No. 07-734

IN THE

Supreme Court of the United States

ILLINOIS BELL TELEPHONE COMPANY,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 21,

Respondent.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether a "recognition clause," a boilerplate provision found in virtually every collective bargaining agreement that simply affirms the union's status as representative of the bargaining unit employees, requires an employer to arbitrate disputes not otherwise implicating any term or provision of the agreement.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

Many of the Chamber's members are unionized employers who are parties to collective bargaining agreements which contain bargained for limited grievance and arbitration procedures. Still many others are non-unionized employers who have voluntarily entered into arbitration agreements as a means of expediting dispute resolution. As employers and potential parties to arbitrations, many of the Chamber's members have a significant interest in the issues raised by this case.

The Chamber seeks to assist the Court by highlighting the impact its decision in this case will have

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and they have been given at least 10 days notice of amici's intention to file. Such consents are being submitted herewith.

beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matters that have not already been brought to its attention by the parties. Because of its experience in these matters, the Chamber is well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

SUMMARY OF THE ARGUMENT

The Seventh Circuit has, in one fell swoop, managed to undermine the federal policy in favor of arbitration, destabilize the careful balance necessary to maintain industrial peace and economic stability, and ignore the hard work this Court did in striking that balance in the *Steelworkers Trilogy*.[2]

The Chamber has been an outspoken advocate of the federal policy in favor of arbitration. The Seventh Circuit's decision, contrary to its pronouncements, actually substantially harms the preference for alternative dispute mechanisms. By vitiating the narrow scope of a consensual arbitration relationship, the Seventh Circuit makes it more likely parties will shy away from entering such agreements. Without predictability and control over which issues are

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[2] In 1960 this Court issued three decisions stabilizing the role of grievance arbitration in labor relations which collectively became known as the "*Steelworkers Trilogy*." *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers v. Enter. Wheel & Car. Corp.*, 363 U.S. 593 (1960).

arbitrable, employers are more likely to opt out of arbitration agreements in both the unionized and non-union context.

Potentially more harmful is the effect this decision will have on industrial relations and the economy generally. The American economy depends on businesses being able to appropriately manage their operations, including the negotiation of certain matters with collective bargaining representatives. The decision below explodes the narrow confines of a contractual arbitration provision in such a way that businesses will be faced with the choice of not agreeing to arbitration provisions or enduring prolonged and costly arbitration proceedings before moving forward with even the most basic of managerial decisions. Either result is disastrous for labor relations and the economy. The former may result in increased strikes and other job actions while the latter slows industrial progress and efficiency.

The ultimate effect of the decision will be the exact consequences this Court sought to and successfully avoided for nearly fifty (50) years since the issuance of the *Steelworkers Trilogy*.

ARGUMENT

I. THE SEVENTH CIRCUIT DECISION UNDERMINES THE FEDERAL POLICY IN FAVOR OF ARBITRATION.

The federal policy in favor of arbitration is well recognized. As former Justice Arthur J. Goldberg noted long ago:

> In the United States Arbitration Act, the Labor-Management Relations Act and in numerous state statutes, our legislative bodies have voiced their conviction that voluntary arbitration of disputes is favored and has an important role in a society which seeks the peaceful, prompt and just disposition of controversies involving our citizens.

Arthur J. Goldberg, *A Supreme Court Justice Looks at Arbitration*, 20 Arb. J. 13, 13 (1965). Subsequent pronouncements of this policy are voluminous and diverse. *TechnoSteel, LLC v. Beers Constr. Co.*, 271 F.3d 151, 160 (4th Cir. 2001); *Keymer v. Mgmt. Recruiters Int'l, Inc.*, 169 F.3d 501, 505 (8th Cir. 1999); *AMTRAK v. ExpressTrak, L.L.C.*, 330 F.3d 523, 531 (D.C. Cir. 2003); *Stone v. Doerge*, 328 F.3d 343, 345 (7th Cir. 2003) and *Albert M. Higley Co. v. N/S Corp.*, 445 F.3d 861, 863 (6th Cir. 2006).

Likewise, the Chamber and its members wholeheartedly support the policy. *See* the Chamber's prior submissions to this Court in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *Green Tree Fin. Corp.*

v. Bazzle 539 U.S. 444 (2003), and *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006). It is in support of that policy that the Chamber respectfully requests the Court grant certiorari and overturn the Seventh Circuit's harmful decision.

To be clear, while the immediate result of the Seventh Circuit decision may be to order one arbitration that would not have been heard, if left to stand, the long term result could be to undermine the federal policy encouraging voluntary arbitrations.

The key ingredients necessary to continuing the policy favoring arbitration are its voluntariness and predictability. Without voluntariness, there would be no arbitrations to compel and without predictability there will be no voluntariness.

At the very core of labor grievance arbitration is the parties' desire to obtain some stability and predictability in industrial operations. Employers routinely yield their authority to make unchallenged decisions in favor of the predictability of a written agreement which includes the stability of a no strike clause. In this regard, employers voluntarily agree to specific limitations, controls and financial obligations related to their operations. Finalizing the quest for industrial stability are the twin covenants that the labor organization will not disrupt the operations with a strike and the employer will agree, pursuant to specific parameters and procedures, to arbitrate the parties' differences.

When entering into these collective bargaining agreements, both parties must make choices in pursuit

of labor peace. It is the expectation of the parties that those choices, once agreed upon, shall be binding and they may proceed with their industrial relationship with predictability.

Included in these choices are the very real decisions about what will be resolved under a current agreement, what will be left for another day and under what circumstances the parties must bargain with one another or must refer a dispute to arbitration. It is the ability to voluntarily make these choices and to achieve the coveted predictability that permits agreements to arbitrate to be reached.

The Court of Appeals has taken a shallow and shortsighted view of the policy favoring arbitrations. At its essence, the Court's apparent position is that the policy should sacrifice voluntariness and predictability in favor of ordering arbitration for every dispute no matter how unrelated to the parties' agreement. This position does not support the policy favoring arbitrations at all; rather, it threatens it.

If courts are permitted to rewrite agreements to compel arbitration of disputes which the parties had no intention to arbitrate and, in fact, took steps to limit, the likelihood of an employer entering into such an agreement is diminished. In fact, judicial intervention into arbitration already has resulted in a precipitous decline in the number of employers in the non-unionized sector entering into such agreements. Lou Whiteman, *Arbitration's Fall From Grace*, *http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1152695125655* (last visited December 19, 2007).

The policy favoring arbitration is especially threatened in the collective bargaining arena where the agreement to arbitrate stands in place of the right of the parties to use economic warfare to force their positions on the other. *AT&T Techns. v. Commc'ns Workers*, 475 U.S. 643, 648 (1986) (noting that the arbitration system has "served the industrial relations community well, and ha[s] led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement.") Collective bargaining is an incredibly flexible medium and the resulting agreement can address any number of issues in myriad ways. The parties, possibly more than in any other form of industrial negotiation, come to the table with an understanding of their ability to address all issues related to the "wages, hours and other terms and conditions of employment." National Labor Relations Act, as amended ("NLRA"), 29 U.S.C. §§ 151, 158(d).[3] They then agree on specific issues, including the scope of the agreement to arbitrate. They are just as free to negotiate a broad agreement to arbitrate as they are a narrow or limited one, but once they do they have a right to have that agreement specifically adhered to.

The Court of Appeals ruling deprived the Illinois Bell Telephone Company ("Illinois Bell") of the benefit of its bargain. More important, it sends a strong signal to other employers to beware of arbitration agreements as they may be used, despite express intentions, to deprive

[3] The NLRA, however, leaves the content of the agreement, including which disputes are arbitrable, to the parties, not the courts or even the NLRB.

employers of the predictability and stability that was at the heart of their agreement to arbitrate.

Faced with the Hobson's Choice of agreeing to an arbitration agreement which may be interpreted by the courts to be limitless (providing no predictability or stability) and the choice of foregoing an agreement altogether (risking a strike), employers may begin to choose to avoid arbitration and resort to their perceived leverage and economic weapons to resolve issues with unions.[4]

Ultimately, this atmosphere will result in more strikes and fewer arbitrations. This certainly cannot be deemed supportive of our national policy in favor of voluntary arbitrations. Consequently, the Court should grant certiorari and overturn the Seventh Circuit's decision.

II. THE UNLIMITED ARBITRATION APPROACH ADVOCATED BY THE UNION WILL HAMPER INDUSTRIAL RELATIONS AND THE NATION'S ECONOMY.

As noted by the dissent, the Seventh Circuit majority is reading into a narrow arbitration procedure

[4] The fact of the matter is most employers recognize that labor unions are not likely to strike over every little dispute or disagreement they may have. Consequently, though obviously tempered by the threat of a strike, many employers may opt for the freedom to act without direct contractual obstruction rather than suffer the death by a thousand cuts which could result from a judicially imposed requirement to engage in endless arbitrations over anything the union desires.

"essentially limitless reach" where "any Company action that can be characterized as contrary to the Union's interests" could be arbitrable. *Int'l Bh. of Elec. Workers, Local 21 v. Ill. Bell Tel. Co.*, 491 F.3d 685, 694 (7th Cir. 2007) ("*IBEW*"). The effect of this would subject employers to a costly and burdensome process to which they did not consent. The decision below judicially imposes what amounts an "interest arbitration" provision into most collective bargaining agreements (those with recognition clauses). It would allow an arbitrator to unilaterally resolve virtually any issue that the parties themselves did not resolve through bargaining. Besides entailing a significant cost not contemplated by the employer, such an unauthorized arbitration would strain the relationships of labor and management, as unions will be free to negotiate an agreeable contract and then grieve for more later. Without the benefits of contractually bargained for arbitration limitations, every action of an employer could be challenged. Most significant, if, even after successfully negotiating a collective bargaining agreement, employers are either required to bargain to new agreement or arbitrate prior to any alteration to any non-contractual aspect of its operations the union thinks affects its interests, economic progress could be halted.

A. The Seventh Circuit's Decision Unlawfully Imposes Interest Arbitration.

Stripped to its bare essence, this case is about an employer meeting and conferring with a union regarding an issue *not* covered by the collective bargaining

agreement.[5] After reaching impasse on the issue, the employer, as is its right under the National Labor Relations Act, implemented its last proposal. *Milwaukee Spring Div.*, 268 NLRB 601, 602 (1984) (citing *NLRB v. Katz*, 369 U.S. 736 (1962)).[6] The union then, having already separately bargained away its right to strike, sought to have an arbitrator intervene and impose new terms on the parties. This is known as "interest arbitration"[7] and may not be lawfully imposed on any party absent their voluntary consent.[8]

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[5] There may be a separate question, not presented to the Court here, over whether any such non-contractual issue is a mandatory or permissive subject of bargaining. Of course, such determinations are left exclusively to the National Labor Relations Board and not to arbitrations or suits to compel them.

[6] Of course, the union could have filed an unfair labor practice charge with the NLRB if it believed the employer did not bargain in good faith. As pointed out by the dissent below, the Respondent chose not to do so. *IBEW*, 491 F.3d at 692.

[7] *Silverman v. Major League Baseball Players Relations Comm., Inc.*, 67 F.3d 1054, 1062 (2d Cir. 1995) ("Interest arbitration is a method by which an employer and union reach agreement by sending the disputed issues to an arbitrator rather than by settling them through collective bargaining and economic force.").

[8] In fact, both the NLRB and the Courts of Appeals have uniformly found that interest arbitration may not be legally imposed upon a party absent its consent, in fact one party cannot even force the other party to discuss it as it is a non-mandatory subject of bargaining. *See Laidlaw Transit Inc.*, 323 NLRB 867 (1997); *Sheet Metal Workers Local 359 (Madison Indus. of Ariz.)*, 319 NLRB 668 (1995); *Elec. Workers Local 135 (La Crosse Elec.*

(Cont'd)

The Seventh Circuit's decision, by acceding to the Respondent's request, has in effect extra-contractually imposed on the parties an interest arbitration provision. This Court should not be distracted, as was the Court of Appeals, by the recognition clause. The simple truth is that this recognition clause argument is nothing more than a dressed up assertion that a union may compel arbitration on *any* new issue of "interest" to it. As the court noted, "the recognition clause is susceptible to any number of interpretations that may impose duties of notice and negotiation upon the Company." *IBEW*, 491 F.3d at 689. In other words, under the Seventh Circuit's logic, if a union says it has an interest that should be arbitrated, the parties must arbitrate.

With the Seventh Circuit decision in hand, unions may begin demanding employers participate in time consuming and costly arbitrations over decisions best left to the give and take of bargaining. The result obviously would be judicially compelled arbitrations on any and all disputed issues in which unions *claim* an interest. This is judicially imposed interest arbitration. This result unlawfully expands the reach of the collective bargaining obligations imposed by the NLRA.

(Cont'd)
Contractor Ass'n), 271 NLRB 250, 251 (1984) (citing numerous cases); *Elec. Workers Local 58 v. Nat'l Elec. Contractors Ass'n (Se. Mich. Chapter)*, 43 F.3d 1026, 1032 (6th Cir. 1995); *Sheet Metal Workers Local 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1476 (5th Cir. 1993) and *Graphic Commc'ns Local 23 (Milwaukee) v. Newspapers, Inc.*, 586 F.2d 19 (7th Cir. 1978) (citing decisions of four circuits and the NLRB in general accord).

Besides being prohibited by the NLRA, interest arbitration is bad policy. Employers enter collective bargaining agreements to obtain stability. They sit at the bargaining table, listen to the union's demands and agree to those they can tolerate. The parties negotiate a term and move forward pursuant to the agreement reached. Every aspect of that agreement, including those items that were left off the table, either explicitly or implicitly, is a part of the parties' bargain. By imposing interest arbitration, employers lose the benefit of their bargain. Without this benefit, employers may struggle to see the value in entering into lengthy "comprehensive" agreements, opting for a more *ad hoc* approach to labor relations.

Ultimately, imposing interest arbitration is neither permitted under the NLRA nor an advisable labor policy. Consequently, the Court should grant certiorari and overturn the Seventh Circuit's decision.

B. The "Agree Now Grieve Later" Method Advanced Below Will Strain the Checks and Balances of the Industrial Relations System.

Sustained labor peace requires that careful checks and balances be placed on both labor and management. Nowhere are these checks and balances more prevalent than in the voluntary agreement to arbitrate. By imposing additional, non-contractual, requirements to arbitrate, the Seventh Circuit has seriously disrupted those checks and balances.

Parties approach the table with the understanding that there are virtually endless issues which they can

discuss and agree. Most negotiations focus on those areas of immediate concern to the parties. Although employers would rather be left to deal with all issues unilaterally, that desire is checked by the counter aspiration for labor peace and stability. As a consequence, management agrees to specified restrictions and obligations in exchange for that stability.

Unions, on the other hand, desire a say in every management decision. Realistically, however, unions select areas of most importance to their members and focus negotiations on those issues. In the end, the union yields its economic weapons in exchange for these issues of importance and a reciprocal commitment that the employer will arbitrate alleged breaches of these negotiated matters.

While this exchange is standard, the result is far from uniform. The substantive provisions contained in collective bargaining agreements are as varied as the number of employers and employees they cover. Likewise, the scope, obligations, sanctions, remedies and other provisions in no strike clauses are equally diverse. Finally, the same can be said for the scope, procedures and restrictions of arbitration agreements.

They are varied because they are meaningful and reflect the particular bargain the parties reached. When, as here, parties bargain for a limited and narrow arbitration provision, it must be given effect. Failure to give it effect destroys the bargain and the checks and balances imposed by the system.

For example, where a union would like a say in uniform apparel but also seeks wage increases, the union may forgo any discussion over uniforms, believing it does not have the necessary leverage to achieve both. During negotiations the union may obtain these wage increases, but the employer likely would require the stability of a no strike clause. The union may grant this stability in exchange for the understanding that any violations of the agreement (*i.e.*, those with respect to wage increases) will be arbitrated. The employer, believing it was achieving its goals of predictability, stability and labor peace likely would sign such an agreement.[9] The checks and balances would have worked.

If the next year, during the term of the agreement, the employer changed the uniform, the union, having not secured a right related to the selection of the uniform, should be without recourse.[10] More so if the agreement to arbitrate is limited to violations of the terms of the agreement.

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[9] Both parties generally would understand that, though possibly tempered by the obligation to meet and confer, management retains "all rights necessary to manage the plant . . . and that unless management limited its management rights by a specific term of the agreement, those rights did not evaporate and hence are still retained by management after the labor agreement is signed." *Fairweather's Practice and Procedure in Labor Arbitration* 299 (Schoonhoven ed., BNA Books 4th Ed. 1999). *See also United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 584; *U.S. Steel Corp. v. Nichols*, 229 F.2d 396, 399-400 (6th Cir. 1956); and *How Arbitration Works* 635 (Ruben ed., BNA Books 6th Ed. 2003).

[10] This is especially so if the employer only did so after discussing the matter fully with the union.

What the Respondent seeks here is to have its cake and eat it too. Having forgone its right to negotiate provisions related to work rules while undoubtedly receiving numerous other favorable contractual concessions, the Respondent now seeks to accept the benefits of its bargain while depriving Illinois Bell of its benefits. Clearly, such a result upsets the checks and balances necessary to a successful industrial relations system.

If employers are constantly agreeing to contractual concessions to obtain stability and then are forced into interest arbitrations over non-contractual matters, they will be deprived of the benefit of their bargain. Without assurance they will receive the benefit of their bargain, employers may opt not to enter into the bargain at all and the delicate balance struck to keep labor peace will be disrupted. To avoid this undesirable consequence, the Court should grant certiorari and overturn the Seventh Circuit's decision.

C. Limitless Arbitration Is Not An Acceptable Form of Dispute Resolution.

Allowing a standard recognition clause to be distorted into an all encompassing provision that permits a union to grieve, as the dissent aptly notes, "any Company action that can be characterized as contrary to the Union's interests" is unacceptable. *IBEW*, 491 F.3d at 694. Notwithstanding the legal barriers to this judicially imposed interest arbitration and its disruption of the labor peace balance, the sheer instability associated with such a revision to the system may crush it under its own weight.

It cannot be seriously disputed that the Seventh Circuit's ruling makes a vast percentage, if not a majority, of the nation's collective bargaining agreements "susceptible to any number of interpretations that may impose duties of notice and negotiation upon the" employer. *IBEW*, 491 F.3d at 689. The decision in no way limits its reach; rather, it makes subject to arbitration any decision by management that a union argues it has an interest in. This of course could be the work rules at issue here, the uniforms discussed above or virtually anything else one can imagine. The temperature of the workspace, the types (including brand) of equipment used, the types of investments made, the products or services offered and even the color of the building could be subject to arbitration at the whim of a union.[11]

Having secured those matters most important in negotiations and protected itself from lockout, unions would be free to file any number of arbitrations in hopes of obtaining an even better deal for their members. If met with any degree of success, the inevitable increase in arbitrations could quickly bog down the entire arbitral system, making its efficiency and efficacy in resolving real contractual disputes inadequate. This consequence provides an additional reason why the Court should grant certiorari and overturn the Seventh Circuit's decision.

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[11] While clearly any of these items could be properly subject to arbitration where the parties had agreed to include a provision regarding them in their agreement or where they had agreed to interest arbitration, such a requirement cannot and should not be judicially imposed.

D. The American Industrial Machine Cannot Afford the Inefficiencies of the Seventh Circuit's Approach.

Putting aside the ramifications on labor relations and the arbitral system, which are significant, the Seventh Circuit's decision threatens our nation's economy by imperiling its ability to adapt and compete. If each time a company wishes to exercise its right to make some alteration which is not in any way restricted by the collective bargaining agreement the company is forced to either bargain to an agreement with the union or endure an interest arbitration[12] prior to making the change, the company risks losing any competitive or economic advantage of making the change.[13]

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[12] Certainly, the company could unilaterally implement its decision and deal with the potential consequences after the arbitration, however, this approach could be far more expensive and even more disruptive to industrial progress if the company were ordered to reverse its course. Consequently, we would submit that if the decision below is left to stand, companies will more often than not await the time consuming resolution of the arbitration prior to making any changes.

[13] It is widely recognized that one of the reasons the American economy began to lose a competitive advantage to some Asian economies in the late nineteen seventies and early eighties was the inability of organized labor to be flexible in times of economic and industrial transformation. *See* Robert B. Reich, *Labor Law, Reform, and the Japanese Model*, 98 Harv. L. Rev. 697, 701 (1985)

> "Professor Gould suggests that the Japanese system is better suited to an advanced industrial

(Cont'd)

For example, imagine a company which had unionized drivers who had for years driven Chevrolet trucks to transport the company's products. Due to wear and tear as well as increased demand, the company needed to buy new trucks but found the deal it could get on Ford trucks to be preferable. Under the Seventh Circuit's rationale, if the union asserted it had an interest in the make of truck (for example, because it had brother members at Chevrolet or because Ford workers were on strike) the company would be forced to arbitrate its decision to obtain these needed Ford trucks. The time and resources associated with the arbitration could cost the company the ability to compete. Likewise, if the company merely acquiesced to the union's position and

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(Cont'd)

> economy seeking to maintain its standard of living in an increasingly competitive global economy. In 1976, for example, the United States, with twice Japan's population, lost almost twelve times as many working days because of strikes or lockouts as Japan did."

and William C. Green, *Negotiating the Future: The NLRA Paradigm and the Prospects for Labor Law Reform*, 21 Ohio N. U. L. Rev. 417, 417 (discussing "Japan's rising economic prowess in the 1980's" and "Japanese lean production techniques and cooperative labor relations"). This inflexibility however dealt only with matters which were properly contained in the existing labor agreements. Here the economic impact could be far greater as we are not only dealing with the potential need to obtain the consent of a union to make changes to the existing contractual provisions, but also potential inflexibility with respect to virtually anything the union claims they have an interest in, whether they previously bargained for it or not. In our fast-paced global economy we cannot afford to place such a drag on the American industrial machine.

acquired the less preferable trucks, it would be forced to give up whatever competitive advantage it saw in making its original decision. Multiplied by the number of decisions like this a company makes and the number of companies which have recognition clauses in their agreements, the Seventh Circuit's ruling could result in institutionalizing unbearable inefficiencies on unionized employers.

As more of these companies have their economic progress stalled or even halted in mid-term negotiations or interest arbitrations, the overall economy will undoubtedly become affected. Our current system is designed to avoid this impact on commerce, to allow the parties to sit down periodically and address their issues for a set period of time and then get back to business, without restraint or interruption. The Seventh Circuit's ruling mutilates that system and by doing so jeopardizes the economic health of the nation. Consequently, the Court should grant certiorari and overturn the Seventh Circuit's decision.

III. THE SEVENTH CIRCUIT DECISION DISRUPTS LONGSTANDING SUPREME COURT PRECEDENT AS ESTABLISHED BY THE *STEELWORKERS TRILOGY*.

As noted above, through the *Steelworkers Trilogy* and its progeny, this Court has firmly staked its position on the side of the national policy favoring arbitration. However, in doing so, it also has clearly set forth the limitations of that policy, overtly requiring there to be

predictability and voluntariness before compelling arbitration. In this regard this Court has found:

> [A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. at 582.

> No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so.

Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 374 (1974).

> Our prior decisions have indeed held that the arbitration duty is a creature of the collective-bargaining agreement and that a party cannot be compelled to arbitrate in any matter in the absence of a contractual obligation to do so.

Nolde Bros., Inc. v. Bakery & Confectionery Workers, 430 U.S. 243, 250-251 (1977).

> We reaffirm today that, under the NLRA, arbitration is a matter of consent, and that it will not be imposed upon parties beyond the scope of their agreement.

Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 201 (1991).

As the Court observed in *AT&T Techns. v. Commc'ns Workers*, 475 U.S. at 648, "[t]he principles necessary to decide this case are not new," and the first of those principles observes that an employer may not be forced to arbitrate any issue or dispute it did not agree to arbitrate. Yet this is exactly what the Seventh Circuit decision attempts to do.

The parties' agreement contains a narrow and limited arbitration provision which expressly limits the right to arbitration to matters that involve the interpretation or application of a term or provision of the agreement. It is undisputed that no term or provision of the agreement deals with work rules.[14] Therefore, the union's demand for arbitration of this issue clearly falls outside of the scope of the areas where arbitration was consensually agreed upon. It also is in clear conflict with the longstanding precedent of this Court. Consequently, the Court should grant certiorari and overturn the Seventh Circuit's decision.

IV. DENYING ARBITRABILITY DOES NOT LEAVE THE UNION WITHOUT RECOURSE.

The Seventh Circuit attempts to cloak its interest arbitration mandate under the guise that without it, the union would be left without recourse. *IBEW*, 491 F.3d at 691. This is quite simply false.

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[14] As noted above, even the most tortured reading of the recognition clause cannot impose an obligation to deal with work rules; rather the union asserts that it should be read to mean the union has the right to arbitrate anything that affects its interests. As explained above, such nonconsensual "interest arbitration" is not permissible.

Adhering to the contractual restrictions of the arbitration clause and denying the arbitrability of grievances which do not fit within those narrow constructs does not leave unions without recourse. To the contrary, unions have more than sufficient options.

First and foremost unions may negotiate with employers on issues outside the scope of the agreement to seek a solution. What happened here was the union abdicated its responsibility as representative in favor of having a third party decide the dispute.

Unions that wish to properly address issues can negotiate broader arbitration clauses as is common to many agreements, or even a legitimate interest arbitration provision. They can negotiate provisions directly relating to their concerns such as a provision restricting the implementation of new work rules or performance guidelines as also is common to many agreements. Additionally, they can negotiate no strike clauses which provide an exception should the employer fail to arbitrate any grieved issue. As noted by the dissent below, a union can file an unfair labor practice charge with the NLRB if it believes the company acted in bad faith in negotiations regarding either the collective bargaining agreement or any midterm implementations which deal with areas outside of the agreement (such as altered performance guidelines). In the present case, in addition to each of these options, the union could have grieved and arbitrated a future discipline if one was imposed under the implemented performance guidelines as violative of the just cause discipline provisions of the agreement. Finally, of course, unions, as is typical, can always wait for the current

agreement to expire and negotiate direct contractual language to deal with any concerns they may have over issues which arose midterm.

Regardless which option a union chooses they certainly are not left without recourse. The current system provides unions many options. Here the Respondent simply chose not to exercise any of these options in hopes that a court, as did the Seventh Circuit, would alter the parties' agreement by judicial fiat. Such manipulation of the system is not sanctioned by law or necessity. Consequently, the Court should grant certiorari and overturn the Seventh Circuit's decision.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition and reverse the Seventh Circuit's decision below.

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