No. 18-1415

In The Supreme Court of the United States

ASARCO, LLC,

Petitioner,

v.

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

In its Brief in Opposition ("Opp."), Respondents United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("Union") fails to offer any reason why this Court should not grant certiorari to resolve the two issues on which the Ninth Circuit has departed from this

Court's arbitration jurisprudence and has created conflicts with other circuits.

First, the Union claims the Ninth Circuit's decision is a "routine" application of deference to an arbitrator's interpretation of a collective bargaining agreement ("CBA"). It is not. The Arbitrator did not interpret the No Add Provision and conceded that the bonus provisions were unambiguous, so there was no interpretation to which the Ninth Circuit could defer.

Moreover, relying on decisions of the First and Fourth Circuits, the Ninth Circuit expressly stated that an arbitrator's power to fashion a remedy is not limited by a No Add Provision that prevents an arbitrator from adding to or deleting provisions from a CBA. The Ninth Circuit deepens a split of authority with decisions of the Third, Seventh, and Tenth Circuits, which hold that No Add Provisions ***do*** limit an arbitrator's choice of remedy. And the Ninth Circuit's holding also is contrary to this Court's holdings that an arbitrator may not "dispense his own brand of industrial justice." *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)

The doctrine of mutual mistake cannot override such limits. The No Add Provision does not disappear merely because an arbitrator believes the CBA should be altered to correct a mutual mistake. As the Seventh Circuit has expressly held, an arbitrator may not rewrite a CBA with a No Add Provision to conform to the parties' intent, as evidenced by the parties' "oral understanding" and "long-standing practice." *Anheuser-Busch, Inc. v. Beer Workers Local Union 744*, 280 F.3d 1133, 1137-40 (7th Cir. 2002). These circuit splits warrant review by this Court.

Second, the Union does not dispute that this and other courts have held that a party does not consent to arbitrate an issue by objecting to its arbitrability before the arbitrator. Petition of Certiorari ("Pet.") 21-23. Instead, the Union argues that the Ninth Circuit did not create a conflict, because it claims the Ninth Circuit did not decide if ASARCO waived its argument that the No Add Provision precluded the Arbitrator from adding to or modifying the CBA.

The Union's argument ignores the practical effect of the Ninth Circuit's repeated statements that ASARCO consented to have the Arbitrator decide the scope of his authority under the No Add Provision by agreeing to arbitrate the underlying bonus dispute and asserting in the arbitration that he could not disregard the No Add Provision. App. 14a-15a. However characterized, the Ninth Circuit held that ASARCO somehow opened the door to the Arbitrator's disregard of the No Add Provision by objecting to his doing so.

The Ninth Circuit ignored this Court's controlling authority, and its opinion conflicts with numerous decisions of other circuits. Certiorari therefore should be granted on the second question presented to resolve this circuit split.

THE WRIT SHOULD BE GRANTED

I. THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH SEVERAL CIRCUITS' DECISIONS ABOUT AN ARBITRATOR'S AUTHORITY TO DISREGARD NO ADD PROVISIONS.

The Ninth Circuit held that the contractual limits on an arbitrator's power set forth in the No Add

Provision do not extend to the ability to "fashion a remedy," a holding that conflicts with decisions of numerous other circuits. Pet. 14-18 (citing App. 14a); *Anheuser-Busch, Inc. v. Beer Workers Local Union 744*, 280 F.3d 1133 (7th Cir. 2002); *Pa. Power Co. v. Local Union No. 272 of the IBEW*, 276 F.3d 174 (3d Cir. 2001); *CP Kelco US, Inc. v. Int'l Union of Operating Eng'rs*, 381 F. App'x 808 (10th Cir. 2010). Certiorari should be granted to resolve this conflict.

The Union: (1) argues the Ninth Circuit's holding is limited to instances of mutual mistake; (2) contends that, by agreeing to arbitrate, the parties effectively gave the Arbitrator authority to disregard the contractual limits on his authority; and (3) effectively maintains that an arbitrator is wholly unconstrained when it finds a mutual mistake and may disregard express contractual limits on its authority. The first argument is unsupported by the Ninth Circuit's opinion and the cases on which it relies; the second would render bargained-for contractual limits on arbitral authority a nullity; and the third cannot be squared with basic principles of arbitration law. And none of these arguments eliminates the clear circuit split previously set forth.

1. The Ninth Circuit stated that courts must "defer to the arbitrator's determination of whether and the extent to which the no-add provision limited the arbitrator's ability to fashion a remedy." App. 14a. This is not limited to mutual mistakes as the Union claims.

Not only does that statement make no mention of mutual mistake, the Ninth Circuit quotes two other circuits that have "'agree[d] that "the fashioning of an appropriate remedy is not an addition to the

obligations imposed by the contract."'" App 14a-15a (quoting *Kraft Foods, Inc. v. Office and Prof'l Employees Int'l Union, AFL-CIO, CLC, Local 1295*, 203 F.3d 98, 101 (1st Cir. 2000) (quoting *Tobacco Workers Int'l Union, Local 317 v. Lorillard Corp.*, 448 F.2d 949, 955 (4th Cir. 1971))). Neither of those cases involved an arbitrator's choice of remedies to reform a contract to cure a mutual mistake.[1]

2. The Union also argues that ASARCO, by agreeing to arbitrate the dispute over whether new hires were entitled to a bonus under the CBA, also agreed the Arbitrator could decide if he could disregard the express limitations of the No Add Provision. This argument defies the basic premise of arbitration – that arbitration is a product of contract and arbitrators must "'give effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2009) (quoting *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 479 (1989)).

Here, the language of the No Add Provision is plain and unambiguous: "The arbitrator shall not have

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[1] The Ninth Circuit also quotes *Int'l Assoc. of Machinists v. Howmet Corp.*, 466 F.2d 1249, 1252–53 (9th Cir 1972), for the proposition that "'a clause limiting the power of the arbitrator to add to, subtract from, or alter the provisions of the agreement does not affect the jurisdiction of the arbitrator, but merely limits his power to fashion an award.'" App. 14a. That language is directly contrary to the Arbitrator's holding here that he could disregard the No Add Provision. In any event, whether the arbitrator could rewrite the CBA to fashion a remedy was not at issue; the case involved only whether a No Add Provision barred arbitration entirely. *Int'l Assoc. of Machinists*, 466 F.3d at 1252-53.

. . . authority to add to, detract from or alter in any way the provisions of this Agreement." This expressly precluded the Arbitrator from rewriting the parties' CBA – even if the equally unambiguous bonus provisions were the product of a mutual mistake.

Thus, the question for this Court is whether a bargained-for contractual limit on an arbitrator's power to add to or alter CBA language must be given effect. This case does not, as the Union erroneously claims, raise a "routine" question of whether the Arbitrator had jurisdiction to decide the underlying bonus dispute or whether he erred in his interpretation of the CBA. *See, e.g.*, Opp. 14-18. The cases the Union cites on those subjects are inapposite. *Id.*

The Union cites *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987), for the proposition that arbitrating parties particularly want the "informed judgment" of an arbitrator "'*when it comes to formulating remedies*.'" Opp. 16 (quoting *Misco*, 484 U.S. at 41) (emphasis in Opp.). But the Union omits what this Court wrote immediately after that: "*The parties, of course, may limit the discretion of the arbitrator in this respect. . . .*" *Misco*, 484 U.S. at 41 (emphasis added). That is precisely what the parties did when they agreed to the No Add Provision.

Nor is it surprising that parties may impose such limits. Given the extreme deference courts must give to arbitrators and the limited appellate review of legal and factual errors, employers and unions are reluctant to permit arbitrators to have unfettered power to make wholesale changes to CBAs.

Equally misguided is the Union's reliance on *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013), for the proposition that the Arbitrator's passing references to the No Add Provision purportedly make it "indisputable that the Arbitrator at least 'arguably … interpreted'" the No Add Provision. Opp. 15 (quoting *Oxford Health*, 569 U.S. at 569). As Judge Ikuta recognized in her dissent, the arbitrator in that case at least "based a potentially unreasonable construction of his authority on a 'textual exegesis,'" while "the arbitrator here made no effort to reconcile his decision to add five lines of text to the agreement with the contract's no-add provision." App. 29a (Ikuta, J., dissenting). Quoting this Court, Judge Ikuta explained, "a 'few references' to a key issue in dispute does not show that the arbitrator 'did anything other than impose its own policy preference.'" App. 30a (quoting *Stolt-Nielsen*, 559 U.S. at 676).

3. The Union's third argument is positively Orwellian. It contends that the Arbitrator's ruling "*advanced* the 'no-add' clause's purpose of ensuring that the parties' true agreement was given effect," because the only "agreement the Arbitrator is prohibited from modifying is the parties' genuine meeting of the minds." Opp. 18. This argument boils down to nothing more than asserting that an arbitrator can freely rewrite and disregard any limit on his authority as long as he divines that the parties' "true" intent is different than what they have written.

This argument only highlights the conflict between this case and the Seventh Circuit's decision in *Anheuser-Busch*. The Union argues there is no circuit split between it and the other cases cited in the

Petition that apply No Add Provisions to limit an arbitrator's choice of remedy. Opp. 20. But *Anheuser-Busch* directly conflicts with the Union's broad theory of mutual mistake.

In *Anheuser-Busch*, the Seventh Circuit considered a union's challenge to an employer's use of a two-tier pay structure. Years earlier, in a 1990 CBA, the parties had agreed to change the pay structure from a single-tier rate to a two-tier pay structure. That same two-tier structure was subsequently included in their 1994 and 1998 CBAs. However, the employer continued to pay according to the previous single-tier pay structure, until two months after the parties signed the 1998 CBA. *Anheuser-Busch*, 280 F.3d at 1134-35.

The union filed a grievance and the arbitrator ruled in its favor. Although the arbitrator recognized that a No Add Provision prevented him from modifying the CBA, he held that the provision did not prevent him "from giving effect to a long-standing practice or oral understanding reaffirmed and readopted by the [employer] following execution of the agreement." *Id.* at 1136.

In so holding, the arbitrator held that the language of the CBA did not reflect the parties' true intent. That intent was set forth in their "oral understanding" and "long-standing practice" of paying a rate different from the rates set forth in the CBA.

The Seventh Circuit, however, held that the arbitrator could not ignore the limits on his authority to conform the CBA to the parties' intent. "The question is not whether the arbitrator misinterpreted the agreement, but only whether the arbitrator's

inquiry disregarded the very language of the agreement itself." *Id.* at 1137. "Any interpretation drawing its essence from the written contract necessarily would have recognized that the arbitrator was without the authority to modify or change the contract in any way." *Id.* at 1140.

Here, although both the Arbitrator and Ninth Circuit found the bonus provisions unambiguous, App. 10a, 124a, the Arbitrator reformed the agreement to what he found to be the parties' true intent, *i.e.*, an unwritten understanding. The No Add Provision, like the clause in *Anheuser-Busch*, prevented him from doing so.

The Union also argues that *Anheuser-Busch* is not controlling law of the Seventh Circuit because each of the judges wrote separately, a lead opinion, concurrence, and dissent. Opp. 21-22 (citing *Int'l Union of Operating Engineers, Local 139 v. J.H. Findorff & Son, Inc.*, 393 F.3d 742, 747 (7th Cir. 2004)). But *J.H. Findorff* merely held that *Anheuser-Busch* does not stand for the proposition that "if the court deems contractual language 'plain,' the arbitrator is forbidden to select any other interpretation." *Id.* at 746-47. *Anheuser-Busch* does not support that broad proposition because the concurring judge held that the arbitrator exceeded his authority by basing his decision on conduct that the CBA precluded him from considering. *Id.* at 747.

Nothing in *J.H. Findorff* suggests that *Anheuser-Busch* is not good law for the rule asserted here – that an arbitrator cannot ignore contractual limits on his power to rewrite a CBA. To the contrary, a more recent Seventh Circuit case cited *Anheuser-Busch* for that very rule. *United States Soccer Fed'n, Inc. v. United*

States Nat'l Soccer Team Players Ass'n, 838 F.3d 826, 835 (7th Cir. 2016) (following *Anheuser-Busch* in holding that an arbitrator violated No Add Provision to change unambiguous provision of CBA).

Accordingly, the Union's arguments completely fail to refute that courts are split over the power of arbitrators to disregard No Add Provisions. Certiorari should be granted to resolve this conflict.

II. THE NINTH CIRCUIT HELD THAT ASARCO SUBMITTED THE SCOPE OF THE ARBITRATOR'S AUTHORITY TO THE ARBITRATOR FOR DECISION WHEN IT ARGUED THAT HE COULD NOT VIOLATE THE NO ADD PROVISION, WHICH CREATED ANOTHER CIRCUIT SPLIT.

1. As detailed in the Petition, the Ninth Circuit held that ASARCO submitted the scope of relief to the arbitrator's discretion by arguing that the No Add Provision limited his authority to fashion a remedy. Pet. 11, 21 (citing App. 14a-15a). This, as the dissent recognized, conflicts with this Court's settled authority. App. 24a-25a; *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946 (1995) ("[M]erely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, *i.e.*, a willingness to be effectively bound by the arbitrator's decision on that point."); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 308-09 (2010) (party does not "'implicitly' consent" to have arbitrator decide issue that party argued was beyond the scope of arbitator's authority).

That holding also conflicts with numerous decisions of other circuits. *E.g.*, *China Minmetals*

Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp., 334 F.3d 274, 290 (3d Cir. 2003); *Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 369 (2d Cir. 2003); *Coady v. Ashcraft & Gerel*, 223 F.3d 1, 9 n.10 (1st Cir. 2000); *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000); *see generally* Pet. 23.

ASARCO also argued that the Ninth Circuit's holding, if allowed to stand, would place parties in an impossible situation of choosing between alerting an arbitrator to limits on his authority or forfeiting an argument that the arbitrator exceeded his authority. For these reasons, certioriari should be granted.

2. The Union does not dispute any of those arguments. Instead, it maintains that the Ninth Circuit did not actually hold that ASARCO submitted the issue of the Arbitrator's authority by arguing that the No Add Provision limited his power to modify the CBA. Opp. 29-30. The Union is wrong.

3. The Union's argument rests on a footnote in which the Ninth Circuit said it did not address "'the Union's alternative waiver argument.'" Opp. 29-30 (quoting App. 15a-16a n.6). Even construing that footnote as a statement that the Ninth Circuit was not deciding if ASARCO waived its objections to the Arbitrator violating the No Add Provision, [2] the

[2] It is not clear if that footnote refers to the argument that ASARCO waived its objections to the arbitrator's disregard of the No Add Provision. The footnote accompanies text addressing a different waiver argument – that ASARCO waived an argument "that the arbitrator's award should be vacated because it violates public policy." App. 15a-16a & n.6. The Ninth Circuit held that argument fails regardless of whether it was waived. *Id.*

footnote and the Union's argument ignores the plain import of the Ninth Circuit's holding.

The Ninth Circuit states earlier in its opinion:

> Having submitted the grievance to the arbitrator, and having argued to the arbitrator that the contract limited his authority to fashion a remedy, ASARCO must now somehow overcome the deference that is afforded the arbitrator's decision.

App. 14a. Shortly after that, it reiterates:

> In the instant case, the dispute between the parties was unquestionably arbitrable. ASARCO argued to the arbitrator that he lacked contractual authority to fashion an award. The arbitrator disagreed. His decision is entitled to deference.

App. 15a. Thus, the Ninth Circuit held that ASARCO consented to the Arbitrator deciding the scope of his authority by arguing that the CBA limited that authority. The footnote does not change that holding.

Judge Ikuta, therefore, is correct that "[t]he arbitrator's first and most crucial error was his implicit conclusion that he could resolve ASARCO's argument about the scope of his authority" and "[t]he majority compounds this error by silently assuming the same." App. 20a (Ikuta, J., dissenting). The Arbitrator had no authority to decide this issue, so there was nothing to which the courts had to defer.

4. The Union, therefore, offered no basis to dispute that the Ninth Circuit's holding conflicts with this Court's precedent and numerous decisions of other circuits. Accordingly, certiorari should be granted to resolve the conflict.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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