No. 18-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a collective bargaining agreement ("CBA") that expressly states "[t]he arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement" prohibits the arbitrator from reforming the CBA by adding language to it?

2. Can a party bring to an arbitrator's attention express contractual limits on his authority without waiving its objections that the arbitrator exceeded his authority by ignoring those agreed-upon limits?

PARTIES TO THE PROCEEDINGS

Petitioner ASARCO, LLC ("ASARCO") was the petitioner in the district court and the appellant in the court of appeals.

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, on behalf of itself and the other unions representing ASARCO's bargaining unit employees in Arizona and Texas, was the respondent in the district court and the appellee in the court of appeals.

RULE 29.6 DISCLOSURE

ASARCO, LLC is a wholly owned subsidiary of ASARCO USA, Inc. ASARCO USA, Inc. is a wholly owned subsidiary of ASARCO, Inc., and ASARCO, Inc. is a wholly owned subsidiary of Americas Mining Corp. Americas Mining Corp. is a wholly owned subsidiary of Grupo Mexico S.A.B. de C.V., which is a publicly traded company.

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OPINIONS BELOW

The revised opinion of the court of appeals (Appendix ["App."] 1a) is reported at 910 F.3d 485 (2018). The original opinion of the court of appeals was withdrawn (App. 35a), but is reported at 893 F.3d 621. The order of the district court (App. 67a) is reported at 2016 U.S. Dist. LEXIS 27262 and 2016 WL 826762.

JURISDICTION

The court of appeals entered its judgment on June 19, 2018. Petitioner timely filed a petition for rehearing and rehearing en banc. On December 4, 2018, the court of appeals vacated its original opinion, issued a new opinion, and denied the petition for rehearing and rehearing en banc as moot. Petitioner again timely filed a petition for rehearing and rehearing en banc, which was denied on January 10, 2019. On March 29, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to May 10, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Section 9 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9 provides, in relevant part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

Section 10 of the FAA, 9 U.S.C. § 10, provides, in relevant part:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> * * *
>
> (4) where the arbitrators exceeded their powers. . . .

INTRODUCTION

This case presents important issues regarding the authority of arbitrators to ignore express contractual limits on their powers and the role of courts in enforcing such limits. As this Court has emphasized, arbitration is a matter of contract and the parties can agree to limit the power of arbitrators. Arbitrators and courts reviewing arbitration awards must abide by those limits to give effect to the contractual rights and expectations of the parties. The Ninth Circuit failed to do so here, and its decision severely undermines limits that agreements commonly impose on an arbitrator's authority to award relief.

Petitioner ASARCO and Respondent United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("Union") agree that, under the plain terms of their collective bargaining agreement ("CBA"), new employees are not

entitled to a particular bonus. The parties also agree that the CBA's express "No Add Provision" states that an arbitrator has "no authority to add to, detract from or alter in any way the provisions of this Agreement." That should have been enough to resolve the underlying dispute, *i.e.*, whether new employees are entitled to the bonus under the CBA.

Despite the No Add Provision, the Arbitrator held that the unambiguous language in the CBA denying the bonus to new hires was a mutual mistake and reformed the CBA by adding five lines of new text "in the interest of justice and fairness." In a 2-1 ruling, the Ninth Circuit upheld the award, but its Opinion conflicts with this Court's precedent and decisions of other circuits in significant ways.

The Ninth Circuit held that the express No Add Provision did not restrict the Arbitrator's power to fashion a remedy. It held that, in crafting remedies, an arbitrator may "range afield of the actual text" of the CBA, including the express limits of the No Add Provision. This conflicts with decisions of the Third, Seventh, and Tenth Circuits, which have held that arbitrators cannot circumvent No Add Provisions or similar language in fashioning remedies. As the dissent recognized, "the arbitrator here ignored the essence of the agreement by violating an express and explicit restriction on his power[.]" App. 28a. Just as parties to a contract can limit the issues that an arbitrator can decide, they can agree on the scope of appropriate remedies.

Nor can the Arbitrator's modifications be justified as an "interpretation" of the CBA. The Ninth Circuit held that it had to defer to the Arbitrator's decision because it was "grounded in his reading" of

the CBA's bonus provisions and the No Add Provision. App. 10a. But, as the dissent recognized, "this statement is dead wrong: the arbitrator did not even mention, let alone construe the no-add provision in formulating his award." App. 29a. The Arbitrator merely mentioned the No Add Provision in citing relevant language of the CBA and describing the parties' positions. *Id*. He did not even purport to interpret it.

Moreover, allowing the modification to stand as an "interpretation" creates an independent conflict with other circuits that have held an arbitrator cannot interpret unambiguous provisions of a CBA. Because the No Add and bonus provisions were unambiguous, the arbitrator had no power to interpret them.

As for the CBA's language governing the bonus, the Arbitrator acknowledged that new hires were not entitled to the bonus under the plain language of the CBA. App. 124a. Instead, the Arbitrator relied on extrinsic evidence in finding a mutual mistake and rewriting the CBA. But, as decisions of the Sixth, Seventh, and Tenth Circuits have held – contrary to the Ninth Circuit – an arbitrator may not rely on extrinsic evidence when the language of the parties' agreement is unambiguous.

The Ninth Circuit also held that ASARCO "submitted" to the Arbitrator the issue of whether the Arbitrator was bound by the No Add Provision when it informed the Arbitrator that he could not amend, alter, or modify the CBA. App. 14a. By objecting to the Arbitrator's rewriting of the CBA, ASARCO, the Ninth Circuit held, waived that objection and is bound by the Arbitrator's non-existent "interpretation" that he could ignore the express No Add Provision. *Id.*

Such a result conflicts directly with this Court's holdings in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), and *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287 (2010). "[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." *First Options*, 514 U.S. at 946. Decisions of the First, Second, Third, and Seventh Circuits – as well as prior Ninth Circuit precedent – also conflict with the Ninth Circuit's holding that ASARCO waived its objections by asserting them in the arbitration.

Accordingly, certiorari should be granted to resolve these conflicts.

STATEMENT OF THE CASE

A. Legal Framework

The "foundational principle" of arbitration is "that '[a]rbitration is strictly a matter of consent.'" *Lamps Plus, Inc. v. Varela*, 203 L. Ed. 2d 636, 645 (2019) (quoting *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2009)). An arbitrator thus derives all of his or her "'powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution.'" *Id.* at 646 (quoting *Stolt-Nielsen*, 559 U. S., at 682). It follows that that "an arbitrator's authority derives solely from the contract." *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 290 (1984); *see also Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 83 (2002).

"Parties may generally shape such agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes." *Lamps Plus*, 203 L. Ed. 2d at 646. "Whatever [the parties] settle on, the task for courts and arbitrators at bottom remains the same: 'to give effect to the intent of the parties.'" *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 684).

In labor disputes, this Court has also long held that an arbitrator interpreting a collective bargaining agreement is "confined to interpretation and application" of the agreement and cannot "dispense his own brand of industrial justice." *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *accord Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001).

B. Factual and Procedural History

1. ASARCO and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("Union") are parties to a CBA, the Basic Labor Agreement, which governs the terms and conditions of employment for Union-represented employees.[1] This CBA, as modified in 2011, includes three provisions relevant here.

The first provision is an express "No Add" provision in Article 5, Section I(6)(c), which provides: ""***The arbitrator shall not have jurisdiction or***

[1] The following facts are drawn from the record below.

authority to add to, detract from or alter in any way the provisions of this Agreement."

Under Article 9, Section B the CBA, ASARCO pays a Copper Price Bonus ("Bonus") quarterly to employees who participate in ASARCO's pension plan. The Bonus is based on the price of copper.

The CBA was modified by a Memorandum of Agreement ("MOA"). The 2011 MOA modified Article 12, Section Q of the CBA. The amended CBA provides that employees hired on or after July 1, 2011 "are not eligible to participate in the pension plan."

The parties agree that, under the plain language of the CBA, as amended, new employees hired after the 2011 amendment to the CBA are not entitled to a Copper Price Bonus. Under the CBA, an employee must participate in the pension plan to receive a Copper Price Bonus (the "Bonus-Pension Link"), and new employees hired after July 1, 2011 are ineligible to participate in the pension plan. Therefore, the amended CBA provides that new employees hired after July 1, 2011 are not entitled to the Copper Price Bonus.

2. After the 2011 MOA, ASARCO declined to pay new hires the Copper Price Bonus. The Union filed a grievance, which proceeded to arbitration. As described by the Arbitrator, the issue was: "Are employees hired on and after July 1, 2011 entitled to receive the Copper Price Bonus?"

The Union contended that ASARCO violated the CBA by refusing to pay the Copper Price Bonus to new hires, arguing there was a mutual mistake by the ASARCO and Union negotiators in failing to recognize

the Bonus-Pension Link excluded employees hired after July 1, 2011 from receiving the Copper Price Bonus. The Arbitrator agreed, and while he recognized that the Union was unable to identify any language in the CBA that was violated because "it simply does not exist[,]" he invoked the doctrine of mutual mistake to reform the CBA, so new employees were entitled to the Copper Price Bonus.

To do this, the Arbitrator added text to the CBA to eliminate the Bonus-Pension Link. Thus, the Arbitrator ordered "that the [CBA] be amended" to add the following five, italicized lines to Article 12, Sec. Q:

> Article 12, Section Q. Pension Plan: Employees hired on and after the Effective Date are not eligible to participate in the pension plan. *However, the Company shall treat such Employees as if they were accruing Continuous Service under the Retirement Income Plan for Hourly Rate Employees of ASARCO Inc. on the same terms as other Employees, only for purposes of determining eligibility for the Copper Price Bonus pursuant to Article 9, Section C.5 of the [CBA].*

In doing so, the Arbitrator paid no heed to the No Add Provision's explicit restriction on his authority, which ASARCO had repeatedly argued restricted his authority. Although the Arbitrator acknowledged the No Add Provision in his recitation of the facts and the parties' positions, App. 99a, 114a-116a, the "Discussion and Award" does not mention the No Add Provision,, App. 124a-134a. The Arbitrator never

interpreted the No Add Provision; he simply ignored its plain language to craft a remedy in the interest of justice and fairness."

3. ASARCO petitioned the District Court to vacate the Award, but the District Court confirmed it. App. 68a.

4. ASARCO appealed to the Ninth Circuit Court of Appeals. On June 19, 2018, in a 2-1 decision, the Ninth Circuit affirmed the District Court. App. 35a.

5. ASARCO petitioned for rehearing, noting, among other issues, that the June 19 Opinion conflicted with other Ninth Circuit precedent.

6. On December 4, 2018, the Ninth Circuit withdrew the June 19 Opinion and issued a new Opinion, and the Dissent also issued a new opinion. App. 1a, 17a. The Ninth Circuit (2-1) again affirmed the District Court. App. 16a.

The majority (Judges Robert W. Gettleman and Richard A. Paez) concluded that the Arbitrator was acting within his jurisdiction when he added terms to the CBA. App. 10a. The majority recognized what the Arbitrator had conceded: "that new hires were not entitled to the Bonus under the plain language of the [CBA] and that [the Arbitrator] could not find for the Union based solely on the language contained in the [CBA]." *Id.* However, the majority held that "the arbitrator was not strictly bound only to the provisions of the [CBA] in crafting a remedy, because 'the arbitrator is entitled, and is even expected, to range afield of the actual text of the collective bargaining agreement he interprets.'" App. 11a (citing *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No.*

1173, Int'l Ass'n of Machinists & Aerospace Workers, 886 F.2d 1200, 1206 (9th Cir. 1989) (en banc)). "The arbitrator was entitled to rely on a number of resources, including statutes, case decisions, principles of contract law, practices, assumptions, understandings, [and] the common law of the shop in his effort to give meaning to the [CBA]." *Id*. (internal quotations and citations omitted).

The majority further held that the Arbitrator was not constrained by the No Add Provision, because "we would still 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. For this, it relied on a prior Ninth Circuit decision, as well as decisions of the Fourth and First Circuits for the proposition 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, 956 (4th Cir. 1971))).

In so holding, the majority also implicitly concluded that, despite ASARCO's objections to the Arbitrator's jurisdiction and authority to amend the CBA, ASARCO submitted that issue to the Arbitrator for decision.

Judge Sandra S. Ikuta filed a vigorous dissent. App. 17a. "[I]n defiance of [the] plain language" of the No Add Provision, she explained that the majority held "that the arbitrator *does* have the authority to rewrite the terms of the agreement under the

circumstances of this case." *Id.* (original emphasis). That conclusion is "flat wrong." *Id.*

Judge Ikuta identified two errors. First, the arbitrator and the majority both erred in implicitly concluding that the arbitrator could resolve ASARCO's argument about the scope of his authority. App. 20a. Under *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995) and *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287 (2010), there must be clear and unmistakable evidence that the parties agreed to submit the matter to the arbitrator. App. 20a-25a. No such evidence existed in this case because, "from the beginning ASARCO vociferously and repeatedly pointed out that the [No Add Provision] precluded the arbitrator from reforming the contract." App. 26a. The majority's conclusion that ASARCO had submitted the issue to the arbitrator was therefore wrong. App. 27a.

Second, Judge Ikuta ruled that the majority erred in affirming the award, "because the arbitrator plainly exceeded the authority granted to him by the [CBA]." App. 27a. The arbitrator had no power to ignore the No Add Provision, nor was his award "grounded in his reading" of the CBA, as the majority had held. App. 29a. That latter holding was "dead wrong" because "the arbitrator did not mention let alone construe, the no-add provision in formulating his award." *Id.* She explained that the Arbitrator "dispensed his own brand of industrial justice by exceeding the scope of his delegated powers and modifying the agreement 'in the interest of justice and fairness.'" App. 32a. The Arbitrator, Judge Ikuta noted, ignored the plain language of the CBA that limited his authority, so his award did not draw its essence from the CBA. *Id.*

7. ASARCO again petitioned for rehearing or rehearing en banc. On January 10, 2019, the Ninth Circuit denied rehearing and rehearing en banc. App. 33a. Judge Ikuta voted to grant the petition for rehearing. *Id*.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED ON WHETHER ARBITRATORS MUST ABIDE BY CONTRACTUAL LIMITS ON THEIR AUTHORITY TO REVISE AGREEMENTS.

A. The Ninth Circuit's Disregard Of The No Add Provision Conflicts With Decisions Of The Seventh, Third, And Tenth Circuits, Which Hold That No Add Provisions Restrict An Arbitrator's Ability To Craft A Remedy.

As both the Arbitrator and the Ninth Circuit recognized, the parties' CBA unambiguously provided that new hires were not entitled to receive the Copper Price Bonus. App. 10a, 124a. The Arbitrator held that the parties did not intend to deny that bonus to new hires and reformed the CBA to conform to the parties' purported intent.

The Arbitrator thus rewrote the CBA despite the express and unambiguous terms of the CBA which expressly prohibited this. As Judge Ikuta rightly explained:

> While arbitrators may have power to reform an agreement where permitted to do so by the collective bargaining agreement, the arbitrator *in this case*

> clearly lacked that power. Rather, "the terms the parties actually agreed upon" in this collective bargaining agreement expressly state that the arbitrator may not add provisions to the agreement. Because "an arbitrator's authority derives solely from the contract," *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 290, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984), the arbitrator here could not add provisions to the agreement, even if there had been a mutual mistake.

App. 30a (Ikuta, J., dissenting) (original emphasis).

1. In affirming the Arbitrator's award, the Ninth Circuit held that contractual limits on an arbitrator's power do not extend to its ability to "fashion a remedy."[2] App. 14a. For this, the Ninth Circuit relied on authority from the Fourth and First Circuits. *Tobacco Workers Int'l Union, Local 317 v. Lorillard Corp.*, 448 F.2d 949, 956 (4th Cir. 1971) ("the fashioning of an appropriate remedy is not an addition to the obligations imposed by the contract"); *Kraft*

[2] This characterization is questionable. As the Arbitrator acknowledged (and the Ninth Circuit reiterated), the plain language of the CBA barred new hires from receiving the Copper Price Bonus. App. 10a, 124a. Before the Arbitrator could craft a remedy, he had to find that ASARCO had to pay the Copper Price Bonus. Relying on the doctrine of mutual mistake, the Arbitrator held that the actual, plain language of the CBA did not control, and rewrote the CBA to conform to the parties' purported intent. In short, the Arbitrator did not just create a remedy; he created a new substantive obligation to require ASARCO to pay the Copper Price Bonus.

Foods, Inc. v. Office and Prof'l Employees Int'l Union, AFL-CIO, CLC, Local 1295, 203 F.3d 98, 101 (1st Cir. 2000) ("a standard 'no-modification' clause does not limit remedies of this type if such a remedy is required to cure a breach and is not specifically barred by the agreement").

By contrast, other circuits have held that No Add Provisions do not permit an arbitrator to rewrite the terms of an agreement when an arbitrator fashions a remedy. For example, in *Anheuser-Busch, Inc. v. Beer Workers Local Union 744*, 280 F.3d 1133 (7th Cir. 2002), the Seventh Circuit held that an arbitrator could not modify the terms of a CBA to enforce what it concluded was a "long standing practice" for the employer to pay a higher commission rate than the one set forth in the CBA. *Id.* at 1138. The arbitrator "improperly injected his personal notions of fairness into his decision and thus manifested 'an infidelity to his obligation' to follow the law and the language of the contract and not to 'add to . . . modify or change' any portion of the thoroughly negotiated agreement." *Id.* at 1144 (quoting *Tootsie Roll Indus., Inc. v. Local Union No. 1*, 832 F.2d 81, 83-84 (7th Cir. 1987)).

Similarly, the Third Circuit has held that an arbitrator exceeded his authority when he altered a CBA to remedy discrimination. In *Pa. Power Co. v. Local Union No. 272 of the IBEW*, 276 F.3d 174 (3d Cir. 2001), an arbitrator found that an employer violated a provision of a CBA prohibiting discrimination by offering certain benefits only to supervisory employees. Despite a No Add Provision, the arbitrator "wrote into the contract that the Plant production and maintenance employees shall have the same benefits as the supervisory employees." *Id.* at

179. This, the Third Circuit held, was a "direct violation" of the CBA's No Add Provision. *Id.* It therefore directed the district court to vacate the arbitration award.

In another case similar to this, the Tenth Circuit refused to permit an arbitrator to use his remedial powers to rewrite a CBA that contained a No Add Provision. *CP Kelco US, Inc. v. Int'l Union of Operating Eng'rs*, 381 F. App'x 808 (10th Cir. 2010). There, the employer had authority under a Management Rights Article to impose policies, rules, and regulations in the workplace unless they conflicted with the CBA. The employer unilaterally adopted a policy requiring maintenance mechanics to wear pagers and respond to pages within 30 minutes. The union challenged that policy. In the arbitration, the arbitrator held that the employer could not impose the new policy without bargaining with the union to impasse, and, in fashioning a remedy, suspended the new policy and reinstated a former policy that reflected the parties' past practice. *Id*. at 812.

The district court vacated the award and the Tenth Circuit affirmed. The arbitrator could not use past practice to alter or rewrite an unambiguous provision in the CBA, particularly when it expressly precluded the arbitrator from amending, altering, or modifying the CBA. *CP Kelco*, 381 F. App'x at 815.

The Ninth Circuit's broad assertion that express limitations on an arbitrator's authority do not extend to remedies conflicts with each of these authorities. It also is inconsistent with the rule that the scope of an arbitrator's power is governed by the parties' agreement. This Court has long recognized that arbitrators must "'give effect to the contractual rights

and expectations of the parties.'" *Stolt-Nielsen*, 559 U.S. at 682 (quoting *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 479 (1989)). This Court recently reiterated that parties "may generally shape such agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes." *Lamps Plus*, 203 L. Ed. 2d at 646; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("'Just as [the parties] may limit by contract the issues which they will arbitrate [citation], so too may they specify by contract the rules under which that arbitration will be conducted.'") (quoting *Volt*, 489 U.S. at 479).

2. If an arbitrator cannot disregard express limitations on the scope of arbitration, the rules governing arbitration, and the parties' obligations under their agreement, neither law nor logic justifies exempting the arbitrator's choice of remedies from similar limitations. Just as if he had disregarded the terms of a CBA to find a breach, the Arbitrator in rewriting the CBA to fashion a remedy, "ignored the essence of the agreement by violating an express and explicit restriction on his power. . . ." App. 28a (Ikuta, J., dissenting).

Indeed, were an arbitrator's choice of remedy unconstrained by contractual limitations, an arbitrator could award punitive damages or attorneys' fees even if an agreement expressly prohibited such relief. Yet this Court has recognized that parties can control the remedies available in arbitration. *Mastrobuono*, 514 U.S. at 58 (acknowledging party's argument that parties could limit issues in arbitration

by waiving punitive damages but if they chose "to *include* claims for punitive damages within the issues to be arbitrated, the Federal Arbitration Act ensures that their agreement will be enforced according to its terms") (original emphasis); *see also Raytheon Co. v. Automated Bus. Sys., Inc.*, 882 F.2d 6, 12 (1st Cir. 1989) (parties that wish to exclude punitive damages "are free to draft agreements that do so explicitly").

Allowing arbitrators to freely disregard contractual limits in forming a remedy disrupts the parties' expectations about the scope of arbitration. If, as here, the parties limit the arbitrator's powers to construing and interpreting the CBA as written, that limit must be enforced. Accordingly, certioriari is necessary to prevent courts from following the Ninth, First, and Fourth Circuits in overriding parties' agreements to limit arbitrators' power.

B. The Arbitrator Did Not Interpret The CBA, Nor, As Three Other Circuits Have Recognized, Could He Interpret It Because The CBA's Bonus Provisions Were Unambiguous.

The Ninth Circuit asserts that the Arbitrator was "construing the [CBA]" and issued an award "grounded in his reading" when he added the additional text to the CBA, so the reviewing court was required to defer to the Arbitrator's interpretation of the CBA. App. 10a. But as Judge Ikuta stated, that "is dead wrong." App. 29a. Not only did the Arbitrator engage in no interpretation of the CBA, he could not rewrite the terms that he conceded were unambiguous. The Ninth Circuit's characterization of

the award as involving "contract interpretation" conflicts with decisions of other circuits.

1. The arbitrator did not interpret the No Add Provision. The Ninth Circuit claims the Arbitrator discussed the No Add Provision in his award (App. 10a & n.4), but the award reveals that his discussion extended only to identifying the No Add Provision as a relevant provision of the CBA and summarizing the parties' arguments about the No Add Provision (App. 99a, 115a). The No Add Provision is not discussed at all in the "Discussion and Award" section of the arbitration award. *See* App. 124a-134a. As Judge Ikuta rightly concluded, the Arbitrator "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. Thus, the Arbitrator was not interpreting either the No Add Provision or any other provision of the CBA. To the contrary, the Arbitrator (and the Ninth Circuit) conceded that the plain language of the CBA prevented new employees from receiving the Copper Price Bonus. App. 10a ("The arbitrator acknowledged that new hires were not entitled to the Bonus under the plain language of the [CBA] and that he could not find for the Union based solely on the language contained in the [CBA].").

The Ninth Circuit nonetheless characterized the Arbitrator's holding as "interpretation" and stated that the Arbitrator "was entitled to rely on a number of resources, including statutes, case decisions, principles of contract law, practices, assumptions, understandings, [and] the common law of the shop in his effort to give meaning to the [CBA]." App. 11a-12a (internal quotations and citations omitted). But there

was nothing to interpret because the plain language of the CBA's bonus provision was unambiguous.

2. The Ninth Circuit's holding that an arbitrator can interpret unambiguous CBA provisions creates an entirely separate conflict between the Ninth Circuit and decisions of the Sixth, Seventh, and Tenth Circuits. "We recognize that an arbitrator 'may of course look for guidance from many sources,' including 'the industrial common law -- the practice of the industry and the shop,' but when the collective bargaining agreement answers the question submitted to the arbitrator in clear and unambiguous language, the arbitrator errs if he looks beyond the contract and uses extraneous considerations to render the contract's clear language ineffective." *Morgan Servs., Inc. v. Local 323, Amalgamated Clothing & Textile Workers Union*, 724 F.2d 1217, 1223-24 (6th Cir. 1984) (citations omitted); *Tootsie Roll Indus.*, 832 F.2d at 84 ("[W]hile [an arbitrator's] reliance on the law of the shop is appropriate to interpret ambiguous contract terms . . . the law of the shop cannot be relied upon to modify clear and unambiguous provisions."); *Anheuser-Busch*, 280 F.3d at 1139 ("[A]ll parties agreed that the contract was clear and unambiguous. . . . It required neither interpretation nor interpretative devices."); *CP Kelco*, 381 F. App'x at 814 ("Although an arbitrator may resolve ambiguities that the arbitrator finds in the collective bargaining agreement by considering extrinsic evidence like past practices or the 'law of the shop,' the arbitrator cannot use such evidence to alter or rewrite an unambiguous provision in the collective bargaining agreement.").

As the Seventh Circuit has explained: "Long and thoroughly negotiated written contracts would cease

to have meaning should we approve of the actions of the arbitrator and allow him to completely ignore and disregard and cast aside clear and unambiguous contractual language and traverse beyond the limited scope of his review merely by invoking the magic words 'contract interpretation.'" *Anheuser-Busch*, 280 F.3d at 1144.

Because the CBA was unambiguous, the Arbitrator could not and did not purport to "interpret" its provisions governing the Copper Price Bonus. Yet the Ninth Circuit held that it was required to defer to that nonexistent "contract interpretation." That was error and, in any event, conflicts with *Morgan Servs.*, *Anheuser-Busch*, *Tootsie Roll*, and *CP Kelco*. This conflict provides further reason to grant certiorari.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND THE FIRST, SECOND, THIRD, SEVENTH, AND NINTH CIRCUITS IN HOLDING THAT A PARTY SUBMITS THE SCOPE OF THE ARBITRATOR'S AUTHORITY FOR ARBITRATION BY NOTING EXPRESS LIMITS ON THAT AUTHORITY.

The Ninth Circuit committed a separate threshold error that independently warrants this Court's review: holding 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. App. 14a-15a.

1. As Judge Ikuta recognized, this holding conflicts with controlling authority of this Court. App. 21a (citing *First Options*, 514 U.S. at 944). This Court

looks to "'clear and unmistakable' evidence'" in the arbitration agreement for determining whether the parties have "delegate[d] threshold arbitrability questions to the arbitrator[.]" *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) (citing *First Options*, 514 U. S. at 944); *see also Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010). "[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." *First Options*, 514 U.S. at 946.

Similarly, in *Granite Rock*, this Court held that participating in an arbitration over an arbitrable issue does not waive or estop a party from objecting to the scope of arbitration. There, an employer sought to arbitrate a grievance over the union's strike. The union disputed the effective date of the CBA. 561 U.S. at 287-88. The Ninth Circuit ruled that, by consenting to arbitrate the grievance, the employer also consented to arbitrate the effective date. This Court reversed. *Id*. at 288, 308-09. Seeking to arbitrate an issue that is within the scope of a CBA's arbitration clause did not establish that the employer agreed to arbitrate matters that were beyond its scope. *Id*.

The same is true here. ASARCO had no basis to oppose arbitration of the underlying issue – whether ASARCO breached the CBA by not paying new hires the Copper Price Bonus – because it fell within the scope of the CBA. But consistent with *First Options* and *Granite Rock*, ASARCO contested the Arbitrator's authority under the CBA to add to its terms by repeatedly reminding him that the No Add Provision restricted his powers to fashion relief.

2. The Ninth Circuit's holding that ASARCO consented to submit the No Add Provision to arbitration also conflicts with numerous decisions of other circuits. *See, e.g.*, *China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 290 (3d Cir. 2003) ("a party does not waive its objection to arbitrability where it raises that objection in arbitration"); *Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 369 (2d Cir. 2003) ("the fact that a party 'forcefully objects' to having an arbitrator decide a dispute – as Bodylines clearly did – suggests an unwillingness to submit to arbitration") (quoting *First Options*, 514 U.S. at 946); *Coady v. Ashcraft & Gerel*, 223 F.3d 1, 9 n.10 (1st Cir. 2000) (holding that party's objection to scope of arbitration was not waived by its participation in arbitration because the party "consistently and vigorously maintained its objection to the scope of arbitration"); *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000) ("If a party willingly and without reservation allows an issue to be submitted to arbitration, he cannot await the outcome and then later argue that the arbitrator lacked authority to decide the matter. [Citation] If, however, a party clearly and explicitly reserves the right to object to arbitrability, his participation in the arbitration does not preclude him from challenging the arbitrator's authority in court."). In fact, the Ninth Circuit's decision even conflicts with prior Ninth Circuit precedent. *Van Waters & Rogers Inc. v. Int'l Bhd. of Teamsters etc., Local Union 70*, 913 F.2d 736, 740-41 (9th Cir. 1990) (objections to arbitrator's authority during arbitration established employer did not submit issue to arbitrator).

In addition to conflicting with the numerous cases discussed above, the Ninth Circuit's holding, if left in place, would lead to absurd results. Parties would have to remain silent about CBA provisions that restrict arbitrators' powers during the arbitration to avoid waiver of post-arbitration challenges. Yet informing an arbitrator about such restrictions before an award issues might prevent the arbitrator from overstepping his authority in the first place and obviate a petition to vacate the award. Judicial economy and common sense cannot countenance the result the Ninth Circuit has approved.

CONCLUSION

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

Respectfully submitted.

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May 10, 2019

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-16363

D.C. No. 2:15-cv-00117- SMM

ASARCO LLC, a limited liability corporation,

Petitioner-Appellant,

v.

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, on behalf of itself and the other unions representing ASARCO LLC's bargaining unit employees,

Respondent-Appellee.

Appeal from the United States District Court
for the District of Arizona

Stephen M. McNamee, Senior
District Judge, Presiding

Argued and Submitted November 16, 2017
Pasadena, California

Filed December 4, 2018

ORDER AND OPINION

Before: Richard A. Paez and Sandra S. Ikuta, Circuit Judges, and Robert W. Gettleman,[*] District Judge.

Order; Opinion by Judge Gettleman;
Dissent by Judge Ikuta

SUMMARY[**]

Labor Law

The panel filed (1) an order withdrawing its opinion and dissenting opinion and denying as moot a petition for rehearing en banc, and (2) a new opinion and new dissenting opinion.

In its new opinion, the panel affirmed the district court's order affirming an arbitration award in favor of a union, which sought relief concerning a bonus provision in the parties' collective bargaining agreement.

The employer asserted that the arbitrator reformed the collective bargaining agreement in contravention of a no-add provision in the agreement. The district court held that the arbitrator was authorized to reform the agreement, despite the no-add provision, based on a finding of mutual mistake.

The panel held that the arbitration award drew its essence from the collective bargaining agreement,

[*] The Honorable Robert W. Gettleman, United States District Judge for the Northern District of Illinois, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

and the arbitrator did not exceed his authority in reforming the agreement. In addition, the arbitrator's award did not violate public policy.

Dissenting, Judge Ikuta wrote that, in light of the no-add provision, the arbitrator exceeded his authority under the collective bargaining agreement.

COUNSEL

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Michael D. Weiner (argued) and Jay Smith, Gilbert & Sackman, Los Angeles, California; Daniel M. Kovalik, United Steelworkers, Pittsburgh, Pennsylvania; Gerald Barrett, Ward Keenan & Barrett P.C., Phoenix, Arizona; for Respondent-Appellee.

ORDER

The opinion and dissenting opinion filed June 19, 2018, and appearing at 893 F.3d 621 (9th Cir. 2018), are withdrawn. They may not be cited by or to this court or any district court of the Ninth Circuit.

A new opinion is filed simultaneously with the filing of this order, along with a new dissenting opinion. Accordingly, the Appellant's petition for rehearing en banc is DENIED as moot. The parties may file petitions for rehearing and petitions for rehearing en banc in response to the new opinion, as allowed by the Federal Rules of Appellate Procedure.

OPINION

GETTLEMAN, District Judge:

This appeal involves the validity of an arbitration award. ASARCO asserts that the award is invalid because the arbitrator reformed the Basic Labor Agreement ("BLA") between the Union and ASARCO in contravention of a no-add provision in that agreement. The Union argues that the arbitrator did not contravene the no-add provision because he was required to reform the BLA upon finding that the parties were mutually mistaken as to its terms when they agreed to it. The district court affirmed the award, holding that ASARCO properly preserved its objection to the arbitrator's jurisdiction, but the arbitrator was authorized to reform the BLA, despite the no-add provision, based on a finding of mutual mistake. We affirm.

I. BACKGROUND AND PROCEDURAL HISTORY

ASARCO is a miner, smelter, and refiner of copper and other precious metals with facilities in Arizona and Texas. ASARCO's employees are represented by the Union. ASARCO and the Union are parties to the BLA, which was originally effective January 1, 2007, through June 30, 2010. The BLA was modified and extended through two Memoranda of Agreement ("MOA") negotiated in 2010 and 2011. Article 9, Section B of the BLA provides that a Copper Price Bonus ("Bonus") will be paid quarterly to employees who participate in ASARCO's pension plan. The Bonus is calculated based on the price of copper and is significant, at times as much as $8,000 annually per employee. The 2011 MOA modified Article 12, Section Q of the BLA to make employees hired on or after July 1, 2011 ineligible for ASARCO's pension plan, and thus ineligible for the Bonus. The Union,

unaware of the link between the pension plan and the Bonus,[1] filed a grievance disputing ASARCO's refusal to pay the Bonus to employees hired after July 1, 2011. The case proceeded to arbitration.[2]

At the beginning of the arbitration hearing the parties stipulated that the matter was properly before the arbitrator and that the arbitrator had jurisdiction to decide the grievance. The Union claimed there was a mutual mistake in the 2011 MOA: the parties failed to recognize that Article 9, Section C of the BLA tied eligibility for the Bonus to participation in the pension plan, and both parties intended for all employees to remain eligible for the Bonus when they negotiated the 2011 MOA. Accordingly, the Union argued that reformation of the BLA was the appropriate remedy. ASARCO offered no evidence to the contrary, but argued that the arbitrator lacked authority to reform the BLA because Article 5, Section I(6)(c) contained the following no-add provision: "The arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement." After hearing six days of evidence the arbitrator concluded that neither party anticipated that the 2011 MOA modification would impact new hires' eligibility for the Bonus. Because he found that the parties were mutually mistaken as to the terms

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[1] It is undisputed that the parties did not discuss the Bonus when negotiating the 2011 MOA, and neither party indicated that the Bonus would be impacted in any way by the modification.

[2] Article 5, Section 1 of the BLA provides that all disputes between the parties as to "the interpretation or application of, or compliance with the provisions . . ." of the BLA or MOAs are to be resolved through a grievance procedure that culminates in arbitration.

of the 2011 MOA, the arbitrator ordered that the BLA be reformed to provide that new hires, though ineligible for ASARCO's pension plan, remain eligible for the Bonus.

ASARCO filed a Petition to Vacate Arbitration Award in the United States District Court for the District of Arizona. ASARCO did not challenge the arbitrator's findings of fact or conclusions of law, but argued that the no-add provision deprived the arbitrator of authority to reform the BLA. The district court confirmed the arbitration award, but rejected the Union's argument that ASARCO had waived any argument regarding the limits of the arbitrator's jurisdiction. In confirming the award, the district court noted the degree of deference due to the arbitrator's decision and concluded that the arbitrator did not violate the no-add provision because the reformation corrected a defect in the BLA, which was the product of mutual mistake, to reflect the terms the parties had agreed upon. ASARCO timely appeals.

II. STANDARD OF REVIEW

Our review of a district court's decision confirming an arbitration award is de novo. *Hawaii Teamsters & Allied Workers Union, Local 996 v. United Parcel Serv.*, 241 F.3d 1177, 1180 (9th Cir. 2001). "Our review of labor arbitration awards is, however, extremely deferential because 'courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.'" *Id.* (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987)) (internal alterations omitted). Unless the arbitrator has "'dispensed his own brand of industrial justice' by making

an award that does not 'draw its essence from the collective bargaining agreement,'" we must confirm the award. *Id.* at 1181 (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960)) (internal alterations omitted).

The context of collective bargaining warrants this extremely limited scope of review because the parties have agreed to have their disputes decided by an arbitrator chosen by them: "[I]t is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *Id.* "Indeed, the mandatory and prearranged arbitration of grievances is a critical aspect of the parties' bargain, the means through which they agree 'to handle the anticipated unanticipated omissions of the collective bargaining agreement.'" *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173, Int'l Ass'n of Machinists & Aerospace Workers*, 886 F.2d 1200, 1205 (9th Cir. 1989) (*en banc*) (quoting St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich.L.Rev. 1137, 1140 (1977)) ("*Judicial Review*") (internal alterations omitted). Such omissions occur because "[u]nlike the commercial contract, which is designed to be a comprehensive distillation of the parties' bargain, the collective bargaining agreement is a skeletal, interstitial document." *Id.*

Consequently, "[t]he labor arbitrator is the person the parties designate to fill in the gaps; for the vast array of circumstances they have not considered or reduced to writing, the arbitrator will state the parties' bargain." *Id.* He is "'their joint *alter ego* for the purpose of striking whatever supplementary bargain is necessary' to handle matters omitted from

the agreement." *Id.* (quoting *Judicial Review*, 75 Mich.L.Rev. at 1140). Because of this role, the arbitrator "cannot 'misinterpret' a collective bargaining agreement," *id.*, and "even if we were convinced that the arbitrator misread the contract or erred in interpreting it, such a conviction would not be a permissible ground for vacating the award." *Va. Mason Hosp. v. Wash. State Nurses Ass'n*, 511 F.3d 908, 913–14 (9th Cir. 2007) (footnote omitted). This deference applies "'even if the basis for the arbitrator's decision is ambiguous and notwithstanding the erroneousness of any factual findings or legal conclusions.'" *Federated Dep't Stores v. United Foods & Commercial Workers Union, Local 1442*, 901 F.2d 1494, 1496 (9th Cir. 1990) (quoting *Stead Motors*, 886 F.2d at 1209).

III. ANALYSIS

Although judicial review of arbitration awards is extremely limited, the Supreme Court and this Circuit have articulated three exceptions to the general rule of deference to an arbitrator's decision: "(1) when the arbitrator's award does not draw its essence from the collective bargaining agreement and the arbitrator is dispensing his own brand of industrial justice; (2) when the arbitrator exceeds the boundaries of the issues submitted to him; and (3) when the award is contrary to public policy." *Id.* (internal quotation marks omitted).

Given the great deference due to arbitrator's decisions, ASARCO wisely does not challenge the arbitrator's findings of fact or conclusions of law, but instead argues that the arbitrator's award does not warrant deference based on all three exceptions. The first two exceptions are interrelated, and we will address them simultaneously before turning to the third exception. ASARCO argues that the no-add provision in the

BLA deprived the arbitrator of authority to reform the BLA, and the arbitrator's award does not draw its essence from the BLA because it ignores this provision.

In deciding whether the arbitrator's award draws its essence from the BLA, "the quality – that is the degree of substantive validity – of [his] interpretation is, and always has been, beside the point." *Sw. Reg'l Council of Carpenters v. Drywall Dynamics, Inc.*, 823 F.3d 524, 532 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 829, 197 L. Ed. 2d 68 (2017). "Instead, the appropriate question for a court to ask when determining whether to enforce a labor arbitration award interpreting a collective bargaining agreement is a simple binary one: Did the arbitrator look to and construe the contract, or did he not?" *Id.* This is because "'[i]t is only when the arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable.'" *Id.* at 531 (quoting *Major League Baseball Players Ass'n v. Garve*y, 532 U.S. 504, 509, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001)) (internal alterations omitted). Accordingly, "the court's inquiry ends" if the arbitrator "made any interpretation or application of the agreement at all." *Id.* at 531–32. We therefore "must limit [our] review to whether the arbitrator's solution can be rationally derived from some plausible[3] theory of the general framework or intent of the agreement." *United Food*

[3] As the parties note, this Court has retired the use of the term "plausibility" when describing judicial review of labor arbitration awards. *See Drywall Dynamics*, 823 F.3d at 532. This step was taken not to "propose any substantive change to the settled law in this area," but rather to underscore the limited nature of the inquiry, which is whether "the arbitrator look[ed] at and construe[d] the contract." *Id.*

& Commercial Workers Int'l Union, Local 588 v. Foster Poultry Farms, 74 F.3d 169, 173 (9th Cir. 1995), *opinion amended on denial of reh'g*, (9th Cir. Jan. 30, 1996).

We have no doubt that the arbitrator's decision was grounded in his reading of the BLA. The arbitrator acknowledged that new hires were not entitled to the Bonus under the plain language of the BLA and that he could not find for the Union based solely on the language contained in the BLA. He also recognized that arbitrators do not generally have the authority to rewrite CBAs or ignore their provisions. He noted, however, that arbitrators can reform a contract to correct an obvious mutual mistake. Citing a substantial amount of evidence that he heard over six days, the arbitrator concluded that the parties presented precisely this scenario: in negotiating the 2011 MOA, they never discussed or even acknowledged that if the BLA were amended to make new hires ineligible for the pension plan, they would also be ineligible for the Bonus. Although he did not specifically cite the no-add provision when explaining the basis of his award, the arbitrator did quote it directly as relevant language of the BLA and noted that, absent a finding of mutual mistake, he would not have the authority to reform the BLA.[4]

Given the arbitrator's extensive treatment of the BLA and acknowledgment of the no-add provision, we

[4] Respectfully, the dissenting opinion is incorrect when it states that the arbitrator failed to discuss, or even mention, the no-add provision. In fact, the arbitrator discussed the no-add provision at length on pages 14 and 16 of the arbitration award, quoting it directly, and discussing the parties' positions regarding its impact. The arbitrator then acknowledged that he lacked authority to rewrite the BLA or ignore its provisions absent a finding of mutual mistake.

agree with the district court that the arbitrator's decision was grounded in his reading of the BLA, and are "bound to enforce the award" even if "the basis for the arbitrator's decision may be ambiguous." *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 764, 103 S. Ct. 2177, 2182, 76 L. Ed. 2d 298 (1983); *see also Drywall Dynamics*, 823 F.3d at 533("'[A]rbitrators have no obligation to give their reasons for an award at all,'" and a court may not "'infer the non-existence of a particular reason merely from the award's silence on a given issue.'") (quoting *Stead Motors*, 886 F.2d at 1208, 1213); *Stead Motors*, 886 F.2d at 1208 ("'[M]ere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award.'") (quoting *Enterprise Wheel*, 363 U.S. at 598, 80 S. Ct. at 1361).

Upon concluding that the parties were mutually mistaken as to the impact of the 2011 MOA on new hires' eligibility for the Bonus, the arbitrator was authorized to reform the CBA despite ASARCO's protest. The standard arbitration clause in the BLA provided that the arbitrator had authority to decide all issues of contract interpretation, which, of course, would include the scope of the no-add provision. Additionally, the arbitrator was not strictly bound only to the provisions of the BLA in crafting a remedy, because "the arbitrator is entitled, and is even expected, to range afield of the actual text of the collective bargaining agreement he interprets." *Stead Motors*, 886 F.2d at 1206. The arbitrator was entitled to rely on a number of resources, including "'statutes, case decisions, principles of contract law, practices, assumptions, understandings, [and] the common law

of the shop'" in his effort to give meaning to the BLA. *Hawaii Teamsters*, 241 F.3d at 1183 (quoting *McKinney v. Emery Air Freight Corp.*, 954 F.2d 590, 595 (9th Cir. 1992)).

Applying ordinary principles of contract law, the arbitrator concluded that the proper remedy for the parties' mutual mistake was to reform the BLA to make it reflect the terms the parties actually agreed upon. *See Caliber One Indem. Co. v. Wade Cook Fin. Corp.*, 491 F.3d 1079, 1083 (9th Cir. 2007) (reformation of contract is warranted to correct mutually mistaken terms). Even if we were to conclude otherwise, "where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect." *Misco*, 484 U.S. at 38, 108 S. Ct. at 371. Because the arbitrator was construing the BLA in light of the evidence presented to him and basic principles of contract law, his decision and award are due great deference. *See W.R. Grace*, 461 U.S. at 765, 103 S. Ct. at 2183 ("Regardless of what our view might be of the correctness of [the arbitrator's] contractual interpretation, [ASARCO] and the Union bargained for that interpretation. A federal court may not second-guess it.") (citation omitted). Although we could conceivably have reached a different result if we were to interpret the BLA ourselves, we conclude that the arbitrator's award drew its essence from the BLA.

The cases ASARCO cites to support its argument that the no-add provision left the arbitrator powerless to remedy what he found to be an obvious mutual mistake fail to do so. First, ASARCO tells us that we need look only to one case to vacate the arbitrator's award: *West Coast Telephone*. *W. Coast Tel. Co. v.*

Local Union No. 77, Int'l Bhd. of Elec. Workers, AFL-CIO, 431 F.2d 1219 (9th Cir. 1970). In *West Coast Telephone* the employer sought to reform its CBA because it contained wage schedules for certain employees that reflected wages higher than what the employer and Union had agreed upon when bargaining. *Id.* at 1220. The employer was made aware of this discrepancy when the Union filed a grievance because the employees were being paid the agreed upon wage rather than the higher wage contained in the CBA. *Id.* The Union requested the dispute be submitted to arbitration under the terms of the CBA, but the company refused to arbitrate and instead filed suit in the district court seeking reformation. *Id.* The Union moved to compel arbitration. The district court denied the motion, and the Union appealed. *Id.* This court, without any explanation, affirmed:

> [T]he company seeks a change in the terms of the written agreement. It can be said with positive assurance that such an issue is not arbitrable under the agreement in question. The arbitration clause of the contract expressly provides that the arbitrator 'shall have no power to destroy, change, add to or delete from its terms.'

Id. at 1221.

ASARCO's reliance on *West Coast Telephone* is misplaced. *West Coast Telephone* did not grapple with courts' deference to arbitrators' decisions, nor did it hold that arbitrators may never, under any circumstances, reform contracts that contain no-add provisions.[5] It simply held that the issue of contract

[5] *West Coast Telephone* did suggest that reformation is the appropriate remedy when the provisions of a contract do not

reformation was not arbitrable under the facts of that case because the contract contained a no-add provision. That question is not before this court. Indeed, neither the district court nor this court in *West Coast Telephone* ever indicated whether the arbitration clause provided that the arbitrator was to decide all issues of contract interpretation. ASARCO attempts to discard this difference as one of inconsequential procedural posture, but here procedural posture makes all the difference. 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. *West Coast Telephone* does not help in that regard.

Even if this court were in the same posture as the court in *West Coast Telephone*, we would still 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. *Int'l Assoc. of Machinists v. Howmet Corp*., 466 F.2d 1249, 1252–53 (9th Cir 1972) ("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.") (citing *Tobacco Workers Int'l Union, Local 317 v. Lorillard Corp.,* 448 F.2d 949, 955 (4th Cir. 1971)); *see also 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) ("While courts disagree on the extent to which a 'no-modification' clause bars arbitrators from looking beyond the lan-

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reflect the parties' agreed upon terms. *See West Coast Telephone*, 431 F.2d at 1221–22.

guage of the agreement to determine breach, courts agree that 'the fashioning of an appropriate remedy is not an addition to the obligations imposed by the contract.'") (quoting *Tobacco Workers Int'l Union*, 448 F.2d at 956).

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.

The other cases cited by ASARCO are equally inapt, if not more so. Not one of them concerns a mutual mistake made by two parties who have agreed to submit their dispute to an arbitrator, or what the proper remedy would be in such a situation. For the reasons discussed above, these facts matter. Additionally, ASARCO faults the Union for not seeking reformation of the BLA in the district court, but ASARCO knew all along that the Union sought reformation. It did not and now cannot present the issue to this court and hope for a better outcome.

Finally, ASARCO argues that the arbitrator's award should be vacated because it violates public policy. The Union argues that ASARCO waived this argument by failing to present it in the district court. ASARCO concedes this fact, but urges that an argument first raised on appeal is not waived when the issue is purely one of law and the opposing party will not be prejudiced. *See United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990). Regardless of whether ASARCO's argument is waived, it fails.[6]

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[6] In light of our disposition, we need not address the Union's alternative waiver argument. Further, as we point out in the text, the parties stipulated that the matter was properly before the arbitrator and that the arbitrator had jurisdiction to decide

There is "a very limited 'public policy exception' to the stringent rule ordinarily requiring courts' enforcement of arbitrators' decisions interpreting and applying collective bargaining agreements." *Drywall Dynamics*, 823 F.3d at 533 (citations omitted). Under this exception "a court may vacate an arbitration award that 'runs contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests.'" *Id.* at 534 (quoting *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 63, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000)) (internal alterations omitted).

According to ASARCO, the public policy interest served by the collective bargaining process demands that the award be vacated because courts should not confirm arbitration awards that distort the product of collective bargaining – the Collective Bargaining Agreement. Assuming ASARCO has stated an "explicit, well-defined, and dominant public policy," its argument still fails for a very simple reason. The arbitrator did not distort the BLA; he reformed it so that it no longer distorted the agreement that the parties made during collective bargaining. For the reasons discussed above, the arbitrator was authorized to do so upon finding the parties were mutually mistaken about the terms they agreed to. The award does not violate public policy.

We conclude that the arbitrator was acting within his authority when he crafted a remedy to cure the parties' mutual mistake.

AFFIRMED.

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the grievance, *supra* section I. There is therefore no need for us to address the dissent's discussion of this issue. *See* Dissent at section II.

IKUTA, Circuit Judge, dissenting:

The "no-add" language in the collective bargaining agreement (the Basic Labor Agreement, or BLA) signed by ASARCO and United Steel (the Union) is unmistakably clear:

> The arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement.

And yet, in defiance of this plain language, the majority holds today that the arbitrator *does* have the authority to rewrite the terms of the agreement under the circumstances of this case.

The majority's conclusion is flat wrong. First, ASARCO did not clearly and unmistakably agree to let the arbitrator decide the scope of his own authority, and so the arbitrator lacked the power to decide whether the BLA authorized him to rewrite the BLA. Second, when mistakenly exercising authority he did not have, the arbitrator reached the wrong answer: the no-add provision makes clear that the arbitrator does *not* have the power to rewrite the BLA. Because the arbitrator ignored the no-add provision, his award fails to draw its essence from the BLA and is invalid. I dissent from the majority's contrary conclusion.

I

ASARCO and the Union are parties to a collective bargaining agreement, the BLA, which provides for the arbitration of grievances. The BLA explains the scope of the arbitrator's authority as follows:

> The member of the Board [of Arbitration] chosen in accordance with Paragraph 7(a) below [providing for selection on a case-by-

> case basis] shall have the authority to hear and decide any grievance appealed in accordance with the provisions of the grievance procedure.

The BLA includes a "no add" provision that limits the arbitrator's authority: "The arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement."

A different section of the BLA provides that certain employees are entitled to a Copper Price Bonus, a quarterly bonus based on the price of copper. Only those employees covered by the pension plan are eligible for the Copper Price Bonus. When the BLA was updated in 2011, the Union and ASARCO added the following language:

> Employees hired on and after the Effective Date [July 1, 2011] are not eligible to participate in the pension plan.

A dispute between ASARCO and the Union arose after the 2011 BLA was signed. Because the new employees were not covered by the pension plan, ASARCO took the position they were not eligible for the Copper Price Bonus. The Union disagreed and filed a grievance, which the parties submitted to arbitration.

The subsequent arbitration decision set forth a statement of the issue and summarized the positions of each party. According to the arbitration decision, the parties were unable to agree upon a statement of the issue before the arbitrator, and instead agreed to allow the arbitrator to frame the issue. The arbitrator determined that the proper statement of the issue was:

> Are employees hired on and after July 1, 2011 entitled to receive the Copper Price Bonus?

The Union's position in arbitration was that there was a mutual mistake which required a reformation of the BLA. Both parties had failed to recognize that eliminating the pension plan for new employees would make them ineligible for the Copper Price Bonus, the Union claimed, and neither party intended this result. Therefore, according to the Union, the BLA must be reformed to make such new employees eligible, and the no-add provision did not prevent this.

ASARCO's position in arbitration was that the BLA clearly states that new employees are not eligible for the Copper Price Bonus, and the arbitrator must give effect to the BLA as written. With respect to the Union's preferred remedy of reformation, ASARCO asserted that the arbitrator does not have the authority under the clear language of the BLA to order that new employees be made eligible for the Copper Price Bonus or to rewrite the BLA to make them eligible for the bonus. According to ASARCO, "a mistake does not authorize an arbitrator to exceed the authority granted to the arbitrator and limited by the parties themselves."[1]

Without addressing ASARCO's position that the arbitrator lacked authority to rewrite the BLA, and without any discussion of the no-add provision or the

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[1] ASARCO reiterated this same position in its opening statement before the arbitrator. It asserted that the arbitrator had no jurisdiction to "add to or detract from or alter in any way the provisions of the agreement," and urged the arbitrator to reject the Union's argument that the arbitrator should reform the contract.

limits of his jurisdiction, the arbitrator amended the pension provision to include five additional lines of text:

> Employees hired on and after the Effective Date are not eligible to participate in the pension plan. *However, the Company shall treat such Employees as if they were accruing Continuous Service under the Retirement Income Plan for Hourly Rated Employees of ASARCO Inc. on the same terms as other Employees, only for purposes of determining eligibility for the Copper Price Bonus pursuant to Article 9, Section C.5 of the BLA.*

In reaching this conclusion, the arbitrator doubly erred. First, whether the arbitrator had the authority to resolve the parties' dispute over the no-add provision is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise. The arbitrator erred in implicitly concluding he had such authority. Second, the arbitrator's decision to rewrite the BLA does not "draw its essence from the collective bargaining agreement," *Federated Emp'rs of Nev., Inc. v. Teamsters Local No. 631*, 600 F.2d 1263, 1264 (9th Cir. 1979). For both reasons, the arbitrator's award is unenforceable.

II

The arbitrator's first and most crucial error was his implicit conclusion that he could resolve ASARCO's argument about the scope of his authority. The majority compounds this error by silently assuming the same.

A

It is a "fundamental principle that arbitration is a matter of contract." *Rent-A-Ctr., W., Inc. v. Jackson*,

561 U.S. 63, 67 (2010). Accordingly, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960); *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) ("[T]he first principle that underscores all of our arbitration decisions: Arbitration is strictly 'a matter of consent.'"). Thus, arbitration "is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chi., Inc. v. Kaplan,* 514 U.S. 938, 943 (1995).

First Options considered three types of disputes that might be submitted to an arbitrator. First, the parties may have a disagreement about the merits of one or several issues (the "Merits Question"). Second, they may disagree about whether their contract required them to arbitrate the merits of such issues (the "Arbitrability Question"). Third, they may disagree about whether a court or the arbitrator should decide the Arbitrability Question, i.e., the question whether the arbitrator has authority to decide that the parties agreed to arbitrate a specific dispute. *Id.* at 942. Because this third species of dispute raises the question whether the parties delegated the arbitrability decision to the arbitrator, it is sometimes referred to as the "Delegation Question." The Supreme Court held that the arbitrability of any of these issues depends upon whether the parties agreed to submit the issue to the arbitrator. *Id.* at 944. This applies equally to the Delegation Question: If the parties disagree about whether the arbitrator should decide whether a particular dispute is arbitrable, the question "'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *Id.* at 943.

The Supreme Court has recognized that the third question—whether the parties agreed to let the arbitrator decide the arbitrability of a particular dispute (the Delegation Question)—"is rather arcane." *Id.* at 945. Because "[a] party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers," courts should not interpret a contract's "silence or ambiguity" on the Delegation Question as giving arbitrators the power to decide whether a specified question falls within their arbitral authority. *Id*. "[D]oing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.* As a result, unless the parties' contract "clear[ly] and unmistakabl[y]" provides that the arbitrator will decide whether the parties agreed to arbitrate a particular issue, a court will decide that question. *Id.* at 944; *see also AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (holding that "the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination"); *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1072 (9th Cir. 2013) (holding that "whether the court or the arbitrator decides arbitrability is 'an issue for judicial determination unless the parties clearly and unmistakably provide otherwise'").[2]

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[2] By contrast, when "the parties have a contract that provides for arbitration of some issues," a court presumes the parties intended to arbitrate related issues, *First Options*, 514 U.S. at 945. There is a "liberal federal policy favoring arbitration agreements," pursuant to which, "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S.

First Options emphasized that courts should not be over-eager to find the requisite "clea[r] and unmistakabl[e]" evidence of consent to arbitrate the question whether a particular issue is arbitrable. 514 U.S. at 944. "[M]erely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue." *Id.* at 946. Clear and unmistakable consent cannot be implied from arguing arbitrability to the arbitrator because such conduct does not evince "a willingness to be effectively bound by the arbitrator's decision on that point." *Id.* Indeed, insofar as a party "forcefully object[s] to the arbitrators deciding their dispute . . . one naturally would think that they did *not* want the arbitrators to have binding authority over them." *Id.* Said otherwise, the parties must expressly agree that the arbitrator (rather than a court) will decide the arbitrability of a particular issue; a court may not infer that the parties have given the arbitrator authority to decide the Delegation Question merely because they argued about it before the arbitrator.

Before *First Options*, we had adopted a different rule. *See George Day Constr. Co. v. United Bhd. of Carpenters & Joiners of Am., Local 354*, 722 F.2d 1471, 1475 (9th Cir. 1984). *George Day* held that when the parties argue about both the merits of the dispute, and about whether the arbitrator has the authority to decide that dispute, "and the case is submitted to the arbitrator for decision," then "the parties have consented to allow the arbitrator to decide the entire controversy, including the question of arbitrability." *Id.* In other words, under *George*

1, 24–25 (1983). But "federal policy in favor of arbitration does not extend to deciding questions of arbitrability." *Oracle Am., Inc.*, 724 F.3d at 1072.

Day, if the parties argued the Merits Question and the Arbitrability Question before the arbitrator, we conclude that they tacitly agreed to let the arbitrator decide the Delegation Question.

We adhered to this rule in the labor context even after *First Options* was decided. *See United Bhd. of Carpenters & Joiners of Am., Local No. 1780 v. Desert Palace, Inc.*, 94 F.3d 1308, 1311 (9th Cir. 1996). *Desert Palace* reasoned that *First Option*'s holding applied only in the commercial context, not "in the collective bargaining context, where there is a strong federal policy favoring arbitration of labor disputes." *Id*. at 1312 (emphasis omitted); *see also Tristar Pictures, Inc. v. Dir.'s Guild of Am., Inc.*, 160 F.3d 537, 540 (9th Cir. 1998); *Pacesetter Constr. Co. v. Carpenters 46 N. Cal. Ctys. Conference Bd.*, 116 F.3d 436, 439 (9th Cir. 1997).

But *Granite Rock* superseded *Desert Palace*. In *Granite Rock*, the Supreme Court "reemphasize[d] the proper framework for deciding when disputes are arbitrable under [its] precedents," and noted that "[i]t is well settled in *both commercial and labor cases*" that "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*." *Id.* at 296–97 (citing *First Options*, 514 U.S. at 943; *AT&T Tech.*, 475 U.S. at 648–649) (first emphasis added). Further, the Supreme Court stated that "the rule requiring 'clear and unmistakable' evidence of an agreement to arbitrate arbitrability" would apply to the labor dispute at issue in *Granite Rock*, but for the fact that the parties had already conceded that a court should decide the question of arbitrability. *Id.* at 297 n.5 (quoting *First Options*, 514 U.S. at 944).

Because *George Day* is "clearly irreconcilable" with *Granite Rock* and *First Options*, it has been "effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). Thus, the principles laid out in *AT&T*, *First Options*, and *Granite Rock* (that a court must decide the Delegation Question absent clear and unmistakable evidence that the parties authorized the arbitrator to decide that question) are controlling.

B

The application of the Supreme Court's precepts to the facts of this case is relatively straightforward. Applying *First Options*'s framework, there were two disputes regarding the merits. ASARCO and the Union disputed both whether new employees were entitled to the Copper Price Bonus and whether the arbitrator had the authority to revise the BLA. Both of these issues are Merits Questions. While ASARCO agreed that it would arbitrate the dispute over the Copper Price Bonus, it did not agree to arbitrate its dispute about whether the arbitrator had the authority to revise the BLA (the Arbitrability Question). Rather, ASARCO repeated its position that the arbitrator had no such authority. Nor did ASARCO agree that the BLA gave the arbitrator the power to decide the scope of its authority to revise the BLA (the Delegation Question).

As explained in *First Options*, we must presume that the parties did not agree that the arbitrator should decide this Delegation Question, unless there is clear and unmistakable evidence to the contrary. There is no such evidence here.

Because arbitration is a matter of consent, we must first look to "the language of the contract" to "define[]

the scope of disputes subject to arbitration," *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). While the BLA states that the arbitrator has the authority "to hear and decide any grievance appealed" by the parties, the BLA provides that the arbitrator lacks the authority to "add to, detract from or alter in any way the provisions of" the BLA. It is silent on the Arbitrability Question (whether ASARCO and the Union have agreed to arbitrate the question whether the arbitrator may "add to, detract from or alter in any way the provisions of" the BLA). It is equally silent on the Delegation Question (whether the parties have agreed that the arbitrator can determine the Arbitrability Question). Because the parties did not clearly and unmistakably agree to arbitrate the question whether the arbitrator has the authority to revise the BLA, that question "is to be decided by the court, not the arbitrator." *AT&T*, 475 U.S. at 649.

In implicitly reaching a contrary conclusion, the majority asserts that "the parties stipulated that the matter was properly before the arbitrator and that the arbitrator had jurisdiction to decide the grievance." Maj. Op. at 5. This characterization is wholly unsupported by the record. ASARCO did not stipulate that the arbitrator had the authority to decide whether it could reform the BLA. Rather, from the beginning ASARCO vociferously and repeatedly pointed out that the BLA precluded the arbitrator from reforming the contract. While the parties agreed to submit their grievance regarding whether new employees were eligible for the Copper Bonus to the arbitrator, and allowed the arbitrator to frame the Copper Bonus issue, the issue submitted to arbitration did not include the scope of the arbitrator's authority to revise the contract. Rather, as the arbitrator himself explained, "the proper statement of

the issue is as follows: Are employees hired on and after July 1, 2011 entitled to receive the Copper Price Bonus?"

Further, because ASARCO did not clearly agree to submit the question of the arbitrator's authority to rewrite the BLA to arbitration, the court must decide the Delegation Question. I would reach this issue, and hold that the arbitrator had no authority to decide that ASARCO and the Union agreed to arbitrate the question whether the BLA could be revised. The parties' contract clearly establishes that the arbitrator lacks the authority to modify the agreement even when there is a mutual mistake, *see W. Coast Tel. Co. v. Local Union No. 77, Int'l Bhd. of Elec. Workers, AFL-CIO*, 431 F.2d 1219, 1221 (9th Cir. 1970). There is no "clear and unmistakable" evidence that the parties contemplated that an arbitrator could reconsider the BLA's prohibition of any arbitral revisions of the BLA and reach a different conclusion. I therefore would reverse the district court's conclusion to the contrary.

III

Even if the majority were right in assuming that ASARCO had agreed to delegate to the arbitrator the question whether the arbitrator had the authority to rewrite the BLA, the majority errs in upholding the arbitration award here because the arbitrator plainly exceeded the authority granted to him by the BLA.

The BLA's no-add provision says: "The arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement." But the arbitrator amended the pension provision to include five additional lines of text:

> Employees hired on and after the Effective Date are not eligible to participate in the pension plan. However, the Company shall treat such Employees as if they were accruing Continuous Service under the Retirement Income Plan for Hourly Rated Employees of ASARCO Inc. on the same terms as other Employees, only for purposes of determining eligibility for the Copper Price Bonus pursuant to Article 9, Section C.5 of the BLA.

Can he do that? We have said no: "an arbitrator has no authority to ignore the plain language of a collective bargaining agreement that limits the scope of his authority." *Haw. Teamsters & Allied Workers Union, Local 996 v. United Parcel Serv.*, 241 F.3d 1177, 1181 (9th Cir. 2001). When issuing awards, "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." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

In reviewing an arbitral award, we are likewise bound by express limitations on an arbitrator's authority. A court may not enforce an arbitration award if it does not "draw its essence from the collective bargaining agreement." *Federated Emp'rs*, 600 F.2d at 1264. An arbitration award that violates "an express and explicit restriction on the arbitrator's power" does not draw its essence from the agreement, but rather "demonstrates that the arbitrator ignored the essence of the agreement in making the award." *Id.* at 1265. Because the arbitrator here ignored the essence of the agreement by violating an express and explicit restriction on his power, the award must be vacated. *See id.*

The majority abandons these principles today based on two unreasoned conclusions. First, the majority upholds the arbitrator's award because it "was grounded in his reading" of the collective bargaining agreement. Maj. Op. at 10. On its face, this statement is dead wrong: the arbitrator did not even mention, let alone construe, the no-add provision in formulating his award.[3] Unlike in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 570 (2013), where the arbitrator based a potentially unreasonable construction of his authority on a "textual exegesis," 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. The majority does not really dispute this point: it concedes that the arbitrator "did not specifically cite the no-add provision when explaining the basis of his award," but concludes it was sufficient for the arbitrator to "quote it directly" in the section of the arbitration decision entitled "Relevant Language of the BLA," which it deems to be an "acknowledgment of the no-add provision." Maj. Op. at 10–11. But the arbitrator's knowledge that the

[3] The Arbitration Award is divided into six sections entitled: "Background"; "Relevant Language of the BLA"; "Relevant Language of the 2011 Memorandum of Agreement"; "Statement of the Issue"; "Summary of the Position of the Parties"; and "Discussion and Award." The no-add provision is mentioned in two sections of the Arbitration Award. The section entitled "Relevant Language of the BLA," sets forth the text of four subsections of the collective bargaining agreement, including one entitled "Board of Arbitration" which explains the role of the arbitrator and contains the no-add provision. The "Summary of the Position of the Parties" sets forth the opposing positions of the Union and ASARCO regarding the effect of the no-add provision. The section entitled "Discussion and Award," where the arbitrator provides his analysis and conclusion, does not discuss or mention the no-add provision.

collective bargaining agreement contained a no-add provision is immaterial if the arbitrator failed to construe it. Obviously, a "few references" to a key issue in dispute does not show that the arbitrator "did anything other than impose its own policy preference." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 676 (2010). Here the arbitrator expressly stated he was reforming the agreement "in the interest of justice and fairness." In other words, the arbitrator issued an award that "simply reflect[s] the arbitrator's own notions of industrial justice." *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000) (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

Second, the majority states that the arbitrator's award is binding because arbitrators can reform a contract to correct a mutual mistake and "to make it reflect the terms the parties actually agreed upon." Maj. Op. at 12. This sweeping assertion is inapposite here. While arbitrators may have power to reform an agreement where permitted to do so by the collective bargaining agreement, the arbitrator *in this case* clearly lacked that power. Rather, "the terms the parties actually agreed upon" in *this* collective bargaining agreement expressly state that the arbitrator may not add provisions to the agreement. Because "an arbitrator's authority derives solely from the contract," *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 290 (1984), the arbitrator here could not add provisions to the agreement, even if there had been a mutual mistake. The majority fails to explain why the arbitrator here could exercise a power directly contrary to the express restrictions on the arbitrator's authority.

Indeed, the majority cites no case supporting its proposition that an arbitrator can reform a contract based on mutual mistake when the parties expressly prohibit the arbitrator from adding to or modifying the agreement. To the contrary, we have held that a no-add provision prohibits an arbitrator from modifying an agreement even when there is a mutual mistake. *See W. Coast Tel. Co.*, 431 F.2d at 1221. In *West Coast Telephone*, we considered a union's demand to compel arbitration of the question whether its collective bargaining agreement should be reformed to reflect the parties' intent. *Id.* at 1220. We concluded "with positive assurance" that the issue of reformation due to mutual mistake was not arbitrable because "[t]he arbitration clause of the contract expressly provides that the arbitrator 'shall have no power to destroy, change, add to or delete from its terms.'" *Id.* at 1221. In other words, a no-add provision in a collective bargaining agreement precludes the arbitrator from rewriting the agreement.

The majority attempts to distinguish *West Coast Telephone* because it addressed whether a dispute over reformation was arbitrable, rather than whether the arbitrator lacked authority to reform the contract, and therefore does not definitively resolve the issue whether the arbitrator's award here drew its essence from the agreement. Maj. Op. at 14. But *West Coast Telephone*'s holding was based on its conclusion that a no-add provision deprives the arbitrator of the authority to modify the agreement, and this ruling is binding on us. 431 F.2d at 1221. We need not consider whether we would defer to an arbitrator who erroneously construed a no-add provision as allowing reformation of a contract in a particular case. That issue is not before us because—as mentioned above—the arbitrator here did not construe the no-add provi-

sion. Because under our precedent the arbitrator's modification was contrary to the no-add provision and is therefore not a "plausible interpretation" of the contract, and because there is no basis for deferring to the arbitrator's construction of the no-add provision in this case, his award must be vacated.[4] *Federated Empr's*, 600 F.2d at 1265.

The arbitrator here dispensed his own brand of industrial justice by exceeding the scope of his delegated powers and modifying the agreement "in the interest of justice and fairness." Because "an arbitrator has no authority to ignore the plain language of a collective bargaining agreement that limits the scope of his authority," the award fails to draw its essence from the collective bargaining agreement. *Haw. Teamsters*, 241 F.3d at 1181.

* * *

In short, the BLA deprives the arbitrator of the authority to rewrite the agreement, and also deprives the arbitrator of the authority to reconsider and reject this limitation on his authority. Either way, the arbitrator's award is invalid. In holding otherwise, the majority today turns its back on Supreme Court principles and our own precedent. I dissent.

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[4] The majority states that we have "retired the use of the term 'plausibility' when describing judicial review of labor arbitration awards." Maj. Op. at 10 n.3 (citing *Sw. Reg'l Council of Carpenters v. Drywall Dynamics, Inc.*, 823 F.3d 524, 532 (9th Cir. 2016)). But of course "a three-judge panel may not overrule a prior decision of the court," *Gammie*, 335 F.3d at 899, except under circumstances not met by *Drywall*. Accordingly, as the majority concedes, *Drywall* did not make any substantive change to the settled law in this area. Maj. Op. at 10 n.3.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 01/10/2019]

No. 16-16363

D.C. No. 2:15-cv-00117-SMM
District of Arizona, Phoenix

ASARCO LLC, a limited liability corporation,

Petitioner-Appellant,

v.

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, on behalf of itself and the other unions representing ASARCO LLC's bargaining unit employees,

Respondent-Appellee.

ORDER

Before: PAEZ and IKUTA, Circuit Judges, and GETTLEMAN,* District Judge.

A majority of the panel has voted to deny Appellant ASARCO's petition for panel rehearing. Judge Ikuta voted to grant the petition for panel rehearing.

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* The Honorable Robert W. Gettleman, United States District Judge for the Northern District of Illinois, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-16363

D.C. No. 2:15-cv-00117- SMM

ASARCO LLC, a limited liability corporation,

Petitioner-Appellant,

v.

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, on behalf of itself and the other unions representing ASARCO LLC's bargaining unit employees,

Respondent-Appellee.

Appeal from the United States District Court
for the District of Arizona

Stephen M. McNamee, Senior
District Judge, Presiding

Argued and Submitted November 16, 2017
Pasadena, California

Filed June 19, 2018

OPINION

Before: Richard A. Paez and Sandra S. Ikuta, Circuit Judges, and Robert W. Gettleman,[*] District Judge.

Opinion by Judge Gettleman;
Dissent by Judge Ikuta

SUMMARY[**]

Labor Law

The panel affirmed the district court's order affirming an arbitration award in favor of a union, which sought relief concerning a pension provision in the parties' collective bargaining agreement.

The employer asserted that the arbitrator reformed the collective bargaining agreement in contravention of a no-add provision in the agreement. The district court held that the arbitrator was authorized to reform the agreement, despite the no-add provision, based on a finding of mutual mistake.

The panel held that the employer did not properly preserve its objection to the arbitrator's jurisdiction because the employer conceded that the union's grievance was arbitrable and failed to expressly preserve the right to contest jurisdiction in a judicial proceeding. The panel further held that the arbitra-

[*] The Honorable Robert W. Gettleman, United States District Judge for the Northern District of Illinois, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

tion award drew its essence from the collective bargaining agreement, and the arbitrator did not exceed his authority in reforming the agreement. In addition, the arbitrator's award did not violate public policy.

Dissenting, Judge Ikuta wrote that, in light of the no-add provision, the arbitrator exceeded his authority under the collective bargaining agreement.

COUNSEL

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Michael D. Weiner (argued) and Jay Smith, Gilbert & Sackman, Los Angeles, California; Daniel M. Kovalik, United Steelworkers, Pittsburgh, Pennsylvania; Gerald Barrett, Ward Keenan & Barrett P.C., Phoenix, Arizona; for Respondent-Appellee.

OPINION

GETTLEMAN, District Judge:

This appeal involves the validity of an arbitration award. ASARCO asserts that the award is invalid because the arbitrator reformed the Basic Labor Agreement ("BLA") between the Union and ASARCO in contravention of a no-add provision in that agreement. The Union argues that the arbitrator did not contravene the no-add provision because he was required to reform the BLA upon finding that the parties were mutually mistaken as to its terms when they agreed to it. The district court affirmed the award, holding that ASARCO properly preserved its objection to the arbitrator's jurisdiction, but the arbitrator was authorized to reform the BLA, despite the no-add provision, based on a finding of mutual mistake. We affirm, but conclude that ASARCO did not properly preserve its objection to the arbitrator's jurisdiction.

I. BACKGROUND AND PROCEDURAL HISTORY

ASARCO is a miner, smelter, and refiner of copper and other precious metals with facilities in Arizona and Texas. ASARCO's employees are represented by the Union. ASARCO and the Union are parties to the BLA, which was originally effective January 1, 2007, through June 30, 2010. The BLA was modified and extended through two Memoranda of Agreement ("MOA") negotiated in 2010 and 2011. Article 9, Section B of the BLA provides that a Copper Price Bonus ("Bonus") will be paid quarterly to employees who participate in ASARCO's pension plan. The Bonus is calculated based on the price of copper and is significant, at times as much as $8,000 annually per employee. The 2011 MOA modified Article 12,

Section Q of the BLA to make employees hired on or after July 1, 2011 ineligible for ASARCO's pension plan, and thus ineligible for the Bonus. The Union, unaware of the link between the pension plan and the Bonus,[1] filed a grievance disputing ASARCO's refusal to pay the Bonus to employees hired after July 1, 2011. The case proceeded to arbitration.[2]

At the beginning of the arbitration hearing the parties stipulated that the matter was properly before the arbitrator and that the arbitrator had jurisdiction to decide the grievance. The Union claimed there was a mutual mistake in the 2011 MOA: the parties failed to recognize that Article 9, Section C of the BLA tied eligibility for the Bonus to participation in the pension plan, and both parties intended for all employees to remain eligible for the Bonus when they negotiated the 2011 MOA. Accordingly, the Union argued that reformation of the BLA was the appropriate remedy. ASARCO offered no evidence to the contrary, but argued that the arbitrator lacked authority to reform the BLA because Article 5, Section I(6)(c) contained the following no-add provision: "The arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement." After hearing six days of evidence the arbitrator concluded that neither party anticipated that the 2011 MOA modification would impact new hires'

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[1] It is undisputed that the parties did not discuss the Bonus when negotiating the 2011 MOA, and neither party indicated that the Bonus would be impacted in any way by the modification.

[2] Article 5, Section 1 of the BLA provides that all disputes between the parties are to be resolved through a grievance procedure that culminates in arbitration.

eligibility for the Bonus. Because he found that the parties were mutually mistaken as to the terms of the 2011 MOA, the arbitrator ordered that the BLA be amended to provide that new hires, though ineligible for ASARCO's pension plan, remain eligible for the Bonus.

ASARCO filed a Petition to Vacate Arbitration Award in the United States District Court for the District of Arizona. ASARCO did not challenge the arbitrator's findings of fact or conclusions of law, but argued that the no-add provision deprived the arbitrator of authority to amend the BLA. The district court confirmed the arbitration award, but rejected the Union's argument that ASARCO had waived any argument regarding the limits of the arbitrator's jurisdiction. In confirming the award, the district court noted the degree of deference due to the arbitrator's decision and concluded that the arbitrator did not violate the no-add provision because the reformation corrected a defect in the BLA, which was the product of mutual mistake, to reflect the terms the parties had agreed upon. ASARCO timely appeals.

II. STANDARD OF REVIEW

Our review of a district court's decision confirming an arbitration award is de novo. *Hawaii Teamsters & Allied Workers Union, Local 996 v. United Parcel Serv.*, 241 F.3d 1177, 1180 (9th Cir. 2001). "Our review of labor arbitration awards is, however, extremely deferential because 'courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.'" *Id.* (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987)) (internal

alterations omitted). Unless the arbitrator has "'dispensed his own brand of industrial justice' by making an award that does not 'draw its essence from the collective bargaining agreement,'" we must confirm the award. *Id.* at 1181 (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960)) (internal alterations omitted).

The context of collective bargaining warrants this extremely limited scope of review because the parties have agreed to have their disputes decided by an arbitrator chosen by them: "[I]t is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *Id.* "Indeed, the mandatory and prearranged arbitration of grievances is a critical aspect of the parties' bargain, the means through which they agree 'to handle the anticipated unanticipated omissions of the collective bargaining agreement.'" *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173, Int'l Ass'n of Machinists & Aerospace Workers*, 886 F.2d 1200, 1205 (9th Cir. 1989) (*en banc*) (quoting St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich.L.Rev. 1137, 1140 (1977)) ("*Judicial Review*") (internal alterations omitted). Such omissions occur because "[u]nlike the commercial contract, which is designed to be a comprehensive distillation of the parties' bargain, the collective bargaining agreement is a skeletal, interstitial document." *Id.*

Consequently, "[t]he labor arbitrator is the person the parties designate to fill in the gaps; for the vast array of circumstances they have not considered or reduced to writing, the arbitrator will state the parties' bargain." *Id.* He is "'their joint *alter ego* for

the purpose of striking whatever supplementary bargain is necessary' to handle matters omitted from the agreement." *Id.* (quoting *Judicial Review*, 75 Mich.L.Rev. at 1140). Because of this role, the arbitrator "cannot 'misinterpret' a collective bargaining agreement," *id.*, and "even if we were convinced that the arbitrator misread the contract or erred in interpreting it, such a conviction would not be a permissible ground for vacating the award." *Va. Mason Hosp. v. Wash. State Nurses Ass'n*, 511 F.3d 908, 913–14 (9th Cir. 2007) (footnote omitted). This deference applies "'even if the basis for the arbitrator's decision is ambiguous and notwithstanding the erroneousness of any factual findings or legal conclusions.'" *Federated Dep't Stores v. United Foods & Commercial Workers Union, Local 1442*, 901 F.2d 1494, 1496 (9th Cir. 1990) (quoting *Stead Motors*, 886 F.2d at 1209).

III. ANALYSIS

Although judicial review of arbitration awards is extremely limited, the Supreme Court and this Circuit have articulated three exceptions to the general rule of deference to an arbitrator's decision: "(1) when the arbitrator's award does not draw its essence from the collective bargaining agreement and the arbitrator is dispensing his own brand of industrial justice; (2) when the arbitrator exceeds the boundaries of the issues submitted to him; and (3) when the award is contrary to public policy." *Id.* (internal quotation marks omitted). According to ASARCO, the arbitrator's award should be vacated on all three grounds. We will address each, but turn first to the Union's argument that ASARCO waived the right to contest the arbitrator's jurisdiction. According to the Union, it did so by conceding that the grievance was arbitrable and failing to expressly preserve the right to

contest jurisdiction in a judicial proceeding. Although the district court rejected this argument, we agree with the Union.

A. Waiver

Generally speaking, the issue of arbitrability is decided by the courts. *John Wiley & Sons, Inc., v. Livingston*, 376 U.S. 543, 546–47, 84 S. Ct. 909, 912–13, 11 L. Ed. 2d 898 (1964). The parties may, however, agree to submit the question of arbitrability to the arbitrator. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578, 80 S. Ct. 1347, 1350, 4 L. Ed. 2d 1409 (1960). Additionally, as occurred here, the parties may stipulate that the controversy is arbitrable. If, however, a party "objects to arbitration on jurisdictional grounds, [it] may refuse to arbitrate the case." *George Day Const. Co. v. United Bhd. of Carpenters & Joiners of Am., Local 354*, 722 F.2d 1471, 1476 (9th Cir. 1984). The party seeking arbitration is "then put to the task of petitioning the court to compel arbitration." *Id.* Alternatively, a party can "object[ ] to the arbitrator's authority, refuse[ ] to argue the [jurisdictional] issue before him, and proceed[ ] to the merits of the grievance." *Id.* at 1475. "[T]hen, clearly the [jurisdictional] question would have been preserved for independent judicial scrutiny." *Id.* "The same result could be achieved by making an objection as to jurisdiction and an express reservation of the question on the record." *Id.*

As another alternative, the objecting party can "take[ ] the initiative by seeking declaratory and injunctive relief prior to the commencement of the arbitration." *Id.* at 1476. The objecting party can take any of these steps to "obtain[ ] an independent judicial examination of the [jurisdictional] question."

Id. The objection is not expressly preserved for judicial examination, however, when "the objection is raised, the [jurisdictional] issue is argued along with the merits, and the case is submitted to the arbitrator for decision." *Id.* at 1475. In such circumstances, "it becomes readily apparent that the parties have consented to allow the arbitrator to decide the entire controversy, including the question of arbitrability." *Id.* Indeed, "an agreement to arbitrate a particular issue need not be express – it may be implied from the conduct of the parties." *Ficek v. S. Pac. Co.*, 338 F.2d 655, 656 (9th Cir. 1964). By voluntarily submitting an issue to the arbitrator, the parties "'evinc[e] a subsequent agreement for private settlement'" of that issue. *Id.* (quoting *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 809 (2d Cir. 1960)). "The rule is sometimes stated in terms of waiver: A claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrators to act." *Id.* at 657 (citation omitted).

ASARCO did not exercise any of the options discussed above to expressly preserve the jurisdictional question for judicial review. Instead, ASARCO conceded that the grievance was arbitrable, then argued to the arbitrator that he lacked jurisdiction to reform the BLA in crafting a remedy. "Although [ASARCO] did suggest at the arbitration hearing that the arbitrator had no authority to [reform the BLA], it chose to argue that the arbitrator lacked authority rather than simply refusing to come to the table." *Tristar Pictures, Inc. v. Dir.'s Guild of Am., Inc.*, 160 F.3d 537, 540 (9th Cir. 1998). "'In this manner, [ASARCO] by its conduct evinced clearly its intent to allow the arbitrator to decide not only the merits of the dispute

but also the question of [jurisdiction].'" *Id.* (quoting *George Day*, 722 F.2d at 1475) (internal alterations omitted).

ASARCO attempts to distinguish *Tristar* by pointing out that in that case the employer disputed the arbitrator's jurisdiction over the entire dispute, whereas ASARCO objected only to the arbitrator's authority to reform the BLA. This point is well taken, but it does nothing to salvage ASARCO's claim that it expressly preserved the question of the arbitrator's authority to reform the BLA for judicial review. As our precedent makes clear, ASARCO submitted that issue to the arbitrator when it chose to argue it before the arbitrator rather than making an express reservation of the issue and arguing only the merits of the grievance. When ASARCO argued to the arbitrator that the he lacked authority to reform the BLA, it submitted that issue to the arbitrator, and could not seek a different result from the district court. The argument was waived. Additionally, ASARCO's decision to argue the issue to the arbitrator suggests that it never really objected to the arbitrator's jurisdiction at all, but rather objected only to the arbitrator crafting the remedy that the Union sought.

In deciding that ASARCO did not waive its right to contest the arbitrator's jurisdiction, the district court relied heavily on *Van Waters & Rogers, Inc. v. Int'l Bhd. of Teamsters, Local Union 70*, 913 F.2d 736 (9th Cir. 1990). In *Van Waters* the company purchased the assets of a rival company and, as part of that purchase, agreed to offer employment to seven of the rival company's employees, all of whom were represented by Local Union 70, and to assume the terms and conditions of their Collective Bargaining

Agreement ("CBA"). *Id.* at 738. The parties' CBA contained a provision that prohibited arbitration of jurisdictional disputes between Local Union 70 and any other Union, and instead mandated that such disputes would be resolved only by the Unions. *Id.* at 740. Local Union 70 filed grievances on behalf of the seven employees hired by Van Waters related to pay, benefits, and seniority status. The parties agreed to arbitrate the grievances. At the outset of the arbitration Van Waters stipulated that under Local Union 70's CBA the arbitrator did not have jurisdiction over its other employees, who were represented by a different Union, Local 287, and that the arbitrator did not have the authority to issue a ruling that would affect the employees represented by Local 287, which was not a party to the proceeding. *Id.* at 741. Van Waters used similar language to that used by ASARCO, and we held that Van Waters adequately preserved the jurisdictional question on the record and had therefore not waived the issue of arbitrability. *Id.* Although ASARCO used similar language, it did so in relation to a vastly different objection under vastly different circumstances.

Van Waters is thus inapposite for at least two reasons. First, Van Waters objected to the arbitrator exercising jurisdiction over an entire group of employees, Local 287, who were not parties to the proceeding and were in no way represented in the arbitration. Second, after objecting to the arbitrator's jurisdiction, Van Waters did not proceed to argue throughout the arbitration hearing how and why the arbitrator lacked jurisdiction, as ASARCO did in the instant case. Instead, Van Waters stipulated to the scope of the arbitration and proceeded to argue only the merits of its case. ASARCO, on the other hand, objected not to the scope of the arbitration and not

to the arbitrator's exercise of jurisdiction over any parties, but rather to his authority to reform the BLA in crafting a remedy. After objecting, ASARCO argued at length, to the arbitrator, that he lacked such authority. By doing so, ASARCO submitted the issue to the arbitrator and "evinced a subsequent agreement for private settlement" of that issue. *Ficek*, 338 F.2d at 656 (internal quotation marks omitted). ASARCO cannot "voluntarily submit [its] claim to arbitration, await the outcome, and, [when] the decision is unfavorable, then challenge the authority of the arbitrator[ ] to act." *Id.* at 657 (citation omitted). Accordingly, we find that ASARCO waived its right to contest the arbitrator's jurisdiction.

B. Merits

Given the great deference due to arbitrator's decisions, ASARCO wisely does not challenge the arbitrator's findings of fact or conclusions of law, but instead argues that the arbitrator's award does not warrant deference because of the following exceptions: (1) the award does not draw its essence from the BLA; (2) the arbitrator exceeded his authority in reforming the BLA; and (3) the award is contrary to public policy. *See supra* at 7–8. The first two exceptions are interrelated, and we will address them simultaneously before turning to the third exception. ASARCO argues that the no-add provision in the BLA deprived the arbitrator of authority to reform the BLA, and the arbitrator's award does not draw its essence from the BLA because it ignores this provision.

In deciding whether the arbitrator's award draws its essence from the BLA, "the quality – that is the degree of substantive validity – of [his] interpretation is, and always has been, beside the point." *Sw. Reg'l*

Council of Carpenters v. Drywall Dynamics, Inc., 823 F.3d 524, 532 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 829, 197 L. Ed. 2d 68 (2017). "Instead, the appropriate question for a court to ask when determining whether to enforce a labor arbitration award interpreting a collective bargaining agreement is a simple binary one: Did the arbitrator look to and construe the contract, or did he not?" *Id.* This is because "'[i]t is only when the arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable.'" *Id.* at 531 (quoting *Major League Baseball Players Ass'n v. Garve*y, 532 U.S. 504, 509, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001)) (internal alterations omitted). Accordingly, "the court's inquiry ends" if the arbitrator "made any interpretation or application of the agreement at all." *Id.* at 531–32. We therefore "must limit [our] review to whether the arbitrator's solution can be rationally derived from some plausible[3] theory of the general framework or intent of the agreement." *United Food & Commercial Workers Int'l Union, Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 173 (9th Cir. 1995), *opinion amended on denial of reh'g*, (9th Cir. Jan. 30, 1996).

We have no doubt that the arbitrator's decision was grounded in his reading of the BLA. The arbitrator acknowledged that new hires were not entitled to the

[3] As the parties note, this Court has retired the use of the term "plausibility" when describing judicial review of labor arbitration awards. *See Drywall Dynamics*, 823 F.3d at 532. This step was taken not to "propose any substantive change to the settled law in this area," but rather to underscore the limited nature of the inquiry, which is whether "the arbitrator look[ed] at and construe[d] the contract." *Id.*

Bonus under the plain language of the BLA and that he could not find for the Union based solely on the language contained in the BLA. He also recognized that arbitrators do not generally have the authority to rewrite CBAs or ignore their provisions. He noted, however, that arbitrators can reform a contract to correct an obvious mutual mistake. Citing a substantial amount of evidence that he heard over six days, the arbitrator concluded that the parties presented precisely this scenario: in negotiating the 2011 MOA, they never discussed or even acknowledged that if the BLA were amended to make new hires ineligible for the pension plan, they would also be ineligible for the Bonus. Although he did not specifically cite the no-add provision when explaining the basis of his award, the arbitrator did quote it directly as relevant language of the BLA and noted that, absent a finding of mutual mistake, he would not have the authority to reform the BLA.[4]

Given the arbitrator's extensive treatment of the BLA and acknowledgment of the no-add provision, we agree with the district court that the arbitrator's decision was grounded in his reading of the BLA, and are "bound to enforce the award" even if "the basis for the arbitrator's decision may be ambiguous." *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 764, 103 S. Ct. 2177, 2182, 76 L. Ed. 2d

[4] Respectfully, the dissenting opinion is incorrect when it states that the arbitrator failed to discuss, or even mention, the no-add provision. In fact, the arbitrator discussed the no-add provision at length on pages 14 and 16 of the arbitration award, quoted it directly, and discussed the parties' positions regarding its impact. The arbitrator then acknowledged that he lacked authority to rewrite the BLA or ignore its provisions absent a finding of mutual mistake.

298 (1983); *see also Drywall Dynamics*, 823 F.3d at 533("'[A]rbitrators have no obligation to give their reasons for an award at all,'" and a court may not "'infer the non-existence of a particular reason merely from the award's silence on a given issue.'") (quoting *Stead Motors*, 886 F.2d at 1208, 1213); *Stead Motors*, 886 F.2d at 1208 ("'[M]ere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award.'") (quoting *Enterprise Wheel*, 363 U.S. at 598, 80 S. Ct. at 1361).

Upon concluding that the parties were mutually mistaken as to the impact of the 2011 MOA on new hires' eligibility for the Bonus, the arbitrator was authorized to reform the CBA despite ASARCO's protest. *W.R. Grace*, 461 U.S. at 765, 103 S. Ct. at 2183 ("Because the authority of arbitrators is a subject of collective bargaining, just as is any other contractual provision, the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator."). Additionally, the arbitrator was not strictly bound only to the provisions of the BLA in crafting a remedy, because "the arbitrator is entitled, and is even expected, to range afield of the actual text of the collective bargaining agreement he interprets." *Stead Motors*, 886 F.2d at 1206. The arbitrator was entitled to rely on a number of resources, including "'statutes, case decisions, principles of contract law, practices, assumptions, understandings, [and] the common law of the shop'" in his effort to give meaning to the BLA. *Hawaii Teamsters*, 241 F.3d at 1183 (quoting *McKinney v. Emery Air Freight Corp.*, 954 F.2d 590, 595 (9th Cir. 1992)).

Applying ordinary principles of contract law, the arbitrator concluded that the proper remedy for the parties' mutual mistake was to reform the BLA to make it reflect the terms the parties actually agreed upon. *See Caliber One Indem. Co. v. Wade Cook Fin. Corp.*, 491 F.3d 1079, 1083 (9th Cir. 2007) (reformation of contract is warranted to correct mutually mistaken terms). Even if we were to conclude otherwise, "where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect." *Misco*, 484 U.S. at 38, 108 S. Ct. at 371. Because the arbitrator was construing the BLA in light of the evidence presented to him and basic principles of contract law, his decision and award are due great deference. *See W.R. Grace*, 461 U.S. at 765, 103 S. Ct. at 2183 ("Regardless of what our view might be of the correctness of [the arbitrator's] contractual interpretation, [ASARCO] and the Union bargained for that interpretation. A federal court may not second-guess it.") (citation omitted). Although we could conceivably have reached a different result if we were to interpret the BLA ourselves, we conclude that the arbitrator's award drew its essence from the BLA.

The cases ASARCO cites to support its argument that the no-add provision left the arbitrator powerless to remedy what he found to be an obvious mutual mistake fail to do so. First, ASARCO tells us that we need look only to one case to vacate the arbitrator's award: *West Coast Telephone*. *W. Coast Tel. Co. v. Local Union No. 77, Int'l Bhd. of Elec. Workers, AFL-CIO*, 431 F.2d 1219 (9th Cir. 1970). In *West Coast Telephone* the employer sought to reform its CBA because it contained wage schedules for certain employees that reflected wages higher than what the

employer and Union had agreed upon when bargaining. *Id.* at 1220. The employer was made aware of this discrepancy when the Union filed a grievance because the employees were being paid the agreed upon wage rather than the higher wage contained in the CBA. *Id.* The Union requested the dispute be submitted to arbitration under the terms of the CBA, but the company refused to arbitrate and instead filed suit in the district court seeking reformation. *Id.* The Union moved to compel arbitration. The district court denied the motion, and the Union appealed. *Id.* This court affirmed:

> [T]he company seeks a change in the terms of the written agreement. It can be said with positive assurance that such an issue is not arbitrable under the agreement in question. The arbitration clause of the contract expressly provides that the arbitrator 'shall have no power to destroy, change, add to or delete from its terms.'

Id. at 1221.

ASARCO's reliance on *West Coast Telephone* is misplaced. *West Coast Telephone* did not grapple with courts' deference to arbitrator's decisions, nor did it hold that arbitrators may never, under any circumstances, reform contracts that contain no-add provisions.[5] It simply held that the issue of contract reformation was not arbitrable under the facts of sthat case because the contract contained a no-add provision. That question is not before this court.

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[5] *West Coast Telephone* did suggest that reformation is the appropriate remedy when the provisions of a contract do not reflect the parties' agreed upon terms. *See West Coast Telephone*, 431 F.2d at 1221–22.

ASARCO attempts to discard this difference as one of inconsequential procedural posture, but here procedural posture makes all the difference.

Even assuming a court would have been obligated under *West Coast Telephone* to hold that the dispute at issue was not arbitrable, ASARCO loses because it agreed to submit the dispute to arbitration. When ASARCO did so, it took the question of arbitrability out of the courts' hands. Consequently, ASARCO is now faced with a nearly insurmountable hurdle given the level of deference that this court must grant to the arbitrator's decision. Had ASARCO refused to arbitrate and instead sought relief in the district court, it is quite possible, if not probable, that the court would have followed *West Coast Telephone*. ASARCO did not. Instead, it stipulated that the dispute was arbitrable and argued to the arbitrator that he lacked authority to reform the BLA. Again, ASARCO "may not voluntarily submit [its] claim to arbitration, await the outcome, and, [when] the decision is unfavorable, then challenge the authority of the arbitrator[ ] to act." *Ficek*, 338 F.2d at 657.

The other cases cited by ASARCO are equally inapt, if not more so. Not one of them concerns a mutual mistake made by two parties who have agreed to submit their dispute to an arbitrator, or what the proper remedy would be in such a situation. For the reasons discussed above, these facts matter. Additionally, ASARCO faults the Union for not seeking reformation of the BLA in the district court, but ASARCO knew all along that the Union sought reformation and was equally capable of seeking relief in the district court by simply refusing to arbitrate the issue. It did not and now cannot present the issue to this court and hope for a better outcome.

Finally, ASARCO argues that the arbitrator's award should be vacated because it violates public policy. The Union argues that ASARCO waived this argument by failing to present it in the district court. ASARCO concedes this fact, but urges that an argument first raised on appeal is not waived when the issue is purely one of law and the opposing party will not be prejudiced. *See United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990). Regardless of whether ASARCO's argument is waived, it fails. There is "a very limited 'public policy exception' to the stringent rule ordinarily requiring courts' enforcement of arbitrators' decisions interpreting and applying collective bargaining agreements." *Drywall Dynamics*, 823 F.3d at 533 (citations omitted). Under this exception "a court may vacate an arbitration award that 'runs contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests.'" *Id.* at 534 (quoting *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 63, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000)) (internal alterations omitted).

According to ASARCO, the public policy interest served by the collective bargaining process demands that the award be vacated because courts should not confirm arbitration awards that distort the product of collective bargaining – the Collective Bargaining Agreement. Assuming ASARCO has stated an "explicit, well-defined, and dominant public policy," its argument still fails for a very simple reason. The arbitrator did not distort the BLA; he reformed it so that it no longer distorted the agreement that the parties made during collective bargaining. For the reasons discussed above, the arbitrator was author-

ized to do so upon finding the parties were mutually mistaken about the terms they agreed to. The award does not violate public policy.

We conclude that the arbitrator was acting within his authority when he crafted a remedy to cure the parties' mutual mistake. Consequently, even if ASARCO did not waive its right to contest the arbitrator's jurisdiction, which it did, we would defer to the arbitrator's judgment, as we must.

AFFIRMED.

IKUTA, Circuit Judge, dissenting:

The operative facts here are quite simple. The no-add provision of the collective bargaining agreement in this case says: "The arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement." The pension provision of the collective bargaining agreement says: "Employees hired on and after the Effective Date are not eligible to participate in the pension plan."

Without discussing the no-add provision, the arbitrator here ordered that the pension provision be amended to include five additional lines of text:

> Employees hired on and after the Effective Date are not eligible to participate in the pension plan. *However, the Company shall treat such Employees as if they were accruing Continuous Service under the Retirement Income Plan for Hourly Rated Employees of ASARCO Inc. on the same terms as other Employees, only for purposes of determining eligibility for the Copper Price Bonus pursuant to Article 9, Section C.5 of the BLA.*

By adding to the pension provision, the arbitrator plainly exceeded the authority granted to him by the collective bargaining agreement. Can he do that? We have said no: "an arbitrator has no authority to ignore the plain language of a collective bargaining agreement that limits the scope of his authority." *Haw. Teamsters & Allied Workers Union, Local 996 v. United Parcel Serv.*, 241 F.3d 1177, 1181 (9th Cir. 2001). When issuing awards, "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." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

In reviewing an arbitral award, we are likewise bound by express limitations on an arbitrator's authority. A court may not enforce an arbitration award if it does not "draw its essence from the collective bargaining agreement." *Federated Emp'rs of Nev., Inc. v. Teamsters Local No. 631*, 600 F.2d 1263, 1264 (9th Cir. 1979). An arbitration award that violates "an express and explicit restriction on the arbitrator's power" does not draw its essence from the agreement, but rather "demonstrates that the arbitrator ignored the essence of the agreement in making the award." *Id.* at 1264–65. Because the arbitrator here ignored the essence of the agreement by violating an express and explicit restriction on his power, the award must be vacated. *See id.*

The majority abandons these principles today based on two unreasoned conclusions. First, the majority upholds the arbitrator's award because it "was grounded in his reading" of the collective bargaining agreement. Maj. Op. at 15. On its face, this statement is dead wrong: the arbitrator did not even mention, let alone construe, the no-add provision in formulating his award.[1] Unlike in *Oxford*

[1] The Arbitration Award is divided into six sections entitled: "Background"; "Relevant Language of the BLA"; "Relevant Language of the 2011 Memorandum of Agreement": "Statement of the Issues"; "Summary of the Position of the Parties"; and "Discussion and Award." The no-add provision is mentioned in two sections of the Arbitration Award. The section entitled "Relevant Language of the BLA," sets forth the text of four subsections of the collective bargaining agreement, including one entitled "Board of Arbitration" which explains the role of the arbitrator and contains the no-add provision. The "Summary of

Health Plans LLC v. Sutter, 569 U.S. 564, 570 (2013), where the arbitrator based a potentially unreasonable construction of his authority on a "textual exegesis," 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. The majority does not really dispute this point: it concedes that the arbitrator "did not specifically cite the no-add provision when explaining the basis of his award," but concludes it was sufficient for the arbitrator to "quote it directly" in the section of the arbitration decision entitled "Relevant Language of the BLA," which it deems to be an "acknowledgment of the no-add provision." Maj. Op. at 14–15. But the arbitrator's knowledge that the collective bargaining agreement contained a no-add provision is immaterial if the arbitrator failed to construe it. Obviously, a "few references" to a key issue in dispute does not show that the arbitrator "did anything other than impose its own policy preference." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 676 (2010). Here the arbitrator expressly stated he was reforming the agreement "in the interest of justice and fairness." In other words, the arbitrator issued an award that "simply reflect[s] the arbitrator's own notions of industrial justice." *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000) (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

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the Position of the Parties" sets forth the opposing positions of the Union and ASARCO regarding the effect of the no-add provision. The section entitled "Discussion and Award," where the arbitrator provides his analysis and conclusion, does not discuss or mention the no-add provision.

Second, the majority states that the arbitrator's award is binding because arbitrators can reform a contract to correct a mutual mistake and "to make it reflect the terms the parties actually agreed upon." Maj. Op. at 16. This sweeping assertion is inapposite here. While arbitrators may have power to reform an agreement where permitted to do so by the collective bargaining agreement, the arbitrator *in this case* clearly lacked that power. Rather, "the terms the parties actually agreed upon" in *this* collective bargaining agreement expressly state that the arbitrator may not add provisions to the agreement. Because "an arbitrator's authority derives solely from the contract," *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 290 (1984), the arbitrator here could not add provisions to the agreement, even if there had been a mutual mistake. The majority fails to explain why the arbitrator here could exercise a power directly contrary to the express restrictions on the arbitrator's authority.

Indeed, the majority cites no case supporting its proposition that an arbitrator can reform a contract based on mutual mistake when the parties expressly prohibit the arbitrator from adding to or modifying the agreement. To the contrary, we have held that a no-add provision prohibits an arbitrator from modifying an agreement even when there is a mutual mistake. *See W. Coast Tel. Co. v. Local Union No. 77, Int'l Bhd. of Elec. Workers, AFL-CIO*, 431 F.2d 1219, 1221 (9th Cir. 1970). In *West Coast Telephone*, we considered a union's demand to compel arbitration of the question whether its collective bargaining agreement should be reformed to reflect the parties' intent. *Id.* at 1220. We concluded "with positive assurance" that the issue of reformation due to mutual mistake was not arbitrable because "[t]he arbitration clause of

the contract expressly provides that the arbitrator 'shall have no power to destroy, change, add to or delete from its terms.'" *Id.* at 1221. In other words, a no-add provision in a collective bargaining agreement precludes the arbitrator from rewriting the agreement.

The majority attempts to distinguish *West Coast Telephone* because it addressed whether a dispute over reformation was arbitrable, rather than whether the arbitrator lacked authority to reform the contract, and therefore does not definitively resolve the issue whether the arbitrator's award here drew its essence from the agreement. Maj. Op. at 17–18. But *West Coast Telephone*'s holding was based on its conclusion that a no-add provision deprives the arbitrator of the authority to modify the agreement, and this ruling is binding on us. 431 F.2d at 1221. We need not consider whether we would defer to an arbitrator who erroneously construed a no-add provision as allowing reformation of a contract in a particular case. This issue is not before us because – as mentioned above – the arbitrator here did not construe the no-add provision. Because under our precedent the arbitrator's modification was contrary to the no-add provision and is therefore not a "plausible interpretation" of the contract, and because there is no basis for deferring to the arbitrator's construction of the no-add provision in this case, his award must be vacated.[2] *Federated Empr's*, 600 F.2d at 1265.

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[2] The majority states that we have "retired the use of the term 'plausibility' when describing judicial review of labor arbitration awards." Maj. Op. at 13–14 n.3 (citing *Sw. Reg'l Council of Carpenters v. Drywall Dynamics, Inc.*, 823 F.3d 524, 532 (9th Cir. 2016)). But of course "a three-judge panel may

The arbitrator here dispensed his own brand of industrial justice by exceeding the scope of his delegated powers and modifying the agreement "in the interest of justice and fairness." Because "an arbitrator has no authority to ignore the plain language of a collective bargaining agreement that limits the scope of his authority," the award fails to draw its essence from the collective bargaining agreement. *Haw. Teamsters*, 241 F.3d at 1181. The majority today turns its back on these basic principles and our precedent. I dissent.

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not overrule a prior decision of the court," *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc), except under circumstances not met by *Drywall*. Accordingly, as the majority concedes, *Drywall* did not make any substantive change to the settled law in this area. Maj. Op. at 13–14 n.3.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed 07/05/16]

No. CV-15-117-PHX-SMM

ASARCO, LLC,

Petitioner,

v.

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, on behalf of itself and the other unions representing ASARCO, LLC'S bargaining unit employees,

Respondents.

ORDER

Pending before the Court are Respondent/Counterclaimant United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFLCIO, CLC's ("Union's") Motion to Amend Judgment, Petitioner/Counterdefendant ASARCO, LLC's ("ASARCO's") Motion for Reconsideration of Judgment, and ASARCO's Motion for Leave to File a Motion for Reconsideration of Judgment Under the District's LRCiv 7.2(g)(2). (Docs. 55, 58, 61.)

The Court will grant the Union's Motion to Amend Judgment, and deny Petitioner/Counterdefendant's

Motion for Reconsideration of Judgment and Petitioner/Counterdefendant's Motion for Leave to File a Motion for Reconsideration of Judgment Under the District's LRCiv 7.2(g)(2).

Background

On March 3, 2016, this Court entered judgment granting the Union's Renewed Motion to Confirm Arbitration Award. (Doc. 37.) On March 16, 2016, the Union filed its Motion to Amend Judgment (Doc. 55.) On March 31, 2016, ASARCO filed its Motion for Reconsideration of Judgment. (Doc. 58.) And on April 11, 2016, ASARCO filed its Motion for Leave to File a Motion for Reconsideration of Judgment Under the District's LRCiv 7.2(g)(2). (Doc. 61.)

The Union's Motion to Amend Judgment

The Union is entitled as a matter of law to post-judgment interest under 28 U.S.C. § 1961. "Under 28 U.S.C. § 1961, the award of post judgment interest on a district court judgment is mandatory." *Barnard v. Theobald*, 721 F.3d 1069, 1078 (9th Cir. 2013) (citing *Air Separation Inc. v. Underwriters at Lloyd's of London*, 45 F.3d 288, 289-90 (9th Cir. 1995)). It is immaterial that the judgment in question is a judgment confirming an arbitration award because "[a] judgment confirming an arbitration award is treated similarly to any other federal judgment." *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 387 F.3d 1021, 1023 (9th Cir. 2004) (citing 9 U.S.C. § 13; *Northrop Corp. v. Triad Int'l Mktg. S.A.*, 842 F.2d 1154, 1155-56 (9th Cir. 1988) (stating that § 1961 applies to judgment confirming award)).

Additionally, Ninth Circuit case law directs that "[i]nterest runs from the date that entitlement to [money] is secured, rather than from the date that

the exact quantity of [money] is set." *Friend v. Kolodzieczak*, 72 F.3d 1386, 1391-92 (9th Cir. 1995) (en banc). Therefore, it is immaterial that the exact quantity of money is unknown. Further, the date that the Union's entitlement to money was secured was March 3, 2016 when this Court confirmed the arbitrator's award. Accordingly, post-judgment interest will run from March 3, 2016, not from the date of the Amended Judgment.

Motion for Reconsideration of Judgment

Motions for reconsideration should be granted only in rare circumstances. *Defenders of Wildlife v. Browner*, 909 F.Supp. 1342, 1351 (D. Ariz. 1995). Mere disagreement with a previous order is an insufficient basis for reconsideration. *See Leong v. Hilton Hotels Corp*., 689 F. Supp. 1572, 1573 (D. Haw. 1988). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1 J, Multnomah County v. ACandS, Inc*., 5 F.3d 1255, 1263 (9th Cir.1993). Such motions should not be used for the purpose of asking a court "'to rethink what the court had already thought through-rightly or wrongly.'" *Defenders of Wildlife*, 909 F. Supp. at 1351 (quoting *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc*., 99 F.R.D. 99, 101 (E.D. Va. 1983)). Arguments that a court was in error on the issues it considered should be directed to the court of appeals. *Id.*

Here, ASARCO contends that the intent of the parties was to prevent an arbitrator from modifying the collective bargaining agreement ("Basic Labor Agreement" or "BLA") in any way, including by

implementing ordinary principles of contract law. (Doc. 58.) Thus, when the arbitrator reformed the BLA he did not merely reform it, but added to it in violation of the "no add" provision. (Doc. 58.) ASARCO made the same argument previously: "[The Union] contends that because of the Arbitrator's mutual mistake finding, he 'merely confirm[ed] the actual agreement entered into by the parties.' . . . The Arbitrator, however, did not 'merely confirm' the Agreement; he added to it." The Court has already reviewed and rejected this argument:

> If the Court were to accept ASARCO's argument, it would mean that an arbitrator may never apply the doctrine of mutual mistake to reform a collective bargaining agreement that contains a "no-add" provision. This runs contrary to the Supreme Court's general guidance in *M&G Polymers* that in a collective bargaining agreement, as with any other contract, the parties' intentions control. . . .

(Doc. 53.)

Because ASARCO merely repeats an argument they previously made and that this Court has already considered, the Motion for Reconsideration constitutes mere disagreement and does not meet the standard for reconsideration.

Motion for Leave to File a Motion for Reconsideration of Judgment Under the District's Local Rule 7.2(g)(2)

Because the Court is denying ASARCO's Motion for Reconsideration of Judgment, which was timely filed under Fed. R. Civ. P. 59(e), the Court will deny as moot ASARCO's Motion for Leave to File a Motion for

Reconsideration of Judgment Under the District's LRCiv 7.2(g)(2).

Accordingly,

IT IS HEREBY ORDERED granting the Union's Motion to Amend Judgment, (Doc. 55) clarifying that the arbitrator's award is confirmed.

IT IS FURTHER ORDERED granting to the Union post-judgment interest at the federal rate pursuant to the statutory provision in 28 U.S.C.A. § 1961 effective March 3, 2016.

IT IS FURTHER ORDERED denying ASARCO's Motion for Reconsideration of Judgment. (Doc. 58.)

IT IS FURTHER ORDERED denying as moot ASARCO's Motion for Leave to File a Motion for Reconsideration of Judgment Under the District's Local Rule 7.2(g)(2). (Doc. 61.)

DATED this 1st day of July, 2016.

/s/ Stephen M. McNamee
Stephen M. McNamee
Senior District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed 03/03/16]

No. CV-15-117-PHX-SMM

ASARCO, LLC,

Petitioner,

v.

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, on behalf of itself and the other unions representing ASARCO, LLC'S bargaining unit employees,

Respondents.

MEMORANDUM OF DECISION AND ORDER

Pending before the Court is Respondents'/ Counterclaimants' United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFLCIO, CLC ("Union") Renewed Motion to Confirm Arbitration Award. (Doc. 37.) The Union's motion is fully briefed. (Docs. 41-44.) The Court scheduled and the parties presented oral argument on the motion. (Docs. 36, 45, 47.)

After review and consideration of the pleadings and the parties' presentations, the Court finds first that ASARCO LLC ("ASARCO") did not waive its

argument regarding limitations on the jurisdictional authority of the Arbitrator to reform the collective bargaining agreement. However, on the merits, the Court will confirm the arbitration award, deny vacating the award, and issue judgment.

BACKGROUND

The relevant undisputed facts that led to grievances being filed by the Union on behalf of newly hired employees of ASARCO were set forth in the decision of the Arbitrator. (Doc. 2-1.) Using the background facts established by the Arbitrator in his decision (*see id.*), the Court will state, quote, or summarize the pertinent facts necessary here for the Court to properly resolve the issues presented.

ASARCO is engaged in mining and/or refining copper and other minerals at five facilities in Arizona. It also operates a copper refinery in Amarillo, Texas. The case before the Arbitrator arose out of a decision by ASARCO not to pay what is known as the Copper Price Bonus ("Bonus") to new employees hired on or after July 1, 2011. A grievance protesting ASARCO's decision was filed by the Union on behalf of the new employees not paid the Bonus. The grievance asserted a violation of the June 15, 2011, Memorandum of Understanding between ASARCO and the Union and referenced failure to issue payment of the Bonus to new hires. The Union requested as a remedy that all new employees hired after July 1, 2011, be made whole on the Bonus.

Historically, to put the matter in context, in 2006, negotiations began between ASARCO and the Union for the 2007 Basic Labor Agreement ("BLA"). (Doc. 2-2.) During negotiations, the Union proposed that ASARCO agree to pay a bonus to its unionized

employees based on the price of copper. Eventually ASARCO accepted the Union's proposal and the Bonus became Article 9, Section C, of the BLA. (*Id*. at 46.) Under this section, ASARCO agreed to pay the Bonus based on the three-month average daily cash settlement price each quarter for copper on the London Metal Exchange. ASARCO was to pay the Bonus quarterly in a lump sum to eligible employees; the Bonus would only be paid if the quarterly average copper price exceeded $1.60 per pound. (*Id.*) If that requirement was met, ASARCO was required to pay the Bonus within 30 days of the end of the quarter according to a scale contained in the BLA. (*Id.*)

During these 2006 negotiations, the parties also agreed to a proposal that limited eligibility to employees who would be entitled to receive the Bonus. Specifically, the eligibility language which became part of the BLA states: "The Copper Price Bonus will be paid to each such Participant accruing Continuous Service under the Retirement Income Plan for Hourly Rated Employees of ASARCO, Inc. at the end of the calendar quarter." At the arbitration hearing the parties stipulated that the "Retirement Income Plan for Hourly Rated Employees of ASARCO is also known as the "pension plan." In January 2007 a tentative agreement on the BLA was reached which contained the proposed Bonus language. The members of the Union ratified the BLA. Although the Bonus amount has varied depending on the price of copper, the amount paid to each eligible employee has been as high as $8,000 annually.

In 2010, negotiations began for the successor to the 2007 BLA, which was set to expire. The parties agreed to extend the BLA for one year by way of a Memorandum of Agreement ("MOA"). The 2010 MOA

was scheduled to expire on June 30, 2011. During the negotiations for a 2011 Agreement, both parties made presentations regarding ASARCO's business outlook. ASARCO displayed a chart showing the cost of the Bonus. It also displayed, under the heading of "Goals and Expectations," the statement "Tie bonus compensation to business performance and achievement of business goals that are defined by key performance indicators or agreed-upon metrics, rather than basing the bonus on the price of copper alone." No specific proposal was made by either party during bargaining to change the Bonus calculation or to change eligibility for the Bonus.

On June 14, 2011, ASARCO proposed modifying Article 12, Section Q of the BLA to state "Employees hired on and after the Effective Date are not eligible to participate in the pension plan." ASARCO also proposed modifying Article 12, Section O, by stating under the heading of Retiree Healthcare: "Employees hired on and after the Effective Date are not eligible for coverage." ASARCO stated that it was its intention to eliminate retiree health care for new hires. ASARCO further proposed a change to Article 12 by adding new language that said: "Article 12, Section P, 401(k) Savings Plan: ASARCO will match 100% of Employee pre-tax contributions up to 6% of eligible pay in cash for Employees hired on and after the Effective date."

At the June 14, 2011 meeting, ASARCO proposed extending the BLA and the 2010 MOA with certain modifications which included ASARCO's proposal that employees hired on and after July 1, 2011, would not be eligible to participate in the pension plan. The language in the previous MOA, which stated that "All provisions of the BLA shall remain in force

and effect, except as otherwise provided herein," also continued in the new MOA. Later, during the negotiations, the Union indicated that it opposed ASARCO's proposal stating that new hires would not be eligible for health care coverage upon retirement. Eventually ASARCO agreed to remove that language.

It is undisputed that at no point during the 2011 collective bargaining negotiations did the Union ask ASARCO if other benefits would be impacted by removing new hires from the pension plan, nor did ASARCO ever state that removing new hires from the pension plan would impact the new hires' eligibility for the Bonus. Rather, neither party mentioned the Bonus or eligibility for the Bonus during collective bargaining. Had the parties been aware of the impact of the change, it is further undisputed that the proposed change in eligibility for the Bonus would have been subject to collective bargaining by the parties. The Union members ratified the new MOA, which was scheduled to go into effect on July 1, 2011.

Between July 1, 2011 and October 25, 2011, ASARCO representatives told prospective new employees and newly hired employees that they would be eligible for the Bonus. ASARCO also made it clear that new hires were not eligible to participate in the pension plan.

Ultimately, before any bonus payments were made to new employees, ASARCO determined that based on the language of the BLA, new employees would not be entitled to the Bonus. The Union then filed a grievance on behalf of the new employees hired on or after July 1, 2011, who were denied the Bonus. The grievance was subject to arbitration.

Before the Arbitrator, the Union argued that there was a mutual mistake shared by both parties which required reformation of the collective bargaining agreement. The Union contended that both parties failed to recognize that the language that eliminated pension benefits for new hires would also make new hires ineligible for the Bonus, and that by failing to change the Bonus eligibility language, the parties failed to ensure that new hires remained eligible for the Bonus. The Union further argued that both parties believed and intended that all bargaining unit employees would remain eligible for the Bonus.

Before the Arbitrator, ASARCO contended that under the clear language of the MOA the Arbitrator did not have authority to order that new hires be made eligible for the Bonus, nor did he have authority to rewrite the BLA to make new hires eligible for the Bonus. ASARCO relied on the language of the BLA which states that an arbitrator lacks the authority to alter the BLA. ASARCO stressed that the parties specifically agreed in the BLA that an arbitrator, acting under the grievance and arbitration procedure, "shall not have jurisdiction or authority to add to, detract from, or alter in any way, the provisions of [the BLA]." (Doc. 2-2 at 32.) According to ASARCO, based on the Union's request for reformation, the Arbitrator would be required to ignore the BLA, and by doing so, exceed his limited authority and do exactly what the clause prohibits by either deleting the bonus pension link or adding a phrase into the BLA that would entitle new hires to receive the Bonus. ASARCO argued that the alleged mistake did not authorize the Arbitrator to so exceed his authority and change the language of the BLA.

The Arbitrator stated that the Union could not point to contract language in the BLA that was violated by ASARCO because it simply did not exist. The Arbitrator found that there is no language in the BLA which required that ASARCO pay the Bonus to any employees not covered by the pension plan. Because there is no dispute that employees hired after July 1, 2011 are not covered by the pension plan, the Arbitrator did not find for the Union based on the language of the BLA. Rather, the Arbitrator applied the doctrine of mutual mistake to reform the BLA to permit the Bonus to be paid to new employees that were not eligible for the Bonus because they did not meet the eligibility requirement of being covered by the pension plan. The Arbitrator ordered that the BLA be amended to read as follows:

> Article 12, Section Q. Pension Plan: Employees hired on and after the Effective Date are not eligible to participate in the pension plan. *However,[ASARCO] shall treat such Employees as if they were accruing Continuous Service under the Retirement Income Plan for Hourly Rated Employees of ASARCO Inc. on the same terms as other Employees, only for purposes of determining eligibility for the Copper Price Bonus pursuant to Article 9, Section C.5 of the BLA.* (new language underlined).

(Doc. 2-1 at 28.)

As to ASARCO's argument that the Arbitrator did not have the authority to rewrite the BLA to make new hires eligible for the bonus the Arbitrator ruled, as follows:

> [A]rbitrators, including the present one, generally recognize that our authority does not normally permit us to rewrite a collective bargaining agreement or ignore its provisions. What all this means is that the ultimate issue in this case is whether the Union met its heavy burden of showing that there was a mutual mistake made by the parties in negotiating and adopting the July 1, 2011 MOA. In situations of that kind, it has been recognized by numerous, but not all, arbitrators and other authorities that in the interest of justice and fairness, the arbitrator can rewrite a contract to correct what appears to be an obvious mutual mistake.

(*Id*. at 23.) The Arbitrator remanded the action so that the parties could remedy issues dealing with monetary matters and retained jurisdiction to enforce the award.

ASARCO initiated this action to vacate the Arbitrator's award. (Doc. 1.) The parties requested and the Court, through Judge Susan R. Bolton, granted a stay in this matter so that issues with relief could be resolved, so that the arbitration award could become final. (Docs. 30, 34.) Subsequently, after issues with relief were resolved, Judge Bolton lifted the stay and the Union moved to enforce the arbitration award. (Doc. 37.) ASARCO responded and the Union replied in support. (Docs. 41-44.) The matter was then reassigned to this Court (Doc. 45), and the Court heard oral argument from the parties on the issues (Doc. 47).

STANDARD OF REVIEW

Jurisdiction is conferred upon this Court by Section 301 of the Labor Management Relations Act, as amended ("LMRA"), 29 U.S.C. § 185, and 28 U.S.C. § 1337(a) (action arising under federal law regulating commerce). Under the LMRA, this Court's review of labor arbitration awards is limited. *See Hawaii Teamsters & Allied Workers Union, Local 996 v. United Parcel Serv.*, 241 F.3d 1177, 1180 (9th Cir. 2001). The Court does not consider claims of factual or legal error by an arbitrator as an appellate court would review the decisions of lower courts. *Id.* "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem." *Id.* at 597. "Nevertheless, 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." *Id.* An arbitration award is legitimate "only so long as it draws its essence from the collective bargaining agreement." *Id.*

Arbitration awards are upheld when they represent a "plausible interpretation of the contract." *Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752*, 989 F.2d 1077, 1080 (9th Cir. 1993). "A reviewing court is bound–under all except the most limited circumstances–to defer to the decision of [the arbitrator], even if . . . that . . . decision finds the facts and states the law erroneously." *Phoenix Newspapers*, 989 F.2d at 1080 (quoting *Stead Motors*

v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200, 1204 (9th Cir. 1989). The Ninth Circuit has identified three exceptions to the general deference owed to an arbitrator's award: (1) when the award does not "draw its essence from the collective bargaining agreement"; (2) when the arbitrator exceeds the scope of the issues submitted; and (3) when the award runs counter to public policy. *Federated Dept. Stores v. United Food & Commercial Workers Union, Local 1442*, 901 F.2d 1494, 1496 (9th Cir. 1990).

Failing to draw its essence from the collective bargaining agreement is reserved for those cases in which a court determines that the arbitrator's award ignored the plain language of the contract and manifestly disregarded the contours of the bargain expressed by the collective bargaining agreement. *See SFIC Properties, Inc. v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. Lodge 94, Local Lodge 311*, 103 F.3d 923, 925 (9th Cir. 1996). Awards not drawing their essence from the collective bargaining agreement reflect neither the language of the agreement nor the intent of the parties. *Id.*

An award may also be upheld if it is based on the arbitrator's understanding of industry practices. *See Federated*, 901 F.2d at 1497. An arbitrator is "not confined to the express terms of the contract" but may also consider the "industrial common law" which "is equally a part of the collective bargaining agreement although not expressed in it." *SFIC*, 103 F.3d at 925.

DISCUSSION

The Union asks the Court to grant its motion to confirm the Arbitrator's award (Doc. 37), to deny

ASARCO's petition to vacate the Arbitrator's award, and to enter judgment in favor of the Union.

Jurisdiction

Initially, the Union argues that ASARCO waived any argument regarding the limits of any jurisdictional authority of the Arbitrator by conceding at the outset of the arbitration hearing and in its post-hearing brief that the arbitrator had authority and jurisdiction to decide the case. (Doc. 37.) According to the Union, to avoid waiving its argument that the arbitrator exceeded the limits of his jurisdictional authority, ASARCO needed to formally object at the arbitration proceeding by either expressly reserving that issue for judicial review or refusing to argue that issue to the Arbitrator and proceeding directly to the merits of the dispute.

In support, the Union relies on the Ninth Circuit cases of *George Day Const. Co. v. United Broth. of Carpenters*, 722 F.2d 1471 (9th Cir. 1984) and *Tristar Pictures, Inc. v. Director's Guild of America, Inc.*, 160 F.3d 537 (9th Cir. 1998). According to the Union, the *George Day* court found that merely objecting to an arbitrator's jurisdiction was insufficient to preserve the issue for judicial review: "[W]here, as here, the objection is raised, the arbitrability issue is argued along with the merits, and the case is submitted to the arbitrator for decision, it becomes readily apparent that the parties have consented to allow the arbitrator to decide the entire controversy, including the question of arbitrability." *Id.* at 1475. In *Tristar*, the court held that the employer waived its right to challenge the arbitrator's jurisdiction by arguing the issue to the arbitrator. 160 F.3d at 540. Although the employer stated at the arbitration hearing that the arbitrator had no authority to decide certain issues, it

chose to argue that the arbitrator lacked authority rather than simply refusing to come to the table. *Id.* In this manner, the employer "by [its] conduct evinced clearly its intent to allow the arbitrator to decide not only the merits of the dispute but also the question of arbitrability." *Id.*

The Union also relies on *Howard Univ. v. Metropolitan Campus Police Officer's Union*, 512 F.3d 716, 720 (D.C. Cir. 2008). In *Howard Univ.*, the court stated that "[A]bsent excusable ignorance of a predicate fact, a party that does not object to the arbitrator's jurisdiction during arbitration may not later do so in court." *Id.* According to the Union, *Howard Univ.* involved reformation of a collective bargaining agreement based on a mutual mistake where the employer subsequently claimed in district court proceedings that the arbitrator lacked jurisdiction to decide the issue. (Doc. 23 at 10.) The D.C. Circuit found that the employer had failed to raise that claim during the arbitration proceeding and, as a result, had waived its arbitrability argument based on jurisdiction. (*Id.*)

Finally, the Union argues that ASARCO cannot claim surprise at this juncture. (Doc. 23 at 10.) The Union contends that it made it clear in its opening statement to the Arbitrator that it claimed mutual mistake and was seeking reformation of the BLA as its request for relief. (Doc. 24-1 at 32-33.)

ASARCO does not contend that the arbitrator did not have jurisdiction to hear the original dispute regarding new employees' eligibility for the Bonus. (Doc. 42 at 3.) At the arbitration hearing, both parties presented their statement of the issue to the Arbitrator. The Union presented the grievance as a breach of contract issue, whether ASARCO breached the BLA

by failing to pay the Bonus to new employees. (*Id.*) ASARCO presented the grievance as a declaratory judgment action, whether under the terms of the BLA new employees meet the individual entitlement requirements to receive the Bonus. (*Id.*) The Arbitrator followed the Union stating the issue as a breach of contract, whether ASARCO breached the BLA by failing to pay the bonus to new employees. (*Id.*, (citing Doc. 24-1 at 5.)[1]

ASARCO contends that although the parties collectively bargained for a grievance and dispute resolution process that culminated in arbitration, they predetermined the parameters for the resolution of their disputes. (Doc. 42 at 2.) The parties included in the BLA a limitation on an arbitrator's authority, such that an arbitrator would "not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of [the BLA]." (*Id*., (quoting Doc. 2-2 at 32).)

ASARCO contends that it repeatedly emphasized on the record that the Arbitrator's jurisdiction and authority was limited by the express terms of the BLA. ASARCO argues that it preserved its jurisdiction argument in its opening statement:

> Mr. Arbitrator, as you consider the grievance before you and the two key documents as a result of the dispute between the parties and also recognizing, as you well know, that your jurisdiction of authority is that the parties have agreed to confer on you, it is

[1] In the Arbitrator's decision, the Arbitrator subsequently framed the issue as: "Are employees hired on or after July 1, 2011 entitled to receive the Copper Price Bonus?" (Doc. 2-1 at 10.)

> important to bear in mind that you cannot, in resolving this grievance, add to or detract from or alter any provisions of the agreement.
>
> Now Mr. Smith has suggested that the union is asking for a reformation remedy in this case and he has suggested to you that essentially this language is meaningless, that while it says expressly the arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this agreement, what he is urging you to do, and he was quite insistent, he was urging on behalf of the union that you do this, is that you rewrite the agreement of the parties. This you cannot do. . . .
>
> Let me get to our conclusion at this point and I would go back to what we talked about earlier, which is in ruling on the grievance before you, we are subject to the agreements the parties have made. *There's no jurisdiction authority here to add to, detract from or alter in any way the provisions of the agreement.*

(Doc. 42 at 6 (quoting 43-1 at 4-5 (emphasis added)).)

ASARCO distinguishes the facts in this case from the facts of the cases cited by the Union in support of ASARCO's alleged waiver. ASARCO argues that the Union's cases concern objections to arbitrability generally rather than a restriction or limitation on the authority of an arbitrator resolving an arbitrable matter. (*See* Doc. 42 at 8-9 (citing *Tristar*, 160 F.3d at 539-40 (whether the arbitrator had jurisdiction when the objecting party asserted that the case should

have proceeded under a more specific, non-arbitration provision in the contract, but where the objecting party still moved forward in the arbitration proceeding despite the objection to the general arbitrability of the matter); *George Day*, 722 F.2d at 1474 (summarizing the arbitrability dispute at the arbitration proceeding as follows: "The employer appeared and contested the arbitrator's authority. The union responded that the grievance was arbitrable [and] . . . . The arbitrator ruled that the issue was arbitrable."); *Howard Univ.*, 512 F.3d at 716 (finding that the employer waived its objection to the arbitrability of the dispute by not mentioning the limit on the arbitrator's jurisdiction until its appearance in the district court).)

Based on the objections it raised at the arbitration hearing, ASARCO contends that it did not waive its objection to an Arbitrator's authority to rewrite the BLA. (Doc. 42 at 10.) ASARCO contends that when an arbitrator's jurisdiction is limited by the agreement of the parties, and if the party preserves its objection to the limits of the arbitrator's authority, that issue is properly raised for judicial review, citing *George Day*, 722 F.2d at 1475.

At issue before the Court is whether, pursuant to *George Day*, ASARCO properly raised its jurisdictional objection to the Arbitrator's authority to rewrite the BLA by expressly stating its objection on the record. The Court finds that ASARCO did not waive its argument regarding the jurisdictional authority of the Arbitrator. (*See* Doc. 43-1 at 4-5.) Pursuant to *George Day*, ASARCO properly raised the issue and thus preserved the issue for judicial review. It is undisputed that the jurisdictional authority of the Arbitrator at issue was not raised by

the parties or the Arbitrator when they all stated the general issue before the Arbitrator at the commencement of the proceeding. (*See* Doc. 42 at 3.) Neither the Union nor ASARCO received notice that the Arbitrator had reformed the BLA until they received the decision of the Arbitrator, which was subsequent to the arbitration hearing and post-hearing briefing by the parties. (Doc. 2-1.) However, the Union argues that ASARCO cannot claim lack of notice, because the Union argued to the Arbitrator that due to the parties' mutual mistake during collective bargaining, it sought for the Arbitrator to reform the BLA to provide relief for the new employees. (Doc. 24-1 at 32-33.)

At issue is whether ASARCO's objection to the Arbitrator's authority to rewrite the BLA on the basis of allegations of mutual mistake, when such relief was raised by the Union at the hearing, was sufficient for judicial review or whether it was insufficient, constituting a waiver. In *Van Waters & Rogers, Inc. v. Int'l Bhd. of Teamsters, Local Union 70*, 913 F.2d 736 (9th Cir. 1990), the court, in evaluating objection language similar to the objection language used by ASARCO at the arbitration hearing, found that Van Waters' objections the jurisdictional question for judicial review. *See id*. at 740-41 (finding that Van Waters preserved its objections to arbitrability according to the *George Day* standard by stating at the outset that the arbitrator only had jurisdiction to decide a limited question and that the arbitrator should make no ruling outside of that jurisdiction). Thus, like the employer in *Van Waters*, the Court finds that ASARCO'S objection on the record to the Arbitrator's jurisdiction and/or authority to take any action to add to, detract from, or alter in any way the

provisions of the BLA, fulfilled the *George Day* standard.

Merits

Having found that ASARCO did not waive its jurisdictional argument, the Court turns to the merits as to whether the Arbitrator had authority to reform the BLA based on allegations of mutual mistake occurring between the parties during collective bargaining or whether the Arbitrator lacked authority to rewrite the BLA based on the BLA provision that an arbitrator would "not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of [the BLA]." (Doc. 2-2 at 32.)

ASARCO does not challenge the general authority of the Arbitrator to decide the grievance filed by the Union on behalf of new employees regarding eligibility for the Bonus. (Doc. 42 at 3.) Further, ASARCO does not challenge the arbitration award based on the Arbitrator's findings of fact regarding mutual mistake by the parties during collective bargaining or the Arbitrator's conclusions of law regarding reformation of the BLA. (Doc. 1 at 2.) At issue is the scope of the Arbitrator's authority in the context of a "no-add" provision contained in the parties' collective bargaining agreement to alter and/or add to the BLA.

ASARCO seeks to vacate the Arbitrator's award contending that the Arbitrator did not have jurisdiction or authority to rewrite the BLA. (*Id.*) ASARCO argues that the Arbitrator exceeded the express jurisdiction and authority granted to him by the parties and dispensed his own brand of industrial justice by issuing an award that fails to draw its essence from the BLA because it expressly violates

the BLA. (*Id.* at 9.) Citing *United Food & Comm'l Workers Union, Local 1119, AFL-CIO v. United Markets, Inc.*, 784 F.2d 1413, 1415 (9th Cir. 1986), ASARCO contends that if "the arbitrator's interpretation [of the collective bargaining agreement] violates the terms of the agreement, the court cannot enforce the award." (Doc. 1 at 11.) According to ASARCO, the award must be vacated because the Arbitrator added a new five-line term to the BLA, despite the BLA's express language stating that the Arbitrator did not have authority to vary the terms of the agreement. (*Id.*)

The Union counters ASARCO's argument, stating that the parties cannot correct, and must be bound to, erroneous language that neither side intended during bargaining, is untenable. (Doc. 23 at 17.) According to the Union, the "no-add" provision in the BLA did not bar the Arbitrator from ordering reformation of the BLA upon a finding of mutual mistake because when mutual mistake is proved, the Arbitrator is not adding to, detracting from, or altering the agreement; rather, the Arbitrator is merely confirming the actual agreement entered into by the parties. (*Id.*) Citing *Caliber One Indem. Co. v. Wade Cook Fin. Corp.*, 491 F.3d 1079, 1083 (9th Cir. 2007), the Union contends that reformation of a finding of mutual mistake does not in any way add to, detract from, or alter the original agreement; it merely ensures that the written document actually reflects the parties' true intent in the agreement. (Doc. 23 at 17.)

Continuing, the Union argues that the "no-add" provision did not strip the Arbitrator of his authority to reform the BLA due to mutual mistake. (Doc. 44 at 10.) The Union cites *Am. Fed'n of State, Cnty. v.*

Miami-Dade Public Schools, 95 So.3d 388, 391-92 (Fla. App. 2012), in which the court held that where a mutual mistake results in a written document which differs from the terms the parties actually agreed upon, an arbitrator who reforms the instrument is merely acting to restore the parties' true intent *even though there is a no modification clause in the collective bargaining agreement* limiting the authority of the arbitrator. (Doc. 44 at 10-11 (emphasis added).)

ASARCO responds that an arbitrator only enjoys wide latitude in fashioning an appropriate remedy in the absence of contractual restriction and that an arbitrator cannot act in direct contravention to a "no-add" provision in the collective bargaining agreement. (Doc. 42 at 14-15.) In support, ASARCO cites *Swepco Tube, LLC v. Local 427*, No.CV 07-767, 2008 WL 746670 at *5-7 (D. N.J. Mar. 18, 2008). In *Swepco*, in its discussion of a "no-add" collective bargaining provision, the court stated that the contractual limit on the arbitrator's authority is unaffected by facts showing mutual mistake. *Id.* at *5-7. Thus, applying that principle here, ASARCO argues that the Arbitrator acted outside the scope of his contractually delegated authority by writing into the contract a provision which did not appear in the BLA even if supported by a mutual mistake made by the parties during collective bargaining.

In reply, the Union contends that accepting ASARCO's argument here would mean that an arbitrator could never apply the doctrine of mutual mistake to reform an agreement containing a boilerplate "no-add" provision. (Doc. 44 at 10.) The Union argues that if the parties had intended to restrict the Arbitrator's authority to apply ordinary

doctrines of contract law such as mutual mistake and reformation, they would have had to so expressly state in the BLA. (*Id.*) The Union contends that ASARCO cited no such contractual or extrinsic evidence supporting the conclusion that the parties intended to preclude arbitrators from applying basic contract principles to resolution of grievances. (*Id.*)

Following oral argument, in a supplemental submission, ASARCO argues that in *Holly Sugar Corp. v. Distillery Workers Int'l Union*, 412 F.2d 899, 905 (9th Cir. 1969), the Ninth Circuit respected the "no-add" provision in the collective bargaining agreement. (Doc. 49.) In *Holly Sugar*, the Ninth Circuit acknowledged its limited review of an arbitrator's award and its holding did not disturb the factual findings or the conclusions of the arbitrator. *Id.* at 904. Alternatively, the court went on to discuss the employer's arguments on the merits in order to justify that judicial intervention was not appropriate regarding the arbitrator's award. *Id.* at 905. Based on a collective bargaining agreement "new jobs" exception to the "no-add" provision, the arbitrator resolved the grievance by creating a new job classification based upon practice within the industry, even though the new job classification had not occurred as a result of collective bargaining. *See United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-82 (1960). The *Holly Sugar* court did not the Arbitrator's reformation did not violate the "no-add" provision because it only corrected the defect in the written document so that it reflected the true terms of the parties' agreement. If the Court were to accept ASARCO's argument, it would mean that an arbitrator may never apply the doctrine of mutual mistake to reform a collective bargaining agreement that contains a "no-add" provision. This runs contrary to

the Supreme Court's general guidance in *M&G Polymers* that in a collective bargaining agreement, as with any other contract, the parties' intentions control. 135 S. Ct. at 933.

The Court disagrees with ASARCO that the holding in *Swepco* regarding the effect of a "no-add" provision in a collective bargaining agreement is persuasive for this case. In *Swepco*, the court first found that the arbitrator had improperly found mutual mistake, that there was only unilateral mistake, that reformation was not an appropriate remedy for a unilateral mistake, and consequently, that the award had to be vacated. 2008 WL 746670 at *4-5. In the context of unilateral mistake, the court then went on to discuss a "no-add" provision in the collective bargaining agreement and found that the arbitrator acted outside of his authority when he rewrote terms into the collective bargaining agreement that had not been agreed to by the company. *Id*. at *5-7. Thus, *Swepco* is not persuasive because it is not a mutual mistake "no-add" case. Furthermore, the *Swepco* court's discussion of the "no-add" provision is not persuasive based upon the reasons this Court has already stated.

CONCLUSION

The Court finds that the "no-add" provision did not close the door on the Arbitrator's authority to fashion relief when the undisputed facts revealed mutual mistake by the parties. The Arbitrator's reformation of the collective bargaining agreement only corrected the defect in the written document so that it reflected the true terms of the parties' agreement. The Arbitrator did not exceed his authority by applying ordinary principles of mutual mistake and refor-

mation in the context of the "no-add" provision of the BLA.

Accordingly,

IT IS HEREBY ORDERED granting the Union's Renewed Motion to Confirm Arbitration Award. (Doc. 37.) The Clerk of Court shall enter Judgment for the Union.

IT IS FURTHER ORDERED denying ASARCO's Petition to Vacate Arbitration Award. (Doc. 1.) The Clerk of Court shall dismiss ASARCO's Petition to Vacate Arbitration Award with prejudice.

DATED this 2nd day of March, 2016.

/s/ Stephen M. McNamee
Stephen M. McNamee
Senior District Judge

APPENDIX F

ARBITRATION AWARD

In the Matter of the Arbitration Between:
UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC, ET AL.

Union

and

ASARCO LLC

Company

Subject: COPPER PRICE BONUS

Appearances:

For the Union:	Jay Smith Michael D. Weiner Gilbert & Sackman 3699 Wilshire Blvd., Suite 1200 Los Angeles, California 90010
For the Company:	Arthur T. Carter Alex Stevens Haynes and Boone, LLP 2323 Victory Ave., Suite 700 Dallas, Texas 75219
	Maurice L. Brimmage, Jr. Akin Gump Strauss Hauer & Feld LLP 1700 Pacific Ave., Suite 4100 Dallas, Texas 75201
Arbitrator:	Michael D. Rappaport 15445 Ventura Blvd. Suite 84 Sherman Oaks, California 91403

BACKGROUND

The case before the Arbitrator arose out of a decision by ASARCO LLC (herein "Company") not to pay what is known as the Copper Price Bonus to new hires that were hired on or after July 1, 2011. A grievance protesting this decision was filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, et. al. (herein "Union") on October 31, 2011 on behalf of "new hires (since 7/1/11)" and asserted a violation of "...the MOU given to the Union 6/15/11." It specifically referenced "failure to issue payment of quarterly bonus..." and requested as a remedy that "All new hires hired after July 1, 2011 be made whole on the copper bonus and any other entitlements of the Basic Labor Agreement, Memorandum of Agreement, and any other applicable agreements."

Although the grievance was filed by the United Steelworkers, there is no dispute that the Steelworkers were also acting on behalf of several other unions which also have members on the ASARCO properties.

For the most part the facts in the present case are not in dispute and are as follow.

The Company is engaged in mining and/or refining copper and other minerals at five facilities in Arizona. It also operates a copper refinery in Amarillo, Texas.

Negotiations for the 2007 Basic Labor Agreement (herein "BLA") began in 2006.

During the negotiations, a profit sharing program was proposed by the Union. The profit sharing program would have been based on a percentage of the

quarterly profit per pound of copper that the Company shipped. That proposal, however, was rejected by the Company.

On December 17, 2006 the Union then proposed, instead of its earlier profit sharing proposal, that the Company agree to pay a bonus to its unionized employees based on the price of copper. Eventually the Union's proposal was accepted and became Article 9, Section C, of the BLA. That section provides that the Company will pay the Copper Price Bonus based on the three month average daily cash settlement price each quarter for copper on the London Metal Exchange. Furthermore, the bonus would be paid quarterly in a lump sum to eligible employees and would only be paid if the quarterly average copper price exceeded $1.60 per pound. If that requirement was met, the Company would then be required to pay the bonus within thirty days of the end of the quarter according to a scale contained in the BLA. (Joint Exhibit 1, Article 9, Section C.3)

The parties also agreed to a proposal by the Union that limited eligibility to receive the bonus. Specifically, the eligibility language which became part of the BLA states:

> "The Copper Price Bonus will be paid to each such Participant accruing Continuous Service under the Retirement Income Plan for Hourly Rated Employees of ASARCO, Inc. at the end of the calendar quarter." (Joint Exhibit 1, Article 9, Section C.5)

At the arbitration hearing the parties stipulated that the "Retirement Income Plan for Hourly Rated

Employees of ASARCO is also known as the "pension plan."[1]

In January 2007 a tentative agreement on the BLA was reached which contained the proposed Copper Price Bonus language. In January and February of 2007 the membership of the participating unions ratified the BLA.

Although the bonus amount varies depending on the price of copper, the amount paid to each eligible employee has been as high as $8000 a year.

There is no dispute that although the Company bargained over the bonus payment amounts, the proposal for the Copper Price Bonus, as well as the link to the Retirement Income Plan, was drafted and proposed by the Union.

In February 2010 negotiations were begun for the successor to the 2007 BLA, which expired in 2010. The parties agreed at that time to extend the BLA for one year by way of a Memorandum of Agreement (herein "MOA") until June 30, 2011. No proposals were made by either party to change the existing Copper Price Bonus language, nor was the subject of which employees were eligible for the bonus discussed. The language of the MOA instead simply stated: "All terms of the 2007 Agreement shall remain in force and effect except as modified herein." (CX 4) In fact, the parties agreed that the Copper Price Bonus was not only not modified, it was not even discussed during the negotiations.

The 2010 MOA was scheduled to expire on June 30, 2011. Therefore negotiations for the 2011 Agreement

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[1] At the arbitration hearing, the parties used the terms "Retirement Income Plan" and "pension plan" interchangeably.

began in January 2011. Ultimately the parties agreed to extend the BLA as it was modified by the 2010 MOA to June 30, 2013.

The record shows that during the negotiations, both parties presented power point presentations regarding the Company's business outlook. As part of its presentation, the Company displayed a chart showing the cost of the bonuses. It also displayed, under the heading of "Goals and Expectations," the statement "Tie bonus compensation to business performance and achievement of business goals that are defined by key performance indicators or agreed-upon metrics, rather than basing the bonus on the price of copper alone." (Union Exhibit 6) No specific proposal, however, was made by either party during bargaining to change the Copper Price Bonus in any way or to change eligibility for the Copper Price Bonus.

The record also shows that on June 14, 2011 the Company proposed modifying Article 12, Section Q of the BLA to state:

> "Employees hired on and after the Effective Date are not eligible to participate in the pension plan." (UX #1)

The Company also proposed modifying Article 12, Section 0 by stating under the heading of Retiree Healthcare: (UX #4)

> "Employees hired on and after the Effective Date are not eligible for coverage." (UX #1)

The Company stated at the time that it was its intention to eliminate retiree health care for new hires. The Company further proposed a change to Article 12 by adding new language that said:

> "Article 12, Section P. 401(k) Savings Plan: The Company will match 100% of Employee pre-tax contributions up to 6% of eligible pay in cash for Employees hired on and after the Effective date." (UX #1)

The language in the previous MOA, which stated that "All provisions of the BLA shall remain in force and effect, except as otherwise provided herein," also continued in the new MOA.

At the June 14, 2011 meeting the Company proposed extending the BLA and the 2010 MOA with certain modifications which included the Company's proposal that employees hired on and after July 1, 2011 (new hires) would not be eligible to participate in the pension plan. There is no dispute, however, that throughout the negotiations, neither party proposed or discussed paying, or not paying, the Copper Price Bonus to new hires or making any modification to the link between the Copper Price Bonus and the pension plan.

Later, during the negotiations, the Union indicated that it opposed the Company's proposal to add language to Article 12 stating that new hires would not be eligible for healthcare coverage upon retirement. Eventually the Company agreed to remove that language.

There is no dispute that at no point during the negotiations did the Union ask the Company if other benefits would be impacted by removing new hires from the pension plan, nor did either party mention the Copper Price Bonus or eligibility for the Copper Price Bonus, nor did the Company ever state that removing new hires from the pension plan would

impact the new hires eligibility for the Copper Price Bonus.

The Union tentatively agreed to the new MOA, which was later ratified by Union members with no further discussion between the parties. On June 24, 2011 the new MOA was then signed. The 2011 MOA was scheduled to go into effect on July 1, 2011.

The next event in this case occurred on June 27, 2011 when the Company produced an information sheet discussing some of the changes in the BLA as a result of the negotiations. It mentioned increased healthcare costs, as well as the increased 401k match, and the elimination of the pension plan eligibility for new hires. (Union Exhibit 28) There was, however, nothing in the document about any change to the Copper Price Bonus or eligibility for the Copper Price Bonus.

During the week of July 4, 2011, the Human Resources Manager of the Company's Ray Facility, Gerald Banky, received a final copy of the new Labor Agreement. According to his proffer of testimony, which was offered by the Union and accepted by the Company and admitted as JX #5, when he reviewed the 2011 BLA and compared it to the 2007 BLA, he became aware that there could be an issue with eligibility for the Copper Price Bonus for new hires. This is because of the link between receiving the Copper Price Bonus and eligibility for the pension plan. He was concerned that this might be a problem for new hires since they were no longer eligible for the pension plan. According to his proffer, he then called his superior, James Coxon, who was the Director of Labor Relations for the Company. According to Banky's proffer, Banky asked Coxon whether he was aware of a qualification issue with the Copper

Price Bonus for new hires. Coxon responded, according to Banky, by saying that he was not aware of any issue and Banky then went on to explain the connection that he saw between new hires not being eligible for the pension plan and the bonus. According to his proffer, Coxon responded by saying, "I can see what you're saying. We have an issue here." Banky also described Coxon as saying that what he (Banky) was telling him was new information for him. Coxon also said that he would look into it. (Joint Exhibit 5)

According to Banky's unrebutted proffer, when Coxon spoke to Banky the following week, he told Banky "Continue telling applicants and new hires that they were eligible for the bonus" and "not to discuss the issue with the Unions." Banky also stated in his proffer that he did not become aware of any information to suggest that anyone at ASARCO was aware of the connection between the pension and bonus eligibility before his call to Coxon.

The record also showed that between July 1, 2011 and October 25, 2011, the Company representatives told prospective new employees and newly hired employees that they would be eligible for the Copper Price Bonus. (JX 4)

On October 11, 2011, however, Coxon sent an email to the Company's Human Resources managers which stated that the upcoming Copper Price Bonus would only be directed to "eligible hourly employees." The email also went on to state, "We have not decided what we are going do as of yet and it remains confidential we are contemplating anything." (Joint Exhibit 5, Union Exhibit 26)

Apparently there is no dispute that new hires hired after the BLA was ratified were told that they were

eligible for the Copper Price Bonus. Twelve of the new hires testified without rebuttal that they were told that they were eligible for the Copper Price Bonus when they asked about it, or when they had meetings with Company representatives either before or at the time of their hiring.

The twelve new hire employees who testified worked for the Company at six different Company facilities in Texas and Arizona. (transcripts Vol. 1 and 2) Furthermore, the Company stipulated that it told new hires until late October 2011 that they were eligible to receive the Copper Price Bonus.

There is also no dispute that the Company made it clear during this same period that the new hires were not eligible to participate in the pension plan.

The first time that the Copper Price Bonuses were due employees after the new MOA went into effect was on October 30, 2011. Several weeks before that, in early September, the record showed that ASARCO President Manuel Ramos informed Union District Director Bob LaVentura, for the first time, that the Company believed that new hires were not eligible for the Copper Price Bonus. There is no dispute that the Company did not tell the Union until this time that it did not intend to pay the upcoming bonus to new hires. In fact, LaVentura testified that he was "surprised" by the Company's position. (transcript p. 607)

After the Union was informed of the Company's position, the parties met to discuss the issue on October 17, 2011. Attending the meeting, in addition to LaVentura and Ramos, were Coxon and the Company's attorney, Arthur Carter and Union Sub-

District Director Manny Armenta. The issue was not resolved.

On October 26, after the parties were unable to resolve their differences over the Copper Price Bonus issue, Coxon sent an email to all of the Company's Human Resources managers, with copies to Ramos, as well as Union counsel, which directed the HR managers to distribute a notice to employees who had been hired after July 1, 2011. The notice stated:

> "The Copper Price Bonus is not being paid at this time to those employees hired on and after July 1, 2011. The Company and Union are in discussions about the payment of this bonus, and if a satisfactory agreement is reached between the parties a Copper Price Bonus will be paid to those employees hired on and after July 1, 2011 as soon as reasonably possible." (CX #14)

This notice was hand delivered to all new hires. The bonus was then paid to all employees who were not new hires and who met the condition that for employees to be entitled to the Copper Price Bonus, they must be eligible to accrue continuous service under the pension plan.

Shortly thereafter the present grievance was filed by the Union protesting the decision by the Company not to pay the Copper Price Bonus to employees hired after July 1, 2011 and it was eventually properly brought before the Arbitrator for a final and binding determination.

RELEVANT LANGUAGE OF THE BLA

Article 5. Workplace Procedures

Section I. Adjustment of Grievances

...

6. Board of Arbitration

...

> c. The member of the Board (arbitrator) chosen in accordance with paragraph 7 (a) below shall have the authority to hear and decide any grievance appealed in accordance with the provisions of the grievance procedure. The arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement.

...

Article 9. Economic Opportunity

Section C. Copper Price Bonus

1. Commencing with the first calendar quarter of 2007...and for each quarter thereafter a lump sum cash payment will be made depending on the average copper price during that calendar quarter.

...

5. Individual Entitlement

The Copper Price Bonus will be paid to each Participant accruing Continuous Service under their Retirement Income Plan for Hourly Rated Employees of Asarco Inc. at the end of the calendar quarter.

...

Article 12. Benefits

...

Section Q. Pension Plan

The Company and Union have negotiated a Pension Agreement regarding the Retirement Income Plan for Hourly-Rated Employees of Asarco, which is contained in a separate document along with a Summary Plan Description.

RELEVANT LANGUAGE OF THE 2011 MEMORANDUM OF AGREEMENT

...

3. The termination date of the BLA and the 2010 MOA shall be modified from June 30, 2011 to June 30, 2013 and all references to the termination date throughout the BLA and the 2010 MOA shall be modified to reflect the terms of this 2011 MOA. The effective date of this 2011 MOA shall be July 1, 2011...

...

8. The BLA at Article 12 and certain sections thereunder shall be amended as follows:

...

(c) Article 12, Section P 401(k) Savings Plan:

Company will match 100% of Employee pre-tax contributions up to 6% of eligible pay in cash for Employees hired on and after the Effective Date.

(d) Article 12, Section Q. Pension Plan:

Employees hired on and after the Effective Date are not eligible to participate in the pension plan...

STATEMENT OF THE ISSUE

The parties were unable to agree upon a statement of the issue before the Arbitrator. The Union proposed the issue as follows:

> "Did ASARCO breach the parties' Collective Bargaining Agreement or the Basic Labor Agreement by failing to pay the Copper Price Bonus to employees hired after July 1, 2011?"

The Company proposed the issue as follows:

> "Pursuant to the January 1, 2007 Basic Labor Agreement, also known as the BLA, as amended by the 2011 Memorandum of Agreement, do employees hired on and after July 1, 2011 meet the individual entitlement requirements to receive the Copper Price Bonus as set forth in Article 9, Section C, paragraph 5 of the BLA?"

The parties did agree, however, to allow the Arbitrator to frame the issue as he deemed appropriate. The Arbitrator has determined that the proper statement of the issue is as follows:

> Are employees hired on and after July 1, 2011 entitled to receive the Copper Price Bonus?

The parties also stipulated that if there is a remedy phase, it would be dealt with separate from the substantive case.

SUMMARY OF THE POSITION OF THE PARTIES

Both parties submitted very extensive briefs, as well as reply briefs. The Union submitted a 65 page brief to argue its position, along with a 24 page reply

brief. The Company submitted a 36 page brief, along with a 28 page reply brief. Both parties also submitted dozens of court decisions, as well as arbitration awards in support of their positions. They also cited various treatises and legal commentary. While the Arbitrator considered the information submitted by the parties, he has determined that in issuing the award, it is not necessary for him to describe the extensive arguments and supporting cases submitted by each party. Therefore, the Arbitrator will instead simply summarize the positions and arguments of the parties.

SUMMARY OF THE POSITION OF THE UNION

The essence of the Union's argument is that there was a mutual mistake, shared by both parties, which under the Doctrine of Mutual Mistake, requires a reformation of a collective bargaining agreement when the language of the agreement does not conform to the parties' mutual intent at the time of the contract formation. The remainder of the Union's argument was largely to establish that there was a mutual mistake and the legitimacy of its position that reformation of the Collective Bargaining Agreement under the circumstances of the present case is necessary and appropriate.

The Union then described and analyzed the history and application of the law of mutual mistake and reformation. In support of its position the Union cited 27 Williston on Contracts 70:13, which states:

> "A mutual mistake occurs when the parties, although sharing an identical intent when they formed a written document, did not express that intent in the document. A mutual mistake in the formation of the

> contract occurs where both parties understand the real agreement is what one party alleges it to be; then, unintentionally a contract was drafted and signed but it does not express the true agreement."

Next the Union argued that in cases of mutual mistake, reformation of the contract is the appropriate remedy. In support of this position it again cited numerous articles, cases and arbitration awards. One of the cited pieces stated:

> "Where...because of a mistake of both parties as to expression the writing fails to express an agreement that they have reached previously, the appropriate relief ordinarily takes the form of reformation of the writing to make it conform to their intention. To the extent the reformation is available, as it usually will be, to correct the effects of such a mistake, it is the exclusive remedy and avoidance is unnecessary and unavoidable." Restatement (Second) of Contracts ch.6"

The Union also cited numerous sources to establish that the application of the law of mutual mistake to collective bargaining agreements has occurred and is appropriate. Furthermore, arbitrators have recognized on many occasions that it is appropriate, when a contract provision reflects a mutual mistake in reducing the parties' agreement to writing, for arbitrators to allow reformation of the contract language to reflect the parties' true agreement. For example, the authors of How Arbitration Works, wrote:

> "The remedy of reformation to correct a mutual mistake in a contract is well established and has been consistently recognized

by arbitrators." (How Arbitration Works, 7th Addition, 18-40)

The Union then argued that the parties made a mutual mistake in the 2011 MOA when they failed to recognize that eliminating the pension plan for new hires would make new hires ineligible for the Copper Price Bonus and by failing to change the bonus eligibility language, to ensure that new hires remained eligible for the bonus. It was argued in support of this position that neither party believed during the 2011 negotiations, or upon the execution of the 2011 MOA, that any aspect of the Copper Price Bonus was changed in any way as a result of the new MOA, including bonus eligibility. This means that both parties believed and intended that all bargaining unit employees would remain eligible for the bonus.

In support of this position, the Union pointed out that there was no dispute, and the testimony was uncontested, that the intent during negotiations was always that the new hires would be eligible for the Copper Price Bonus as shown by the fact that neither party at any time raised any intent to change or alter in any way the Copper Price Bonus or the eligibility for the bonus. In fact, the Copper Price Bonus was never even mentioned. More specifically, the Company, in its written proposals, never mentioned the Copper Price Bonus, or the link between the bonus and the pension plan and eligibility for the bonus. It was then pointed out that the only reference to treating new hires different from other employees was the Company's proposal that new hires would receive less generous health insurance and would be ineligible to participate in the defined benefit pension plan and retiree health coverage. The fact that the

Company proposed these changes shows that the Company knew how to make explicit proposals for specific items when it wished to do so.

The Union then went on to discuss the bargaining history in some detail. It stressed again that at no time did the Employer ever indicate that it was aware of the linkage between pension eligibility and the Copper Price Bonus. It was then contended that if the Company was aware of the link between pension eligibility and the Copper Price Bonus, the Employer must have been actively misleading the Union. The evidence, however, showed that the Company was not aware of these links because nothing in the parties' discussion ever indicated such an awareness. It was also stressed repeatedly that the Copper Price Bonus was never mentioned in the negotiations or meetings leading up to the new MOA.

It was readily conceded by the Union that it made a mistake and that the Union negotiators should have more carefully reviewed the BLA to ensure that the elimination of the pension for new hires would not impact other provisions of the BLA. It was then argued that the Union's failure to notice the BLA's link between pension eligibility and bonus eligibility amounts to a mutual mistake, not a unilateral mistake, and therefore the Company should not be in a position to take advantage of any benefit so derived. This is because any other result would promote "sharp" and "overly cautious" bargaining practices which, as recognized through arbitration awards, would be detrimental to labor relations.

The Union then cited numerous cases in which arbitrators have found mutual, rather than unilateral, mistakes when the language and written agreements reflect the terms and conditions that were

never proposed by the party later seeking the benefit from the changes. In particular it was argued that all the cases cited show that the party seeking reformation was arguably negligent and certainly mistaken during the negotiations. Nonetheless, it was found because the other party in those cases did nothing during bargaining to indicate that it actually sought the change that was erroneously incorporated into the contract, the mutual mistake doctrine was satisfied and the agreements were reformed to conform to the parties' actual intent. Given that the Company never proposed, or even mentioned during the negotiations, any change to the eligibility criteria for the Copper Price Bonus, shows that mistakes were committed by both parties. Therefore the Union's failure to appreciate the impact that eliminating the pension for new hires would have does not defeat its claim for reformation.

The Union next turned to a discussion of the uncontested evidence that it argued establishes the Company's intent during negotiations was to maintain eligibility for the Copper Price Bonus for new hires. It argued that this evidence was overwhelming in establishing that the Company was unaware, during negotiations, of the link between pension and bonus eligibility and that it did not intend to eliminate the Copper Price Bonus for new hires.

It was again stressed that in the bargaining and discussions, the Company never proposed the elimination of the bonus for new hires even though the Company knew that from the Union's perspective, this would be a very significant change. In addition it was stressed again that the Copper Price Bonus was completely unmentioned during negotiations. Furthermore, it was pointed out that when asked,

Company President Ramos expressly assured the Union at the end of negotiations that there were no other changes in the BLA beyond the express provisions of the Agreement.

The testimony of Gerald Banky, which was undisputed, that Mr. Coxon, who was the Company's Chief of Human Resources, was unaware of the link between pension eligibility and the bonus until several weeks after the Memorandum of Agreement was resolved, and until several days after it became effective, was then cited. The Union also stressed that the Company's behavior in the months following the effective date of the 2011 MOA clearly establishes that it did not intend to eliminate the Copper Price Bonus for new hires. In support of this position the Union cited the record that shows that from July to October 2011 the Company explicitly assured new hires that while they were ineligible for the pension, they were eligible for the Copper Price Bonus.

In addition, when the Company announced on October 26, 2011 that new hires would not receive the bonus, it said that the bonus would still be paid if "a satisfactory agreement" was reached with the Union.

The Union stressed that the Company's behavior after the execution of the MOA also demonstrated that the Company had no intention of abolishing the Copper Price Bonus for new hires. This is significant because, as indicated in *How Arbitration Works*, at 12-20, "party'[s] intent is most often it[s] actions." It then contended that many arbitrators have found that the parties' conduct after a contract formation may provide a clearer expression of their intent than the contract language alone, as indicated, in *Common Law of the Workplace* 2.20 CMT.b. It was then

pointed out that the Company's own statements during this period were revealing since, for example, notices from the Company stated that the Copper Price Bonus would be paid to "all bargaining employees." This occurred even after the MOA was signed on July 7, 2011, which belies the Company's alleged intent during negotiations to limit eligibility for the bonus.

According to the Union, an even more explicit admission was made by the Company that it never intended to exclude new hires from the Copper Price Bonus on October 11, 2011 when the Company sent out an email from Coxon to the Company's Human Resources managers, copied to Ramos, which stated that the upcoming bonus notice should, for the first time, use the language "eligible hourly employees" rather than "all bargaining unit employees." (Joint Exhibit 5, Union Exhibit 26) In addition, Coxon's statement in that email said: "We have not decided what we are going to do as of yet and it remains confidential that we are contemplating anything." This was very supportive of the Union's position since the statement would make no sense if the Company genuinely intended to eliminate the bonus for new hires when it signed the 2011 MOA. Surely, if this was the plan, the Company would not need to "decide" in October what it was going to do. This also further bolsters Banky's undisputed testimony that the Company was unaware of the link between pension eligibility and bonus eligibility until after the MOA was executed.

The Union also pointed to the October 26 email from Coxon notifying new hires of its "decision," which said that the Copper Price Bonus "is not being paid at this time to those employees hired on or after

July 1, 2011." The notice then went on to indicate that the Company and the Union were in discussions about payment of the bonus and that if a satisfactory agreement is reached between the parties, the bonus would be paid to new hires. (Company Exhibit 14) It was then argued that this notice was totally anomalous if the Company intended in the negotiations to abolish the bonus for new hires. The Union then asked why the Company would enter into such discussions with the Union and promise to pay the bonus if a "satisfactory agreement was reached" when just four months earlier the Company had negotiated an agreement that was specifically intended to relieve the Company of its obligation to pay the bonus. This demonstrated that the Company remained indecisive about whether to pay the bonus to new hires until the last minute.

Likewise, the Company never told the new hires that they could not participate in retiree health coverage. (JX #4) The Company, did, however, tell them that they were ineligible for the pension plan as reiterated in the Company fact sheet explaining the benefit changes for new hires prepared on June 27, 2011 describing increasing health insurance costs, an increased 401(k) match and elimination of the pension plan, but said nothing about the Copper Price Bonus. (Union Exhibit 28)

It was then argued that it was unlikely that the Company would have blatantly misled new hires if its intent all along was to abolish the bonus. Instead the most charitable explanation for the Company's conduct was that it was totally surprised by Banky's realization that pension eligibility and bonus eligibility were linked. Even then the Company did not alert the Union to this issue but, instead, Coxon instructed

Banky to continue telling applicants and new hires that they were eligible for the bonus and not to discuss the issue with the Unions. In fact, nothing was said to the Unions until mid-September or early October 2011.

Given the bargaining history, as well as express admissions made by the Company, and the Company's behavior in the months following the signing of the Agreement, the undeniable conclusion is that the Company, like the Union, failed during negotiations to recognize the connection between Copper Price Bonus eligibility and pension participation and did not intend to eliminate the Copper Price Bonus for new hires. This means that the mutual mistake doctrine is satisfied and that the BLA must be reformed to reflect the parties' mutual intent.

Next it was pointed out that the Company failed to call a single witness to contest the Union's overwhelming evidence of the Company's intent. The Arbitrator should therefore draw an adverse inference from the Company's failure to call any witnesses. The Arbitrator should infer that had the Company's representatives testified, they would have admitted they were unaware of the connection between pension participation and eligibility for the Copper Price Bonus during the course of the negotiations. The Arbitrator should also infer that the intent of the Company all along was to leave the Copper Price Bonus unchanged and continue to pay the bonus to all employees, including new hires.

The Union also argued that even if the Company intended to eliminate the bonus for new hires, the evidence is clear that the Company was aware of the Union's mistake at the time of negotiations and therefore it actively misled the Union and employees.

It was then argued that the mutual mistake doctrine recognizes that reformation is required under such circumstances and that such behavior compels reformation of the 2011 MOA. This is especially true since the Company undoubtedly recognized that the Union would never have knowingly agreed to eliminate the Copper Price Bonus for new hires without bargaining the issue since the bonus is a significant part of employee earnings. Clearly, the Union would not have silently accepted such a massive pay cut for its members. Various cases were then cited which upheld the notion that under such circumstances, reformation of a contract is warranted.

The Union next argued that since it has been shown that there was a mutual mistake, the Arbitrator must order reformation of the 2011 MOA. This is because it has been recognized that the exclusive remedy to correct the parties' mutual mistake is reformation. Numerous authorities were then cited in support of this position. It was also noted that the parties agreed that if the grievance was sustained, calculation of the back pay remedy would be deferred to a collateral hearing. Therefore, the Arbitrator does not need to calculate damages at the present time and should simply order the reformation of the 2011 MOA and direct the Company to make employees whole.

According to the Union, the MOA should be reformed by amending paragraph 8 (d) to read:

> Article 12, Section Q. Pension Plan: Employees hired on and after the Effective Date are not eligible to participate in the pension plan. However, the Company shall treat such employees as if they were accruing Continuous Service under the Retire-

> ment Income Plan for Hourly Rated Employees of ASARCO Inc. on the same terms as other Employees only for purposes of determining eligibility for the Copper Price Bonus pursuant to Article 9, Section C.5 of the BLA."

The Union then focused on the language in the BLA which prohibits an arbitrator from "adding to, detracting from, or altering the Agreement," and argued that this language does not prevent reformation. It was pointed out that such language is commonly found in collective bargaining agreements. Various cases were cited, however, which have held that such language does not prevent reformation of the agreement when the mutual mistake doctrine is otherwise satisfied. Such cases found, for example, that the effect of such reformation does not "add to" or "delete" a provision since the impact of the reformation does not add to or modify the contract but instead simply gives effect to the parties' original intent. By doing so the arbitrator is remaining faithful to the parties' original agreement and deciding the case on the parties' original agreement rather than the inaccurately written agreement.

The Union also argued that what the Company was essentially arguing was that the Arbitrator lacks jurisdiction under the "add to" clause to reform the BLA and that the reformation was not appropriate because it was not arbitrable. It was then argued that this assertion is wrong because the Company waived its right to assert that the Arbitrator lacks jurisdiction to issue a reformation order by stipulating that the grievances were properly before the Arbitrator and by authorizing the Arbitrator to frame the issues.

Equitable considerations also support the Union's position, according to the Union. Again cases and commentary were cited in support of this argument. It was then stressed that such consideration directly favored the Union because in this extremely rare situation the Company actually stipulated that it actively misled its own employees. It did this when it admitted that for four months following the execution of the MOA in 2011, Human Resources representatives from the Company repeatedly and consistently promised applicants and new hires that they would receive the Copper Price Bonus. (Joint Exhibit 4)

In conclusion it was argued that the grievance should be sustained and the 2011 MOA should be reformed and the Company should be required to pay the Copper Price Bonus to employees hired on or after July 1, 2011. The Arbitrator should also order that the Company make such employees whole for their losses and retain jurisdiction to resolve any disputes regarding the implementation of the remedy, including the calculation of back pay and the calculation of injury.

SUMMARY OF THE POSITION OF THE COMPANY

The Company argued that the Arbitrator does not have the authority under the clear language of the MOA to order that new hires be made eligible for the Copper Price Bonus; nor does the Arbitrator have the authority to rewrite the BLA to make new hires eligible for the bonus.

The Company agreed with the Union's acknowledgement that it is "very clear" under the BLA's plain language that employees hired on or after July 1,

2011 are not eligible to receive the Copper Price Bonus. (transcript p. 673 - 674)

This means that the analysis in this case is simple and clear. That analysis shows that by its very clear terms, Article 9, Section C.5 of the BLA clearly states that there is a link between eligibility for the pension plan and receiving the Copper Price Bonus.

> The language at issue was then cited which reads:
>
> "The Copper Price Bonus will be paid to each such participant accruing continuous service under the Retirement Income Plan for hourly rated employees of ASARCO, Inc. at the end of the calendar quarter."

It was then pointed out that there is no dispute, as shown in the MOA, that employees hired on or after July 1, 2011 are not eligible to participate in the pension plan. Therefore the new hires, who cannot participate in the pension plan, also could not satisfy the bonus/pension link necessary to be awarded the Copper Price Bonus. For this reason alone, the grievance should be denied.

The Company then went on to argue that the Arbitrator could not rewrite the BLA to make new hires eligible for the bonus.

Numerous cases were then cited which hold that an arbitrator cannot modify unambiguous contract language

According to the Company, those cases clearly apply in the present case. This is because the parties agreed that under the unambiguous terms of the BLA, new hires, who were hired after July 1, 2011, are not entitled to the Copper Price Bonus. Therefore,

the only way to make them eligible is to delete the Bonus/Pension link in Article 9, Section C.5 or add at the end of the phrase something like: "and all employees hired on and after July 1, 2011, whether or not they are such a participant." It was then contended that this was prohibited by law as shown when the courts regularly overturn arbitrators who exceed their authority by ignoring clear contract language.

The Employer then cited the language of the BLA which clearly states that an arbitrator lacks the authority to alter the BLA. It was stressed that the parties specifically agreed in the BLA that an arbitrator, acting under the grievance and arbitration procedure, "Shall not have jurisdiction or authority to add to, detract from, or alter in any way, the provisions of [the BLA]." This means that in the instant case, to accomplish what the Union is requesting, the Arbitrator would have to ignore this very clear provision, and by doing so, exceed his limited authority and do exactly what the clause prohibits by either deleting the bonus pension link or adding a phrase into the BLA that would entitle new hires to receive the bonus.

The Company then turned to the Union's argument that the Arbitrator could take this action because there was a "mistake." The Company argued that there was no legally recognized mistake and, in any event, a mistake does not authorize an arbitrator to exceed the authority granted to the arbitrator and limited by the parties themselves. Various cases were then cited in support of this position. This all means that the Arbitrator should deny the grievance since it would require the Arbitrator to exceed his jurisdiction, which is clearly prohibited by the parties'

Agreement and which is not enforceable under the law.

The next argument put forth by the Company was that rewriting the BLA would undermine the efficacy of written agreements. This is because nearly every court and other authorities recognize that modifying the parties' written agreement would undermine the predictability of bargaining agreements.

In this case rewriting the BLA would devastate the collective bargaining process, as well as reward the Union's failure to analyze the effects of the parties' agreed to contractual modifications. Numerous cases were then cited which recognized that what the Union was asking for would be an impermissible expansion of an arbitrator's authority.

The next point made by the Company was that the Union's failure to comprehend the consequences of the 2011 MOA does not warrant rewriting the parties' agreement. This is because there is no dispute that the Union employed able and sophisticated negotiators, yet they are now claiming that at every turn they simply failed to take into account the effect of the changes to pension eligibility on the Copper Price Bonus provision. This claim, even if it is true, should not be seen as the basis for ignoring the plain language of the parties' agreement. In fact, it is all the more reason to counsel against rewriting the parties BLA just to fix an alleged mistake made by the Union. It was also argued that the lack of the Union's diligence continued throughout this matter when it failed to consider, or even ask the Company, whether the proposed revision of the pension plan language would have any impact on new hire bonus eligibility or any other benefit. In fact, it was pointed out that the Union acknowledged that its failure to

read the BLA caused the Union to overlook the 2011 MOA's direct effect on new hire eligibility. It was then contended that the Arbitrator cannot fix this situation by simply modifying the parties' agreement. To do so, by rewriting the BLA, would grant what the Union wishes it had agreed to, and allow the Union to use its own inaction as a shield against a foreseeable consequence of the Agreement. As recognized by the courts, this would be so fundamental as to defeat the purpose of the written agreement.

In addition, rewriting the BLA would remove inherent incentives in contract negotiations for parties to make good faith efforts to explain their proposals and understanding of each side's position. The law does not permit this result and the Arbitrator should reject it in the present case.

The Company next argued that the arguments put forth by the Union that the Arbitrator should rewrite the BLA based on a "mistake" lack merit. It pointed out that the Union was asserting two doctrines in the alternative: mutual mistake and unilateral mistake. The Arbitrator is also being urged to make his decision based on "equitable principles." It was then emphasized that in making these arguments, the Union bears a very heavy burden. A significant number of cases were then cited by the Employer to substantiate this position.

It was also argued that the evidence in the record does not meet the higher standard of proof required to rewrite the parties' agreement. Furthermore, the Union cannot establish that a mutual mistake was made that would require reformation. The Company then pointed to cases which have held that in order to justify reformation based on a mutual mistake, the Union would have to show that a prior agreement

between the parties was not expressed as a final written agreement and that this was due to a shared mistake. It was then argued that the Union cannot satisfy either of these elements. This is because there was no prior agreement not expressed in the terms of the BLA. Furthermore, reformation cannot be used to second guess what the parties would have agreed to if they were not dealing under a mistake. This means, as recognized by numerous cited authorities, that the party asserting reformation must conclusively show that the words in the writing do not correctly express the meaning that the parties agreed upon.

In support of this position, the Company also argued that the only manifestation of intent regarding bonus eligibility is in the plain language of the BLA and the 2011 MOA which clearly show that new hires are not eligible for the bonus. This shows that the parties reached a meeting of the minds in 2006 to use pension plan participation to determine eligibility for the bonus. Furthermore, there is no evidence to the contrary, nor any evidence of the intent to pay the Copper Price Bonus for new hires, or to modify the bonus/pension link. Therefore the Union placed great emphasis on the parties' silence regarding these items at the bargaining table. Silence, however, cannot prove that the parties reached a prior agreement that differs from the BLA.

It was also stressed that there was no evidence that anyone with the Company mistakenly believed at the time of the 2011 MOA that new hires would be entitled to the bonus. While the Union may feel that it made a mistake, there is no evidence in the form of documentation or testimony or exhibits to demonstrate that the Company shared the Union's alleged mistake and belief. In fact, there is no evidence that

the Company had any belief, other than its expectation that the plain language of the BLA would be given full force and effect.

The Company also argued, contrary to the Union's contention, that no adverse inference should be drawn against the Company based on the absence of evidence. The case of NLRB v. Cornell California Inc., 57 2d513 (9th Cir. 1978) was cited in which the court indicated that it is "...generally recognized that the inference is drawn against the party with the burden of persuasion...or against the party who is relying on the statements of the uncalled witness." The court went on to say "Because the Union failed to meet its burden here, the correct inference is that the Company "properly decided that no proof on its part was necessary."

The Company then asserted that the Union engaged in speculative reasoning when it argued that the only reasonable conclusion to draw from the Company's silence is that the Company, like the Union, believed that new hires would receive the bonus. Such speculative reasoning, however, cannot supplant the clear language of the Agreement as an expression of the Company's intent. Cases were then cited which recognize that when a mutual mistake argument is based on speculation, and not supported by the evidence, there is no justifiable reason to deviate from the contract language.

The Company then turned to the Union's reliance on events that occurred after the parties entered into the 2011 MOA by noting that the Union proffered Gerald Banky, who was the former Human Resources Manager at Ray Mine, and who stated in his proffer that he recognized that new hires were ineligible for the Copper Price Bonus after reading the 2011 MOA

in July. He also claimed that he discussed this issue with Coxon and that Coxon was unaware of it. The Company then described this as Banky's secondhand phrasing of Coxon's alleged comments and argued that the record lacks any reasonable basis to impute Coxon's alleged lack of knowledge of the 2011 MOA's effects to the Company. This is because there is no evidence that either Coxon, or Banky participated in formulating the Company's strategy or proposals or were otherwise privy to the Company's bargaining objectives. Instead, Carter and Ramos were the only Company representatives who bargained with the Union regarding this matter. Furthermore, the evidence of Ramos' and Carter's thoughts, other than the plain language of the Agreement, came in September when Ramos informed the Union that new hires were not entitled to the bonus under the parties' agreement. Therefore, for the Union to attempt to determine the Company's state of mind at the time of the 2011 MOA negotiations from Banky's description of Coxon's comments are unfounded and should be rejected.

It was next contended that Banky's proffered testimony undercuts the Union's other arguments relying on the events following the 2011 MOA. Specifically it was noted that the Union emphasized that Company Human Resources representatives told some new hires that they would receive the Copper Price Bonus. The Union then contended that these statements suggest that the Company shared the Union's mistaken belief that new hires would receive the bonus. It was then pointed out by the Company, however, that Banky confirmed that the Company knew immediately following the 2011 MOA that new hires could not satisfy the BLA's bonus eligibility requirements. Furthermore, it is not reasonable to

impute Banky's and Coxon's alleged prior ignorance to the Company. This is because, as recognized by courts, imputing an agent's knowledge to the principle does not mean that a court can impute the agent's prior ignorance to the principal. This was later confirmed by Ramos in September when he told the Union that new hires were not eligible for the bonus. Furthermore, it was contended that even if HR representatives may have continued telling recruits about the bonus, that shows nothing, especially given the Company's efforts to keep this matter confidential while negotiating with the Union in a hope to avoid litigation. After it became clear, however, that the parties would not resolve their differences as to whether the bonuses were due, the Company altered its recruiting interview practice and announced that new hires were ineligible for the bonus.

The Company then argued that the Union also could not establish a unilateral mistake, which is significant, since the Union argued that reformation is also warranted under the theory of unilateral mistake. It was pointed out that it has been found in prior cases that the elements of unilateral mistake require the Union to prove not only its own mistake, but also that the Company engaged in inequitable or fraudulent conduct. The Company contended, however, that the Union cannot make that showing. This is because there is no evidence that the Company engaged in inequitable or fraudulent conduct and, in fact, the Union has demonstrated the opposite. This was shown because the Union repeatedly emphasized the absence of any Company actions, relying instead on the Company's silence regarding new hire bonus eligibility. Silence and inaction, however, do not prove fraud and cannot show that the Company tried to take advantage of anyone. This is especially true

because there is no evidence to show that anyone from the Company was even aware of the Union's alleged mistake. This means that there was no evidence that the Company attempted to defraud the Union by purposely remaining silent.

As for the Union's equitable arguments, it was argued that they are misplaced and irrelevant. This is because the Arbitrator lacks the authority to ignore the BLA's plain language for any reason, including equitable ones. Furthermore, it has been widely recognized that when the contract is clear and unambiguous, it must be applied in accordance with its terms, despite the equity that may present on either side. According to the Company, this is exactly the present situation.

It was also pointed out that courts have routinely vacated arbitration awards that are based on "equitable grounds" and contrary to the parties' written agreement. Numerous cases were cited in support of this position.

In addition, it was argued that new hires could not have reasonably relied on statements contrary to the BLA's bonus eligibility criteria because the statements were made by low-level HR employees. There is also no evidence that any new hire detrimentally relied on the representation made by Human Resources representatives regarding the bonus. Therefore the Union's equitable arguments failed on the merits. It was also noted in this regard that the parties stipulated that these HR employees lacked actual authority to depart from the terms of the BLA. (transcript p. 110)

It was also pointed out that even the new hire witnesses admitted in their testimony that the Com-

pany's HR personnel could not unilaterally change the terms and conditions of employment as established in the BLA. Therefore, the Union has not shown that any new hire reasonably relied on statements about the bonus, and thus could not obtain the equitable relief under the law. In addition there was no showing that new hires incurred losses due to the Company's adherence to the BLA or this language. Specifically it was argued that the Union made no showing that any new hire was in a worse position than he would have been had he declined the Company's offer of employment. Furthermore, the lack of a bonus is not damages or lost income since new hires have not lost the Copper Price Bonus since the Company has not taken it away. Instead the Company has provided new hires every benefit that the Union secured for them at the bargaining table. Therefore, the Arbitrator cannot award them anything more.

In conclusion it was argued that absent proof of the parties' shared intent to enter into a different agreement, what remains is the language chosen by the parties. Furthermore, there is no dispute that the parties agreed that employees must accrue continuous service under the pension plan to receive the Copper Price Bonus according to the language of the BLA and that new hires could not participate in the pension plan and therefore could not accrue continuous service under the pension plan. Therefore what this case amounts to is the Union attempting to escape what it admits was the patently foreseeable consequences of the Agreement, which is that new hires are not eligible for the bonus. In addition, the impermissible result sought by the Union is contrary to the principles of collective bargaining and ignores the foundation of contract law and is expressly

prohibited by the BLA. Therefore, the Arbitrator should decline the Union's invitation to impose upon the parties an agreement that they never reached or ever discussed. Instead, the Arbitrator should uphold the clear language of the parties' Agreement and deny the grievance.

DISCUSSION AND AWARD

In most contract cases, the moving party can usually point to contract language that it contends was violated. In the instant case, however, the Union, which is the moving party, cannot point to such language because it simply does not exist. This is because there is no language in the BLA which requires the Company to pay the Copper Price Bonus to any employees who are not covered by the pension plan. Since there is no dispute that employees hired after July 1, 2011 are not covered by the pension plan, this means that the Arbitrator cannot find for the Union based solely on the language of the BLA. The Union, however, recognized this problem by arguing that the Doctrine of Mutual Mistake should apply in this case because this would allow the Arbitrator to rewrite the BLA to permit the Copper Price Bonus to be paid to new employees who are ostensibly not eligible for the Copper Price Bonus since they do not meet the eligibility requirement of also being covered by the pension plan.

The Union's position means that the Union has a heavy burden to convince the Arbitrator that he should find for the Union because the contract language by itself is clearly in favor of the Company. Furthermore, arbitrators, including the present one, generally recognize that our authority does not normally permit us to rewrite a collective bargaining agreement or ignore its provisions.

What all this means is that the ultimate issue in this case is whether the Union met its heavy burden of showing that there was a mutual mistake made by the parties in negotiating and adopting the July 1, 2011 MOA. In situations of that kind, it has been recognized by numerous, but not all, arbitrators and other authorities that in the interest of justice and fairness, the arbitrator can rewrite a contract to correct what appears to be an obvious mutual mistake. The Arbitrator is persuaded that the case before him is such a case for the reasons that follow.

As pointed out in the background section of this award, as well as in the parties' arguments, it is undisputed that neither party ever clearly and specifically recognized and stated during negotiations for the new MOA that new hires would not be eligible for the Copper Price Bonus under the proposed MOA because of a change in the BLA language regarding eligibility of new hires for the pension plan.

The change regarding eligibility for the pension plan is a change which on its face had nothing to do with the Copper Price Bonus. This is because when the change regarding eligibility for new hires for the pension plan was negotiated, it simply removed new hires from eligibility for participation in the pension plan. There was no evidence, and no claim, that the parties ever discussed or negotiated, or even mentioned or recognized, that by removing new hires from participation in the pension plan, that the new hires would then also not be eligible for participation in the Copper Price Bonus. In short, there was no nexus, which was apparently recognized, discussed or even mentioned by either party, when the language removing new hires from the pension plan was negotiated, which connected such action to the

Copper Price Bonus. Thus there was never any stated linkage by either party between the inability of new hires to participate in the pension plan and their ability to participate in the Copper Price Bonus. Instead it is very clear, and undisputed, that neither party ever discussed the linkage between removing new hires from the pension plan and the impact that it would have on the new hires ability to participate in the Copper Price Bonus.

Not only was this matter not discussed, it was clearly never mutually recognized and agreed to by the parties. In fact, the Union admitted that it never saw the connection and that it made a mistake by not seeing the connection between removing new hires from participation in the pension plan and the impact it would have on the new hires' ability to participate in the Copper Price Bonus. The Company, while it never admitted to not seeing this connection, certainly never mentioned it during negotiations, nor did it ever bring up the consequences of what would happen to the ability of a new hire to receive the Copper Price Bonus if the language excluding new hires from the pension plan was adopted. This is significant in part because it was the Company that proposed the language removing new hires from the pension program.

The Arbitrator finds this to be a significant concern because the Company was clearly aware of the significant part of the employees' remuneration that the Copper Price Bonus made up in the total wage package. Furthermore, given the significance of the Copper Price Bonus as part of the total wage package, clearly the Company must have known, or certainly should have known, that the Union would not just give away the Copper Price Bonus for new

employees without some negotiated benefit in return. Therefore, the question becomes one of whether the Company also made a mistake, like the Union, and simply overlooked the connection between the Copper Price Bonus and the pension plan, or did the Company know all along that the change it proposed in the eligibility requirements for the pension plan would also have the indirect impact of removing new hires from participation in the Copper Price Bonus which would result in a significant decrease in their wages. This means the question is whether the Company knew all this, but said nothing, and therefore knowingly deceived the Union throughout the bargaining process, or whether the explanation for the Company not saying anything was the fact that the Company, like the Union, made a mistake by not recognizing what the impact would be on the ability of new hires to receive the Copper Price Bonus if they were no longer covered by the pension plan.

After considering this question, the Arbitrator is persuaded that the evidence clearly supports the conclusion that both the Company and the Union overlooked the impact on the new hires' ability to receive the Copper Price Bonus because they were no longer covered by the pension plan. There are a number of reasons for this conclusion.

One is that the Arbitrator frankly finds it difficult to believe, and really does not want to believe, that the Company would deliberately engage in such deceitful bargaining and not say anything. This is particularly true since the Company reasonably must have known that at some point the Union would discover the Company's position and that the Union would never accept it. The Company also had to have known that the Union would not, nor could not,

forfeit such an important part of the employees' income as the Copper Price Bonus without negotiating something in return for doing so.

Furthermore, there was no evidence produced by the Company to show that it made the connection between the Copper Price Bonus and the pension eligibility before the 2011 MOA was signed. This is because no evidence was produced that at any time the Company became aware of this connection until after the new MOA was negotiated. Certainly there was no evidence that it was ever discussed or brought up by the Company at the bargaining table or in any informal discussions or sidebars. Nor was any bargaining history, notes of internal discussions among Company negotiators, or any other such evidence produced by the Company to bolster its position that it was aware of what would happen to the Copper Price Bonus eligibility of new hires if new hires were no longer eligible for the pension plan.

Another reason for the Arbitrator's conclusion that the Company did not recognize the connection between pension eligibility and the Copper Price Bonus when the Company proposed eliminating new hires from pension eligibility, is the fact that the Company did not deny that its representatives and managers in HR and elsewhere, who by virtue of their position dealt with recruiting, interviewing and hiring new employees, were de facto spokespersons for the Company. The individuals in those positions are the ones who do the recruiting, make the hiring decisions and interact with potential and new employees. The record showed, however, that the individuals representing the Company consistently told new hires, as shown by the unchallenged testimony of new hires, that they would be eligible to

receive the Copper Price Bonus both before and after they were hired. Thus the unrebutted evidence showed that the Company representatives and managers, whose job it was to deal with new hires, were telling the new hires, even after the new MOA went into effect, that they were eligible for the Copper Price Bonus. Furthermore, they apparently did so even after they knew that the new hires, under the new MOA, were not covered by the pension plan.

The Company argued that the Arbitrator should not put significant weight on the testimony from new hires as to what they were told by the HR representatives because the HR representatives were not decision makers or upper level management. The Arbitrator, however, found this argument disingenuous and not persuasive because the Arbitrator is convinced that when the HR representatives were doing the job that they were hired to do by the Company, and were telling the new hires that they were eligible for the Copper Price Bonus, they were acting as agents on behalf of the Company. The fact that there was unrebutted testimony by new hires to establish that these kinds of conversations took place at a number of properties in Arizona and Texas, and not just at one isolated property, also suggests that this was the widespread belief and understanding of the HR representatives and not just due to a misunderstanding by some HR representative at one property. Furthermore, it strongly suggests that the HR representatives had never been told to tell the new hires that they would not be eligible for the Copper Price Bonus, nor had they been told to stop telling new hires that they were eligible for the Copper Price Bonus.

The record also showed that contrary to the argument by the Company, new hires did, in fact, rely on this information. This is because it appears that in some cases they quit the jobs in which they were working elsewhere and gave up their seniority rights because they believed what they had been told about being eligible for the Copper Price Bonus and the impact that it would have on their wage package. In one case the new employee witness testified that he took a pay cut to move to ASARCO in part in anticipation of receiving the Copper Price Bonus. (transcript p. 156)

The Arbitrator must also point out that the new hires were told, based on their unrebutted testimony, that the same Company representatives who were telling them that they were not eligible for the pension plan, were telling them that they would be eligible for the Copper Price Bonus. This suggests to the Arbitrator that the Company representatives who were speaking to new hires on behalf of the Company were never made aware of the connection between eligibility for the Copper Price Bonus and the fact that the new hires were no longer eligible for the pension plan. Furthermore, the Arbitrator is persuaded that it is hard to believe that if the Company knew all along that new hires would not be eligible for the Copper Price Bonus, that the Company would continue to allow its representatives to tell the new hires that they were eligible for the Copper Price Bonus. This is even more difficult to understand, since the Company apparently did tell its representatives that new hires were no longer eligible for the pension plan. All of this makes the Company's position even more difficult to accept since the Company must have known, or should have known, that eventually a day of reckoning would come when

the Copper Price Bonus was due and the new hires were informed that despite being told otherwise by Company representatives, they were not eligible to receive the Copper Price Bonus.

All the above strongly suggests to the Arbitrator that the Company, like the Union, simply made a mistake by overlooking the connection between the Copper Price Bonus and the fact that new hires were no longer eligible for the pension plan. To find otherwise, the Arbitrator would have to conclude that HR representatives and Management deliberately engaged in deceiving the new hires when at some point they knew the new hires would find out about the change in policy. The Arbitrator simply must give the Company more credit than believing that higher Management would deliberately engage in such deceptive action by using, without their knowledge, the Company's own HR representatives and other spokespersons.

The Arbitrator must also note in support of this conclusion that no new hires were called by the Company to testify that they were told that they would not be eligible for the Copper Price Bonus. Instead, all the new hires who testified consistently testified that they were told that they were eligible to receive the Copper Price Bonus.

In addition, no one from the Company testified that they were ever told before or after the new MOA went into effect, until just before the Copper Price Bonus was due, that new hires would not receive the Copper Price Bonus. Nor was there any evidence that they were ever instructed to tell new hires that they would not receive the bonus until just before the bonus was due. Instead, the conduct of the HR employees, as described by the new hire witnesses,

overwhelmingly suggests that the Company, like the Union, simply did not realize that the new hires would not be eligible for the Copper Price Bonus because they were no longer eligible for the pension plan.

The fact that no senior management ever told the new hires that they would receive the Copper Price Bonus was not found significant by the Arbitrator despite the Company's suggestion to the contrary. This is because senior management cannot be reasonably expected to discuss these matters with new hires. Instead, they depend on lower level management, such as HR representatives, to do so. Therefore the fact that no senior level manager testified one way or the other at the arbitration hearing certainly does not support a claim that Management was aware that new hires would not receive the bonus and instead suggests that Management, like the Union, was not aware of the situation.

In fact, the evidence showed that the Company never said anything to the Union, or the new hires, about not being eligible for the Copper Price Bonus until after the issue was raised by Banky with Coxon, as described in Banky's proffer. When Banky raised the issue, according to the proffer, he was not told by Coxon, nor anyone else, that the bonus would not be paid because new hires were ineligible for the pension plan. Instead, according to Banky's unchallenged proffer, Coxon simply said something to the effect that it might be an issue and he would be looking into it. The Arbitrator found the proffer by Banky to be very significant, particularly since neither Coxon, nor anyone else, was called to refute Banky's proffer.

The fact that according to Banky, Coxon told him, after talking to higher management, to say nothing to employees or the Union about the bonus also shows, in the Arbitrator's opinion, that the Company had uncertainty about the connection between the inability of new hires to participate in the pension plan and the impact on the Copper Price Bonus. All of this suggests to the Arbitrator that the Company, like the Union, never thought about the issue until it was raised by Banky and that the Company, like the Union, had simply made a mistake and overlooked the connection between the Copper Price Bonus and the lack of eligibility for new hires to participate in the pension plan.

Based on all the above, the Arbitrator has concluded that the evidence has persuasively established that neither the Union nor the Company saw the connection when the new MOA was agreed to between the new hires' ineligibility for the pension plan and their not being eligible for the Copper Price Bonus. The evidence also persuasively suggests that neither the Company nor the Union ever intended to abolish the Copper Price Bonus for the new hires because they were not eligible for the pension plan. Instead, the Arbitrator is persuaded that when this was all brought to the Company's attention, it attempted to gain by its mistake, and the Union's mistake, when it realized that eliminating the Copper Price Bonus would be an unforeseen financial benefit for the Company. Accordingly, it appears to the Arbitrator that the Company was simply trying to turn its mistake, as well as the Union's mistake, into something that neither party intended, which was to end the Copper Price Bonus for the new hires. Therefore, it appears that the Company was trying to benefit from a mutual mistake by taking away from

the Union and its employees a bargained for, significant compensation benefit, which was the Copper Price Bonus, without any bargaining and which the Company knew the Union would never have agreed to without any bargaining.

This now raises the question of what is the proper remedy under the circumstances of this case, after the arbitrator has determined that both parties made a mutual mistake by overlooking the linkage between new hires being ineligible for the pension plan and the impact that this would have on the eligibility that new hires would have to receive the Copper Price Bonus. After considering this question, the Arbitrator has concluded that it would be appropriate for him to reform the MOA, as requested by the Union.

AWARD

1. The Arbitrator finds that the Company breached the parties' Basic Labor Agreement as amended by the 2011 Memorandum of Understanding when it failed to pay the Copper Price Bonus to employees hired after July 1, 2011.

2. The Arbitrator orders that the BLA be amended to read as follows:

> "Article 12, Section Q. Pension Plan: Employees hired on and after the Effective Date are not eligible to participate in the pension plan. However, the Company shall treat such Employees as if they were accruing Continuous Service under the Retirement Income Plan for Hourly Rated Employees of ASARCO Inc. on the same terms as other Employees, only for purposes of determining eligibility for the Copper Price Bonus pur-

suant to Article 9, Section C.5 of the BLA." (new language underlined)

3. The Arbitrator remands back to the parties, as stipulated to by the parties, any further remedy issues dealing with monetary matters. If, however, the parties are unable to resolve those matters, the Arbitrator will retain jurisdiction to deal with those issues.

Dec. 5, 2019	/s/ Michael Rappaport
Date	Arbitrator