No. 07-

IN THE

Supreme Court of the United States

FIVE STAR PARKING,

Petitioner,

v.

UNION LOCAL 723, affiliated with the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Five Star Parking filed a complaint in the United States District Court for the District of New Jersey challenging an arbitration award in favor of Respondent Local 723, Affiliated with the International Brotherhood of Teamsters that found that Petitioner's imposition of a wage after bargaining to an impasse in reopener negotiations was a violation of their collective bargaining agreement. The District Court vacated the award on December 20, 2005, finding that the arbitrator had exceeded his jurisdiction by deciding issues of unfair labor practices governed by the National Labor Relations Act and under the jurisdiction of the National Labor Relations Board. Respondent appealed to the Third Circuit Court of Appeals, which reversed the District Court's decision and reinstated the arbitrator's award.

The question presented is this:

When parties to a collective bargaining agreement, negotiating mandatory terms of bargaining pursuant to an economic reopener provision in the agreement, reach an impasse, is the employer's decision to implement its final offer on impasse a right that is governed by the National Labor Relations Act and falling under the primary jurisdiction of the National Labor Relations Board, where the reopener provision in agreement does not make such implementation subject to arbitration?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Five Star Parking, has no parent corporation and no publicly held company owns 10% or more of its stock.

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Five Star Parking ("Five Star") respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 24, 2007, in order to resolve a conflict between the D.C. Circuit, the Tenth Circuit and the First Circuit on the one hand and the Third Circuit and the Eighth Circuit on the other. The Eighth Circuit and now the Third Circuit have held that the Employer's ability to unilaterally impose its last offer after an impasse in reopener negotiations is an arbitrable contractual question. The D.C. Circuit and the Tenth Circuit have held that under the National Labor Relations Act (the "NLRA") an employer has a right to implement its final offer in reopener negotiations. And the First Circuit has held that disputes over the right to implement a final offer after an impasse in negotiations over new or renewal agreements are not arbitrable because that right arises under the NLRA and thus falls under the primary jurisdiction of the National Labor Relations Board (the "NLRB"). The Court is presented with a holding that an arbitrator's jurisdiction pursuant to a rights arbitration clause includes determining whether an impasse has been reached in reopener negotiations. This Court should resolve this important question of federal labor law.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is dated July 24, 2007, and it is not published in the Federal Reporter, but is published at *Five Star Parking v. Union Local 723*, No. 06-2012, Slip Copy, 2007 WL 2110716 (3d Cir. July 24, 2007) (the "Third Circuit Decision") (App. 1a). The opinion of the District Judge William J. Martini, United States District Court for the District of New Jersey is dated December 23, 2005, and it is not published in the Federal Reporter, but is published at *Five Star Parking v. Union Local 723*, No. 05-cv-3975, 2005 WL 3502936 (D.N.J. Dec. 23, 2005) (the "District Court Decision") (App. 13a). The order of the Third Circuit denying the Petition for Rehearing or Rehearing En Banc was issued on August 29, 2007. (Aug. 29, 2007 Order, App. 65a). The arbitration award reviewed by the District Court and Third Circuit in this matter was issued on August 3, 2005. Opinion and Award in the Matter of the Arbitration Between Five Star Parking and IBT Local 723 (Aug. 3, 2005) (App. 21a)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 24, 2007. (App. 1a). A Petition for Rehearing and for Rehearing En Banc was timely filed, and was denied on August 29, 2007. (App. 65a). Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 8 of the National Labor Relations Act, 29 U.S.C. § 158 states:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.
>
> * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

* * *

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period

of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

* * * *

STATEMENT OF THE CASE

Five Star and Local 723, Affiliated with the International Brotherhood of Teamsters (the "Union") are parties to a collective bargaining agreement, effective August 1, 2002 through July 31, 2008 (the "CBA"). The CBA pertains to Five Star operations at Newark Airport for which Five Star employs, and the Union represents, cashiers, attendants and lot checkers. Five Star is an employer in an industry affecting commerce, as defined in Sections 501(1) and (3) and 2(2) of the National Labor Relations Act (the "NLRA") (29 U.S.C. § 142(1), (3) and 29 U.S.C. § 152(2)), and within the meaning of Section 301 of the NLRA (29 U.S.C. § 185). The Union is a labor organization representing employees in an industry affecting commerce, as defined in Sections 501(1), (3) and 2(5) of the NLRA (29 U.S.C. § 142(1), (3), and 29 U.S.C. § 152(5)), and within the meaning of Section 301 of the NLRA (29 U.S.C. § 185).

The CBA sets forth a grievance procedure, including provisions establishing specific jurisdictional standards for arbitration. Article 4 of the CBA allows either party to submit to arbitration any disputes "involving or concerning the meaning, interpretation, operation, or application of any clause of" the CBA. The CBA limits the jurisdiction of the arbitrator to "the particular dispute in question" and provides that the arbitrator

"shall not have jurisdiction or authority to add to, modify, detract from, or alter in any way the provisions of this Agreement or any amendment or any supplement thereto." (CBA Art. 4 at 2-3, *see* App. 23a). There are no provisions in the CBA that give an arbitrator jurisdiction to decide issues outside of the CBA. There are no provisions in the CBA that give an arbitrator jurisdiction to decide issues under the NLRA, such as whether an "impasse" has occurred.

The CBA sets wage rates for the time period from August 1, 2002 until July 31, 2004. The CBA does not set wage rates for the period from August 1, 2004 through the expiration of the CBA on July 31, 2008. The CBA also contains a reopener provision that allows either party, by giving written notice, to reopen the terms of the CBA "solely for the purpose of renegotiating concerning wages and monetary fringe benefits, but for no other purpose." On June 18, 2004, the Union gave Five Star notice of wage reopener bargaining pursuant to the reopener provision. Five Star agreed to negotiate with the Union and the parties commenced a series of negotiations concerning wage rates.

Five Star proposed a 12-and-one-half percent (12.5%) reduction in wage rates, explaining that operational costs necessitated the downward wage adjustment. The Union rejected the offer. Negotiations continued. The Union demanded confidential financial data from Five Star covering all Five Star facilities (not limited to Newark Airport). Five Star made financial information concerning Newark Airport available to the Union but declined to provide data for facilities other than Newark Airport. The Union refused to continue

participating in the negotiations and purported to withdraw its request for wage reopener. Having rejected Five Star's proposal at several meetings and through correspondence, the Union never changed its position or exhibited any willingness to alter its position on wage rates or even to engage in further discussions. Five Star determined that the parties had reached an impasse and implemented its last and final offer, the 12.5% wage rate reduction, on September 17, 2004.

The Union submitted the alleged unfair labor practice charge to the National Labor Relations Board (the "NLRB"). The Union withdrew its charge before the NLRB.

The Union then invoked the grievance procedure of the CBA and pursued arbitration. From the outset of the arbitration, Five Star maintained that the arbitrator lacked jurisdiction to decide issues under the NLRA. Five Star specifically stated that the arbitrator lacked jurisdiction to decide the question of whether an "impasse" occurred.

The Award was issued on August 3, 2005. While in some parts of the Award, the arbitrator disclaimed any authority or intention to determine the issue of "impasse," the text of the award and the issue decided make clear that the only issue determined in the arbitrator's opinion was that no "impasse" existed under the NLRA. After stating this labor-law determination, the Award simply declares in conclusory terms that Five Star breached the CBA, never identifying any provision of the CBA that Five Star allegedly violated.

On August 11, 2005, Five Star filed in the District Court a Complaint and a motion to vacate the Award. On December 20, 2005, the District Court issued an Order granting Five Star's motion to vacate the Award, denying Five Star's motion for attorneys' fees, and denying the Union's motion in its entirety, on the grounds that the "arbitrator exceeded his jurisdiction" by "fail[ing] to ground his decision in any provision of the CBA." (App. 17a-18a). The District Court found that the arbitrator had based his decision entirely on whether an impasse had been reached and not on a construction of any term or provision of the CBA, and that whether an impasse had been reached was a question of federal labor law to be decided by the NLRB. (App. 17a-19a).

The Union filed a notice of appeal to the Third Circuit on January 19, 2006. The Third Circuit issued an opinion on July 24, 2007 reinstating the arbitrator's award. (App. 12a). The Third Circuit decision held that the arbitrator had the authority to determine whether an impasse existed. (App. 10a-12a). A timely petition for Panel Rehearing and Rehearing En Banc was denied on August 29, 2007. (App. 65a-66a).

This Court should now consider the Petitioner's claim that a CBA that allows for rights, but not interest, arbitration does not permit an arbitrator to decide whether an impasse has been reached in economic reopener negotiations. The Court is now presented with the opportunity to clarify the law attendant to reopener negotiations and the arbitrability of disputes that arise thereunder.

REASONS FOR GRANTING THE PETITION

The Third Circuit Decision highlights a disagreement among the Circuit Courts of Appeals on several issues related to the arbitrability of disputes concerning economic reopener negotiations. The D.C. Circuit and the Tenth Circuit, as well as the NLRB, have held that when an employer and a union negotiate pursuant to an economic reopener provision in the CBA, the NLRA allows the employer to unilaterally implement its final offer after bargaining to a good faith impasse. *Local Union No. 47, Int'l Bhd. of Elec. Workers v. N.L.R.B.*, 927 F.2d 635, 643-644 (D.C. Cir. 1991); *Colorado-Ute Elec. Ass'n, Inc. v. N.L.R.B.*, 939 F.2d 1392, 1404 (10th Cir. 1991). The First Circuit has held that after negotiating over new or renewal agreements to an impasse, the employer's right to implement is not arbitrable because it falls under the jurisdiction of the NLRB. *Newspaper Guild of Salem, Local 105 of the Newspaper Guild v. Ottaway Newspapers, Inc.*, 79 F.3d 1273, 1283-84 (1st Cir. 1996).

In contrast, the Eighth Circuit in *General Drivers and Helpers Union, Local No. 554 v. Mid-Continent Bottlers, Inc. (Omaha Division)*, 767 F.2d 482, 485 (8th Cir. 1985), and the Third Circuit in this case, both held that the operation of reopener agreements and the remedies thereunder arise from the CBA and are arbitrable.

A. Decisions of the First, Tenth and D.C. Circuits Hold That An Employer's Right to Implement After An Impasse In Reopener Negotiations Arises from the NLRA and Is Not Arbitrable

1. Decisions of the United States Supreme Court Define the Rights of Parties after an Impasse is Reached in Negotiating a CBA

This Court has held that when parties negotiate mandatory terms of a new or renewal CBA to a good faith impasse, the NLRA grants the employer the right to unilaterally implement its last offer. *See, e.g., Litton Fin. Printing Div., A Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 198 (1991) (employer may unilaterally implement after impasse when negotiating a replacement for an expired CBA); *NLRB v. Katz*, 369 U.S. 736, 745 (1962) (employer may unilaterally implement after impasse when negotiating the terms of an initial CBA). This Court has also held that when an impasse has been reached in reopener negotiations, the Union retains its right to strike unless the CBA expressly waives that right. *NLRB v. Lion Oil Co.*, 352 U.S. 282, 293-294 (1957). However, this Court has not yet extended its decision in *Lion Oil* to its logical conclusion that when parties to a CBA negotiating pursuant to a reopener provision reach a good faith impasse, both parties retain all of their economic weapons including the employer's right to unilaterally implement its final offer.

2. Decisions of the D.C. Circuit and the Tenth Circuit Hold that the Right to Implement at Impasse Arises from the NLRA

In *International Brotherhood of Electrical Workers*, the D.C. Circuit extended the holding of *Lion Oil* to include the rights of employers. It held that an employer's right to implement its final offer after an impasse in reopener negotiations arises from the NLRA and that in order to waive that right, the CBA must evidence a "clear agreement" to preclude the use of such "economic leverage." 927 F.2d at 642-644.

In that case, an employer and union entered into negotiations pursuant to a wage reopener provision in their CBA, and after reaching an impasse, the employer implemented its final offer. *Id.* at 639-40. After the union filed an unfair labor practice complaint, an administrative law judge ("ALJ") and the NLRB both found that the employer had a right, under Section 8(d) of the NLRA, that after an impasse in reopener negotiations the parties could resort to any of the economic weapons available to them when bargaining for a new or renewal agreement, including the right to lock-out, strike, or unilaterally implement final offers. *Id.* On appeal to the D.C. Circuit Court of Appeals, the union argued that the contractual language of the reopener provision precluded the right to implement. *Id.* at 643. The union pointed to the language of the reopener which provided for reopening "only for the purpose of negotiating ... changes" and that "[a]greement reached as a result of such reopening shall become effective as of January 1." *Id.* The union argued that because the provision required "negotiating" and

provided for an effective date for the subsequent "agreement", the reopener provision merely allows the renegotiation of terms "while leaving the existing terms and conditions fully effective until mutual agreement on a modification is reached." *Id.* at 643-44. The D.C. Circuit disagreed with the union and upheld the orders of the ALJ and NLRB.

The D.C. Circuit found that "the employer's obligation to bargain over a reopened wage term carries with it the right to implement a final wage offer upon genuine impasse" and that "curtailing the right . . . 'would turn reopener bargaining into little more than a ***charade*** that would barely differentiate it from the kinds of discussion that may lawfully occur even in the absence of a reopener.'" *Id.* at 644 (quoting *Speedrack, Inc.*, 293 N.L.R.B. No. 128, at 4-5 (May 17, 1989) (emphasis added)). The D.C. Circuit drew a distinction between the discussions that parties can engage in throughout the course of their relationship and negotiations pursuant to a reopener provision that are governed by the NLRA. The D.C. Circuit followed the reasoning of the NLRB in *Speedrack*, which in turn followed the reasoning of this Court in *Lion Oil*. *Id.* at 642-45. In *Lion Oil*, this Court construed the term "expiration date" in Section 8(d)(1) and (4) of the NLRA as applying both to expiration of fixed-term contracts and to date on which the terms of a contract are opened pursuant to a reopener provision. *Lion Oil*, 352 U.S. at 289-90. The NLRB in *Speedrack*, relied on that construction to find that when a reopener provision is invoked, the CBA is effectively terminated with respect to the reopened terms and the parties may then resort to the same economic weapons available to them when bargaining a new or renewal agreement.

Speedrack, 293 N.L.R.B. No. 128, at 2. The D.C. Circuit adopted the NLRB's presumption that reopener bargaining is the functional equivalent of bargaining in the absence of a contract with respect to the reopened terms, and as such, the parties retain the same leverage.

In *Colorado-Ute*, the Tenth Circuit also held that an employer's right to implement its final offer after reaching a good faith impasse in reopener negotiations arises from the NLRA. 939 F.2d at 1404-05. In that case, after bargaining to an impasse in reopener negotiations the employer implemented its final offer and the union initiated a strike. *Id.* at 1398-1400. The parties continued to bargain after the impasse and the union then filed a complaint alleging that the employer had violated Section 8(a)(5) of the NLRA by, *inter alia*, "unlawfully implementing the terms of its wage offer during negotiations." *Id.* The ALJ found that the employer acted within its rights, but the NLRB found that though the employer had the right to implement at impasse, that the substance of this final offer was one that could not be implemented unilaterally. *Id.* at 1399-1400.

The Tenth Circuit reversed, finding that there were no such restrictions on an employer's right to implement on impasse. *Id.* at 1403-05. Further, it found that the right to implement arose from the NLRA, limited only by the NLRA's requirement that the employer bargain in good faith. *Id.* at 1404, 29 U.S.C. § 158(d). The Tenth Circuit's decision not only held that the employer has the right to implement at impasse in reopener negotiations and that the right arises from the NLRA, but also that operation of that right—whether negotiations were in good faith—is also governed by standards set by the NLRA. *Id.* at 1404-05.

3. Decisions of the First Circuit Hold that the Right to Implement at Impasse is Not Arbitrable

While the decisions of the D.C. and Tenth Circuits discussed above establish the right to implement after an impasse in reopener provisions, they do not address the arbitrability of disputes over those rights or over the operation of reopener provisions in general. However, "[i]t is well-settled that the NLRB enjoys primary jurisdiction over disputes involving unfair labor practices. . . ." *Ottaway Newspapers*, 79 F.3d at 1283. The First Circuit has held, in a dispute involving negotiating a renewal CBA, that a dispute over the right to implement at impasse was not arbitrable because it arises solely from the NLRA and not from the CBA itself. *Id.* at 1283-1284.

In *Ottaway Newspapers*, the parties negotiated a renewal to an expired CBA. *Id.* at 1275-76. After an underwhelming employer proposal that included proposed layoffs, the union filed a demand for arbitration with the American Arbitration Association, a complaint in the U.S. District Court for the District of Massachusetts seeking an order to compel arbitration, and an unfair labor practice complaint with the NLRB. *Id.* at 1276. The District Court denied the union's request because no layoffs had been made and stated that if layoffs were made after the conclusion of negotiations, that could constitute an unfair labor practice under the jurisdiction of the NLRB. *Id.* A week after the District Court's decision, the union appealed to the First Circuit. *Id.* at 1277. A week after the appeal, the employer declared an impasse and stated an intent to implement its last offer.

Id. The union then amended its complaint with the NLRB to challenge the unilateral implementation by the Employer. *Id.*

On appeal, the union argued that pursuant to a rights arbitration provision, an arbitrator could determine the scope of negotiations over a renewal agreement. In doing so, the union contended, "the arbitrator would not be dictating the terms of the successor agreement; instead it would be determining whether [a provision governing negotiating successor agreements] imposes an obligation to negotiate in good faith." *Id.* at 1280-81. The First Circuit disagreed, finding that there is no "meaningful distinction" between arbitrating the scope of negotiations and arbitrating the terms. Both are interest arbitration. *Id.* at 1281. The First Circuit went on to hold that questions of whether an impasse had been reached and whether the employer bargained in good faith arise all "fall squarely within the NLRB's primary jurisdiction as they are essentially extra-contractual claims" that arise under the NLRA. *Id.* at 1285.

B. Decisions of the Eight Circuit Hold that the Right to Implement at Impasse arises from the CBA and is Arbitrable

The Eighth Circuit, alternatively, has found that implementation at impasse is a creature of the CBA, and, as such, is arbitrable. *See, e.g., Mid-Continent Bottlers*, 767 F.2d at 485; *Bricklayers and Allied Crafts Union, Local No. 4 of Minn. v. Associated General Contractors of Minn.*, 711 F.2d 90 (8th Cir. 1983). In *Mid-Continent Bottlers*, the parties reached an impasse after negotiating pursuant to a reopener provision. *Id.* at 484.

After the employer unilaterally implemented its final offer, the union brought an action for breach of the contract in the U.S. District Court for the District of Nebraska. *Id.* After the District Court's decision in favor of the union, the employer appealed, claiming that District Court lacked jurisdiction because the claim was subject to a broad rights arbitration provision in the CBA. *Id.* The Eighth Circuit agreed with the employer that the right to implement "existed under the contract" and "presented a controversy over interpretation of or adherence to the bargaining agreement." *Id.* at 485. In allowing an arbitrator to address the employer's implementation after impasse, the Eighth Circuit did not once mention the NLRA.

In *Laundry, Dry Cleaning & Dye House Workers Int'l Union, Local 93 v. Mahoney*, after the parties negotiated wages to an impasse pursuant to a reopener provision, the union sought arbitration. 491 F.2d 1029, 1030 (8th Cir. 1974). The CBA contained provisions for resolving grievances, including through arbitration, and also contained a limitation that an arbitrator did not have the authority to "add to, subtract from, or change the terms of the contract." *Id.* at 1031. The Eighth Circuit in this case upheld the decision of the District Court that the wage dispute was arbitrable. Citing this Court's decision in *United Steelworkers v. Warrior and Gulf Navigation*, 363 U.S. 574 (1960), the Eighth Circuit held that absent any express provision excluding a matter from arbitration, any disputes arguably under a CBA containing an arbitration provision are arbitrable. *Mahoney*, 491 F.2d at 1032. The Eighth Circuit recognized concerns that its decision will make all mid-term wage disputes arbitrable, but points out that

parties seeking to exclude this type of dispute from arbitration can include language to that effect in the CBA. *Id.* at 1033. The decision did not once mention the NLRA.

C. The Third Circuit Decision Holds that the Right to Implement at Impasse arises both from the CBA and the NLRA and is Arbitrable

The Third Circuit's decision in *Five Star Parking* diverges from those of the First, Tenth and D.C. Circuits by finding that disputes over the operation of reopener provisions arise *both* from the NLRA *and* the CBA, thus converting the primary jurisdiction of the NLRB into concurrent jurisdiction. (App. 11a-12a). In this case, after Five Star implemented its final offer after declaring an impasse in reopener negotiations, the parties agreed to arbitrate whether the CBA had been breached. (App. 22a). Five Star made clear, however, that it was not willing to arbitrate the existence of an impasse, because that was a matter of federal labor law and not a question under the CBA. (App. 15a). After the arbitrator found that Five Star had breached the CBA by failing to negotiate to an impasse, the District Court vacated the Award, holding that the only issue decided by the arbitrator was the existence of an impasse, a term to be interpreted by the NLRB and not by an arbitrator operating under a rights arbitration clause. (App. 17a-19a). The Third Circuit reversed. (App. 12a). While it agreed with the District Court that "the concept of impasse and whether the parties bargained in good faith" raised questions of unfair labor practices, it also believed that the terms of the reopener provision itself were in dispute and provided an independent basis for the

arbitrator's jurisdiction. (App. 11a-12a). The Third Circuit held that because the reopener clause contemplated that the parties "negotiate", the arbitrator could decide that a failure to negotiate was a violation of the CBA. *Id.*

D. The Dispute in *Five Star Parking* Would Not Be Arbitrable Under the Holdings of the First, Tenth, and D.C. Circuits

In *Five Star Parking*, the Third Circuit found that an arbitrator operating under a rights arbitration provision had the authority to interpret the word "negotiation" in an economic reopener provision to require something different than what the NLRA requires. Applying the standards discussed in *International Brotherhood of Electrical Workers, Colorado-Ute* and *Ottoway Newspapers*, the meaning of the terms within the reopener provision are governed by the NLRA. The requirement to negotiate in good faith arises from the NLRA, and the text would need to evidence a clear agreement to limit the rights provided to the parties under the NLRA. Since the text demonstrates no such agreement to limit Five Star's right to implement at impasse or to modify the good faith requirement, the dispute over Five Star's implementation at impasse is a question for the NLRB and not within the jurisdiction of an arbitrator.

CONCLUSION

Based on the conflicting decisions of the Circuit Courts described above, employers and unions are placed in an untenable position that requires resolution by this Court. Employers and unions need guidance concerning the applicability of federal labor law to the context of reopener negotiations. This Court has made clear that when employers and unions bargain to impasse, the parties are entitled to resort to their respective economic weapons, the employer to implementing its most recent offer and unions to the right to strike. Many courts find that these rights arise under the NLRA and fall under the primary jurisdiction of the NLRB and that arbitration of these rights amounts to impermissible interest arbitration, while other courts find that because the reopener provision appears in the CBA, its language, and thus rights attendant to the negotiations, is arbitrable even in the absence of an interest arbitration provision. This issue presents a question of overriding importance because it affects reopener bargaining nationwide. Indeed, absent resolution by this Court, reopener bargaining may become a "charade" rather than an important part of the collective bargaining process. Finally, clarity is needed concerning the status of reopener provisions and the respective rights and obligations of employers and unions under these widely-used occasions of collective bargaining.

For the foregoing reasons a writ of certiorari should be granted.

Respectfully submitted,

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