

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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ILLINOIS BELL TELEPHONE COMPANY,

*Petitioner,*

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS, LOCAL 21,

*Respondent.*

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**On Petition for a Writ of Certiorari to  
the United States Court of Appeals for the  
Seventh Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION 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 bargaining unit employees, requires an employer to arbitrate disputes not otherwise implicating any term or provision of the agreement.

**RULE 14.1(B) STATEMENT**

Petitioner (defendant-appellant below) is the Illinois Bell Telephone Company.

Respondent (plaintiff-appellee below) is the International Brotherhood of Electrical Workers, Local No. 21.

**RULE 29.6 STATEMENT**

Petitioner Illinois Bell Telephone Company does business as AT&T Illinois. Petitioner's parent corporation is AT&T Teleholdings, Inc., which is wholly owned by AT&T, Inc.

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioner Illinois Bell Telephone Company respectfully petitions for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) and the court's denial of rehearing en banc (App., *infra*, 25a-26a) are reported at 491 F.3d 685 (7th Cir. 2007). The district court's judgment (App. *infra*, 24a) and prior order granting respondent's motion to compel arbitration (App., *infra*, 19a-23a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 2, 2007. A timely petition for rehearing was denied on August 28, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### PRELIMINARY STATEMENT

Absent review by this Court, the decision in this case by a divided Seventh Circuit panel threatens to nullify the ability of parties to collective bargaining agreements to determine the scope of disputes subject to arbitration.

As is frequently the case, the parties' collective bargaining agreement here limits arbitration to disputes involving the interpretation or application of a specific term or provision of that agreement. It is undisputed that *no* term of the agreement addresses work performance guidelines, the subject of the parties' dispute in this case. Nevertheless, a divided Seventh Circuit panel ordered arbitration. In so doing, the panel majority relied solely on a standard

provision that is contained in virtually all collective bargaining agreements: the recognition clause, which, by its plain terms and under consistent prior understanding, simply affirms the union’s right to represent specified bargaining unit employees.

As Judge Sykes explained in dissent, the panel majority’s holding has “essentially limitless reach.” App., *infra*, 17a. Because the agreement “contains no terms or provisions whatsoever relating to performance guidelines or standards,” “[i]f this dispute is arbitrable as an arguable violation of the recognition clause, then almost any dispute is; any Company action that can be characterized as contrary to the Union’s interests ‘could’ violate the recognition clause if its scope is as boundless as the majority believes.” *Id.* at 12a, 17a-18a (emphasis added).

In short, the panel majority’s decision—on which the Seventh Circuit, which rarely grants rehearing, denied rehearing en banc by a 4-4 vote—would transform the scope of arbitration rights in collective bargaining. It thus raises an important issue warranting plenary review by this Court. Moreover, as explained further below, a grant of certiorari is also warranted because the decision below conflicts with decisions of this Court and with the Ninth Circuit’s decision in *Aluminum Co. of Am. v. UAW*, 630 F.2d 1340, 1344-1345 (9th Cir. 1980) (Kennedy, J.).

## STATEMENT OF THE CASE

**Factual Background.** The collective bargaining agreement (“CBA”) between the International Brotherhood of Electrical Workers, Local 21 (“Union”) and the Illinois Bell Telephone Company (“Company”) includes an arbitration provision that states:

The right to invoke arbitration shall extend *only* to matters which involve:

(A) The interpretation or application of any of the terms or provisions of this Agreement, unless excluded by specific provisions of this Agreement.

(B) The discipline of an employee with six (6) or more months of Net Credited Service.

C.A. App. 22 § 13.16 (emphasis added). This arbitration clause is narrower than the CBA's grievance procedure, which permits the Union to grieve any "differences \* \* \* regarding the interpretation or application of any of the terms or provisions of [the CBA] *or \* \* \* any other grievance or dispute.*" C.A. App. 21 § 13.10 (emphasis added).

In late 2005, the Company informed the Union that it planned to implement new work performance guidelines for its sales staff. After a series of meetings with the Union, the Company made material changes to the guidelines in response to the Union's comments, but the Union nevertheless challenged their implementation. At the Union's request, the Company agreed to expedite the grievance process, but it advised the Union that the grievance was not arbitrable because the guidelines could not "in good faith be said to violate any particular provision of" the CBA. The Company thereafter denied the grievance and reiterated its position that the dispute was not arbitrable because it did not involve the interpretation or application of any CBA term or provision. C.A. App. 10-15.

**District Court Proceedings.** The Union subsequently filed suit in federal district court seeking to compel arbitration. The district court recognized that

the arbitration agreement was, in relevant part, limited to disputes involving the “interpretation or application of \* \* \* the terms or provisions of [the CBA]” but concluded that the dispute was arbitrable because it implicated a provision of the CBA (§ 4.01) entitled “Company – Union Relationship,” which provides:

The Company and the Union recognize that it is in the best interests of both Parties, the employees and the public that all dealings between them be, and continue to be, characterized by mutual responsibility and respect. To insure that this relationship continues and improves, the Company and the Union, and their respective representatives at all levels, shall apply the terms of this Agreement fairly, in accord with its intent and meaning and consistent with the Union’s status as exclusive bargaining representative of all employees in the Unit. Each party shall bring to the attention of all employees in the Unit, including new hires, that their purpose is to conduct themselves in a spirit of responsibility and respect for the measures they have agreed upon to insure adherence to this purpose.

C.A. App. 19; see App., *infra*, 20a.

Although recognizing that this section “is broad and nebulous,” the district court concluded, without elaboration, that it “could apply” to the Company’s decision to implement new performance guidelines and thereby made the Union’s grievance arbitrable. App., *infra*, 23a. Accordingly, the district court granted the Union’s motion to compel arbitration.

**Court of Appeals Proceedings.** A divided panel of the Seventh Circuit affirmed, but its decision did not rest on the provision invoked by the district court. Instead, the panel majority found the dispute arbitrable based on the CBA’s generic recognition clause (§ 1.01), which provides:

The Company recognizes the Union as the exclusive bargaining agent for those employees of the Company in the State of Illinois \* \* \* and Lake and Porter County, Indiana, whose occupations are represented by the Union and whose titles and classifications are included in the Title Summaries listed in Appendices attached to and made a part of this Agreement.

C.A. App. 18.

Judge Kanne, writing for the panel majority, acknowledged that, under the terms of the CBA, arbitration is limited to disputes requiring “interpretation or application of \* \* \* the terms or provisions of [the CBA]” and that “nothing in the CBA specifically pertains to the implementation of performance guidelines.” App., *infra*, 3a. Nonetheless, the panel majority opined, without elaboration or supporting citation, that “an arbitrator *could* interpret the recognition clause to prohibit the Company from making significant changes in the terms and conditions of employment without the consent of the Union.” *Id.* at 6a (emphasis added). The panel majority concluded that, because “[t]he recognition clause is susceptible to any number of interpretations that may impose duties of notice and negotiation upon the Company,” the parties’ dispute had to be arbitrated. *Ibid.*

Judge Sykes dissented, rejecting the majority’s “expansive interpretation” of the CBA’s limited arbitration provision. App., *infra*, at 12a. She concluded that the dispute was not arbitrable because “[t]he CBA contains no terms or provisions whatsoever relating to performance guidelines.” *Ibid.* Moreover, “the recognition clause merely specifies *who*—that is, which union—shall be recognized as the employees’ bargaining agent.” *Ibid.* It does not address substantive terms of employment in general, “much less performance guidelines in particular.” *Id.* at 12a-13a. Accordingly, Judge Sykes concluded, the panel majority’s speculation as to its possible “interpretation is impossible.” *Id.* at 14a.

As noted at the outset, Judge Sykes also voiced “serious concerns about the essentially limitless reach” of the panel majority’s reasoning. App., *infra*, 17a. She explained that if the present dispute is deemed arbitrable as an alleged violation of the recognition clause, then “any Company action that can be characterized as contrary to the Union’s interests ‘could’ violate the recognition clause if its scope is as boundless as the majority believes.” *Id.* at 17a-18a. Further, because recognition clauses and arbitration provisions like those found in the CBA are “routine” in collective bargaining agreements, the decision will compel arbitration of disputes that do not implicate any term of the parties’ agreement. *Id.* at 18a. That prospect, she concluded, would violate “the fundamentally contractual nature of arbitration and the axiom that ‘a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.’” *Ibid.* (quoting *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)).

The Seventh Circuit denied rehearing en banc by a vote of 4-4, with three judges not participating. Chief Judge Easterbrook and Judges Ripple, Manion, and Sykes voted to grant rehearing.

### **REASONS FOR GRANTING THE PETITION**

A union recognition clause can be found in virtually every collective bargaining agreement. Its function is simple and limited: it reaffirms the Union's representative status and defines the scope of the bargaining unit. As the dissent below aptly put it, the panel majority interpreted this generic clause in an "impossible" manner that conflicts with its well-settled meaning.

The effect of the panel's ruling is to impose, in Judge Sykes' phrase, an "essentially limitless" duty to arbitrate *any* union objection to *any* company policy notwithstanding limits on arbitrability set forth in the parties' agreement. App., *infra*, 17a. Because recognition clauses and limited arbitration clauses are routine provisions in collective bargaining agreements, the impact of the decision below cannot be overstated, and the decision merits plenary review by this Court.

Review is also warranted because the ruling below conflicts with the Ninth Circuit's decision in *Aluminum Co. of Am. v. UAW*, 630 F.2d 1340, 1344-1345 (9th Cir. 1980) (Kennedy, J.). There, the Ninth Circuit held that "general implied contractual obligation[s]" are insufficient to require an employer to arbitrate a union's objections to company policies where the collective bargaining agreement does not address those policies and the arbitration provision is limited in scope to disputes involving the terms of the agreement.

Equally significant, the sweeping effects of the Seventh Circuit majority’s decision cannot be reconciled with this Court’s two primary principles of arbitrability: First, “arbitration 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.” *AT&T Techs. v. Commc’ns Workers*, 475 U.S. 643, 648 (1986) (quoting *Warrior & Gulf*, 363 U.S. at 582). Second, “the question of arbitrability \* \* \* is undeniably an issue for judicial determination,” not one to be ceded to an arbitrator. *Id.* at 649.

**A. The Ruling Below Threatens To Expand Drastically And Improperly The Scope Of Arbitration Under Collective Bargaining Agreements.**

1. The recognition clause is one of “the conventional provisions” of a collective bargaining agreement. *Lodge No. 1424, Int’l Ass’n of Machinists v. NLRB*, 362 U.S. 411, 412 (1960); accord 20 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 55:38, at 151 (4th ed. 2001) (the recognition clause is “[a]mong the usual clauses found in collective bargaining agreements”). Its function is simply to recognize the union as the exclusive bargaining agent for the employees subject to the agreement. *Lodge No. 1424*, 362 U.S. at 412; *WILLISTON ON CONTRACTS*, *supra*, § 55:3.<sup>1</sup>

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<sup>1</sup> See also, *e.g.*, FRANCIS A. O’CONNELL, *PLANT CLOSINGS: WORKER RIGHTS, MANAGEMENT RIGHTS AND THE LAW* 73 (1986):

The purpose of the recognition clause in any union contract is generally twofold: From the union’s standpoint it reaffirms, by agreement of the employer, the representative status of the union. From the employer’s standpoint it defines and limits the bargaining unit and the operations or facility covered by the agreement.

This Court recognized that limited function almost fifty years ago, holding that a recognition clause “does not come within the definition of mandatory bargaining” under the NLRA because it does not concern “wages, hours, [or] other terms [or] conditions of employment.” *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349-350 (1958) (quoting 29 U.S.C. § 158(d)).

The limited function of a recognition clause has been reaffirmed consistently by courts, commentators, the NLRB, and practitioners alike. For example, Archibald Cox, who has been called “the father of the [Steelworkers] *Trilogy*,”<sup>2</sup> described the recognition clause as a “stereotyped clause found in almost every contract” and a “standard provision in almost every collective-bargaining agreement.” Archibald Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1420 (1958). Cox explained that “[n]o normal, well-advised employer would boggle over such a clause without an ulterior motive.” *Ibid.* Indeed, in *Reed & Prince Mfg. Co.*, 96 N.L.R.B. 850, 858 (1951), enforced, 205 F.2d 131 (1st Cir. 1953), the NLRB held that the employer had “exhibited bad faith” by its “unreasonable withholding of acquiescence on admittedly trivial matters, such as \* \* \* the [wording of the] recognition clause.” A quarter cen-

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<sup>2</sup> Note, *Arbitration After Communications Workers: A Diminished Role?*, 100 Harv. L. Rev. 1307, 1313, 1325 n.32 (1987) (“Cox was cited three times in the *Trilogy*, and his theory of the collective bargaining relationship was central to *Warrior & Gulf*”). The Steelworkers *Trilogy*, which sets forth fundamental principles of arbitrability in the collective bargaining context, is comprised of *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

tury after Cox's article, Professor Weiler observed that some employers exhibited bad faith by "put[ting] forth highly offensive proposals on matters of *purely symbolic interest* (such as the wording of the recognition clause)." Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 Harv. L. Rev. 351, 359 (1984) (emphasis added).

The courts of appeals also have recognized the narrow purpose of a recognition clause. For example, the Ninth Circuit explained that the purpose of a standard recognition clause is merely to describe which "people" are subject to the collective bargaining agreement. *Boeing Co. v. NLRB*, 581 F.2d 793, 796 (9th Cir. 1978). The court therefore rejected the NLRB's determination that a recognition clause "may be extended by implication to become a Jurisdictional Clause, reserving exclusively for the Union all 'functions' which might normally have been performed by those 'people.'" *Ibid.* The Ninth Circuit's decision relied on an opinion by Justice Clark, sitting by designation on the Seventh Circuit, which similarly rejected the NLRB's attempts to "read a jurisdictional guarantee into a recognition clause." *Univ. of Chi. v. NLRB*, 514 F.2d 942, 944 (7th Cir. 1975) (Clark, J.); accord *Newspaper Printing Corp. v. NLRB*, 692 F.2d 615, 622 (6th Cir. 1982).

Subsequent to *Boeing* and *University of Chicago*, the NLRB aligned itself with these court decisions and determined, in conflict with the panel majority's analysis here, that a recognition clause does not govern the substantive terms and conditions of employment. *Milwaukee Spring Div. of Ill. Coil Spring Co.*, 268 N.L.R.B. 601, 602 (1984), *aff'd*, 765 F.2d 175 (D.C. Cir. 1985). The Board concluded that it was

“not for the Board \* \* \* to create an implied work-preservation clause in every American labor agreement based on \* \* \* recognition provisions,” and it “expressly decline[d] to do so.” *Ibid.* Thus, as these prior court decisions and the expert NLRB have recognized, a recognition clause provides no basis for imposing un-bargained-for obligations in every collective bargaining agreement. Accordingly, a recognition clause cannot serve the broad function of making otherwise non-arbitrable disputes arbitrable. See Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1516 (1959) [hereinafter, Cox, *Reflections*] (arbitration should be denied if the contention that the dispute falls within the scope of the collective bargaining agreement is “patently frivolous”); *UAW v. Acme Precision Prods., Inc.*, 521 F. Supp. 1358, 1362 (E.D. Mich. 1981) (a recognition clause is a “boilerplate harmony provision” and not an agreement “to arbitrate every dispute”).

2. The panel majority’s departure from these prior understandings was improper. Without pointing to any actual contract language that would support such a reading, the majority asserted that an arbitrator could “interpret” the recognition clause to “prohibit the Company from making significant changes in the terms and conditions of employment without the consent of the Union.” App., *infra*, 6a. But as this Court held in *Borg-Warner*, 356 U.S. at 349-350, a standard recognition clause such as the one in this CBA does not address the “terms and conditions of employment.” Those terms and conditions are instead addressed by the substantive provi-

sions of the agreement, which in this instance do not cover performance standards.<sup>3</sup>

Nor does the recognition clause impose the broad requirement, hypothesized by the Seventh Circuit majority, that the Union “consent” to any change in those terms and conditions. Rather than imposing any such substantive obligation, the recognition clause by its plain terms simply states that, for the relevant employees in the relevant areas, the Union will be the entity with which the Company will bargain: “The Company recognizes the Union as the exclusive bargaining agent for those employees of the Company in the State of Illinois \* \* \* and Lake and Porter County, Indiana \* \* \* .” C.A. App. 18; see App., *infra*, 12a.

Since arbitration under this agreement, as under most collective bargaining agreements, is limited, as relevant here, to “interpretation” or “application” of agreement terms (C.A. App. 22 § 13.16), the fact that no agreement term, including the recognition clause, governs the issue of performance standards means that disputes about performance standards are not arbitrable. Of course, the Union could seek to bargain for the kind of broader arbitration rights—rights untethered to any specific substantive term of the agreement—suggested by the panel majority. But there is no basis to read the arbitration and recognition clauses negotiated here (which are similar

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<sup>3</sup> Under established labor law principles, union consent is unnecessary for policy changes that are not limited by the collective bargaining agreement. See *UAW v. NLRB*, 765 F.2d 175, 210 (D.C. Cir. 1985) (if bargaining does not resolve dispute over change to a policy that “is not contained in the contract,” the employer “may unilaterally implement its bargaining proposal with respect to the matter not contained in the agreement”).

to those negotiated in most other labor contracts) into a grant of such rights.

By transforming the CBA's standard recognition clause into the source of a costly and burdensome obligation on the Company to arbitrate disputes about any company policy, the court of appeals departed drastically from the limited and well-settled purpose of the clause, as long understood by courts, commentators, the NLRB, practitioners, and, most important, parties to collective bargaining agreements. Never before has such a clause been interpreted to grant a union unilateral authority to require arbitration of disputes over company policies not addressed by the parties' collective bargaining agreement. Rather, as discussed above, the clause has been described variously as "trivial," a "matter[] of purely symbolic interest," "standard," and "stereotyped."

Indeed, the Seventh Circuit struggled to distinguish its own prior precedent regarding the scope of a recognition clause. See App., *infra*, 7a-9a. In *Indep. Petroleum Workers, Inc. v. Am. Oil Co.*, 324 F.2d 903 (7th Cir. 1963), *aff'd* by an equally divided Court, 379 U.S. 130 (1964), the arbitration clause was "limited to" disputes involving "applications, interpretations, or alleged violations of the terms of [the] agreement," leading the court to raise an obvious question: "The question immediately arises—what terms?" *Id.* at 905-906. The *Independent Petroleum Workers* court rejected the union's reliance on the recognition clause because "[t]he recognition clause makes no reference either to arbitration or to the contracting out of work" and the union's position would mean that "either party by alleging a refusal of the other to bargain with respect to any con-

ceivable issue or controversy would become subject to arbitration.” *Id.* at 906-907.

The panel majority distinguished *Independent Petroleum Workers* on the ground that, in that case, the parties had previously bargained over subcontracting and their agreement included a provision suspending the no-strike clause if the company refused to arbitrate a grievance. App., *infra*, 7a. The majority did not, however, explain how either circumstance would transform a standard recognition clause into a broad arbitration clause.

**3.** The impact of the Seventh Circuit’s decision is staggering. See App., *infra*, 17a (expressing the dissent’s “serious concerns about the essentially limitless reach of today’s decision”). As the NLRB noted, the same basic recognition clause at issue in this case can be found in virtually “every American labor agreement.” *Milwaukee Spring*, 268 N.L.R.B. at 602. Similarly, the arbitration clause at issue, which in relevant part limits arbitration to disputes involving interpretation or application of the CBA, is a common component of collective bargaining agreements. See *Am. Mfg. Co.*, 363 U.S. at 565 (“the standard form” arbitration provision calls for arbitration of “all disputes between the parties ‘as to the meaning, interpretation and application of the provisions of this agreement’”).<sup>4</sup> Accordingly, no longer can parties confidently limit an arbitrator’s jurisdiction to interpret-

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<sup>4</sup> See also BROOK I. LANDIS, VALUE JUDGMENTS IN ARBITRATION 36 (Cornell Univ. Press 1977) (an arbitration clause “limiting the arbitrator’s jurisdiction to ‘any disputes involving the interpretation or application of any provision of this agreement’” is regarded as “the prevalent standard or narrow arbitration clause”).

ing and applying the terms of their agreement: under the Seventh Circuit's reasoning, *any* dispute over *any* company policy can be transformed into an arbitrable dispute simply by alleging that an obligation to arbitrate is implied by the recognition clause.

Given the ubiquity of recognition clauses and arbitration provisions of the sort at issue here, the impact of the decision is certain to be widespread and will impose the significant expense of numerous unbargained-for arbitrations on employers across the country. Because the decision below grossly expands the proper scope of arbitration under collective bargaining agreements and, in so doing, conflicts with the purpose of recognition clauses as consistently articulated by this Court, lower courts, the NLRB, and leading commentators, the Court should grant the petition to address this important question of federal labor law.

4. Finally in this regard, although the breadth of the Seventh Circuit's reasoning and its significant consequences alone warrant review here, it should be noted that this is not the first instance where the circuit courts have evinced confusion as to the proper role of these standard clauses.

Two prior circuit court cases, both cited by the Seventh Circuit majority (App., *infra*, 9a), invoked the recognition clause in holding that disputes over contracting out of work to non-union employees were arbitrable. *E.M. Diagnostic Sys., Inc. v. Local 169, Int'l Bhd. of Teamsters*, 812 F.2d 91, 95-96 (3d Cir. 1987); *Local 1912, Int'l Ass'n of Machinists v. United States Potash Co.*, 270 F.2d 496 (10th Cir. 1959). In those cases, unlike here, the employers were charged with shifting work out of the recognized bargaining unit, arguably implicating the recognition clause.

But see *E.M. Diagnostic*, 812 F.2d at 104 (Garth, J., dissenting) (“the majority’s effort to require arbitration where it is not permitted represents a dramatic departure from established precedent”). In one other case, also cited by the Seventh Circuit (App., *infra*, 9a), the court relied on “just cause,” “health and safety,” and “recognition” provisions in holding that a dispute over a drug control policy was arbitrable, but did not specify which of these provisions the dispute implicated. *Oil, Chem. & Atomic Workers Int’l Union v. Phillips 66 Co.*, 976 F.2d 277, 278-279 (5th Cir. 1992). While not directly on point, these cases demonstrate confusion in the lower courts as to the proper use, if any, of the recognition clause as a basis for arbitration.

#### **B. The Ruling Below Conflicts With The Ninth Circuit’s Ruling In *Alcoa*.**

The decision below conflicts with the Ninth Circuit’s decision in *Aluminum Co. of Am. v. UAW*, 630 F.2d 1340 (9th Cir. 1980) (Kennedy, J.) (“*Alcoa*”). As in this case, the collective bargaining agreement in *Alcoa* permitted grievances of a broad array of disputes, but authorized arbitration of only those disputes that involved interpretation of the agreement. *Id.* at 1342. The underlying dispute in *Alcoa* centered on the union’s objections to a new employee attendance policy that, like the work performance guidelines in this case, was not addressed by the parties’ agreement. *Ibid.*

The union in *Alcoa* contended that the dispute was arbitrable for two reasons: (i) employees might be disciplined for violating the attendance policy in the future, thereby implicating the “just cause” limitation on the employer’s right to discipline (an argument also raised by the Union in this case (R.10, att.

1, at 10); and (ii) the attendance policy violated an implied commitment by the employer to act fairly. 630 F.2d at 1343-1344. In an opinion by then-Judge Kennedy, the Ninth Circuit held that neither contention could make the dispute arbitrable.

In rejecting both of the union's arguments, the Ninth Circuit repeatedly emphasized that general provisions in an agreement that explicitly limits the scope of arbitrable disputes should not be read in a manner that would render virtually any dispute arbitrable. Thus, in finding it implausible that the parties intended to allow an arbitrator to adjudicate the propriety of any company policy because it might result in future disciplinary action, the court pointed to the lack of "any limiting principle to contain the logic of [the union's] position, which would seemingly make arbitrable any company policy [that] could conceivably lead to disciplinary action." 630 F.2d at 1344. Under the agreement, even if the attendance plan were "unfair," the parties had agreed not to arbitrate that issue, but rather to leave it "to the collective bargaining process, negotiation, the economic strength of the parties, and such judicial action as may be available, at least until the policy is applied in particular cases." *Ibid.*

Similarly, the court rejected the claim that the agreement could be arbitrated based on an implied agreement to act in good faith because that too would grant essentially limitless arbitration rights: "nearly any employer practice which an employee thought was unfair seemingly could be taken to arbitration on the theory that the employer impliedly promised not to take unfair actions." 630 F.2d at 1344. As then-Judge Kennedy reasoned, nothing in this Court's precedents requires a court to turn a blind

eye to the actual provisions of the collective bargaining agreement limiting the scope of arbitration and to compel arbitration based on such a limitless theory. *Ibid.*

The ruling below conflicts with *Alcoa*. The Ninth Circuit gave meaning to the agreement terms limiting arbitration to specific circumstances by rejecting broad readings of general or implied terms that would authorize arbitration of essentially all disputes. By contrast, in this case, the Seventh Circuit relied on a provision that, by its terms, imposes no substantive duties as a basis to mandate arbitration and thus effectively to override the limits in the CBA's arbitration clause. App., *infra*, 12a, 17a. This Court should grant the petition to resolve this conflict.

**C. The Ruling Below Departs From The Fundamental Principles Of Arbitrability Set Forth By This Court.**

The “first principle” of the *Steelworkers Trilogy* is that, notwithstanding the federal policy favoring arbitration, “arbitration 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.” *AT&T Techs.*, 475 U.S. at 648 (quoting *Warrior & Gulf*, 363 U.S. at 582). The Court has consistently reaffirmed that the scope of any duty to arbitrate is a function of the governing contract.<sup>5</sup>

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<sup>5</sup> See *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 201 (1991) (“arbitration is a matter of consent [and] will not be imposed upon parties beyond the scope of their agreement”); *Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers*, 430 U.S. 243, 250-251 (1977) (“a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do

The parties agreed to arbitrate “only” matters involving the interpretation or application of a CBA term or provision. App., *infra*, 2a-3a. The court of appeals majority acknowledged both this limitation and the fact that “nothing in the CBA specifically pertains to the implementation of performance guidelines”—*i.e.*, the subject matter of the underlying dispute. *Id.* at 3a. That should have been the end of the court’s inquiry, for the parties plainly did *not* agree to arbitrate disputes that do not pertain to the provisions of the CBA.

Nonetheless, the panel majority proceeded to speculate that there *might* be a connection between the dispute and the CBA’s recognition clause and to conclude that such a possible connection was sufficient to compel arbitration. Compelling arbitration of matters that the parties agreed to exclude from the set of arbitrable matters—merely because an arbitrator might devise some connection—cannot be reconciled with the *Steelworkers Trilogy*’s first principle that a party cannot be forced to arbitrate claims it has not in fact agreed to arbitrate.

The Seventh Circuit decision likewise contravenes “[t]he second rule” of the *Steelworkers Trilogy*, “which follows inexorably from the first”: “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.” *AT&T Techs.*, 475 U.S. at 649. This rule flows from and respects the expectations of contracting parties that courts, not arbitrators, will decide issues of substantive arbitrability

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so”); *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 374 (1974) (“No obligation to arbitrate a labor dispute arises solely by operation of law”).

“[u]nless the parties clearly and unmistakably provide otherwise.” *Ibid.*

The requirement that courts independently decide issues of substantive arbitrability is central to the federal policy favoring arbitration. “[T]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be ‘drastically reduced’ \* \* \* if a labor arbitrator had the ‘power to determine his own jurisdiction.’” *AT&T Techs.*, 475 U.S. at 651 (quoting Cox, *Reflections*, 72 Harv. L. Rev. at 1509). If the rule were otherwise, “an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but, instead, would be empowered ‘to impose obligations outside the contract limited only by his understanding and conscience.’” *Ibid.* (quoting Cox, *Reflections*, 72 Harv. L. Rev. at 1509). Thus, if a court cedes this authority to an arbitrator, it undermines federal policy both by making agreements to arbitrate less attractive and by diminishing the utility of collective bargaining agreements in “setting out the rights and duties of the parties.” *AT&T Techs.*, 475 U.S. at 651.

Although the Seventh Circuit majority acknowledged this principle, the effect of its decision is to cede the issue to the arbitrator. Despite the lack of any reference to work performance in any term or provision of the CBA and the limited function of the recognition clause, the Seventh Circuit speculated that “an arbitrator *could* interpret the recognition clause to prohibit the Company from making significant changes in the terms and conditions of employment without the consent of the Union.” App., *infra*, 6a (emphasis added). The court also suggested, without further elaboration, that an arbitrator might ar-

rive at some interpretation of the recognition clause “that *may* impose duties of notice and negotiation” and thus of arbitration. *Ibid.* (emphasis added). Having floated the possibility of such implied duties, however, the court failed to take the necessary next step and determine whether they *actually* exist under the CBA.

Under this Court’s precedent, the court below was obligated to determine whether any such implied term or provision actually exists because the parties agreed to submit to arbitration “only” those disputes that actually involve the interpretation or application of a CBA term or provision. In refraining from resolving this issue and insisting that “such interpretation is the province of the arbitrator” (App., *infra*, 6a), the Seventh Circuit repeated the error it made in *AT&T Technologies*. See *Commc’ns Workers of Am. v. W. Elec. Co.*, 751 F.2d 203, 205 (7th Cir. 1984) (holding that resolution of substantive arbitrability was for the arbitrator), vacated sub nom. *AT&T Techs.*, 475 U.S. at 643.

The rule that arbitrability “is undeniably an issue for judicial determination” (*AT&T Techs.*, 475 U.S. at 649) is no mere technicality. Rather, it is essential to the consensual nature of arbitration and necessary to protect the bargained-for contractual rights of the parties. See Cox, *Reflections*, 72 Harv. L. Rev. at 1509 (explaining that, in general, the limits of “the conventional arbitration clause” reflect a bargained-for “safeguard against the arbitrator’s imposition of significant obligations not contemplated by the agreement and quite beyond its scope”). The Court should grant the petition because, as it did in *AT&T Technologies*, the Seventh Circuit has repudi-

ated its judicial responsibility to determine arbitrariness.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2007

# **APPENDIX**

**APPENDIX A**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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No. 06-2335

INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS, LOCAL 21,  
*Plaintiff-Appellee,*

*v.*

ILLINOIS BELL TELEPHONE COMPANY,  
*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Northern District of Illinois,  
Eastern Division.  
No. 06 C 705—George W. Lindberg, *Judge.*

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ARGUED NOVEMBER 8, 2006—DECIDED JULY 2, 2007

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Before CUDAHY, KANNE, and SYKES, *Circuit Judges.*

KANNE, *Circuit Judge.* After Illinois Bell Telephone Company (“Company”) refused to arbitrate a grievance, the International Brotherhood of Electrical Workers, Local 21 (“Union”) filed a motion to compel arbitration in federal district court. Under the terms of the parties’ collective bargaining agree-

ment (“CBA”), the district court found the grievance arbitrable and granted the motion. We affirm.

### I. BACKGROUND

The parties’ CBA has been in effect since June 27, 2004. In late 2005, the Company informed the Union that it planned to implement new “consumer performance management guidelines.” In the past, employees were evaluated on a “work flow” system. Essentially, employees were required to perform specific tasks in response to actions taken by the customers with whom they dealt. The new guidelines would replace the work flow system with a sales evaluation system, wherein employees would be evaluated based on actual sales made. If an employee should fail to meet his sales requirements, he could be disciplined and eventually fired.

Upon notice of the Company’s plans, the Union filed a grievance challenging the implementation of the guidelines. The parties engaged in a series of discussions regarding the guidelines, and the Company made some changes to the program. In the end, however, the parties could not resolve their dispute. The Union requested that the grievance be submitted to arbitration, but the Company refused, asserting that the grievance was not arbitrable under the terms of the CBA. The Union then filed its motion to compel arbitration in federal court pursuant to the Federal Arbitration Act, 9 U.S.C. § 4.

The arbitration clause, § 13.16 of the CBA, defines what topics are arbitrable:

The right to invoke arbitration shall extend only to matters which involve:

(A) The interpretation or application of any of the terms or provisions of this

Agreement, unless excluded by specific provisions of this Agreement.

(B) The discipline of an employee with six (6) or more months of Net Credited Service.

To invoke the arbitration clause, the Union points to several provisions of the CBA, the interpretation or application of which may be involved in this dispute. First, the recognition clause, § 1.01 of the CBA, states: “The Company recognizes the Union as the exclusive bargaining agent for [the] employees of the Company . . . .” Second, § 4.01 requires “mutual responsibility and respect” and a fair application of the CBA “in accord with its intent and meaning and consistent with the Union’s status as exclusive bargaining representative.” Third, the CBA includes a “no strike” provision, strictly prohibiting the Union from striking under any circumstance. None of the above provisions have been explicitly excluded from arbitration, and nothing in the CBA specifically pertains to the implementation of performance guidelines.

## II. ANALYSIS

“We review the district court’s ruling to compel arbitration de novo.” *American United Logistics, Inc. v. Catellus Dev. Corp.*, 319 F.3d 921, 929 (7th Cir. 2003) (citing *Harter v. Iowa Grain Co.*, 220 F.3d 544, 549-50 (7th Cir. 2000)). “[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.” *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)); *Int’l Med. Group, Inc. v. Am. Arbitration Ass’n, Inc.*, 312 F.3d 833, 842 (7th

Cir. 2002). The arbitrator derives his authority to resolve the parties' dispute from their agreement to allow him to do so. *Int'l Med. Group, Inc.*, 312 F.3d at 842. Unless the parties clearly provide otherwise, the question of arbitrability is properly decided by a court, not the arbitrator. *Id.*

When resolving arbitrability disputes, a court must bear in mind the liberal federal policy in favor of arbitration agreements. *James v. McDonald's Corp.*, 417 F.3d 672, 676-77 (7th Cir. 2005); *see* 9 U.S.C. §§ 2, 3. "[W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *AT&T Techs.*, 475 U.S. at 650 (quoting *Warrior & Gulf*, 363 U.S. at 582-83); *see Continental Cas. Co. v. American Nat. Ins. Co.*, 417 F.3d 727, 730-31 (7th Cir. 2005).

When determining whether the parties have agreed to arbitration, a court must be careful not to consider the merits of the underlying claim. *AT&T Techs.*, 475 U.S. at 650. If the dispute falls within the scope of the parties' arbitration agreement, even a seemingly frivolous claim must be submitted to arbitration. *Id.*; *see Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 466 F.3d 577, 581 (7th Cir. 2006). However, the arbitrator's jurisdiction remains limited by the terms of the CBA. *Am. Postal Workers Union, AFL-CIO, Milwaukee Local v. Runyon*, 185 F.3d 832, 835 (7th Cir. 1999). Thus, under the terms of § 13.16(A) of the CBA, an arbitrator's authority is limited to resolving

disputes that involve the interpretation or application of a term of the CBA.

The parties have spent much time debating whether the arbitration clause in the CBA is “broad” or “narrow.” While the utility of such categorization, without context, is dubious at best, the clause does appear to be in line with those that have been considered “broad.” See *AT&T Techs.*, 475 U.S. at 650 (finding arbitration clause broad where applied to “differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder”); *Int’l Union of Operating Eng’rs, Local Union 103 v. Indiana Constr. Corp.*, 13 F.3d 253, 254, 257 (7th Cir. 1994) (finding arbitration clause broad where applied to “any dispute . . . concerning the interpretation or application of the terms of this contract,” plus a specific exclusion for jurisdictional disputes); *Certified Grocers of Illinois, Inc. v. Produce, Fresh & Frozen Fruits & Vegetables, Fish, Butter, Eggs, Cheese, Poultry, Florist, Nursery, Landscape & Allied Employees, Drivers, Chauffeurs, Warehousemen & Helpers Union, Chicago and Vicinity, Illinois, Local 703*, 816 F.2d 329, 329-30 (7th Cir. 1987) (finding arbitration clause broad where applied to “any difference . . . between the Employer and the Union concerning any interpretation or application of any of the provisions of this Agreement”).

In order to determine whether the parties have agreed to submit this particular dispute to arbitration, we must turn to the specific language of the arbitration clause. When interpreting a contract, we look first to the plain meaning of the provision, and strive to avoid absurd results. See *County of McHenry v. Ins. Co. of the West*, 438 F.3d 813, 822 (7th Cir. 2006). On its face, the arbitration clause in

this case applies to any dispute that would require the adjudicator to interpret or apply any term or provision of the CBA, so long as another provision of the CBA does not specifically exclude that topic from arbitration.

The district court based its finding of arbitrability upon § 4.01, the mutual respect and responsibility clause. The Union has also argued that this dispute involves the interpretation and application of the recognition clause, § 1.01, and thus requires the Company to submit the dispute to arbitration. We prefer to begin our analysis with the recognition clause.

An arbitrator could interpret the recognition clause, which obligates the Company to recognize the Union as the employees' sole bargaining representative, to require only that the Company refrain from dealing with other labor organizations. Alternatively, an arbitrator could interpret the recognition clause to prohibit the Company from making significant changes in the terms and conditions of employment without the consent of the Union. The recognition clause is susceptible to any number of interpretations that may impose duties of notice and negotiation upon the Company. The point is that such interpretation is the province of the arbitrator—not of this court. So long as the recognition clause is susceptible to an interpretation wherein the Company's actions have breached its duties, and the recognition clause is encompassed by the arbitration provision, we must compel arbitration. *See AT&T Techs.*, 475 U.S. at 650 (citing *Warrior & Gulf*, 363 U.S. at 582-83).

The Company has argued that the recognition clause cannot support arbitrability, and points to

this court's 1963 opinion in *Indep. Petroleum Workers of Am., Inc. v. American Oil Co.*, in support. 324 F.2d 903 (7th Cir. 1963), *aff'd mem. by an equally divided Court*, 379 U.S. 130 (1964). *Independent Petroleum Workers* involved a labor dispute that arose when a company subcontracted work that was formerly performed by union workers. *Id.* at 904. The Union attempted to support arbitrability with the recognition clause, where the arbitration clause provided for mandatory arbitration of “[q]uestions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.” *Id.* at 905.

In response to the union's argument in *Indep. Petroleum Workers*, this court stated: “This position, if accepted, means that either party by alleging a refusal of the other to bargain with respect to any conceivable issue or controversy would become subject to arbitration. Plaintiff's position is devoid of logic.” *Id.* at 906-07. The circumstances of the *Indep. Petroleum Workers* case, however, were very different than the case at hand. First, the union in that case “for many years had sought the inclusion of a clause in the collective bargaining agreement specifically prohibiting or limiting” the right at issue. *Id.* at 907. Thus, the issue of subcontracting had already been negotiated during the regular course of labor-management bargaining. This court found that point both relevant and significant. *Id.*

Second, the CBA in *Indep. Petroleum Workers* contained a rather unique provision which suspended the no-strike clause when the company refused to arbitrate a grievance. *Id.* at 905. Arbitration provisions are generally considered reciprocity for no-strike provisions. *Int'l Bhd. of Teamsters, Chauff-*

*feurs, Warehousemen and Helpers of Am., Local Union No. 371 v. Logistics Support Group*, 999 F.2d 227, 230-31 (7th Cir. 1993). A recognition clause very well might take on a different meaning in a CBA that contains a strict no-strike provision, because a refusal of the company to arbitrate would otherwise leave the union without options. If the Company can unilaterally change the conditions of employment, refuse to arbitrate, and still prohibit the Union from striking, then the purposes of the recognition clause and the Union itself are significantly undermined. This makes the case before us readily distinguishable from *Indep. Petroleum Workers*.

Finally, our decision in *Indep. Petroleum Workers* was not based solely on the merits. We also held that, because the union had already attempted to compel arbitration of the same issue in a previous suit, collateral estoppel precluded relitigation of the issue. 324 F.2d at 909. Thus, a determination on the merits was not essential to the disposition of the case.

*Indep. Petroleum Workers* predates the Supreme Court's opinion in *AT&T Techs.*, which reaffirmed the strong presumption in favor of arbitration set forth in the *Steelworkers* Trilogy. 475 U.S. 643 (1986); see *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.* 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Supreme Court precedent constrains a broad reading of *Indep. Petroleum Workers*, which centered around parties with a unique bargaining history and CBA. See *Mobil Oil Corp. v. Local 8-766, Oil, Chemical & Atomic Workers Int'l Union*, 600 F.2d 322, 328-29 (1st Cir.

1979) (“The court’s reasoning on the first issue, even if treated as more than dicta to its collateral estoppel holding, is not pertinent to this case. The arbitration clause in the instant dispute does not involve a voluntary arbitration provision . . . .”); *Humble Oil & Refining Co. v. Indep. Indus. Workers’ Union*, 337 F.2d 321, 324 (5th Cir. 1964). Indeed, a number of our sister circuits have found that allegations that a CBA’s recognition clause has been violated can validly support arbitrability. *E.g. Oil, Chemical & Atomic Workers Int’l Union v. Phillips 66 Co.*, 976 F.2d 277, 278-79 (5th Cir. 1992); *E.M. Diagnostic Sys., Inc. v. Local 169, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am.*, 812 F.2d 91, 96 (3d Cir. 1987); *Local 1912, Int’l Ass’n of Machinists v. United States Potash Co.*, 270 F.2d 496, 499 (10th Cir. 1959).

While an equally divided Supreme Court affirmed *Indep. Petroleum Workers* without discussion, the Supreme Court has instructed that “summary affirmances have considerably less precedential value than an opinion on the merits,” and such value “can extend no farther than the precise issues presented and necessarily decided by those actions.” *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180, 182 (1979); *see also Boggs v. Boggs*, 520 U.S. 833, 849 (1997); *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979). From the Supreme Court’s equally divided summary affirmance in *Indep. Petroleum Workers*, we can infer no comment on its approval or disapproval of the use of recognition clauses to support arbitrability.

Given the significant differences between the CBA and bargaining history in this case and that in

*Indep. Petroleum Workers*, we conclude that *Indep. Petroleum Workers* is not controlling in this case. Additionally, the Supreme Court's summary affirmation sheds no light on the viability of the Union's arguments because the decision may very well have rested upon the collateral estoppel holding.

The Union in this case alleges that the Company's actions constitute a breach of the recognition clause of the CBA, § 1.01. Up until the proposed implementation of the new performance guidelines, employees were evaluated based upon the tasks they performed. If they performed the tasks that the Company told them to at the appropriate times, they received a favorable evaluation and no discipline resulted. The proposed guidelines would require the employees to deliver results. If the employees do not meet their sales quotas, they will be disciplined and possibly discharged. At the time that the current CBA was bargained over, the Union had no indication that such a change was on the horizon. Attempts at bargaining between the Company and the Union prior to implementation of the guidelines reached impasse, and the Union has alleged that this bargaining was not in good faith. Without the ability to strike or compel arbitration, the Union has no recourse.

We cannot say with positive assurance that the arbitration clause is not susceptible of an interpretation wherein a good faith allegation that the recognition clause of the CBA has been violated binds the Company to mandatory arbitration. *See AT&T Techs.*, 475 U.S. at 650. The parties could have exempted the recognition clause from arbitration, but chose not to. The Union has alleged that the Company did not bargain in good faith prior to implemen-

tation of the guidelines and has submitted employee statements alleging that unilateral implementation of the performance guidelines threatens the continued relationship between the parties. R. 14-4. Given the presumption in favor of arbitrability, the Union has met its burden. We hold that the recognition clause is an adequate basis for arbitration in this case, and therefore need not address the Union's other arguments.

### III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

SYKES, *Circuit Judge*, dissenting. I respectfully dissent. The presence of an arbitration clause in a contract creates a presumption in favor of arbitration, but this means only that doubts about whether a particular dispute is covered are resolved in favor of coverage; "arbitration 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 of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648-50 (1986); *Int'l Ass'n of Machinists & Aerospace Workers, Progressive Lodge No. 1000 v. Gen. Elec. Co.*, 865 F.2d 902, 904 (7th Cir. 1989). The presumption of arbitrability is overcome when "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the

asserted dispute.” *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-83; *AT&T Techs.*, 475 U.S. at 650.

The arbitration clause in the parties’ collective bargaining agreement (“CBA”) provides: “The right to invoke arbitration shall extend *only* to matters which involve: (A) The interpretation or application of any of the terms or provisions of this Agreement, unless excluded by specific provisions of this Agreement. (B) The discipline of an employee with six (6) or more months of Net Credited Service.” (Emphasis added.) The use of the term “only”—obviously a term of limitation—suggests a somewhat less expansive interpretation than that urged by the Union and adopted by my colleagues. The dispute at issue here is about performance guidelines, and it is arbitrable *only* if it involves the interpretation or application of a term or provision in the CBA, or the discipline of an employee.

The CBA contains no terms or provisions whatsoever relating to performance guidelines or standards, and this dispute concerns the performance guidelines policy itself, not the discipline of an employee pursuant to it. Nonetheless, the majority concludes that the dispute is arbitrable because it “could” involve the interpretation of the so-called “recognition” clause of the CBA. Majority op. at 6. That provision, § 1.01 of the CBA, states as follows: “The Company recognizes the Union [Local 21] as the exclusive bargaining agent for those employees of the Company in the State of Illinois . . . and Lake and Porter County [sic], Indiana.”

On its face, the recognition clause merely specifies *who*—that is, which union—shall be recognized as the employees’ bargaining agent; it does not address any substantive topics pertaining to employ-

ment terms and conditions as a general matter, much less performance guidelines in particular. Nor does it articulate any duties beyond recognition or describe the scope of bargaining. Scope of bargaining issues, and the rights and obligations arising from bargaining impasses or violations, are governed by the National Labor Relations Act, 29 U.S.C. § 158 *et seq.*, and a well-developed body of judicial and NLRB decisional law interpreting the statutory duty to bargain collectively and in good faith. *See generally NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 498 (1960); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); *Inland Tugs v. NLRB*, 918 F.2d 1299, 1307-08 (7th Cir. 1990); *Kankakee-Iroquois Co. Employers' Ass'n v. NLRB*, 825 F.2d 1091, 1094 (7th Cir. 1987); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. NLRB*, 765 F.2d 175, 179-80 (D.C. Cir. 1985). There is nothing in this generic recognition clause that could be interpreted to expand the parties' statutory bargaining duties or the derivative rights and obligations flowing from bargaining impasses or illegal bargaining behavior.

In any event, the Union does not assert that the Company failed or refused to bargain in good faith over the performance guidelines. Indeed, the record reflects that the Company gave notice of the new policy and offered to meet with Union representatives to bargain over it. The Union has historically taken the position that it will not formally "bargain" over policies of this sort but agreed to meet for informal discussions with the Company. Accordingly, meetings were held and changes made to the guidelines as a result of the Union's input and objections to specific aspects of the policy.

So it is not surprising that the Union does not argue that the Company failed or refused to bargain in good faith, beyond suggesting that what occurred was “not bargaining in any real sense,” whatever that means. The Union has not alleged, for example, that bargaining had not reached impasse before the Company imposed the performance guidelines. See *Inland Tugs*, 918 F.2d at 1307 (“In the event of impasse, the employer is permitted to make unilateral changes in conditions of employment, but only as to matters that have been previously offered to the union.”); *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 765 F.2d at 179 (“Where a mandatory subject [of bargaining] is not contained in the contract, an employer must bargain in good faith to impasse with union representatives; if no agreement is reached, the employer may unilaterally implement its bargaining proposal with respect to the matter not contained in the agreement.”). The Union’s grievance challenges the performance guidelines themselves, not the bargaining conduct of the Company.

The majority concludes that the dispute is arbitrable because the recognition clause “could” be interpreted “to prohibit the Company from making significant changes in the terms and conditions of employment without the consent of the Union.” Majority op. at 6. Such an interpretation is impossible; it would require the arbitrator to completely rewrite the recognition clause, engrafting a duty that is not there. Indeed, such an interpretation would contradict well-settled principles in the case law pertaining to the statutory duty to bargain collectively and establishing the rights and obligations that arise from good-faith bargaining impasses and illegal bargaining demands. While a mandatory subject of bargain-

ing contained in a pre-existing collective bargaining agreement may not be altered without consent, an employer is permitted to unilaterally implement new employment conditions *not* contained in the agreement after bargaining in good faith to impasse. See *Inland Tugs*, 918 F.2d at 1307-08; *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 765 F.2d at 179. Also, an unfair labor practice on the part of a union suspends the duty to bargain and permits the employer to unilaterally implement new conditions of employment. *Inland Tugs*, 918 F.2d at 1308.

Because the performance guidelines are not contained in the current CBA, the Company has a good-faith bargaining duty under the NLRA but no duty to obtain consent from the Union before implementing the policy. The “no strike” provision in the CBA does not leave the Union without recourse; its remedies are in the collective bargaining process and the NLRA. The recognition clause simply is not susceptible of an interpretation that would vest the Union with the sort of veto power suggested by the majority.

The out-of-circuit case law cited by my colleagues is either distinguishable or badly reasoned. In *Oil, Chemical & Atomic Workers International Union v. Phillips 66 Co.*, 976 F.2d 277, 278-79 (5th Cir. 1992), the court held that a labor/management dispute about an employee drug testing policy was arbitrable because it arguably violated the collective bargaining agreement’s recognition, just cause, and health-and-safety clauses. The court’s decision did not specifically or solely rely on the agreement’s recognition clause, as the majority opinion does here.

*E.M. Diagnostic Systems, Inc. v. Local 169, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 812 F.2d 91, 96 (3d Cir. 1987), involved a dispute about the employer's right to subcontract work outside the bargaining unit. The collective bargaining agreement provided for arbitration of disputes "arising out of a claimed violation of this agreement" but also contained a management rights clause explicitly reserving to the employer the right to subcontract work without interference from the union. A divided Third Circuit held the dispute was arbitrable. It was enough, the majority said, if the subject matter of the grievance fell within the "zone of interests" protected by the collective bargaining agreement. *Id.* An unfettered right to subcontract, the majority concluded, "would include the right to subcontract all work of the bargaining unit and would be inconsistent with the agreement's recognition of the Union as the bargaining agent for the Company's employees." *Id.* The dissenting judge objected that the "majority [has] redrawn the parties' Agreement," nullifying the management reservation of rights clause by way of an unbounded interpretation of the recognition clause. *Id.* at 97-98 (Garth, J., dissenting). The majority in *E.M. Diagnostics* cited no authority for its "zone of interests" approach to arbitrability questions.

Finally, *Local 1912, International Ass'n of Machinists v. United States Potash Co.*, 270 F.2d 496, 499 (10th Cir. 1959), also addressed the arbitrability of a dispute about subcontracting, although in this case the parties' agreement was silent on the subject. The Tenth Circuit held that because subcontracting could have the effect of "injuring the union as an effective bargaining unit," the dispute implicated the recognition clause of the contract and was therefore

arbitrable. This holding was based on the court's rather expansive view of its interpretive task: "It would stifle the underlying purposes of the whole agreement to construe it according to its dry words. It is for us to put meat on the skeleton rather than tear the flesh from the bones." *Id.* at 498. This is hyperbole, not reasoning. I find none of these cases persuasive.

The Union argues in the alternative that § 4.01 of the CBA, the "mutual responsibility and respect" clause, is implicated in this dispute. In that clause, the parties "recognize" that "all dealings between them be, and continue to be, characterized by mutual responsibility and respect" and that the terms of the CBA shall be applied "fairly in accord with its intent and meaning and consistent with the Union's status as exclusive bargaining representative." Because the CBA is silent about performance guidelines or standards, the Company cannot be guilty of "unfairly" applying a term of the CBA by adopting the guidelines. The Union has made no effort to identify how the performance guidelines policy itself might reflect a lack of "mutual responsibility and respect."

Accordingly, the arbitration clause—which covers only those disputes that involve an interpretation of a term or provision of the CBA or the discipline of an employee—is not reasonably susceptible of an interpretation that covers this dispute. The parties' dispute over the performance guidelines is not arbitrable.

In closing, I have serious concerns about the essentially limitless reach of today's decision. If this dispute is arbitrable as an arguable violation of the recognition clause, then almost any dispute is; any Company action that can be characterized as con-

trary to the Union's interests "could" violate the recognition clause if its scope is as boundless as the majority believes. Recognition clauses of this sort are routine in collective bargaining agreements, as are arbitration clauses that limit arbitration to disputes involving an interpretation or application of the terms of the parties' agreement. Henceforward, recognition clauses will be invoked as malleable enough to compel arbitration of disputes that do not squarely implicate any other term or provision of the contract. In my judgment, this violates the fundamentally contractual nature of arbitration and the axiom that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf Navigation Co.*, 363 U.S. at 582; *AT&T Techs.*, 475 U.S. at 648-50.

**APPENDIX B**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS**

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LOCAL UNION NO. 21

*v.*

ILLINOIS BELL TELEPHONE COMPANY

Case Number 06 C 705

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George W. Lindberg, Judge

April 4, 2006

Plaintiff's motion to compel arbitration [1] is granted. The parties are ordered to arbitrate plaintiff's December 22, 2005 grievance under the terms of the parties' collective bargaining agreement. If plaintiff intends to proceed with its request for fees and costs, plaintiff must file a brief in support of that request by 4/11/06. Otherwise, this case will be dismissed with prejudice because all other disputed issues have been resolved.

**STATEMENT**

Plaintiff, IBEW Local No. 21 ("IBEW"), moves pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, to compel defendant, Illinois Bell Telephone Co. ("Bell"), to arbitrate IBEW's grievance. For the reasons set forth below, the motion to compel is granted.

The following background facts are taken from the parties' pleadings, including attached exhibits and affidavits. *See Capitol Leasing Co. v. FDIC*, 999 F.3d 188, 191 (7th Cir. 1993). On June 27, 2004, IBEW and Bell entered into a Collective Bargaining Agreement ("CBA"). Section 13.16 of the CBA, entitled Arbitrable Topics, provides for arbitration under the following circumstances:

The right to invoke arbitration shall only extend to matters which involve:

(A) The interpretation or application of any of the terms or provisions of this Agreement, unless excluded by specific provisions of this Agreement.

(B) The discipline of an employee within six (6) or more months of Net Credited Service.

Section 4.01 of the CBA states, in pertinent part:

[Bell] and [IBEW] recognize that it is in the best interests of both Parties, the employees and the public that all dealings between them be, and continue to be, characterized by mutual responsibility and respect. To insure that this relationship continues and improves, [Bell] and [IBEW], and their respective representatives at all levels, shall apply the terms of this Agreement fairly, in accord with its intent and meaning and consistent with [IBEW's] status as exclusive bargaining representative of employees in the Unit. . . .

Neither party asserts that a specific provision of the CBA excludes arbitration regarding the interpretation or application of Section 4.01.

In late 2005, Bell informed IBEW that it intended to implement Consumer Performance Management Guidelines ("Guidelines") that would apply

to Bell employees who were members of the IBEW and covered by the CBA. Under the proposed Guidelines, IBEW member employees could be disciplined and discharged if they did not meet certain performance standards. In a letter dated December 22, 2005, IBEW informed Bell that it was grieving the proposed implementation of the Guidelines. In the grievance, IBEW stated that the proposed Guidelines violated, *inter alia*, Articles 1, 4 and 13 of the CBA. IBEW requested that Bell escalate its grievance to the third step of the grievance procedures outlined in the CBA. Further, in the event its grievance was not resolved favorably, IBEW requested that Bell agree to arbitrate the grievance.

In a letter dated January 18, 2006, Bell informed IBEW that it would accelerate the grievance regarding the Guidelines to the third step of the grievance procedures. Bell also stated that the event the grievance procedures did not resolve the issue, it would not agree to arbitrate the grievance because in light of Section 13.16 of the CBA, Bell did not believe the issue was arbitrable. The step three grievance meeting did not resolve the grievance and IBEW filed the instant motion to compel Bell to arbitrate its grievance regarding the implementation of the Guidelines.

The FAA, 9 U.S.C. § 1 *et seq.*, governs the interpretation, validity and enforcement of arbitration clauses in state and federal courts. The court's role in an action to compel arbitration is limited to determining whether the asserted grievance is covered by the arbitration provision in the parties' CBA. *Int'l Union of Operating Engineers, Local 103 v. Indiana Construction Corp.*, 910 F.2d 450, 452 (7th Cir. 1990). This is a pure matter of contract interpreta-

tion and Bell cannot be required to arbitrate IBEW's grievance if the language of Section 13.16 of the CBA does not provide for arbitration of the disputed grievance. *AT&T Tech. v. Communication Workers of Am.*, 475 U.S. 643, 648-49 (1986). This narrow legal determination does not involve looking into the substance or merits of the grievance. *See United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960). The Court also notes that because the parties' CBA contains an arbitration provision, there is a presumption in favor of arbitrability. *Local 232, Allied Indus. Workers of Am. v. Briggs & Stratton Corp.*, 837 F.2d 782, 784 (7th Cir. 1988). Therefore, IBEW's motion should not be denied unless "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers v. Warriors & Gulf Navigation Co.*, 363 U.S. 574, 582-83.

Both parties agree that the arbitration clause in their CBA creates a right to arbitrate matters involving "[t]he interpretation or application of any of the terms or provisions of [the CBA]." In the disputed grievance, IBEW alleges that Bell violated Articles 1, 4 and 13 of the CBA by implementing the Guidelines. The Court first turns to the parties' arguments regarding the applicability of Article 4 as a grounds for compelling arbitration of IBEW's grievance. This issue is dispositive of the instant motion. Section 4.01 of Article 4 of the CBA provides that the parties' dealings with each other be "characterized by mutual responsibility and respect" and that the parties "apply the terms of the [CBA] fairly" and in accord with the CBA's intent and meaning and consistent with IBEW's status as the exclusive bargaining represen-

tative of all employees. As stated above, neither parties asserts that Section 4.01 is excluded from the scope of CBA's arbitration provision.

The language of Section 4.01 is broad and nebulous. What constitutes "mutual responsibility and respect"? What is a fair application of the terms of the CBA? What is the CBA's intent and meaning? This Court is not tasked with answering those questions, or with addressing the substance of IBEW's grievance. Instead, this Court is solely tasked with determining whether IBEW's grievance alleges an arbitrable topic as defined in Section 13.16 of the CBA. In other words, the Court must determine whether the language of Section 4.01 could apply to Bell's decision to implement the Guidelines, as IBEW has alleged in its grievance. Section 13.16 clearly covers the interpretation and application of Section 4.01 and the language of Section 4.01 could apply to Bell's decision to implement the Guidelines. Therefore, in light of the presumption of arbitrability and because the Court cannot say with possible assurance that Section 13.16 does not cover IBEW's grievance, the motion to compel arbitration is granted.

Finally, because the Court found that IBEW's reference to a violation of Article 4 in its grievance provides an adequate ground to compel arbitration of the grievance under Section 13.16 of the CBA, the Court will not address IBEW's other bases for compelling arbitration.

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**APPENDIX C**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

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**LOCAL UNION NO. 21 OF THE  
INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS**

*v.*

**ILLINOIS BELL TELEPHONE COMPANY**

Case Number 06 C 705

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**JUDGMENT IN A CIVIL CASE**

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of Local 21 and against Defendant Illinois Bell Telephone Company ("Illinois Bell"), and that Illinois Bell is ordered to proceed to arbitration on Local 21's grievance.

Date: 4/25/2006

**APPENDIX D**

**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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No. 06-2335

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 21,  
*Plaintiff-Appellee,*

*v.*

ILLINOIS BELL TELEPHONE COMPANY,  
*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Northern District of Illinois,  
Eastern Division.  
No. 06 C 705—George W. Lindberg, *Judge.*

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August 28, 2007

**Before**

Hon. RICHARD D. CUDAHY, *Circuit Judge*  
Hon. MICHAEL S. KANNE, *Circuit Judge*  
Hon. DIANE S. SYKES, *Circuit Judge*

**ORDER**

On consideration of the petition for rehearing en banc, a vote was requested on the petition and a majority of the judges in active service, and participat-

ing,\* have voted to deny a rehearing en banc.\*\* It is, therefore, ORDERED that the petition for rehearing en banc is DENIED.

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\* Judges Flaum, Rovner and Williams took no part in the consideration of the petition for rehearing en banc.

\*\* Chief Judge Easterbrook, Judges Ripple, Manion, and Sykes voted to grant the petition for rehearing en banc.