splicing technicians; maintenance and field support administrators; and technical specialists and clerical associates. SA13; R14 ¶ 14 (uncontested). Through negotiations with the Union, the Company reduced the number of employees to be laid off to 600, almost all of them cable splicing and installation and repair technicians. R3, Tab 2, at 73-76, 79.

At the time this layoff occurred in late December 2002, the Company was subcontracting out various types of bargaining unit work that it had customarily contracted out, and also was contracting out

various types of work outside the scope of the bargaining unit, including maintenance of air-conditioning systems in the Company's buildings, trash removal, painting, and cutting grass. SA46-SA48.

Arbitrator Flagler's award

Before the layoff was implemented, the Union filed a grievance, which the parties agreed to resolve through an accelerated arbitration process. They presented the following issue to arbitrator John Flagler:

> Does the Company have the right to layoff members of the Bargaining Unit while continuing to contract out work that employees are able and trained to perform, as provided under Article 1.03 of the Collective Bargaining Agreement?

SA12. Arbitrator Flagler concluded that the Company did have that right.

Flagler examined paragraph 1.03 element by element. He concluded that the sentence stating that "the Company may continue to contract out such work as is now customarily contracted out and has been customarily contracted out" is "a broad grant of authority" for the Company to continue subcontracting bargaining unit work just as it had customarily done in the past. SA28. The next clause—"If such work to be contracted out will cause layoffs, or part-timing or prevent the rehiring of employees with seniority standing"—introduces a conditional limitation on that authority. If and only if that condition is met, Flagler concluded, the Company and Union must review the contracting out and allot the

subcontracted work to Union employees "on the basis of what the Company is equipped to perform" and what the employees "are able and trained to perform." SA29-SA30. The words "to be" signal that this limitation applies only "prospectively" to new contracting out that would "cause layoffs" or "prevent rehiring." SA29-SA30.

Flagler accordingly held that the "threshold issue" is: "Will any prospective contracting out cause layoffs * * * or prevent the rehiring of employees with seniority standing?" SA29-SA30. Only when this causation prerequisite is met can the arbitrator order the parties to begin the review and allotment process. SA30.

Using this framework, Flagler concluded that the Company's right to subcontract was not limited under the circumstances of the Ameritech layoff. SA31. Flagler found the record evidence "abundantly and unequivocally clear that the pending layoffs * * * were neither caused by, nor did they result from, any contracting out activity currently engaged in or practiced in the past." SA29. Indeed, there was no evidence that subcontracting had anything to do with the layoffs. Rather, the Company showed that the layoffs "resulted solely from a severe, precipitous and continuing decline in the Company's business." *Ibid.* Because the causation prerequisite had not been established, Flagler held that the limitation on subcontracting did not apply and hence "no remedy of

remanding to the parties for review and allotment can be directed by the arbitrator." SA31. He therefore denied the Union's grievance on December 2, 2002. *Ibid*. Later that month the Company implemented the planned layoff.

Arbitrator Kasher's award

Immediately following the layoff, the Union sought to re-litigate the subcontracting issue before a different arbitrator. It filed another grievance under paragraph 1.03, arguing that the Company could not continue subcontracting bargaining unit work while Union members able and trained to perform that work were on layoff status. This grievance was submitted to arbitrator Richard Kasher in March 2004.

In advance of the arbitration hearing, the Company provided the Union with extensive discovery regarding post-layoff subcontracting that could have been used to address the threshold causation issue: whether post-layoff subcontracts would prevent the rehiring of laid-off Union employees with seniority standing. R3, Tab 1, at 10-11; *id.*, Tab 2, at 23-24; *id.*, Tab 4, at 8 n.4. Once again, however, the Union failed to offer any facts, argument, or expert opinion purporting to show a causal link

between such subcontracting and the Company's inability to rehire these employees.[2]

By contrast, the Company pointed to undisputed evidence that its inability to rehire resulted solely from a continuing erosion of its core business in 2003, not from subcontracting. SA39-41; R3, Tab 4, at 10-11. SBC's stock had continued to drop, losing 35% of its value from the beginning of 2002 to the end of 2003. In the midwest region, the Company's wireline revenues dropped a further 8.8% and it lost an additional 1.8 million retail access lines in 2003. As a result, installation and repair work orders continued to decline and the Company further reduced its capital expenditures for outside plant construction and maintenance. *Ibid*. The Company also offered uncontradicted evidence that its post-layoff subcontracting in 2003 was consistent with its customary practice. R3, Tab 3, at 250-52; *id.*, Tab 4, at 29.

Despite this evidence, arbitrator Kasher issued an award in June 2004 that compelled the Company to begin the review and allotment process—without any finding that the causation prerequisite had been satisfied. After finding that the Company had continued to contract out

[2] As a result of negotiations with the Union conducted outside the Agreement, the Company did offer available customer service jobs in Illinois to laid-off Union employees. R3, Tab 2, at 86-89.

work, Kasher simply leaped to the conclusion that review and allotment were required:

> The facts before this Arbitrator establish that subsequent to the December, 2002 layoffs the Company has continued to contract out work. While that contracting has not, apparently, resulted in additional reductions in force among the members of the bargaining unit, the Union may justifiably *argue* that such "new" contracting has "prevented the rehiring of employees with seniority standing."
>
> Based upon that *argument*, the Union is entitled to compel the review procedure contemplated by [paragraph] 1.03. Whether there should be an allotment of certain new contracted out work to members of the bargaining unit would depend upon the parties[']' agreement of "what the Company is equipped to perform and what the employees represented by the Union are able and trained to perform."

SA68 (emphasis added).

Kasher acknowledged the Flagler award, but he did not even consider—much less disagree with—Flagler's holding that paragraph 1.03 requires *proof* of causation before review and allotment may be required. Rather, Kasher simply noted that Flagler's award was not *res judicata* and then ordered the parties to begin the review and allotment process:

> [I]t is this Arbitrator's finding that the doctrine of *res judicata* does not apply in this case.
>
> The question of whether new contracting out of work subsequent to the implementation of the December 27, 2002 layoffs properly triggered the Union's right to

> demand a review and allotment process was not decided by Arbitrator Flagler.
>
> Accordingly, it is this Arbitrator's finding that the Union has the right under [paragraph] 1.03 to demand such a review and allotment process.

SA69. Kasher ordered the Company, as part of this process, "to provide the Union with sufficient identifying data concerning post-December 27, 2002 subcontracting." SA71. He also emphasized the preliminary nature of his award, noting that evidence about "the nature of the work being contracted out" had been "offered prematurely" and that "no such claims [are] presently ripe for adjudication." SA70.

Arbitrator Kasher's letter amending his award

Following this award, the Union demanded that the Company produce information regarding *all* of its subcontracting, including contracts for work outside the job title groups of the laid-off employees and outside the scope of the bargaining unit. R14 ¶ 23 (uncontested). When the Company resisted this demand as overbroad, the Union's counsel wrote a series of letters asking arbitrator Kasher to intervene.

The Union requested "that the Arbitrator resolve the dispute between the parties over the subcontracting information and documentation which must be provided by the Company." R1, Tab G. Specifically, it asked arbitrator Kasher to "determine whether the Company's restrictions on the contracted work it is prepared to review

with the Union is [*sic*] in compliance with your Award" (*id.*, Tab D), and to issue a directive "requiring the Company to allow the Union to review all the documents relating to the contracting of all work since the subject layoffs." *Id.*, Tab F. The Company countered that the arbitrator's jurisdiction was *functus officio*, having terminated with the issuance of his award. *Id.*, Tab E.

In response to the Union's request, arbitrator Kasher issued a letter to the parties. SA71a-71b. Kasher's letter disavowed any continuing jurisdiction over the Union's grievance, agreeing with the Company that his status was *functus officio*. SA71b. Nevertheless, he proceeded to broaden the award's scope significantly, stating that his order to produce information concerning subcontracting "makes no distinction as to whether * * * subcontracts were let by one department of the Company as opposed to another." *Ibid.* Kasher thus gave the Union what it wanted: language that the Union insists means that the jobs to be allotted are not confined to the bargaining unit. See R46, Tab B, ¶ 2.

Arbitrator Kasher's award and letter create severe practical problems

The Union maintains that Kasher's award and subsequent letter require the Company to engage in a broad review process, producing information on all contracts with any outside contractor in Illinois or Northwest Indiana, including the number of man-hours required to

perform each contract. R46, Tab B, ¶ 2. These contracts involve disparate functions completely separate from the Company's core telecommunications business and from any work performed by the bargaining unit. They include, for example, plumbing, landscaping, snow plowing, trash removal, vending machine servicing, food service, painting, road construction, animal control, and various other services that the Company does not perform on its own and lacks the necessary equipment to perform. *Id.* ¶ 4; SA46-SA48, SA52.

Because the Company does not possess much of this information and any attempt to compile it would involve a massive undertaking, compliance with arbitrator Kasher's award and letter on the Union's terms would be "a physical and logistical impossibility." R46, Tab B, ¶¶ 5-6. The Company has already produced thousands of pages of documents relating to work contracted out from the groups impacted by the layoffs, which is a mere fraction of the material demanded by the Union. *Id.* ¶ 5. The Company possesses information identifying the general terms and conditions of each job and the amounts paid to the contractor. But most of the information sought by the Union, which includes the number of employee hours and type of equipment required for outside contractors to perform the work, is not within the possession or control of the Company. *Id.* ¶ 6. In short, the Union is using the

Kasher award to claim a right to receive a huge amount of information that extends well beyond the terms of the Agreement, most of which the Company cannot secure.

The district court rulings

By cross-motions for summary judgment in the district court, the Company sought to vacate arbitrator Kasher's award and letter while the Union sought to enforce them. R12; R16. In denying the Company's motion and granting the Union's motion, Judge Der-Yeghiayan repeatedly emphasized that judicial review of arbitration awards is narrow. A4-A5. The district court failed, however, to analyze arbitrator Kasher's award under the standards applied by this Court and the Supreme Court. Though the court paid lip service to the principles that an arbitrator's award must draw its essence from the agreement and actually interpret the contract, it held these requirements were satisfied merely because arbitrator Kasher "based his decision on the CBA, in particular [paragraph] 1.03." A7. Beyond this generalized conclusion, the court did not further examine the arbitrator's ruling or the Agreement to determine whether, as the Company maintains, arbitrator Kasher ignored the key contractual precondition to the review and allotment process. In failing to do so, the court did not enforce the requirement that the award must draw its essence from the agreement, nor did the

court apply established principles governing the scope of judicial review. The district court also failed to address the Company's arguments that arbitrator Kasher's post-award letter exceeded his authority.

After the district court entered summary judgment, the Union twice moved to hold the Company in contempt for failing to produce all the requested information. R31; R42. The court denied both motions but also declined to stay the effectiveness of its order. See A11-A14.

Arbitrator Perkovich's award

Both parties appealed, and this Court suspended briefing pending a settlement conference under Circuit Rule 33. The parties subsequently agreed to submit their dispute to a new arbitration before Robert Perkovich. SA72. In a joint pre-conference statement signed by counsel for both parties, the Company and the Union agreed that they were now requesting "a *final* resolution of the proper interpretation and application of [paragraph] 1.03 * * * relative to [the 2002 layoffs]." SA73 (emphasis added).

Arbitrator Perkovich issued his award in two phases. In the first phase, he resolved the parties' dispute over the meaning of paragraph 1.03 in favor of the Company by interpreting the provision as follows:

> The phrase "prevent the rehiring of employees with seniority standing" * * * is a positive statement of the Employer's right to contract out bargaining unit work consistent with its customary practice. That right is

> limited only if the Union first establishes a *direct causal nexus* between prospective or new contracting out of bargaining unit work and the failure of the Employer to reemploy laid off bargaining unit employees with recall rights. The Union must prove this causation element *before* the parties can be compelled to engage in the remedial review and allotment process.

SA87-SA88 (emphasis added). Perkovich reasoned that this interpretation had been adopted previously by arbitrator Flagler and thus "became a part of the parties' collective bargaining agreement," making it "unnecessary to examine Arbitrator Kasher's award." SA87 & n.6d.

In the second phase, Perkovich considered whether the Union employees were "not rehired *because* the Employer contracted out" or "for some other reason." SA94-SA95. After examining the parties' evidence, he found that subcontracting had "decreased when compared to pre-layoff levels" and that the subcontractors' work "has not included tasks that they did not perform in the past." SA95. In addition, the adverse business conditions that caused the 2002 layoffs had "not improved sufficiently to conclude that laid off employees have not been recalled for any reason other than financial considerations." *Ibid.* Accordingly, Perkovich concluded: "Section 1.03 does not automatically shelter from contracting out during a layoff any work that bargaining unit employees have performed or are able and trained to perform. With regard to whether the Union has met its burden of meeting the test of

causation, I find that it has not. Thus, the review and allotment process is not in play." SA96.

The Company's Rule 60(b) motion

The Company then filed a motion under Fed. R. Civ. P. 60(b), asking the district court to vacate its judgment enforcing the Kasher award in light of the subsequent Perkovich award. R60. The Company's motion explained that district courts in this Circuit have jurisdiction to consider and indicate their inclination to grant a Rule 60(b) motion while a case is on appeal. *Id.* at 6 (citing *Boyko*, 185 F.3d at 675). Nevertheless, the district court summarily denied the motion on the sole ground that "Plaintiff's appeal before the 7th Circuit Court of Appeals is still pending." A15.

SUMMARY OF ARGUMENT

This Court should reverse the erroneous judgment of the district court and remand with instructions to vacate arbitrator Kasher's award. Without considering applicable Supreme Court and Seventh Circuit precedent, the district court upheld an award that violates two important legal limits on arbitral awards.

First, an arbitrator's task is to interpret and apply the parties' collective bargaining agreement. If an arbitrator does not interpret or apply a governing contract provision, his award does not draw its

essence from the agreement and must be vacated. See pp. 28-30, *infra*. Here, arbitrator Kasher did not interpret or apply the text of the Agreement's relevant clause, which allows review and allotment *only* "[i]f such work to be contracted out will cause layoffs * * * or prevent the rehiring of employees." SA2 ¶ 1.03. Kasher's disregard of this express causation prerequisite eviscerated the Company's bargained-for right to subcontract freely absent proof that such subcontracting had caused layoffs or prevented rehiring. When an arbitrator disregards a contractually-prescribed right to subcontract in this manner, his award must be vacated, as courts of appeals have consistently recognized following *Clinchfield Coal Co.* v. *United Mine Workers*, 720 F.2d 1365 (4th Cir. 1983).

Second, courts must ensure that arbitrators do not exceed the limits of their contractual authority. See pp. 30-32, *infra*. As this Court has recognized, an arbitrator may exceed those limits by granting a burdensome remedy when the contractual prerequisite to doing so has not been met. *Amax Coal Co.* v. *United Mine Workers*, 92 F.3d 571, 576 (7th Cir. 1996). That is precisely what arbitrator Kasher did here. The Agreement conditions an arbitrator's remedial authority to order a review of subcontracting on a finding that such subcontracting will prevent rehiring. Yet Kasher ordered review and allotment without making that

finding. Because this order exceeded the powers delegated to Kasher by the parties, his award cannot stand.

Under these same legal standards, Kasher's letter amending his award also must be vacated. That letter requires the Company to begin the review process by producing information on all post-layoff subcontracts even if they do not involve work customarily performed by employees within the bargaining unit. Kasher's authority was limited to interpreting and applying the terms of the Agreement, and those terms expressly cover only bargaining unit work.

By ordering a review that expanded the scope of the bargaining unit without interpreting the relevant language of this paragraph, Kasher's letter exceeded his authority and failed to draw its essence from the Agreement. The parties would never have agreed to the enormously burdensome and effectively boundless review he ordered had the question arisen during bargaining. See *Carpenter Local No. 1027* v. *Lee Lumber & Bldg. Material Corp.*, 2 F.3d 796, 799 (7th Cir. 1993). Kasher's letter amending his award further exceeded his authority because an arbitrator may not add to a party's obligations after an award is final. See *Anderson* v. *Norfolk & W. Ry.*, 773 F.2d 880, 883 (7th Cir. 1985).

The policies underlying the National Labor Relations Act support vacatur here. If arbitrators could disregard express contractual

conditions to imposing heavy burdens on a party, parties would be less willing to submit their controversies to arbitration. See *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 651 (1986). By acting to protect the integrity of the parties' contractual dispute resolution process, this Court will encourage the use of labor arbitration, encourage arbitrators to apply controlling contractual provisions in their awards, and enable the parties to address subcontracting as their Agreement specifies.

Alternatively, the district court's judgment should be vacated in light of the Perkovich award. That judgment was based on the Kasher award, which—as the subsequent Perkovich award has made clear—amounted to but an interim step in the arbitral resolution of the parties' dispute. Now that the Perkovich award, which was issued at the mutual request of the Company and Union, has conclusively resolved the issue giving rise to that dispute, the judgment should be vacated to ensure that a review and allotment obligation that no longer remains valid cannot be enforced. Allowing an inconsistent judgment that has been drained of any practical significance to remain in effect would promote confusion and disrupt the parties' implementation of a now conclusive arbitral resolution of their dispute.

STANDARD OF REVIEW

This Court reviews a district court's decision to grant or deny summary judgment *de novo*. *Amax Coal*, 92 F.3d at 574. In this case, the Company does not challenge arbitrator Kasher's interpretation of the Agreement. Rather, the matter at issue—which the district court did not analyze—is whether Kasher abdicated his duty as an arbitrator by ignoring key provisions of the Agreement regarding subcontracting and failing to interpret and apply them at all.

The district court should have evaluated this issue under two well-established standards. First, both this Court and the Supreme Court have held that "courts have no choice but to refuse enforcement of [an arbitral] award" that does not "draw[] its essence from the collective bargaining agreement." *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). "[A] decision to ignore or supersede language conceded to be binding allows a court to vacate the award." *Int'l Union of Operating Eng'rs* v. *J.H. Findorff & Son*, 393 F.3d 742, 745 (7th Cir. 2004).

Second, an arbitrator must "act[] within the scope of his authority." *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 38 (1987). If the arbitrator "exceed[s] the powers delegated to him by the parties," his award is not enforceable. *Ethyl Corp.* v. *United Steelworkers*, 768 F.2d

180, 184 (7th Cir. 1985). Kasher's award is subject to vacatur under both of these well-established limits on a court's usual deference to arbitral awards.

The denial of a Rule 60(b) motion is reviewed for abuse of discretion. *Castro v. Bd. of Educ.*, 214 F.3d 932, 934 (7th Cir. 2000). Yet "deferential review does not mean no review at all." *Money Store, Inc. v. Harriscorp Fin., Inc.*, 885 F.2d 369, 372 (7th Cir. 1989). The Court "must be satisfied that the district court's decision was guided by established principles of law." *Ibid.*

ARGUMENT

I. The District Court Failed To Apply The Legal Standards Governing Judicial Review Of Labor Arbitration Awards.

The district court failed to consider two questions that the Supreme Court and this Court have held are critical to determining the validity of an arbitration award: (1) whether the arbitrator interpreted and applied the agreement; and (2) whether he exceeded his contractual authority. Judge Der-Yeghiayan incorrectly reasoned that arbitrator Kasher's award should be enforced just because he purported to "bas[e] his decision on the CBA, in particular [paragraph] 1.03." A7. "Simply referencing the agreement is insufficient for [a] court to uphold the award. The Arbitrator must show that the award is rationally inferable in some logical way from the agreement." *Beaird Indus., Inc.* v. *Local 2297, Int'l Union*, 404 F.3d

942, 947 (5th Cir. 2005). Here, arbitrator Kasher entirely bypassed a key contractual requirement that precluded him from compelling review and allotment.

A. Judicial review of arbitral awards is narrow, but not a mere formality.

The narrow scope of judicial review of arbitration awards is well-established. *E.g.*, *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 509 (2001) (per curiam); *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 36 (1987). As this Court has explained,

> the question for decision by a federal court asked to set aside an arbitration award * * * is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred * * * [or] grossly erred in interpreting the contract; it is *whether they interpreted the contract*.

Int'l Union of Operating Eng'rs v. *J.H. Findorff & Son*, 393 F.3d 742, 745 (7th Cir. 2004) (emphasis added) (quoting *Hill* v. *Norfolk & W. Ry.*, 814 F.2d 1192, 1194-1195 (7th Cir. 1987)). Put another way, "the issue * * * is not whether the arbitrator's interpretation of the contract was correct but whether it was a bona fide interpretation of the contract." *Ethyl Corp.* v. *United Steelworkers*, 768 F.2d 180, 187 (7th Cir. 1985). Labor lawyers have come to understand the limited nature of this review, as evidenced

by studies showing that less than 1% of labor arbitral awards are challenged in court (of which 26-33% are vacated).[3]

While federal court review of labor arbitral awards is narrow in scope, it is not merely a formality. It serves as an important deterrent to and remedy for labor arbitration awards that exceed the arbitrator's authority under the collective bargaining agreement, and it advances the National Labor Relations Act's policy of safeguarding parties' private agreements. See Part IV, *infra*. To vindicate these policies, this Circuit and the Supreme Court have recognized meaningful limits on arbitral awards that the district court failed to apply here.

B. When an arbitral award fails to draw its essence from the parties' agreement, it must be vacated.

One important limit is that "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." *Enterprise Wheel*, 363 U.S. at 597. Therefore, "his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts

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[3] See Michael H. LeRoy & Peter Feuille, *The Steelworkers Trilogy & Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 INDUS. REL. L.J. 78, 83, 103 (1991); Calvin William Sharpe, *Judicial Review of Labor Arbitration Awards: A View from the Bench*, ARBITRATION 1999: QUO VADIS? THE FUTURE OF ARBITRATION & COLLECTIVE BARGAINING 141-142 (Proceedings of the 52nd Annual Meeting of the National Academy of Arbitrators, Jay E. Grenig & Steven Briggs, eds., 2000).

have no choice but to refuse enforcement of the award." *Ibid.* In other words, an arbitral award "fails to draw its essence from the collective bargaining contract" and will be vacated if "it exceeds the confines of interpreting and applying the contract." *Tootsie Roll Indus., Inc.* v. *Local Union No. 1, Bakery Workers' Int'l Union*, 832 F.2d 81, 83 (7th Cir. 1987).

Under this test, "arbitral action contrary to express contractual provisions will not be respected." *Polk Bros.* v. *Chicago Truck Drivers Union*, 973 F.2d 593, 599 (7th Cir. 1992). Accordingly, "[t]he arbitrator may not ignore the plain language of the contract." *Misco*, 484 U.S. at 38. Furthermore, "[a] party can complain if the arbitrators don't interpret the contract—that is, if they disregard the contract and implement their own notions of what is reasonable or fair." *Hill*, 814 F.2d at 1195. If an arbitrator "ignore[s] or refuse[s] to follow [a contract] clause," or if he "reject[s] the plain language of the contract * * * and in doing so rewr[ites] the contract," his award must be vacated. *Anheuser-Busch, Inc.* v. *Beer Sales Drivers, Local Union No. 744*, 280 F.3d 1133, 1147 (7th Cir. 2002) (Easterbrook, J., dissenting); *id.* at 1140 (lead opinion of Coffey, J.).

Moreover, as the Court has noted, the arbitrator cannot "shield from judicial correction an outlandish disposition of a grievance" simply by "making the right noises—noises of contract interpretation." *Ethyl Corp.*, 768 F.2d at 187. To warrant deference, the Court has explained,

arbitral awards must be "intellectually honest"; "a decision to ignore or supersede language conceded to be binding allows a court to vacate the award." *J.H. Findorff & Son*, 393 F.3d at 745.

In this case, arbitrator Kasher's decision failed to draw its essence from the Agreement because it ignored an express condition to the Union's right to engage in review and allotment of subcontracted work—a showing that subcontracting would cause layoffs or prevent recall of laid-off employees. SA2 ¶ 1.03. Under the cases discussed above, because arbitrator Kasher refused to interpret parts of the Agreement which unambiguously confirmed the Company's right to subcontract, his decision must be vacated. The district court erred by failing to consider this pivotal issue.

C. When an arbitrator exceeds his authority, his award must be vacated.

Despite the narrow scope of judicial review, a court also is obligated to ensure that the arbitrator "act[ed] within the scope of his authority." *Misco*, 484 U.S. at 38. "An arbitrator's power is both derived from, and limited by, the collective-bargaining agreement." *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 744 (1981); see also *AT&T*, 475 U.S. at 648-649 ("arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"). This Court has observed that "respect for the parties'

contract justifies the limited review courts do undertake" of arbitral awards: "for a court to enforce an award that clearly is beyond the arbitrator's power denies the parties * * * the benefit of their bargain just as surely as overturning an award because the court disagrees with the decision's legal or factual basis." *Lee Lumber*, 2 F.3d at 798.

Accordingly, "whether an arbitrator's award exceeded the limits of his contractual authority" must be "subject to meaningful review." *Torrington Co.* v. *Metal Prods. Workers Union Local 1645*, 362 F.2d 677, 680 (2d Cir. 1966). When an arbitrator "exceed[s] the powers delegated to him by the parties" (*Ethyl Corp.*, 768 F.2d at 184) or "'fail[s] to confine himself to the terms of the collective bargaining agreement,'" his award is not enforceable. *Anheuser-Busch*, 280 F.3d at 1138, 1144 (lead opinion of Coffey, J.) (vacating award because "the arbitrator ignored the plain language of three clauses" that "limited his authority and were written by the parties to prevent the type of improper award" at issue).

One way that an arbitrator may exceed his contractual authority is by "resolv[ing] a concededly arbitrable issue in an impermissible manner. For example, the arbitrator may * * * fashion a remedy expressly precluded by the agreement." DONALD P. ROTHSCHILD ET AL., COLLECTIVE BARGAINING & LABOR ARBITRATION 326 (3d ed. 1988); see, *e.g.*, *Lee Lumber*, 2 F.3d at 799 (arbitrator may not "impose a remedy" that is "inconsistent

with [an] express limitation" in the contract). An arbitrator also exceeds his authority when he modifies the contract even though—as here—it contains a provision prohibiting arbitral modifications. SA10 ¶ 13.22; *Ethyl Corp.*, 768 F.2d at 186 ("The arbitrator may not modify the contract unless authorized to do so"). In either event, the arbitrator's decision will not be enforced.

Here, the district court improperly failed to consider whether arbitrator Kasher exceeded his authority by ordering review and allotment without deciding the threshold issue of causation explicitly set forth in the Agreement.

II. Under The Governing Legal Standards, The Kasher Award Must Be Vacated.

Arbitrator Kasher's award falls squarely within the exceptional circumstances that require vacatur under this Court's precedents. Kasher not only ignored the Company's right to contract out work unless doing so would cause layoffs or prevent rehiring, he also exceeded his authority by ordering the parties to engage in the burdensome review and allotment process without even addressing whether the contractual causation prerequisite to that remedy had been satisfied. As this Court has recognized, there is "a big difference" between "misunderstanding and ignoring contractual language," and there is no doubt that arbitrator

Kasher ignored the key causation prerequisite in paragraph 1.03. *J.H. Findorff & Son*, 393 F.3d at 745.

A. The Kasher award fails to draw its essence from the Agreement because it ignores controlling contract language.

1. Arbitrator Kasher ignored plain language of the Agreement that conditions review and allotment on the Union's proof of causation.

Paragraph 1.03 of the Agreement provides that "the Company may continue to contract out such work as is now customarily contracted out." That sentence, arbitrator Flagler held, "represents a broad grant of authority for the company to * * * contract out the same work [assigned to bargaining unit employees] based only on continuing a * * * customary practice." SA28. The Agreement then states that "*[i]f* such work to be contracted out will *cause layoffs* * * * or *prevent the rehiring* of employees with seniority standing," then "such contracting out of work will be reviewed * * * and allotted" to employees represented by the Union "on the basis of what the Company is equipped to perform and what the employees represented by the Union are able and trained to perform." SA2 ¶ 1.03 (emphasis added). Arbitrator Flagler construed that sentence as a "limitation on the Company's right to contract out" that applies only if there is "a finding in favor of the Union's position on the so-called

'threshold issue,'" which is: "Will any prospective contracting out cause layoffs * * * or prevent the rehiring of employees?" SA29-30.

Arbitrator Perkovich confirmed this construction, holding that the right to contract out "is limited only if the Union first establishes a direct causal nexus between prospective or new contracting out" and the Company's "failure * * * to reemploy laid off bargaining unit employees." SA87-SA88. "The Union must prove this causation element before the parties can be compelled to engage in the remedial review and allotment process." SA88.

Yet arbitrator Kasher failed even to address this threshold causation issue in his award. He did not "interpret [or] apply" the key contractual clause (*Enterprise Wheel*, 363 U.S. at 597): "If such work to be contracted out will cause layoffs * * * or prevent the rehiring of employees with seniority standing." SA2 ¶ 1.03. Instead, Arbitrator Kasher leaped from a finding that "the Company has continued to contract out work"—a right preserved by the Agreement—to the conclusion that as a result "the Company is obligated to engage in the review process." SA68, SA70. Kasher's sole reference to the causation clause was to state that it allows the Union to "*argue* that * * * 'new' contracting has 'prevented the rehiring of employees.'" SA68 (emphasis added). He ordered the Company into the burdensome review and

allotment process without determining that the Union had made such an argument—let alone *proven*, as the Agreement requires, that subcontracting in fact had that effect. His award must be vacated because it "ignore[s]" and "supersede[s]" the "binding" contractual language selected by both parties. *J.H. Findorff & Son*, 393 F.3d at 745.

An arbitrator cannot "shield his award [from vacatur] simply by * * * stating an issue without discussing it" (*Clinchfield Coal*, 720 F.2d at 1369) or by making "noises of contract interpretation." *Ethyl Corp.*, 768 F.2d at 187; see also *Beaird Indus.*, 404 F.3d at 947 ("Simply referencing the agreement is insufficient"). Here, Kasher did not even make interpretive noises regarding the "if" clause of paragraph 1.03's last sentence. Rather, he "disregard[ed]" that causation prerequisite altogether and crafted a compromise based on his "own notion[] of what [was] reasonable or fair," ordering the Company to turn over information as part of the review and allotment process without deciding whether the Company's subcontracting would in fact cause layoffs or prevent rehiring. *Hill*, 814 F.2d at 1195. Because Kasher "ignore[d] the plain language of" the causation clause, his award must be vacated. *Misco*, 484 U.S. at 38; see *Int'l Paper Co.* v. *United Paperworkers Int'l Union*, 215 F.3d 815, 817-18 & n.1 (8th Cir. 2000) (arbitrator may not nullify contract language by ignoring "a condition precedent"); *Boise Cascade*

Corp. v. *Paper Allied-Indus., Chem., & Energy Workers*, 309 F.3d 1075, 1084 n.9 (8th Cir. 2002) ("courts have repeatedly vacated arbitral decisions that failed to discuss probative terms"); *Champion Int'l Corp.* v. *United Paperworkers Int'l Union*, 168 F.3d 725, 731 (4th Cir. 1999) (if arbitrator fails to "construe [relevant] contractual provisions," he "abdicat[es his] duty to apply the contract").

Kasher's disregard of this clause is especially flagrant because the Union did not even attempt to prove that any subcontracting would prevent the rehiring of Union employees. Although the Company provided the Union with extensive discovery on the issue of causation, the Union made no showing whatever of a link between subcontracting (if any) and the Company's inability to rehire laid-off employees. Indeed, the undisputed record evidence before arbitrators Kasher, Flagler, and Perkovich conclusively showed (and Flagler and Perkovich found) that an unprecedented and continuing erosion of the Company's core business—not subcontracting—was the cause of its failure to rehire these employees. See pp. 9-10, 12-14, 21, *supra*. Because Kasher ignored the parties' evidence as well as the Agreement's text on the issue of causation, his award failed to draw its essence from the Agreement. See *Clinchfield Coal*, 720 F.2d at 1372 (Sprouse, J., concurring).

2. Arbitrator Kasher disregarded arbitrator Flagler's prior interpretation of paragraph 1.03.

This fatal flaw in the Kasher award is confirmed by the interpretations of paragraph 1.03 by arbitrators Flagler and Perkovich. As discussed above, arbitrator Flagler held that the provision's plain language requires a finding in the Union's favor on the causation issue before the Company can be plunged into the review and allotment process. Although Kasher concluded that Flagler's award did not dispose of the Union's entire grievance under principles of *res judicata*, he did not evaluate or disagree with Flagler's construction of the Agreement's key language. Instead, he simply ignored it, as well as the causation prerequisite that Flagler found plain in the language of paragraph 1.03.

As arbitrator Perkovich recognized, *res judicata* is not the issue. Instead, Flagler's award provides "a finding as to the parties' mutual intent lying behind" paragraph 1.03. SA87. It is improper for an arbitrator to disregard—without explanation or consideration—a prior arbitrator's interpretation of the very collective bargaining provision at issue. It is an "established arbitral principle that an award interpreting a collective bargaining agreement usually becomes a binding part of the agreement and will be applied by arbitrators thereafter." *Trailways Lines, Inc.* v. *Trailways, Inc. Joint Council*, 807 F.2d 1416, 1425 (8th Cir. 1986) (internal quotation marks and brackets omitted) (quoting FRANK ELKOURI

& EDNA ELKOURI, HOW ARBITRATION WORKS 425 (4th ed. 1985)); SA86. Indeed, the parties in this case agreed that Flagler's award "shall be final and binding." SA10 ¶ 13.20. Moreover, arbitrator Perkovich concluded that Flagler's interpretation "is reasonable" and "became a part of [paragraph 1.03]," especially given the "substantial fact identity" and "party identity" of the arbitrations, "no contrary provision of the Code of Professional Conduct of Arbitrators," an "absence of changed material circumstances," and the parties' decision to include the same provision without change in a new Agreement negotiated after Flagler's award. SA86-SA87; SA93-SA94.

Even if an arbitrator need not always follow prior arbitral precedent, he still must interpret and apply the Agreement and cannot simply disregard a prior arbitrator's interpretation of the same contract terms. Kasher was therefore required to "consider" and exercise his "judgment" on the validity of Flagler's interpretation. *Hotel Ass'n, Inc.* v. *Hotel & Restaurant Employees Union, Local 25*, 963 F.2d 388, 390 (D.C. Cir. 1992). Kasher's decision to ignore Flagler's interpretation of "binding" language in the Agreement "allows [this Court] to vacate [the Kasher] award." *J.H. Findorff & Son*, 393 F.3d at 745; see also *Trailways*, 807 F.2d at 1425-1426 (an arbitrator who "does not accord any

precedential effect to a prior award" must "at least explain the reasons for refusing to do so").

3. The Kasher award rewrites the parties' Agreement regarding the Company's right to subcontract.

Finally, the Kasher award does not draw its essence from the Agreement because it "hamper[s] the exercise" of the Company's vitally important right to subcontract, which is "established explicitly" in the first sentence of paragraph 1.03. *Young Radiator Co.* v. *U.A.W.*, 734 F.2d 321, 325 (7th Cir. 1984). Several circuits have addressed similar facts regarding arbitral impairment of subcontracting rights, and their decisions confirm that the Kasher award must be vacated.

In particular, the Fourth Circuit's *Clinchfield Coal* decision is on all fours with this case. Clinchfield operated its own coal mines with union employees and also licensed out coal lands to independent mining contractors. 720 F.2d at 1367. The collective bargaining agreement provided that "[l]icensing out of coal mining operations * * * shall not be permitted unless the licensing out does not cause or result in the layoff of Employees." *Ibid.* When demand for coal sharply declined, Clinchfield closed an inefficient mine and laid off the employees working there, but it continued to license out coal lands. *Ibid.* In response to a union grievance, an arbitrator found that Clinchfield had violated the above-

quoted provision and ordered it to put the laid-off employees back to work. *Id.* at 1369.

The Fourth Circuit vacated the arbitrator's award for two reasons. First, it held that the arbitrator "ignored the history of [the relevant paragraph], as evidenced by the consistent approach taken by other arbitrators to evidence of an economic * * * cause, independent of licensing, for layoffs." *Clinchfield Coal*, 720 F.2d at 1369. Under the approach taken by prior arbitrators adjudicating disputes under the same agreement, if the "cause of the layoffs" was a "demand decline, then [the agreement] was not violated even though Clinchfield at that time was licensing out coal lands." *Id.* at 1369-1370. The court noted that Clinchfield had presented "substantial evidence" that the cause of the layoffs was indeed a demand decline, while the Union had not "attempt[ed] to show that the layoffs resulted from a particular licensing out." *Id.* at 1369, 1370 n.2. Yet the arbitrator had disregarded Clinchfield's causation evidence as irrelevant. In so doing, the court held, the arbitrator "strayed from the essence of the Agreement." *Id.* at 1369.

Second, the court observed that the arbitrator "neither discussed nor decided" whether Clinchfield's licensing was "[l]icensing out of coal mining operations"—which the agreement prohibited if layoffs would result—or permissible licensing of "coal lands." *Clinchfield Coal*, 720 F.2d

at 1367-1368. It concluded that "[w]here, as here, the arbitrator fails to discuss critical contract terminology * * * [that] might reasonably require an opposite result, the award cannot be considered to draw its essence from the contract." *Id.* at 1369.

As in *Clinchfield Coal*, vacatur is required in this case. In fact, the Agreement here provides much stronger protection for subcontracting. While the *Clinchfield Coal* agreement was phrased negatively, stating that the company shall not license out unless the licensing will not result in layoffs, the Agreement in this case positively confirms that the Company may contract out and limits that right only if such contracting out will prevent rehiring.

Arbitrator Kasher's award suffers from the same flaws as the award vacated in *Clinchfield Coal*. Kasher ignored arbitrator Flagler's prior holding that the Agreement does not limit contracting out when there is an economic cause, independent of contracting, for layoffs or failure to rehire. SA29-SA31. Kasher also disregarded the Company's undisputed evidence that an enormous erosion of its core business—not subcontracting—was the cause of its failure to rehire laid-off Union personnel. Thus, as in *Clinchfield Coal*, this Court should hold that Kasher's award limiting the Company's right to subcontract did not draw its essence from the Agreement.

In addition, Kasher did not discuss contract terminology that might "reasonably require an opposite result." *Clinchfield Coal*, 720 F.2d at 1369. As noted above, he never addressed the causation prerequisite in the last sentence of paragraph 1.03, which triggers the process of review and allotment only if subcontracting will prevent rehiring. Given the lack of findings or evidence that any subcontracting would prevent rehiring, this language can (at minimum) reasonably be read to uphold the Company's retained right to subcontract without engaging in a review process.

A consistent line of decisions from other circuits confirms that an arbitral award should be vacated when the arbitrator disregards a contractually recognized right to subcontract. In *International Paper*, the collective bargaining agreement stated that situations might arise in which subcontracting was necessary. An arbitrator "avoided" deciding whether he faced one of those situations and simply granted the union's grievance complaining about subcontracting. 215 F.3d at 817-18 & n.1. The Eighth Circuit held that the award did not draw its essence from the contract because the arbitrator's decision "eviscerate[d] and wr[ote] out of the [agreement] the language that permit[ted] the Company to hire outside workers * * * in certain 'situations.'" *Id.* at 218 n.1. Similarly, arbitrator Kasher ordered a review and allotment of the Company's

subcontracting without deciding whether it would cause layoffs or prevent rehiring, thereby eviscerating the Company's right to continue subcontracting absent an adverse impact on jobs.

In *Sears, Roebuck & Co.* v. *Teamsters Local Union No. 243*, 683 F.2d 154 (6th Cir. 1982), the agreement gave the company a right to subcontract work that could be performed more efficiently outside the bargaining unit. An arbitrator recognized this right but nevertheless sustained a union grievance regarding subcontracting, concluding that "the costs to the Union of the disputed subcontract outweighed its benefits to the employer." *Id.* at 155. The Sixth Circuit vacated the award, holding that when the parties to a collective bargaining agreement have negotiated an express subcontracting provision, an arbitrator lacks authority "to alter the effect of that provision by performing, sua sponte, a 'balancing test.'" *Id.* at 156; see also *Beaird Indus.*, 404 F.3d at 946-947 (vacating award because arbitrator "failed utterly to draw his conclusions from the essence of the CBA" when he "limit[ed] the [company's] subcontracting right"). Likewise, arbitrator Kasher lacked discretion to alter the clear terms of paragraph 1.03 by limiting the Company's right to subcontract without proof that continued subcontracting would prevent rehiring.

There are compelling reasons why these federal courts of appeals have protected the right to subcontract against arbitral impairment. As the record in this case shows, subcontracting serves important business purposes. For example, the Company uses subcontractors to complete large jobs that its employees are not properly located or equipped to perform and to contain liability for property damage. R3, Tab 1, at 26. The Company's ability to subcontract protected by the Agreement has significant operational importance.

More generally, subcontracting allows a company to focus its time and money on core business functions while using outside providers for ancillary activities that are high-cost and offer the company no competitive advantage. See *Sears, Roebuck*, 683 F.2d at 155; RONALD COASE, THE FIRM, THE MARKET, AND THE LAW 43-44 (1988); DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 18, 384 (3d ed. 2000). Subcontracting also helps companies control their operating costs by tapping into an outside provider's economies of scale and specialization advantage. In addition, outside providers can increase a company's competitiveness by providing it with specialized industry expertise, access to emerging technologies, the flexibility to deal with rapid change, and the capacity to deal promptly with emergencies (such as storms) that can greatly inconvenience a community.

For these reasons, the parties to a collective bargaining agreement often bargain carefully regarding subcontracting terms. The Agreement at issue here preserves the right to subcontract in the very first paragraph of a voluminous collective bargaining contract. Such terms should be respected by arbitrators as well as courts. Because arbitrator Kasher's award disregarded the terms of the parties' bargain regarding continued subcontracting, it should be vacated.

B. Arbitrator Kasher exceeded his authority by ordering review and allotment without addressing the causation prerequisite to that remedy.

Apart from this failure to draw its essence from the Agreement, arbitrator Kasher's award also must be vacated because it exceeds his authority. Paragraph 1.03 sets forth clear contractual limits on the arbitrator's authority to resolve disputes over subcontracting and to order burdensome remedies in that sphere. As explained above, that paragraph confirms the Company's right to continue subcontracting as it has in the past, without sanction or penalty. Only if the Union shows that subcontracting will cause or perpetuate layoffs may the Company be thrust into a burdensome process of reviewing its subcontracts with the Union and allotting the work to the Union that the Company "is equipped to perform" and Union workers "are able and trained to perform." SA2 ¶ 1.03.

Kasher's award did not discuss these limits at all, even though they had been clearly stated by arbitrator Flagler. Flagler held that the last sentence of paragraph 1.03 regarding review and allotment "is designed to *limit the authority* of the arbitrator as to permissible *remedy*, conditional obviously to a finding in favor of the Union's position on the so-called 'threshold issue' of whether * * * the limitations on * * * contracting out of work appl[y] under the facts of the case." SA30-SA31 (emphasis added). Those limitations apply only if "any prospective contracting out [will] cause layoffs * * * or prevent the rehiring of employees with seniority standing." SA29.

Thus, "[t]here can be no doubt that the limitation provisions restrict the arbitrator's authority to fashion a remedy for a violation of the [Agreement]." *Polk Bros.*, 973 F.2d at 597-98. Yet Kasher granted the subcontracting review remedy sought by the Union without finding that the Agreement's causation prerequisite to that remedy had been met. SA68. In so doing, he "exceeded the powers delegated to him by the parties" in paragraph 1.03 and "modif[ied] the contract" without "authori[ty] to do so." *Ethyl Corp.*, 768 F.2d at 184, 186; see also *Polk Bros.*, 973 F.2d at 598; p. 8, *supra* (discussing Agreement provision prohibiting arbitral modification). This Court should accordingly vacate his award.

This Court's decision in *Amax Coal* is instructive. There, the parties' agreement vested the direction of the workforce exclusively in the company and established a seniority-based procedure for realigning workers to new jobs in the event of a workforce reduction. 92 F.3d at 572-573. When the company realigned an employee to a lower paying position, an arbitrator held that the company had followed the agreement but nevertheless granted the employee back pay and job retraining. *Id.* at 576. This Court vacated the award, concluding that "there can be no remedy when there is no breach." *Ibid.* In ignoring the condition precedent to an award for the employee—that the company had breached the agreement—"the arbitrator was not really 'interpreting' the Agreement" at all but imposing his own "compromise" resolution on parties who had bargained instead for particular contract rights. *Ibid.* Because there was "'no possible interpretive route' to the arbitrator's award," he had "'exceeded the powers delegated to him by the parties'" and his award was set aside. *Id.* at 575-576.

This is not a case where the Agreement "explicitly allows" the remedy awarded or where the remedy selected amounts to a "'bon[a] fide contractual interpretation.'" *Dexter Axle Co.* v. *Int'l Ass'n of Mach. & Aerospace Workers*, 418 F.3d 762, 768-769 & n.7 (7th Cir. 2005) (upholding award of backpay where provision of contract provided for

that remedy and arbitrator construed provision to apply to dispute). Arbitrator Kasher improperly ordered the cumbersome remedy of review and allotment when there was no proof—and no finding—that the Company had engaged in subcontracting that "prevented the rehiring of employees." That remedy was "inconsistent with the express limitation [the parties] imposed on their agreement to arbitrate," an additional reason for vacating the Kasher award. *Lee Lumber*, 2 F.3d at 799.

III. Arbitrator Kasher's Subsequent Letter Failed To Draw Its Essence From The Agreement And Exceeded His Authority.

This Court also should vacate arbitrator Kasher's letter amending his award, which he had no authority to issue. That letter addressed the scope of the award's requirement that the Company begin the review process by "provid[ing] the Union with sufficient identifying data concerning post-[layoff] subcontracting." SA71. The Union demanded that the Company produce information on all subcontracting, including contracts for work outside the job title groups of the laid-off employees and outside the scope of the bargaining unit defined by the Agreement. R14 ¶ 23. When the Company resisted this demand as overbroad, the Union requested "that the Arbitrator resolve the dispute." R1, Tab G.

In response to this request, Kasher wrote a letter acknowledging that his status was *functus officio* and that "it is not my intention to reassert jurisdiction in this case." SA71b. Nevertheless, he attempted to

expand greatly the scope of the award, stating that his order to produce subcontracting information "makes no distinction as to whether * * * subcontracts were let by one department of the Company as opposed to another." *Ibid*. According to the Union, this statement means that the work to be reviewed and allotted to laid-off Union members goes beyond the telecommunications-related work customarily performed by the bargaining unit and covers all work that the Company has subcontracted—including maintenance of buildings and grounds. See p. 17, *supra*. This letter exceeded Kasher's authority and failed to draw its essence from the Agreement.

The Agreement "recognizes the Union as the exclusive bargaining agent for those employees * * * whose titles and classifications are * * * listed in [the] Appendices"—which do not list building maintenance and other non-bargaining unit tasks. SA2 ¶ 1.01; see p. 6, *supra*. Furthermore, the first sentence of paragraph 1.03 defines the scope of the bargaining unit by stating that the Agreement covers only "the work customarily performed by [those] employees." The Company's continued right to subcontract and the limits on that right discussed later in paragraph 1.03—including the review and allotment remedy—are stated as qualifications to this definition of the bargaining unit, introduced by the word "[h]owever." SA2 ¶ 1.03. Thus, the subcontracting provisions do

not expand but rather restrict the scope of work covered by the Agreement.

Arbitrator Flagler confirmed this reading of the Agreement, which was then the Union's reading as well. The section of Flagler's award entitled "Position of the Union" acknowledges that the subcontracting provisions of paragraph 1.03 are "exceptions to the work which has been 'customarily performed by the [bargaining unit].'" SA15-SA16. Thus, "[i]t is * * * evident that the paragraph does not include all subcontracting which may be undertaken by the Company, but only subcontracting of bargaining unit work; i.e., work which is associated with the tasks performed by various titles and classifications within the bargaining unit." SA16.

Nevertheless, arbitrator Kasher's letter requires the Company to engage in a review process regarding *all* of its subcontracts, even if they do not concern work customarily performed by bargaining-unit employees. In requiring the Company to produce information about these subcontracts, Kasher did not even refer to paragraph 1.03's contrary statement that the Agreement covers only "work customarily performed by" those employees. For this reason, arbitrator Kasher's post-award letter did not draw its essence from the Agreement. And it exceeded the

scope of Kasher's authority because it impermissibly expanded the scope of the bargaining unit beyond the Agreement's definition.

By requiring the Company to review all of its subcontracts with a view to allotting the subcontracted work to laid-off Union members, Kasher's letter also exceeded limits that other parts of the Agreement place on his remedial authority. SA70; SA71a-71b. Paragraph 30.56, which governs the recall of laid-off employees, requires the Company to offer them reemployment (in order of seniority) only "in the same job title group" from which they were laid off. R1, Tab A, at 129-130 ¶ 30.56; see also R3, Tab 2, at 83. Thus, under paragraph 1.03, the only subcontracts that could "prevent the rehiring of employees with seniority standing" are for "work customarily performed by" the job title groups affected by layoffs. For this additional reason, Kasher's letter should be vacated.

Finally, Kasher's post-award letter exceeded his authority because his jurisdiction over the parties' dispute had expired. "[A]fter a final decision by an arbitrator, the arbitrator becomes *functus officio* and lacks the power to reconsider or amend the decision." *Anderson* v. *Norfolk & W. Ry.*, 773 F.2d 880, 883 (7th Cir. 1985); see also *La Vale Plaza, Inc.* v. *R.S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967) (recognizing the "fundamental common law principle that once an arbitrator has made

and published a final award his authority is exhausted and he is *functus officio* and can do nothing more in regard to the subject matter of the arbitration"). Given that his letter was written over two months after the award in response to a post-award dispute, arbitrator Kasher "agree[d] with the [Company's] position that my status is *functus officio*" and stated that "it is not my intention to reassert jurisdiction in this case." SA71b. Nevertheless, his letter amends (and greatly enlarges) the award to require production of information on all subcontracting by the Company. Under the doctrine of *functus officio*, this belated amendment was unauthorized and should be vacated.

This Court has recognized an exception to the *functus officio* doctrine "for clarification or completion, as distinct from alteration, of the arbitral award." *Glass Workers Int'l Union* v. *Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995). But a party may not seek a *more favorable* award under the guise of clarification. A more favorable alteration is precisely what the Union sought and obtained from arbitrator Kasher. It asked him to resolve a new, post-award "dispute between the parties over the subcontracting information * * * which must be provided by the Company" (R1, Tab G), and to "determine whether the Company's restrictions on the contracted work it is prepared to review * * * [are] in compliance with your Award." *Id.*, Tab D. Because the parties did not

agree to submit either question to arbitration, arbitrator Kasher lacked the authority to resolve them by amending his prior award. See *Ottley* v. *Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987) (rejecting contention that arbitrators may review compliance with their own awards" and ruling that "the arbitrator was without authority to rule on that issue").

The *functus officio* doctrine is "a default rule, operative if the parties fail to provide otherwise." *Glass Workers*, 56 F.3d at 848. Because the parties did not provide otherwise in their Agreement, this Court should apply the doctrine and set aside arbitrator Kasher's letter. If the Court concludes that the letter merely clarified the award, however, then (according to the Union) the award itself ordered the Company to provide information on *all* subcontracts. In that event, the Court should vacate the award for the same reasons explained above with respect to the letter.

The impossible burdens produced by arbitrator Kasher's letter confirm that vacatur is required. The Union insists that the letter and award require the Company to provide information on all contracts between it and any outside contractor that relate to services within Illinois or Northwest Indiana. See p. 17, *supra*. For an enterprise the size of the Company, which lacks control over the sort of detailed information concerning subcontractor equipment and man-hours that the Union

seeks, compliance with this requirement is "a physical and logistical impossibility." R46, Tab B, ¶¶ 5-6.

As discussed above, the contracts at issue involve disparate functions separate from the Company's core business and from work performed by the bargaining unit. Much of the information sought by the Union is not in the Company's possession or control. Given these burdens, "it is 'almost unimaginable' that the [Company] would have agreed to the type of remedy imposed here if the question had arisen during bargaining." *Lee Lumber*, 2 F.3d at 799 (quoting *Miller Brewing Co.* v. *Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1164 (7th Cir. 1984)). Accordingly, the letter and award imposing that remedy should be vacated. *Id.* at 798-800.

IV. Failure To Constrain The Arbitrator Here Will Frustrate Collective Bargaining And Discourage Resort To Arbitral Remedies.

Important policy considerations favor vacatur in this case. The purpose of the National Labor Relations Act is to encourage private ordering of the terms and conditions of employment through collective bargaining by labor and management. 29 U.S.C. §§ 151, 158(d). This purpose is advanced, not hindered, by respecting bargained-for limits on an arbitrator's authority: "enforc[ing] an award that clearly is beyond the

arbitrator's power denies the parties * * * the benefit of their bargain." *Lee Lumber*, 2 F.3d at 798.

Permitting arbitrators to ignore contractual rights and limitations (as arbitrator Kasher did here) undermines the system of informal resolution of labor disputes. "The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be drastically reduced" if an arbitrator were "empowered to impose obligations outside the contract limited only by his understanding and conscience." *AT&T Techs.*, 475 U.S. at 651. Failure to enforce provisions like the causation prerequisite to review and allotment of subcontracted work "undercuts the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements and is antithetical to the function of a collective-bargaining agreement as setting out the rights and duties of the parties." *Ibid.*

Exercising limited judicial review serves to "stimulate voluntary resort to labor arbitration and thereby strengthen this important aspect of labor-management relations." *Torrington*, 362 F.2d at 682. It also "deepen[s] the arbitrator's sensitivity to the admonition in *Enterprise Wheel* about the sources of his authority" and "promote[s] clearer and better reasoned opinions by arbitrators." Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. CHI. L.

REV. 545, 554 (1967); see also *id.* at 553-554 (explaining the importance of "some judicial responsibility for the results to be enforced" because an "award, although therapy for one party, may be poison to the agreement, whose purpose, after all, is to provide a code for both parties rather than a couch for one of them").

As these policies show, allowing arbitrator Kasher to require burdensome review and allotment proceedings, expand the scope of the bargaining unit, ignore express contractual provisions, and restrict the scope of the contractually-recognized right to subcontract would make reliance on the terms of the collective bargaining agreement a hazardous proposition for either party. Parties would be hesitant to agree to arbitration if this sort of standardless departure from a collective bargaining agreement were permitted. By instructing the district court to vacate the Kasher award in this exceptional case, the Court will ensure that both parties receive the benefit of their bargain, stimulate the use of labor arbitration, encourage arbitrators to address governing contract provisions in their awards, and enable the parties to determine the meaning of a contract provision critical to the proper functioning of the collective bargaining relationship.

V. Alternatively, The District Court's Judgment Enforcing The Kasher Award Should Be Vacated In Light Of The Perkovich Award.

Even if this Court does not vacate arbitrator Kasher's award ordering review and allotment, it should nonetheless vacate the district court's judgment enforcing that award given arbitrator Perkovich's subsequent conclusion that "the review and allotment process is not in play." SA96. The Company filed a Rule 60(b) motion to vacate the judgment shortly after Perkovich rendered his award. R60. The district court summarily denied that motion, stating only that "Plaintiff's appeal before the 7th Circuit Court of Appeals is still pending." A15. In so doing, the district court abused its discretion.

As the Company told the district court, "it would be inequitable (and senseless)" to leave the district court's judgment in place now that "the arbitration process has run its course." R60 at 5. That judgment, as well as the complaint and counterclaim on which it was based, addressed only the Kasher award directing the Company to engage in the review and allotment process. As the parties' subsequent arbitration agreement and the resulting Perkovich award confirm, Kasher's award was incomplete from the outset and left final resolution of the parties' dispute to be addressed by another arbitrator. See p. 15, *supra*. At the parties' behest, arbitrator Perkovich decided the critical question left

unresolved by the Kasher award, ruling that review and allotment may be triggered only if the Union satisfies its burden of establishing causation—which it did not do. See pp. 20-21, *supra*.

Under these circumstances, the district court's judgment should be vacated because: (1) "a prior judgment upon which it is based has been reversed or otherwise vacated"; (2) "it is no longer equitable that the judgment should have prospective application"; and (3) "other reason[s] justify[] relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(5)-(6). These principles embody "the traditional power of a court of equity to modify its decree in light of changed circumstances," *Frew* v. *Hawkins*, 540 U.S. 431, 441 (2004), and each confirms that the district court abused its discretion by denying Rule 60(b) relief here.

With respect to the first principle, the district court's judgment enforcing arbitrator Kasher's award indisputably was "based on" that award—in other words, the award was a "necessary element" of the judgment. *De Filippis* v. *United States*, 567 F.2d 341, 343 n.4 (7th Cir. 1977); see also *Bailey* v. *Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990). Consistent with the parties' agreement to seek "a final resolution of the proper interpretation and application of [paragraph] 1.03" before a third arbitrator (SA73 at 1), arbitrator Perkovich then effectively "reversed or otherwise vacated" the Kasher award by holding

that Flagler's interpretation was controlling and that—contrary to Kasher's order—review and allotment were *not* required. See pp. 19-20, *supra*. Under these circumstances, the district court's judgment must be vacated to confirm that a purported review and allotment obligation that can have no practical significance in light of the Perkovich award cannot be enforced.

The second principle also points to vacatur. As the Union's motions for enforcement and contempt illustrate, Kasher's order directing the Company to engage in the review and allotment process is prospective. Rather than "simply resolv[ing] the parties' rights based on a past dispute," it "affect[s] events that happen in the future." *Cincinnati Ins. Co.* v. *Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 631 (7th Cir. 1997). That prospective order is inequitable. The Perkovich award is a "significant change in circumstances" that is contrary to and thus "warrants revision of" the judgment enforcing Kasher's order. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992); see also *Protectoseal Co.* v. *Barancik*, 23 F.3d 1184, 1187 (7th Cir. 1994). Given Perkovich's holding that the Union failed to prove its entitlement to review and allotment under the parties' Agreement, the district court abused its discretion by leaving in place a judgment compelling the

Company—on pain of contempt sanctions—to review and allot its subcontracted work to laid-off Union members.

Finally, relief from the judgment is warranted because Perkovich's conclusion that review and allotment is not in play—which the parties agreed would be final—"create[s] a substantial danger that the underlying judgment" upholding Kasher's review and allotment order is "unjust." *Margoles* v. *Johns*, 798 F.2d 1069, 1073 (7th Cir. 1986) (per curiam).

As the three arbitration awards before this Court make clear, the Kasher award was incomplete because it ignored the key causation issue. A district court confronted with an incomplete arbitration award must order further arbitration proceedings rather than enter a judgment enforcing the award. *Enterprise Wheel*, 363 U.S. at 595-596, 599 (holding that the appellate court properly modified a judgment enforcing an incomplete award and required the parties to complete arbitration); *Young Radiator*, 734 F.2d at 326 (reversing judgment enforcing award and remanding to the arbitrator because he "never ruled one way or the other" on the dispositive issue). Vacatur of such a judgment is particularly necessary when, as here, the parties have completed the arbitration by agreement and the final award is inconsistent with the interim judgment. Indeed, were it not for the district court's now-obsolete

judgment, the Union could not hope to compel review and allotment based on Kasher's order because it agreed to abide by the Perkovich award as "a *final* resolution of the proper interpretation and application of [paragraph] 1.03 * * * to the 2002 layoffs." SA73 at 1 (emphasis added); see also *ibid.* (describing the Perkovich arbitration as "the *culmination* of protracted litigation between the parties" (emphasis added)).

Allowing the district court's judgment to remain in place would only sow confusion and interfere with the parties' agreement to resolve this dispute efficiently and finally through arbitration. The Supreme Court has explained that "the federal statutes regulating labor-management relations" reflect "a decided preference for private settlement of labor disputes" without "the intervention of government." *Misco*, 484 U.S. at 37. If courts were free to intervene at intermediate stages, "the speedy resolution of grievances by private mechanisms would be greatly undermined." *Id.* at 38; see also *Lee Lumber*, 2 F.3d at 798. These statutory policies disapprove judicial actions that delay, confuse, and render more expensive the arbitral dispute resolution system selected by the parties. Because a cause of action to enforce labor arbitration from these statutes is an implied right, see *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 450-51 (1957), the policies behind them are critical

in deciding when enforcement is proper. Here, those policies require vacatur of the district court's judgment enforcing Kasher's preliminary award.

Vacatur is further required because the Kasher award is now moot. Mootness arises "[w]hen circumstances change during litigation such that there is no longer any case or controversy," *Ovadal* v. *City of Madison*, 469 F.3d 625, 628 (7th Cir. 2006), including when a decision in a collateral proceeding causes a case to become moot. *E.g., Powder River Basin Resource Council* v. *Babbitt*, 54 F.3d 1477, 1485 (10th Cir. 1995). Here, the Perkovich award finally resolved the parties' dispute over the validity and applicability of the Kasher award, effectively rendering the latter moot. Because this mootness did not result from a settlement but rather from a subsequent and final award, the district court's judgment enforcing the Kasher award must be vacated. See *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 23 (1994); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). At a minimum, the Court should make clear that the Company cannot be held in contempt for refusing to engage in the review and allotment ordered by arbitrator Kasher in light of arbitrator Perkovich's final award.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment and remand for entry of an order vacating arbitrator Kasher's award and letter. Alternatively, in light of the subsequent Perkovich award, the Court should vacate the district court's judgment enforcing arbitrator Kasher's award.

Dated: February 7, 2006

Respectfully submitted.

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Michael A. Warner, Jr.
FRANCZEK SULLIVAN P.C.
300 South Wacker Drive
Chicago, Illinois 60606
(312) 986-0300

Stephen J. Sferra
LITTLER MENDELSON, P.C.
Erieview Tower
1301 East Ninth Street
Cleveland, Ohio 44114
(216) 696-7600

Stephen M. Shapiro
Timothy S. Bishop
Jeffrey W. Sarles
MAYER, BROWN, ROWE & MAW LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that the foregoing opening brief of appellant Ameritech Corporation

(i) complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(i) because it contains 13,610 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 97-2002 in 13-point Bookman.

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One of appellant's attorneys

Dated: February 7, 2007

CIRCUIT RULE 30(d) CERTIFICATE

Pursuant to Circuit Rule 30(d), the undersigned counsel hereby certifies that all materials required by Circuit Rules 30(a) and (b) are included in the appendices.

_____

One of appellant's attorneys

CIRCUIT RULE 31(e) CERTIFICATE

The undersigned attorney certifies that he has filed electronically, pursuant to Circuit Rule 31(e), the brief and all of the appendix items that are available in non-scanned PDF format.

Dated: February 7, 2007

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One of appellant's attorneys

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on February 7, 2007 he caused two copies of the foregoing Brief for Plaintiff-Appellant Ameritech Corporation to be served by hand delivery, and a digital version of that brief to be served by e-mail, on the following:

Gilbert A. Cornfield
Cornfield and Feldman
25 East Washington Street, Suite 1400
Chicago, Illinois 60602-1803.

_____

One of appellant's attorneys

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