

No. 09-214

In the

SUPREME COURT OF THE
UNITED STATES OF AMERICA

MAJOR LEAGUE BASEBALL,
Petitioner,

v.

KEVIN WILSON;
MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT
OF APPEALS FOR THE FOURTEENTH CIRCUIT

Team 28
Counsel for the Petitioner

QUESTIONS PRESENTED

- I. WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT A MAJOR LEAGUE BASEBALL PLAYER'S CLAIMS UNDER MINNESOTA'S DRUG AND ALCOHOL TESTING IN THE WORKPLACE ACT CHALLENGING HIS SUSPENSION UNDER MLB'S COLLECTIVELY BARGAINED FOR DRUG POLICY ARE NOT PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT WHERE THE PLAYER'S CLAIMS ARE SUBSTANTIALLY DEPENDENT UPON INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT AND THE POLICY.

- II. WHETHER THE CIRCUIT COURT ERRED IN SETTING ASIDE, UNDER A NARROW PUBLIC POLICY EXCEPTION, A NEUTRAL ARBITRATOR'S AWARDS UPHOLDING A MAJOR LEAGUE BASEBALL PLAYER'S SUSPENSION BASED UPON HIS VIOLATION OF MLB'S BANNED SUBSTANCE POLICY WHERE THE AWARDS DO NOT VIOLATE AN EXPLICIT PUBLIC POLICY, THE CIRCUIT COURT DID NOT BASE ITS DECISION UNDER THE FEDERAL ARBITRATION ACT, AND THE CIRCUIT COURT DID NOT SHOW DEFERENCE TO THE ARBITRATOR'S DECISION AS REQUIRED BY COMMON LAW GOVERNING ARBITRATION AWARDS.

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STATEMENT OF THE CASE

In this appeal, Major League Baseball ("MLB") appeals the Circuit Court's reversal of the District Court's granting of a summary judgment in favor of MLB, Dr. John Larson, Independent Administrator of the MLB Policy on Anabolic Steroids and Related Substances (the "Policy"), and Andrew Birch, MLB's Vice President of Law and Labor Policy. Specifically, MLB appeals the Circuit Court's decision that claims under Minnesota's Drug and Alcohol Testing in the Workplace Act ("DATWA") brought by the Major League Baseball Players Association (the "MLBPA") on behalf of an employee of the Minnesota Twins, L.L.C, and four other players, all of whom were suspended for taking a substance banned under the Policy, are not preempted by Section 301 of the Labor Management Relations Act (the "LMRA"). MLB also appeals the Circuit Court's judgment to vacate the awards of a neutral arbitrator, to whom the players appealed their suspensions pursuant to the terms of the Policy, on the grounds that the arbitrator's decision to uphold MLB's suspension of the players violates public policy.

STATEMENT OF THE FACTS¹

The Petitioner, MLB, and the Respondent, the MLBPA, entered into a Collective Bargaining Agreement (the "CBA") in 2007 that incorporates the Policy. (R. at 1). The Policy explicitly prohibits MLB players from using any "Prohibited Substances," including performance enhancing drugs and "Other Anti-estrogens, including Clomiphene, Cyclophenil, and Fulvestrant." *Id.* It provides that "players are responsible for what is in their bodies," and under its strict liability approach, "a positive test result

¹ (R. at 1) refers to page 1 of the District Court's record, (R2. at 1) refers to page 1 of the Circuit Court's record

will not be excused because a player was unaware he was taking a Prohibited Substance.”

Id. The Policy also “strongly encourages players to avoid the use of supplements altogether,” and warns players “if you take these products, you do so AT YOUR OWN RISK!” (R. at 9).

Under the Policy, players who test positive for a banned substance are subject to disciplinary action by the Commissioner of MLB. The first time a player tests positive for a banned substance, he will face a suspension of between 15 and 25 games. (R. at 2). The Policy also provides that “Players subject to disciplinary action may appeal to a neutral arbitrator... whose decision constitutes a full, final, and complete disposition of the appeal that is binding on all parties.” *Id.* Additionally, the Policy created the “MLB Supplement Hotline” (the “Hotline”), a confidential hotline available to players who have questions or concerns about particular supplements. *Id.* Use of the Hotline, according to the Policy, does “not excuse a positive test result” because the players “alone are responsible for what goes into” their bodies. *Id.*

Dr. Larson, a licensed physician, is in charge of implementing the terms of the Policy, including overseeing the drug-testing procedures, reporting positive test results to the Commissioner, and educating the Players about the Policy’s rules. (R. at 2). Dr. Ray Finkle, the “Consulting Toxicologist,” aids in the implementation of the Policy. *Id.*

In 2007, MLB learned that SpeedShot, an energy-boosting supplement, contained Clomiphene, a banned substance named in the Policy, even though the substance was not listed as an ingredient on the SpeedShot label. (R. at 3). Shortly after Dr. Larson learned about SpeedShot, he, Dr. Finkle, and Andrew Birch received confirmation from a laboratory analysis that SpeedShot contained Clomiphene. (R. at 3).

MLB and Dr. Larson responded accordingly. First, MLB notified the MLBPA that “Mega Energy Products, which distributes SpeedShot,” had become a banned company with which teams and players were prohibited from doing business and asked the MLBPA to pass that information on to their players. (R. at 3). The MLBPA relayed the information to all players through their agents. *Id.* Additionally, Dr. Larson sent a memorandum to all MLB players reminding them of the dangers posed by energy-boosting supplements and “urging players not to take products or supplements that claim to provide or boost energy.” *Id.* Larson decided to send this general warning about all energy-boosters rather than about SpeedShot specifically to warn players not only of Clomiphene, but also of any supplement distributed by Mega Energy or any other company that might also contain an undisclosed banned substance. (R. at 16). Moreover, Birch instructed the Hotline to inform players who called that they should avoid taking any energy supplement because the label might not list all ingredients. (R. at 17). Finally, Dr. Larson made himself available to inform any inquisitive player who called him specifically about SpeedShot that the drink contained Clomiphene, though no players contacted him. (R. at 16).

Despite multiple warnings against the use of energy-boosting supplements, Kevin Wilson of the Minnesota Twins and four other players took SpeedShot. Their results came back positive for Clomiphene after a drug test. (R. at 4). After Wilson and the four players (collectively “the Players) were suspended for 15 games as required by the Policy, they, along with the MLBPA, appealed the suspensions to a neutral arbitrator pursuant to the terms of the Policy. During the arbitration proceedings, none of the Players disputed their positive test results. They admitted that they were aware of the

warnings regarding energy-boosters, the Hotline, and the Policy's rule that each player is responsible for what is in his body. (R. at 4). The Players argued, however, that their positive test results should be excused because Dr. Larson and MLB knew that at least some SpeedShot shots contained Clomiphene and did not specifically advise MLB players of this fact. They asserted that their suspensions should be lifted because the Policy created a fiduciary duty that required MLB to give a more particularized warning about SpeedShot once MLB learned that it contained Clomiphene. *Id.*

After the hearing, the arbitrator upheld the suspensions pursuant to the Policy's strict liability rule. Specifically, the arbitrator found that the Policy unequivocally "enforces a rule of a strict liability – a rule that players alone are responsible for what is in their bodies; that supplements are used at the player's own risk, and each player clearly understood that rule and what it means." (R. at 5). The arbitrator also found that "the Policy does not articulate or impose an obligation to issue specific warnings about specific products, and nothing in the record suggests that the bargaining parties have ever contemplated imposing such a requirement." *Id.*

Wilson subsequently filed suit against Dr. Larson, Dr. Finkle, and Mr. Birch in Minnesota state court, alleging that the Policy violated DATWA. He sought both damages and an injunction against enforcement of the arbitration awards. After the court granted Wilson a temporary restraining order barring his suspension, MLB removed the case to federal court, where it was consolidated with an action brought by the MLBPA seeking to vacate the arbitration awards under the LMRA.

SUMMARY OF THE ARGUMENT

Section 301 of the LMRA allows for the preemption of state law claims that are substantially dependent upon the interpretation of a labor contract between an employer and its employees. Preemption under Section 301 begins with an analysis of the claim or claims at issue within the purview of the state law at issue.

In the present case, the Respondent asserts only two amended claims under DATWA's minimum requirements standard. The first claim alleges generally that the Petitioner violated Respondent's substantive and procedural rights under DATWA. Respondent's second claim alleges that the Petitioner did not meet the certified laboratory testing requirements under DATWA.

Because the Respondent fails to identify any specific substantive and/or procedural violations under DATWA, the Respondent's first claim, in and of itself, requires a comprehensive analysis of precisely how and when these alleged violations transpired, if they did at all. Furthermore, DATWA's minimum requirements standard only provides a claim against an employer whose *policy* does not meet DATWA's minimum requirements standard. Thus, the policy itself, and not what actually happened to the Respondent, would need to meet DATWA's minimum requirements standard. Such analysis is substantially dependent upon an interpretation of both the CBA and the Policy, and thus necessitates preemption.

Respondent's second claim regarding certified laboratory standards is predicated upon a finding that the scope of DATWA's minimum requirements standard is intended to apply to performance enhancing drugs, energy boosters, and specifically, Clomiphene. However, DATWA's definition of "drugs" explicitly enumerates which drugs are

covered under DATWA's minimum requirements standard. Specifically, performance enhancing drugs, energy boosters, and Clomiphene are not included within this definition. In fact, in defining the term "drugs," the drafters of DATWA purposely adopted the stricter of two available definitions because they did not intend for the statute to regulate the testing of performance enhancing drugs, energy boosters, and Clomiphene. Therefore, application of DATWA to the present case in this regard is inappropriate.

Additionally, as it relates to vacation of arbitration awards, the public policy exception is narrow and must satisfy the principles set forth in governing Supreme Court precedent. One of these principles is that in order to preclude enforcement of an arbitration award, a public policy must be explicit, well-defined, and dominant. The MLBPA has not identified an explicit public policy of which the arbitration awards are in violation. The Circuit Court, therefore, erred in setting aside the awards.

The Court also erred in concluding that the awards sanction breaches of fiduciary duty, and therefore violate public policy, because no fiduciary relationship existed between MLB and the Players. Under New York law, a fiduciary relationship exists between two persons when one of them is under a duty to give advice for the benefit of the other upon matters within the scope of the relationship, or, alternatively, when a party reasonably relied on the other's superior knowledge or expertise. No fiduciary relationship existed between MLB and the Players under either of these definitions.

The Policy imposes no obligation upon either Dr. Larson or MLB to give advice to players about which specific supplements they should refrain from taking. Thus, any reliance by the Players upon the expertise and knowledge of either Dr. Larson or MLB in assuming that SpeedShot did not contain a banned substance was unreasonable. Also,

MLB did not undertake a fiduciary duty either by directing players with questions about a particular supplement to contact Dr. Larson or by operating the Hotline.

Furthermore, even if a fiduciary relationship existed between MLB and the Players, MLB did not breach its duty by not specifically warning the Players about SpeedShot because any such fiduciary duty did not include a duty to disclose which specific supplements contain banned substances. In this regard, a duty to disclose arises when one party has information that the other party is entitled to know because of a fiduciary relationship between them, or, alternatively, where a party has superior knowledge not available to the other.

Because the Policy does not require MLB to caution players about particular supplements, the Players were not entitled to receive a specific warning about SpeedShot. Furthermore, in addition to Dr. Larson warning all players not to take any energy-boosting supplement, Mr. Birch instructed the Hotline to inform players who called that they should avoid taking all energy supplements because the label might not list all ingredients. Also, Dr. Larson ultimately would have told any player who called him to inquire about SpeedShot that it contained Clomiphene. Therefore, MLB did not possess information that was not readily available to the Players.

Moreover, the Circuit Court erred in setting aside the arbitration awards because its decision conflicts with the Federal Arbitration Act (the “FAA”). In this respect, the FAA lists four conditions under which a court may set aside an arbitration award. Because the Court set aside the awards without finding that any of these conditions had been met, its decision directly contradicts the FAA.

Finally, the Circuit Court erred in vacating the arbitration awards because common law governing arbitration awards provides that courts must afford an arbitrator's decision a high level of deference. Specifically, a court may not vacate an arbitration award simply because the court disagrees with the arbitrator's interpretation of the contract. In this case, however, the Circuit Court set aside the arbitrator's awards because it did not agree with the arbitrator's interpretation of the Policy that the Policy did not impose an obligation upon either Dr. Larson or MLB to issue specific warnings to its players about specific supplements.

STANDARD OF REVIEW

For the purposes of this case, the Supreme Court will review all matters *de novo*.

ARGUMENT AND CITATIONS OF LEGAL AUTHORITY

- I. THIS COURT SHOULD REVERSE THE CIRCUIT COURT’S DECISION THAT RESPONDENT’S CLAIMS UNDER DATWA CHALLENGING THE SUSPENSION OF AN MLB PLAYER UNDER MLB’S COLLECTIVELY BARGAINED FOR DRUG POLICY ARE NOT PREEMPTED BY SECTION 301 OF THE LMRA

Pursuant to Section 301 of the Labor Management Relations Act, "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a). The Supreme Court in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985) held that LMRA Section 301 preempts state-law claims that are "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." Accordingly, "if the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law . . . is pre-empted and federal labor-law principles - necessarily uniform throughout the Nation - must be employed to resolve the dispute." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988) (footnote omitted).

LMRA Section 301 ensures that labor contracts are uniformly interpreted and enforced. Specifically, "Uniformity in the interpretation of collective bargaining agreements is considered essential to the federal scheme favoring collective bargaining." *Anderson v. Ford Motor Co.*, 803 F.2d 953, 955 (8th Cir. 1986). Thus, substantive issues under Section 301 will be resolved according to "federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

The Supreme Court in *Lueck* cautioned that it would be improper to “preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.” *Lueck*, 471 U.S. at 211. However, the Respondent’s claims are not “independent” because the collectively bargained Policy is the instrument through which the Respondent was tested; the Policy establishes the procedure by which the Respondent is directly challenging under state law; and the Policy determines whether DATWA’S minimum requirements standard applies to the challenged conduct at all. Far from “independent,” the collectively bargained Policy is the beginning, middle, and end of the Respondent’s state statutory claims. Accordingly, all claims should be preempted. *See Gore v. Trans World Airlines*, 210 F.3d 944, 949, 50 (8th Cir. 2000) (In affirming preemption: “While state law has created these [cause of] actions, the collective bargaining agreement is the defining source of the duties specifically owed by the defendants for each claim asserted”).

A. Respondent’s DATWA claims are preempted because the statute expressly requires analysis of the CBA and the Policy

The Supreme Court has prescribed a two-step approach for determining whether a state-law claim meets the “substantially dependent” standard. First, any state-law claim founded on rights created by the CBA itself is preempted under Section 301. *See Teamsters v. Lucas Flour, Co.*, 369 U.S. 95, 102-03 (1962). In other words, preemption is based on whether the claim “derives from or is implied from contract rights established under a collective bargaining agreement.” *Anderson*, 803 F.2d at 956. Second, Section 301 preemption applies to any claim whose resolution is “inextricably intertwined with consideration of the terms of the labor contract.” *Lueck*, 471 U.S. at 213.

“The proper starting point for determining whether interpretation of a CBA is required in order to resolve a particular state law claim is an examination of the claim itself.” *Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 331 (8th Cir. 2006). A state-law cause of action under DATWA will arise if an employer “requires or requests” a drug or alcohol test “*unless* the testing is done pursuant to a written drug and alcohol testing policy that contains the minimum information required in section 181.952; and, is conducted by a testing laboratory which participates in one of the programs listed in section 181.953, subdivision 1.” Minn. Stat. § 181.951(b) (emphasis added). Additionally, a claim will arise if the testing is “arbitrary and capricious.” *Id.* § 181.951(c). Thus, DATWA creates three available methods by which a party may assert a claim: 1) claims against the policy when it falls below DATWA minimum requirements, 2) claims against inadequate testing laboratories, and 3) claims against testing procedures that are arbitrary and capricious.

After considering the claims available under DATWA, “the court must [then] look to the essence of the plaintiff’s claim, in order to determine whether the plaintiff is attempting to disguise what is essentially a contract claim.” *Stringer v. National Football League*, 474 F.Supp.2d 894, 900 (S.D Ohio 2007) (citations omitted). As a threshold matter, the Respondent alleges only one specific DATWA claim within its amended complaint: failure by MLB to use certified laboratories (the “Specific Claim”). (R2. at 6). Besides this single claim, the Respondent makes a general claim that “the Defendants have violated the Player’s substantive and procedural rights under the Minnesota Drug and Alcohol Testing in the Workplace Act” (the “General Claim”). *Id.* The Petitioner

will entertain Respondent's General Claim and Respondent's Specific Claim within the purview of the three claims available under DATWA.

B. Analysis of Respondent's General Claim under DATWA's first available claim

i. DATWA's First Available Claim

As set forth in § 181.951(b), and under the first available DATWA claim, a state-law cause of action will arise when an employer requests or requires drug testing, unless the testing is done pursuant to a written drug and alcohol "*testing policy*" that contains the minimum requirements. *See* Minn. Stat. § 181.951(b). A state-law DAWTWA claim is thus predicated upon whether the *policy* at issue "contains the minimum information required." *Id.* As such, the first available claim may only arise after the court has analyzed the policy against the backdrop of DATWA's minimum requirements. Such analysis would require "interpretation or construction" of the policy and thus necessitate preemption. *See Twin City Bricklayers*, 450 F.3d at 330.

ii. Respondent's General Claim is Inextricably Intertwined with the Policy

Respondent's General Claim alleges a violation of the Respondent's "substantive and procedural rights" under DATWA. (R2. at 6). In addition to being vague and unavailing, Respondent's General Claim requires this Court to analyze exactly how and when the Respondent's "substantive and procedural rights" were violated, if such violations exist at all. In doing so, Respondent's General Claim would require an application of DATWA's minimum requirements standard to the terms of the Policy. Because any such violation would be "inextricably intertwined with consideration of the terms of the labor contract," the claim must be preempted. *See Lueck*, 471 U.S. at 213.

In contrast, the Circuit Court’s analysis rests upon the conclusion that a court need only “compare the facts and the procedure that MLB actually followed with respect to its drug testing of Wilson with DATWA’s requirements in order to determine if Wilson is entitled to prevail.” (R2. at 7). In response to Respondent’s General Claim, the court below would have this Court search for “substantive and procedural” violations within the “actual” conduct of MLB, rather than against the Policy itself.

However, DATWA does not provide a claim against “actual” drug tests that do not meet the minimum requirements. Instead, the statute only provides a claim against “testing policies” that do not “contain the minimum information required.” *See* Minn. Stat. § 181.951(b). The Circuit Court’s analysis is critically flawed as it mistakenly bestows the DATWA minimum requirements upon the “actual” facts and procedures rather than conferring these requirements to the policy itself.

C. Analysis of Respondent’s Specific Claim under DATWA’s second available claim

i. DATWA’s second available claim

Respondent’s Specific Claim within its amended complaint alleges that the Petitioner failed to use certified laboratories. (R2. at 6). This Claim corresponds to the second available claim under DATWA, § 181.951(b), which requires testing to be performed “by a testing laboratory which participates in one of the programs listed in section 181.953, subdivision 1.” In applying this requirement to the Specific Claim, it is first important to determine whether the testing of performance enhancing drugs and energy boosters, such as Clomiphene, falls within the scope of DATWA.

DATWA is structured so as to provide employers with the freedom necessary to collectively bargain with their employees. Section 181.855(1) states that DATWA testing requirements

shall not be construed to limit the parties to a collective bargaining agreement from bargaining and agreeing with respect to a drug and alcohol testing policy that meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection provided in those sections

Minn. Stat. § 181.955(1). The collectively bargained Policy may very well “exceed[]” the standards and requirements set forth by DATWA if the drugs tested in the Policy go beyond those covered by the Act.

ii. The drugs tested under the Policy “exceed” those intended to be regulated by DATWA’s minimum requirements

The type of “drug” applicable to DATWA’s testing standard is defined in the Act as a “controlled substance.” *See* Minn. Stat. §§ 181.950 subdiv. 4, 152.01 subdiv. 4. Subsequently, a “controlled substance” is defined in the form of a list that explicitly enumerates substances contained within Schedules I through V of § 152.02 and does not include energy boosters, performance enhancing drugs, or Clomiphene. Because the substances covered by DATWA are enumerated and unambiguous, the plain language of the Act controls. *See Twin City Bricklayers*, 450 F.3d at 329.

Furthermore, the Minnesota Legislature chose the narrower of two available definitions when defining the term “drug” as it relates to DATWA standards. Section 152.01, along with the definition adopted by DATWA, contains a distinct and much broader definition of “drug.” *See* Minn. Stat. § 152.01 subdiv. 2 (“The term ‘drug’ includes all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary and any substance or mixture of substances intended to be used for

the cure, mitigation, or prevention of disease of either humans or other animals.”). By choosing to adopt the enumerated definition of “drug” as a “controlled substance,” rather than the broad definition, the Minnesota Legislature purposefully limited the interpretation and application of the drugs to be encompassed by DATWA.

iii. Respondent’s Specific Claim is inextricably intertwined with the Policy

Whether the Petitioner was required to meet the certified laboratory standard is predicated upon a finding that the DATWA standard does in fact apply to the testing of performance enhancing drugs, energy boosters, and specifically, Clomiphene. In turn, this determination would require this Court to compare the provisions of the state statute with those of the CBA, thus rendering the Respondent’s Specific Claim “substantially dependent upon analysis of the terms of [the Policy]” and preempted under Section 301. *Lueck*, 471 U.S. at 220.

The Circuit Court has reasoned that the LMRA does not give employers the power to “displace any state regulatory law they found inconvenient.” (R2. at 9). However, this case does not present a question of “displacement,” but rather, whether the Policy “exceeds” state-law requirements, specifically those provided by DATWA. The resolution of this issue requires interpretation and analysis of the terms of the CBA and the Policy, and thus underlies any finding of statutory liability.

D. Analysis of DATWA’s third available claim

The third available claim under DATWA will arise if the drug testing is performed on an “arbitrary and capricious basis.” *See* Minn. Stat. § 181.951(4). However, DATWA provides an exception for the random drug testing of professional sports leagues, provided that the random testing is “consistent with the collective

bargaining agreement.” *Id.* Thus, in cases involving random testing, DATWA actually requires the state court to interpret the parties' collective bargaining agreement and to determine how the collective agreement's procedures and requirements match up with the provisions of the state statute. *See Zupanich v. United States Steel Corp.*, No. 08-5847, 2009 U.S. Dist. LEXIS 44504, at *8-9 (D. Minn. May 27, 2009) (“[T]he plain language of the statute requires the Court to examine the CBA to determine whether the agreement negotiated by the parties resulted in conditions that are not more favorable to employees. As such, the claim is inextricably intertwined with the CBA.”).

The record is devoid of an indication that either Respondent’s General or Specific Claims are asserted under the “arbitrary and capricious” standard provided under § 181.951(4). Even if this were the case, it is apparent from the plain language of the provision that DATWA’s “arbitrary and capricious” test requires a determination of whether the random testing is “consistent” with the Policy. This sort of contractual analysis is precisely what the Supreme Court in *Lueck* sought to preempt.

E. Application of divergent state laws would render the uniform enforcement of the CBA practically impossible

Uniform federal law is better equipped to determine “what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement.” *Stringer*, 474 F.Supp.2d at 900. Otherwise, a collectively bargained agreement possessing, “different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of [these] collective agreements.” *Lucas Flour, Co.*, 369 U.S. at 103. The difficulty in applying inconsistent state laws would be intensified by the fact that many of the performance enhancing substances and energy boosters that threaten the integrity of professional

sports pose little danger within the ordinary workplace. Thus, an exhaustive analysis of each state drug testing statute would be necessary to determine if indeed the state law was intended to regulate the types of performance enhancing drugs and energy boosters unique to the regulation of professional sports.

In particular, “national uniformity [is] required in [the] regulation of baseball and its reserve system . . . [because] the burden on interstate commerce outweighs the state interests in applying state laws to those relationships.” *Partee v. San Diego Chargers Football Co.*, 668 P.2d 674, 679 (Cal. 1983). This is precisely why Section 301 of the LMRA is necessary to “ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes.” *Lingle*, 486 U.S. at 404.

Thus, the Respondent’s Specific Claim and the Respondent’s General Claim under DATWA are predicated upon an interpretation of the CBA and the Policy. Because these claims are inextricably intertwined with the terms therein, preemption under Section 301 of the LMRA is necessary.

II. THIS COURT SHOULD REVERSE THE CIRCUIT COURT’S DECISION TO SET ASIDE THE ARBITRATION AWARDS BECAUSE THE COURT ERRED IN CONCLUDING THAT THE AWARDS VIOLATE PUBLIC POLICY

Judicial review of an arbitration award is extremely limited. *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 972 (8th Cir. 2008). Beyond the grounds for vacation of an arbitration award provided in the FAA, an award should be set aside only when it is “completely irrational or evidences a manifest disregard for the law.” *Stark v. Sandberg*, 381 F.3d 793, 796 (8th Cir. 2004). In this regard, as it relates to vacation of arbitration awards, the public policy exception is narrow and must satisfy principles set forth in

governing Supreme Court precedent. *Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57 (2000).

A. The Respondent has not met its burden of proving that the arbitration awards violate an explicit, well-defined, and dominant public policy

A party to a collective bargaining agreement seeking to vacate an arbitration award on the grounds that the award violates public policy bears the burden of proving that the arbitrator was “fully aware of the existence of some clearly defined governing legal principle, but refused to apply it.” *Stark*, 381 F.3d at 793. Consequently, as the U.S. Supreme Court held in both *W.R. Grace* and *Eastern Associated Coal*, in order to preclude enforcement of an arbitration award, a public policy must be “explicit, well-defined and dominant” and “ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.” *Eastern Associated Coal*, 531 U.S. at 58; *citing W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766 (1983).

Applying this standard articulated by the U.S. Supreme Court, the Circuit Court in the case at bar erred in holding that the arbitration awards violate public policy. The Respondent asserts that the arbitration awards violate public policy because Dr. Larson, as a fiduciary in connection with his role as the league’s physician, had a duty to the players to issue a specific warning regarding SpeedShot and the fact that it contained Clomiphene. (R. at 16). However, the Respondent has offered no authority clearly articulating such a public policy under either New York or federal law. This failure to demonstrate an explicit, well-defined, and dominant public policy that would require Dr. Larson’s disclosure precludes the Respondent from applying the narrow public policy exception as a basis for vacating the arbitration awards.

- B. The arbitration awards do not encourage breaches of fiduciary duty nor do they encourage breaches of duty to disclose

In deciding that the arbitration awards should be set aside, the Circuit Court maintained that the awards violate public policy because they “sanction the MLB’s knowing and intentional breach of a fiduciary duty and willful failure to disclose the fact that SpeedShot secretly contained a banned substance.” (R2. at 11). This argument is erroneous on two grounds.

- i. No fiduciary relationship existed between MLB and the Players requiring MLB to inform the Players that SpeedShot contained Clomiphene*

A fiduciary relationship exists between two persons when one of them is under a duty to act or to give advice for the benefit of the other upon matters within the scope of the relation. *United Feature Syndicate Inc. v. Miller Features Syndicate, Inc.*, 216 F.Supp.2d 198, 200 (S.D.N.Y. 2002) (holding that a fiduciary relationship can be established when one party entrusts another with its funds). Alternatively, a fiduciary relationship exists when “a party reposed confidence in another and reasonably relied on the other’s superior knowledge or expertise.” *Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs.*, 388 F.Supp.2d 292, 305 (S.D.N.Y. 2005).

In the present case, concerning on whom the responsibility of ensuring that players comply with the Policy falls, the Policy “strongly encourages players to avoid the use of supplements altogether” and warns players that “if you take these products, you do so AT YOUR OWN RISK!” (R. at 9). The Policy also stresses to players that “you and you alone are responsible for what goes into your body.” (R. at 9). As these terms, which were jointly negotiated by the MLBPA and the MLB Commissioner (R. at 8). indicate, the Policy imposes no obligation upon either Dr. Larson or MLB to give advice

to MLB Players about which specific supplements they should refrain from taking, thereby precluding the existence of a fiduciary relationship between MLB and the Players under *United Feature*.

Instead, the Policy provides that by taking a supplement, the ingredients of which are unknown to him, a player assumes the risk that the supplement does not contain a substance that is banned under the Policy. Indeed, the Policy's application of strict liability provides the Players with sufficient notice that on their shoulders alone rests the burden of ensuring that any supplements they choose to take do not contain banned ingredients. Therefore, any reliance by the Players upon the expertise and knowledge of Dr. Larson in assuming that SpeedShot did not contain a banned substance was unreasonable, thereby precluding the existence of a fiduciary relationship between MLB and the Players under *Lumbermens*.

1. MLB did not assume a fiduciary duty by directing players with questions about a particular supplement to contact Dr. Larson or by operating the Hotline

An athletic commission does not voluntarily assume a fiduciary duty when the commission either represents itself as an expert in the field of illegal substances or instructs athletes to use its hotline to obtain information on those substances. *See Walton-Floyd v. United States Olympic Committee*, 965 S.W.2d 35 (Tex 1st DCA 1998) (holding that the United States Olympic Committee did not breach a duty when one of its hotline operators instructed an athlete that a supplement containing a banned substance was not on the banned list). Nevertheless, in the case at bar, the Circuit Court, in concluding that MLB breached its fiduciary duty by not warning the Players about the risks of taking SpeedShot, asserted that

The Policy explicitly provides “if you have questions or concerns about a particular supplement or other product, you should contact Dr. Larson...By declaring itself and Dr. Larson the authoritative sources of information about all supplements, the MLB undertook a duty “to give advice for the benefit of [MLB Players] upon matters within the scope of the relation.”

(R2. at 12). Applying the holding from *Walton-Floyd*, however, MLB did not undertake a fiduciary duty by directing players with questions or concerns about a particular supplement to contact Dr. Larson. Therefore, the Circuit Court’s argument is without merit. Moreover, the Respondent argued that Mr. Birch breached a fiduciary duty because he did not instruct Hotline operators to issue callers a specific warning about SpeedShot. (R. at 16). This argument also holds no merit because *Walton-Floyd* provides that MLB neither assumed a duty through its operation of the Hotline nor could it have breached any such duty when Hotline operators did not issue a warning about SpeedShot specifically.

ii. Even if a fiduciary relationship existed between MLB and the Players, MLB did not breach its duty by not warning the Players specifically about SpeedShot because any such fiduciary duty did not include a duty to disclose which specific supplements contained banned substances

A duty to disclose arises when one party has information that the other party is entitled to know because of a fiduciary or other similar relation of trust and confidence between them. *Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 185 (2d. Cir. 1998). In *Grandon*, investors in municipal securities challenged the District Court’s dismissal of their complaint against their broker alleging that the broker breached its duty by failing to disclose the amount of price markups. *Id.* In vacating the dismissal of the investors’ complaint, the Court first acknowledged that by recognizing a private right of action for fraud against securities brokers for charging undisclosed excessive markups on sales of

securities, “the S.E.C. has established through its enforcement actions the principle that charging undisclosed excessive commissions constitutes fraud.” *Id.* at 192 (quoting *Ettinger v. Merrill Lynch*, 835 F.2d 1031 (3d Cir. 1987)). The Court then concluded that because “the Supreme Court has a rich tradition of interpreting the antifraud provisions of the Federal Securities Act expansively,” the brokers had a duty to disclose the excessive markups. *Grandon*, 147 F.3d at 192. Additionally, the Court noted that “given the tenuous federal presence in the municipal securities market, investors in that market have ‘substantially less protection’ than investors in the ‘regular securities market.’” *Id.* at 189 (quoting Thomas Lee Hazen, *The Law of Securities Regulation* § 10.5 (3d ed. 1995)).

The present case is distinguishable from *Grandon* on numerous grounds. First, neither the Respondent nor either of the courts below argued that failing to warn athletes about a specific banned substance rises to the level of fraud. Nor did the Respondent or either of the courts below identify a “rich tradition” of the Supreme Court of interpreting drug-testing policies in collective bargaining agreements expansively. Finally, given that baseball players like the ones in the present case are free to negotiate the terms of drug-testing policies in their collective bargaining agreements, it is unlikely that the Court in *Grandon* would find that baseball players need more protection from athletic commissions. In fact, because the freely-negotiated terms of the Policy in this case do not entitle MLB players to be informed of specific supplements that might contain ingredients prohibited by the Policy, under *Grandon*, neither Dr. Larson nor MLB was under a duty to disclose to the Players that SpeedShot contained Clomiphene.

Moreover, a duty to disclose may arise where a party has superior knowledge not available to the other. *Callahan v. Callahan*, 127 A.D.2d 298, 300 (N.Y. App. Div.

1987) (holding that an attorney who misrepresented the value of property and failed to disclose other information about the property in order to induce the wife of the attorney's client to release her interest in the real estate violated his duty to disclose). The facts of the present case are distinguishable from those of *Callahan* because, unlike the attorney in *Callahan*, Dr. Larson did not misrepresent the ingredients of SpeedShot in order to induce the Players to take the supplement and violate the Policy. Furthermore, under *Callahan's* standard, MLB did not have a duty to disclose to the Players of what it learned about SpeedShot because MLB's knowledge that products distributed by Mega Energy contained banned substances was readily available to the Players.

First, Dr. Larson sent a general warning about all energy-boosting supplements to the Players to warn them not only of Clomiphene, but also of any supplement distributed by Mega Energy or any other company that might contain an undisclosed banned substance. (R. at 16). Moreover, Mr. Birch instructed the Hotline to inform players who called to avoid taking any energy supplement because the label might not list all ingredients. (R. at 17). Finally, Dr. Larson testified that he would have told any player who called him to inquire about SpeedShot that it contained Clomiphene. (R. at 16).

III. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S DECISION TO SET ASIDE THE ARBITRATION AWARDS BECAUSE THE COURT'S DECISION DOES NOT COMPLY WITH THE FEDERAL ARBITRATION ACT

The FAA establishes a liberal federal policy favoring arbitration agreements. *Stark*, 381 F.3d at 794. It permits a court to set aside an arbitration award in four circumstances:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators . . . ;
- (3) where the arbitrators were guilty of misconduct . . . ; (4) where the arbitrators exceeded their powers . . .

9 U.S.C.A. § § 10(a)(1)-(4). Beyond grounds for vacation of arbitration awards that are provided in the FAA, an award should be set aside only when it is completely irrational or evidences a manifest disregard for the law. *Stark*, 381 F.3d at 796. The arbitrator's awards in this case are not irrational because they draw their essence from the CBA, a fact which the parties conceded (R. at 15)., and, as stated, *supra*, they do not violate public policy. Therefore, because the Circuit Court set aside the arbitration award without finding that any of the four conditions provided in the FAA had been met, its decision directly contradicts the FAA.

IV. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S DECISION TO SET ASIDE THE ARBITRATION AWARDS BECAUSE THE COURT DID NOT SHOW DEFERENCE TO THE ARBITRATOR'S DECISION IN VIOLATION OF COMMON LAW GOVERNING ARBITRATION AWARDS

Courts must afford an arbitrator's decision "an extraordinary level of deference." *Crawford*, 543 F.3d at 972. In fact, as long as an honest arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision. *Eastern Associated Coal*, 531 U.S. at 57. In addition, a court may not overrule an arbitrator's decision simply because the court believes that its own interpretation of the collective bargaining agreement would be the better one. *W.R. Grace*, 461 U.S. at 757.

Both the U.S. Supreme Court and the Eighth Circuit have explicitly provided policy concerns in support of these rationales. The Supreme Court in *Eastern Associated Coal* recognized that while "reasonable people can differ as to whether" an arbitrator's decision is the most appropriate remedy for a labor dispute, when "both employer and union have agreed to entrust this remedial decision to an arbitrator," courts should not

interfere with this decision. *Eastern Associated Coal*, 531 U.S. at 68. The Supreme Court in *W.R. Grace*, moreover, acknowledged that “when the parties include an arbitration agreement clause in their collective bargaining agreement, they choose to have disputes concerning construction of the contract resolved by an arbitrator.” *W.R. Grace*, 461 U.S. at 763. Finally, the Court in *Crawford*, in determining the propriety of the District Court’s order upholding an arbitration award in favor of a shareholder in a dispute over the value of the shareholder’s stock in the company, noted that

The conflicting testimony submitted by the parties set forth persuasive arguments in support of their respective positions. It was for the arbitrators to accept those portions of the testimony which they found more persuasive. Whether we as judges would have found that testimony equally as persuasive is beside the point, for we may not set aside an award simply because we might have interpreted the Agreement differently or disagreed with the arbitrator’s factual determinations.

Crawford, 543 F.3d at 978.

The decision of the Circuit Court to overrule the arbitrator’s decision in the case at bar violates these policies. In this regard, during the arbitration proceedings, the arbitrator found that the Policy unequivocally “enforces a rule of strict liability – a rule that Players alone are responsible for what is in their bodies; that supplements are used at the player’s own risk, and each player clearly understood that rule and what it means.” (R. at 5). Also, the arbitrator found that “the Policy does not articulate or impose an obligation to issue specific warnings about specific products, and nothing in the record suggests that the bargaining parties have ever contemplated imposing such a requirement.” (R. at 5). Nevertheless, the Circuit Court set aside the arbitrator’s awards because the Court disagreed with these interpretations, finding instead that “Dr. Larson and the MLB owed the players the duty to disclose all material facts they knew within the

scope of [their] relationship.” (R2. at 13). Moreover, the Circuit Court set aside the arbitrator’s awards despite the fact that both parties conceded that the arbitrator’s decisions drew their essence from the CBA. (R. at 15).

In overruling the District Court, the Circuit Court showed deference neither to the arbitrator’s decisions nor to the fact that both MLB and the MLBPA collectively decided that “Players subject to disciplinary action may appeal to an arbitrator...whose decision constitutes a full, final, and complete disposition of the appeal that is binding on all parties.” (R. at 2). Furthermore, the Circuit Court overruled the arbitrator’s decision “simply because the court believed that its own interpretation of the collective bargaining contract would be the better one.” *W.R. Grace*. The Court’s decision to set aside the arbitration awards should, therefore, be reversed.

CONCLUSION

For the reasons and legal authorities set forth herein, the Petitioner urges this Honorable Court to overrule the Circuit Court's decision by declaring that Section 301 of the LMRA preempts Respondent's DATWA claims and by enforcing the arbitration awards. Respondent's DATWA claims are substantially dependent upon interpretation and analysis of the CBA and the Policy, and the awards do not violate public policy.

RESPECTFULLY SUBMITTED,

BY: _____

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy hereof has been furnished to counsel for the Respondent by mail on _____, 2010.

BY: _____

COUNSEL FOR PETITIONER

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the foregoing complies with the typeface and font size, Times New Roman 12 point proportionately spaced, as set forth in the Rules.

BY: _____

COUNSEL FOR PETITIONER