

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**

REPLY BRIEF FOR PETITIONER

MICHAEL K. KELLOGG

SEAN A. LEV

Kellogg, Huber, Hansen,

Todd, Evans & Figel,

PLLC

1615 M. St., N.W.

Washington, D.C. 20036

(202) 326-7900

JEFFREY W. SARLES

Counsel of Record

JACK L. WILSON

DIANA ANDSAGER

Mayer Brown LLP

71 South Wacker Drive

Chicago, IL 60606

(312) 782-0600

Counsel for Petitioner

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The Union does not contest that, under the Seventh Circuit majority’s reasoning, any dispute over the terms and conditions of employment would be arbitrable as a potential violation of a boilerplate recognition clause. Nor does the Union dispute that both the recognition clause and the arbitration clause at issue here are standard provisions that appear routinely in collective bargaining agreements. There can thus be no doubt as to the enormous general importance of the ruling by the divided Seventh Circuit panel in this case.

The Union does no better in trying to defend the merits of that decision. It is common ground that the CBA requires arbitration not of any dispute relating to the terms and conditions of employment but only of disputes involving the interpretation or application of a CBA term or provision. And it is equally uncontested that no CBA term or provision expressly addresses work performance. Although the Union contends that the recognition clause could be interpreted to cover such a dispute, the Union, like the Seventh Circuit before it, can identify *no* language in that clause—which simply states that “[t]he Company recognizes the Union as the exclusive bargaining agent” for a set of employees (C.A. App. 18)—that could even potentially support that result.

Moreover, although the Union relies nearly exclusively on *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986), in support of its position, that case in fact expressly rejects the Union’s argument that courts should defer interpretive issues necessary to determine arbitrability to an arbitrator. As discussed below, the Court concluded in *AT&T Technologies* that “[i]t is the court’s duty to interpret the agreement and to determine whether the

parties intended to arbitrate” any particular issue. *Id.* at 651.

By neglecting that duty and disregarding negotiated limits on arbitrability based on a standard recognition clause, the ruling below, if permitted to stand, will have an enormously harmful impact on collective bargaining relationships, warranting the Court’s review. See, *e.g.*, U.S. Telecom Association Br. 10-11.

The ruling below not only conflicts with this Court’s precedents but also with the Ninth Circuit’s decision in *Alcoa v. UAW*, 630 F.2d 1340 (9th Cir. 1980) (Kennedy, J.). As demonstrated below, the Ninth Circuit refused to accept the position espoused by the Seventh Circuit, namely, that a mere assertion that a dispute implicates a plainly inapplicable contract clause suffices to make the dispute arbitrable. That conflict over an important issue of federal labor law provides further reason to grant the petition.

A. The Decision Below Conflicts With This Court’s Precedents.

The Union contends (at 2-9) that the Seventh Circuit’s ruling is consistent with this Court’s decision in *AT&T Technologies*. In fact, the decision below directly conflicts with that precedent.

The Union’s brief (at 5-6) relies primarily on the Seventh Circuit’s view that the recognition clause “is susceptible to any number of interpretations” and that an arbitrator “could” interpret it “to prohibit the Company from making significant changes in the terms and conditions of employment without the consent of the Union.” Pet. App. 6a. But the Union cannot and does not offer any interpretation of the

relevant language—language that simply “recognizes the Union as the exclusive bargaining agent” for certain employees (C.A. App. 18) and does not in any way address the terms and conditions of employment—that could support that conclusion. See generally *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349-350 (1958) (recognition clause does *not* address “terms and conditions of employment”). In the end, then, the Union contends that its mere *assertion* that the parties’ dispute implicates the recognition clause—even where it is impossible to interpret that clause to cover the issue in dispute—is enough to require the Company to arbitrate.

That contention runs headlong into *AT&T Technologies*, 475 U.S. at 649, in which the Court firmly held that “the question of arbitrability [is] undeniably an issue for judicial determination” and that “a compulsory submission to arbitration *cannot precede* judicial determination that the collective bargaining agreement does in fact create such a duty” (emphasis added). Thus, a court *must* interpret the agreement to determine whether the issue is arbitrable: “It is the court’s duty to interpret the agreement and to determine whether the parties intended to arbitrate” any particular issue. *Id.* at 652.

Applying that holding here, whether the recognition clause can be interpreted to address a dispute regarding performance guidelines, and thus whether the arbitration clause applies, is a question of arbitrability that must be resolved by a court. Only if the court, after reviewing the language of the relevant contract provisions, answers that question affirmatively may the dispute be referred to an arbitrator. That is the mandate of *AT&T Technologies*, one that the Seventh Circuit disregarded by failing to deter-

mine whether the recognition clause *actually* governs the parties' dispute. Put differently, in determining whether the parties agreed to arbitrate their dispute, the court must construe the recognition clause to determine whether it applies to a dispute over work performance guidelines. The court "cannot avoid that duty" merely "because it requires [it] to interpret a provision of a bargaining agreement." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 209 (1991).

In seeking to defend the Seventh Circuit, the Union argues (at 8) that interpreting the agreement would usurp the role of the arbitrator and therefore the Company must "argue its interpretation of the recognition clause to the arbitrator." That analysis is contrary to *AT&T Technologies*, for the reasons discussed above. And the snippets of that decision on which the Union purports to rely are simply irrelevant here. The language cited by the Union deals *not* with arbitrability, which is emphatically a judicial function and is the only issue presented here, but with resolution of the merits, an arbitral function (if the court finds the dispute to be arbitrable). See Opp. at 3 (quoting *AT&T Technologies*, 475 U.S. at 649, for the proposition that "a court is not to rule on the potential merits of the underlying claims"); *id.* at 9 (making same point).

Just as a court may not assume federal question jurisdiction based on an "insubstantial" or "implausible" federal claim (*Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)), a court may not refer a dispute to an arbitrator before deciding whether the purportedly arbitral claim "*on its face* is governed by the contract." *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960) (emphasis added). Thus, to resolve the Union's claim that arbitral jurisdiction

rests on the recognition clause, a court must determine whether the recognition clause “on its face” can support such a claim.¹

In this regard, the Union’s observation (at 6) that the CBA does not exempt the recognition clause from arbitration is accurate but beside the point. Disputes actually arising under the recognition clause—for example, over whether certain work falls within the bargaining unit—are certainly subject to arbitration. The problem here, one for which the Union has no answer, is that a clause limited to recognition of the Union as exclusive bargaining agent has no role to play in determining the propriety of work performance guidelines.

Unable to overcome that limitation, the Union (at 9-10) claims that the ruling below is consistent with four cases from other circuits. But two of those cases, unlike this case, involved disputes expressly governed by contract terms *other* than the recognition clause. See *E.M. Diagnostic Sys., Inc. v. Local 169, Int’l Bhd. of Teamsters*, 812 F.2d 91, 96 (3d Cir. 1987) (subcontracting dispute under a contract that contained express “[l]imits on the right to subcontract”); *F&M Schaefer Brewing Co. v. Local 49, Int’l Union of United Brewery Workers*, 420 F.2d 854, 855-856 (2d Cir. 1970) (pay rate dispute under a contract that expressly addressed pay rates). Indeed, in *E.M. Diagnostic* the Third Circuit *distinguished* cases (like this one) where the contract’s arbitration provision

¹ Indeed, courts often hold that they “may need to decide the merits of the underlying claim in order to decide arbitrators’ jurisdiction.” See, e.g., *Int’l Chem. Workers Union Council v. PPG Indus., Inc.*, 236 F. App’x 789, 792 (3d Cir. 2007) (collecting cases).

applies only to “a specific provision of the agreement” and no such provision applies to the parties’ dispute. 812 F.2d at 96 n.2. The other two cases cited by the Union, unlike this case, involved disputes over union recognition issues and thus *did* arguably implicate the recognition clause. See *Humble Oil & Refining Co. v. Independent Indus. Workers’ Union*, 337 F.2d 321, 323 (5th Cir. 1964) (company refused to recognize union’s right to represent employees in pre-discipline interrogations); *Local 1912, IAM v. United States Potash Co.*, 270 F.2d 496, 499 (10th Cir. 1959) (subcontracting at issue had “the effect of destroying or injuring the union as an effective bargaining unit”). None of these cases holds or even suggests that a standard recognition clause governs work performance issues.

The Union disregards the cases cited in the petition (at 10) holding that a recognition clause cannot govern a dispute that does not involve a union recognition issue. See *Newspaper Printing Corp. v. NLRB*, 692 F.2d 615, 622 (6th Cir. 1982) (recognition clause does not govern dispute over work assignments); accord *Boeing Co. v. NLRB*, 581 F.2d 793, 796 (9th Cir. 1978); *UAW v. Acme Precision Prods., Inc.*, 521 F. Supp. 1358, 1362 (E.D. Mich. 1981) (a recognition clause does not require parties “to arbitrate every dispute”). These cases cannot be reconciled with the ruling below.

At bottom, the Seventh Circuit, by requiring parties to arbitrate disputes that have nothing to do with any term or provision of their agreement, impermissibly imposes compulsory “interest arbitration” on parties who never agreed to it. See COLLE/NAM Br. 13-18; Chamber of Commerce Br. 9-12. The Seventh Circuit has effectively amended

the CBA to require arbitration of disputes over performance requirements, an issue on which the contract actually negotiated by the parties is silent, and indeed over virtually any dispute (as Judge Sykes noted in dissent). Such compulsion is completely at odds with this Court's repeated insistence that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs.*, 475 U.S. at 648.

B. The Decision Below Conflicts With The Ninth Circuit's Decision In *Alcoa*.

As the petition explains (at 16-18), the Seventh Circuit's decision in this case conflicts with that of the Ninth Circuit in *Alcoa v. UAW*, 630 F.2d 1340 (9th Cir. 1980) (Kennedy, J.). The Union responds (at 11) that the asserted conflict is "not even colorable." The Union fails to note that:

- *Alcoa* (like this case) involved a challenge to a new company policy that could lead to future disciplinary action. 630 F.2d at 1342.
- *Alcoa* (like this case) involved an agreement with an arbitration clause that was narrower in scope than the grievance clause. *Ibid.*
- The court in *Alcoa* rejected the notion that the contract's "just cause" provision impliedly made arbitrable "all disputes which might relate to wages, hours, and work conditions." *Id.* at 1344. In contrast, the Seventh Circuit accepted the notion that the CBA's recognition clause impliedly made arbitrable all such disputes. Pet. App. 6a.
- The court in *Alcoa* held that an arbitrator cannot "acquire jurisdiction" where the chal-

lenged policy did not implicate any contract term or provision simply because it “might” do so in the future. 630 F.2d at 1343. In contrast, the Seventh Circuit referred this case to arbitration simply because an arbitrator “could” find that the challenged policy somehow implicated the recognition clause.

- The court in *Alcoa* rejected the notion that a mere assertion that the employer violated an implied commitment to act in good faith is arbitrable. *Id.* at 1344. In contrast, the Seventh Circuit found the Union’s mere assertion that the Company violated a duty implied by the recognition clause is arbitrable.
- The court in *Alcoa* rejected the union’s arbitrability argument because it had no “limiting principle” and “would seemingly make arbitrable any company policy application.” *Ibid.* In contrast, the Seventh Circuit accepted an arbitrability argument with no limiting principle that would make arbitrable the implementation of any Company policy.

In sum, the Ninth Circuit’s decision in *Alcoa* and the Seventh Circuit’s decision in this case cannot be reconciled. Whereas the Ninth Circuit refused to order arbitration based on a mere assertion that the parties’ dispute implicated a plainly inapplicable contract provision, the Seventh Circuit majority rested its ruling on just such an assertion. Indeed, the Ninth Circuit’s rejection of the union’s unlimited arbitrability theory in *Alcoa* is indistinguishable from the dissent’s rejection of such a theory below, confirming the conflict. This Court should resolve this conflict over an important issue of federal labor law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MICHAEL K. KELLOGG	JEFFREY W. SARLES
SEAN A. LEV	<i>Counsel of Record</i>
<i>Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC</i>	JACK L. WILSON
<i>1615 M. St., N.W. Washington, D.C. 20036 (202) 326-7900</i>	DIANA ANDSAGER
	<i>Mayer Brown LLP</i>
	<i>71 South Wacker Drive Chicago, IL 60606 (312) 782-0600</i>

Counsel for Petitioner

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