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No. 08-1214

IN THE

Supreme Court of the United States

GRANITE ROCK COMPANY,
Petitioner,
v.

THE INTERNATIONAL BROTHERHOOD TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DUANE B. BEESON
Counsel of Record
for Teamsters Local 287
BEESON, TAYER & BODINE
1404 Franklin Street
5th Floor
Oakland, CA 94612
(510) 625-9700

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether in an employer's action for breach of a collective bargaining agreement, a dispute over whether the agreement was ratified by the union's members is subject to arbitration upon demand by the Union under a clause in the agreement that requires arbitration of "(a)ll disputes arising under this agreement."

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INTRODUCTORY STATEMENT

The Petition presents two separate issues which arose out of a 2004 labor dispute between Petitioner and Respondent Teamsters Local 287. This opposition brief addresses only Petitioner's effort to overturn the decision of the court below that Petitioner must arbitrate its dispute with the Local Union "in its entirety." (Pet. A.19.) The other issue concerns allegations directed at the International Brotherhood of Teamsters, which is filing its own opposition brief.

STATEMENT OF THE CASE

Prior to the events in this case, Petitioner and Respondent Local 287 had an established collective bargaining relationship covering Petitioner's ready-mix drivers. In the late spring of 2004, when negotiations for a successor agreement were unsuccessful, Local 287 struck in support of its proposals. Early in the morning of July 2, 2004, following an all night negotiating session, the parties reached a tentative agreement, subject to ratification by the Local's members. The members met later that morning, and according to Petitioner, ratified the tentative agreement. Local 287 denies that a ratification vote was taken. The strike continued after July 2, following a break in the picketing over the long Fourth of July weekend.

On July 22, 2004, the Petitioner filed its First Amended Complaint for Injunctive Relief and Damages (Respondent Appendix (Resp. "A.")) alleging that the ongoing strike violated the no-strike clause of the agreement. The Complaint alleged in part that "Plaintiff is willing to participate in the grievance and arbitration proceedings provided in the Agreement, subject to all rights and defenses available to it." (Resp. App A, p.6a.) Local 287 on more than one occasion moved the District Court for arbitration on all issues in the case, including particularly the dispute as to whether the tentative collective bargaining agreement had been ratified.[1] The District

[1] By order dated July 18, 2005, the District Court denied Local 287's motion for arbitration, stating that it was "misplaced" in light of the unresolved issue as to whether ratification of the successor collective bargaining agreement had taken place. (Pet. A.102-103.)

Court allowed arbitration of Petitioner's breach of contract and damages claims, conditioned, however, upon a jury determination that the agreement had been ratified. (Pet.A.94-96.)

A jury trial was conducted in late April and early May, 2007, on the bifurcated issue of ratification. The jury found that the tentative agreement had been ratified by Local 287's membership (Pet. A.22-24), whereupon the District Court directed that the issues of contract violation and damages be arbitrated. (Pet. A.20-21.)

On appeal by the Union, the Ninth Circuit reversed the trial court's orders denying arbitration of the ratification dispute, and remanded the case to the District Court "with instructions that Granite Rock and Local 287 should be compelled to arbitrate their dispute in its entirety." (Pet. A.19.) The analysis of the Court of Appeals starts with recognition that "(t)he United States Supreme Court has drawn a distinction between challenges to an arbitration clause and challenges to an entire contract." (Pet. A.14.) Quoting this Court in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), the court below explains the distinction as follows (*id.*):

> [U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is consi-

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By order dated November 18, 2005, the District Court directed arbitration of the issues of contract violation and damages, but ruled that the ratification dispute should be resolved by a jury. (Pet. A.82-96.)

By order dated February 16, 2007, the District Court rejected Local 287's repeated motion for arbitration that it filed on the basis of a recent *en banc* Ninth Circuit decision (*Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006)). (Pet.A.60.)

dered by the arbitrator in the first instance. 546 U.S. 440, 445-46 (2006).

In the present case, as the Ninth Circuit notes, "Granite Rock did not make an independent challenge to the arbitration clause." (Pet. A.15-16.) Responding to Granite Rock's argument that it did not agree to submit the issue of contract formation to an arbitrator, the decision below states (Pet. A.18):

> Here, both parties consented to arbitration; Granite Rock implicitly by suing under the contract containing the arbitration clause, and Local 287 explicitly by asserting the arbitration clause. Either might have had the right to a court determination of the formation issue had that right not been waived by asserting the validity of the contract.

REASONS FOR DENYING THE PETITION

1. The narrow and somewhat unique issue presented by the record in this case does not satisfy the "important question of federal law" standard for granting a writ of certiorari imposed by Rule 10(c) of this Court's Rules. Petitioner's statement of the question presented fails to reflect the carefully circumscribed scope of the decision below. Thus, asserting that it "never consented to have an arbitrator decide the existence of an agreement" (Pet. A.12), Petitioner invites this Court to rule that an arbitrator would be without authority to resolve the contract formation dispute (*i.e.*, whether the agreement had been ratified) so long as there is a controversy over the existence of the underlying contract. But the decision below holds that Petitioner did consent to arbitration of the ratification dispute. More specifically, the Ninth Circuit has ruled that Petitioner, as a mat-

ter of law, consented to an arbitrator's authority to resolve the ratification dispute by basing its underlying claim in its lawsuit on the existence and enforceability of a contract that included a provision granting an arbitrator authority to resolve "[a]ll disputes arising under this agreement." (Pet. A.19.) Petitioner does not challenge the decision of the court below that the broad language of the grievance and arbitration clause covers the dispute between the parties over contract formation.[2] Accordingly, the ruling that Petitioner requests this Court to review is that Petitioner, by bringing an action based on the existence of a contract, has necessarily assented to and is bound by the arbitration clause that concededly covers the issue of contract formation, at least where, as here, the union party to the bargaining relationship invokes that arbitration clause.

The issue on the merits of this case is accordingly both narrow and unusual. Issues involving the arbitrability of contract formation and/or validity normally arise where the party resisting arbitration denies the validity, existence or enforceability of the agreement. Here it is the other way around. Petitioner asserts, indeed stakes its case on the existence of the entire agreement, but refuses to accept any obligation to comply with the arbitration provision contained in the agreement. The very different and broader proposition asserted by Petitioner, backed by

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[2] The decision of the Ninth Circuit comments that Petitioner "argue[d] briefly" that the "clause does not cover a dispute over formation," but the Court dismissed the suggestion, pointing out that "the arbitration clause is certainly 'susceptible of an interpretation' that covers the dispute"—all that is necessary to give the provision effect. (Pet. A.16, fn. 4, quoting from *Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. 574, 582-83 (1960).)

citations of a number of appellate court decisions, is that an obligation to arbitrate cannot be established in any case, regardless of the alignment of the legal positions of the parties, where the formation of the contract in which the arbitration provision appears is disputed, unless and until a court finds the contract itself exists. None in the array of decisions cited by Petitioner, (Pet. pp. 14-17), with one exception[3], deals with a claimant who simultaneously relies on the existence of a contract and denies any obligation to comply with its arbitration clause. The circumstances of the issue in the present case are unusual, infrequent, and denial of the Petition would create no stir among contracting parties as to the role arbitration plays either in the areas of labor relations or commercial contracts.

2.(a) The decision below is fully consistent with this Court's application of the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1-16). Section 2 of FAA provides in relevant part that "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Local 287 invoked this provision by filing motions to refer Petitioner's claim to arbitration. Section 4 provides in part that in an action to compel arbitration the court shall direct arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue . . .". *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 397 (1967) is the seminal case applying the FAA to contract disputes in which a party seeks

[3] The exception is *Sandvik AB v. Advent Int'l. Corp.*, 220 F.3d 99 (3rd Cir. 2000), discussed *infra*, pp. 7-8

to avoid arbitration where the contract itself, but not the arbitration clause, is challenged. In *Prima Paint* the Court read the phrase "making of the agreement for arbitration" to refer to the arbitration provision, and not to other provisions in the contract or to the contract as a whole. Thus, the party resisting arbitration in *Prima Paint*—because the entire contract was invalid by reason of fraud in its inducement—was required to present that defense to an arbitrator, since his challenge was not restricted to the arbitration clause of the agreement. The pertinent holding in *Prima Paint* was summarized and endorsed most recently by this Court in *Buckeye Check Cashing, Inc. v. Cardegna, supra*, 546 U.S. 440, 445-46 (2006): "[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."[4]

The Ninth Circuit has correctly applied the foregoing rulings in the present case. The underlying issue here is whether the agreement in its entirety was ratified and therefore in effect when the alleged contract violation occurred. Neither Petitioner nor the Union has suggested that the arbitration clause is

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[4] Petitioner points out that this Court in *Buckeye* did not address cases where it is disputed whether "any agreement between the obligor and obligee was ever concluded." 546 U.S. 440, 444, fn. 1. In the same footnote, however, the *Buckeye* court also states that the decision does not speak to the issue in *Sandvik AB v. Advent Int'l. Corp.*, 220 F.3d 99 (3rd Circuit 2000). The caveat in footnote No. 1 reflects only the Court's normal reluctance to address more issues in a decision than is necessary to dispose of the case, a practice that neither argues for nor against granting certiorari in future cases presenting similar issues.

separately defective. As the court below concluded (Pet. A.19):

> The challenge here regards contract formation, Granite Rock does not challenge the arbitration clause independently, and both parties have consented to arbitration. As such, Granite Rock's claims against Local 287 should have been dismissed in favor of arbitration.

The correctness of this analysis is not affected by Petitioner's insistence that the existence of the contract involved here was controverted, unlike the contracts in *Prima Paint* and *Buckeye*, where the contracts were at least executed, although asserted by one of the parties in each case to be invalid. First, this Court has made explicitly clear that the term "contract" as used in FAA "includes putative contracts." 546 U.S. at 448. The contract sued upon by Petitioner was at least putative. Perhaps more important in the context of this case, the contract here was asserted by Petitioner to be in existence. Petitioner cannot have it both ways.

2.(b) *Sandvik AB. v. Advent International Corp.*, 220 F.3d 99 (3rd Circuit 2000) is the single decision cited by Petitioner that adopts its rationale in circumstances where the party resisting arbitration also acknowledges the existence and enforceability of the contract in which the arbitration clause appears. *Sandvik* is distinguishable, however, in that the contract involved there provided for arbitration pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (CREFAA), for which the FAA is the implementing mechanism. *See* 9 U.S.C. § 201, *et seq*. The Third Circuit in *Sandvik* reads Article II Section 3 of CREFAA require a court decision to determine whether an agreement to arbi-

trate is "'null and void, inoperative or incapable of being performed.'" (Resp. App. B, p.11a) In *Sandvik*, Defendant Advent International, the party opposing arbitration, asserted that the agreement was executed by an agent without authority to bind it, and was therefore null and void. In short, the decision in *Sandvik* is explained by the court's application of CREFAA, independently of the decisional law under FAA.

The *Sandvik* decision, however, also expounds at some length on the decisional law under FAA dealing with the appropriate forum to resolve disputes over contract validity and/or formation where arbitration provisions are involved. The decision concludes, in what appears to be dicta, that the proper forum is the judiciary, irrespective of whether the party advocating the validity of the contract resists or urges arbitration.

There are at least two reasons for not accepting the Third Circuit's conclusion. First, the *Sandvik* court based its decision on a distinction it attributes to the analysis in *Prima Paint*, namely that the severability and enforcement of the arbitration clause applies only to contracts that are voidable, but not with respect to contracts "that are asserted to be 'void' or non-existent." 229 F.3d at 105-108. According to the Third Circuit, the challenge to the contract in Prima Paint (invalid for fraud in the inducement) was voidable. That distinction, however, was rejected in the Buckeye decision. As the Court there explained, the application of the *Prima Paint* severability rule is controlling in the enforcement of an arbitration agreement irrespective of "whether the challenge at issue would have rendered the contract void or voidable." *Buckeye*, 546 U.S. at 446.

The *Sandvik* decision suffers from another defect. It does not face up to the inconsistency and unfairness of the position of a claimant that seeks the enforcement of a contract and concurrently denies that it is bound by the provision that provides for the procedure by which enforcement is to be accomplished. *Sandvik* repeats the theme that an arbitration clause in a contract cannot be found to exist if the contract in which it is embedded does not exist. As a generality that may be so, but a party that chooses to enforce a contract necessarily subscribes to its existence. In that situation, the abstract proposition relied on by the Third Circuit cannot be fairly applied. *Sandvik* has no answer to the Ninth Circuit's notation that Petitioner's right "to a court determination of the formation issue . . . [was] waived by asserting the validity of the contract." (Pet. A.18.)

2.(c) The starting point in Petitioner's justification for refusing to arbitrate the ratification dispute in this case is this Court's familiar language that "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." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), quoted in *AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986).[5]

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[5] Petitioner also cites *Litton Financial Printing v. NLRB*, 501 U.S. 190 (1991) and *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) for the same general proposition. These are decisions where the only challenge made is to the survival of arbitration clauses after the termination of the collective bargaining agreements in which they appear. As made clear in *Prima Paint, supra*, disputes limited to the validity (or indeed to the existence) of the arbitration provision are to be resolved by a court. Here, as in *Prima Paint*, the ratification dispute goes to the existence of the entire contract.

That proposition is fundamental and certainly is not disputed by the Respondent Union. But it is also undisputable that a party may be held to be bound by a contract and its obligations by its conduct as well as by its words or signature.[6] That is what happened here. By bringing a lawsuit to enforce the putative agreement, Petitioner manifested its assent to it. The Union's assent was by way of invoking the arbitration clause through appropriate motions. The Ninth Circuit's conclusion that the arbitration obligation was binding on Petitioner in these circumstances is clearly correct.

3. The ruling of the court below is fully consistent with and supported by the Court's recent decision in *14 Penn Plaza v. Pyett*, 556 U.S. __, 129 S.Ct. 1456, 173 L.Ed 2d 398 (April 1, 2009) sustaining the enforceability of an agreement for arbitration of a statutory right. The Court in *Pyett* made clear that it is not the nature or character of the issue to be arbitrated that is material to the right to arbitration, but rather whether the parties have legally bound themselves to arbitrate the particular issue. The notion that arbitrators lack competency to "resolve complex questions of fact and law" is put to rest in *Pyett*. Sl. Op. p. 19. We note, however, that the issue for arbi-

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[6] State law, here California law, controls the issues "concerning the validity, revocability, and enforcement of contracts generally" in the application of FAA section 2. *Perry v. Thomas*, 482 U.S. 483, 492 , fn. 9 (1987). *See also Arthur Anderson LLP v. Wayne Carlisle*, __ U.S. __, 129 S.Ct. 1896 (Case No. 08-146, opinion filed May 4, 2009); *First Options v. Kaplan*, 514 U.S. 938, 944 (1985). California law binds the contracting parties when there is "[m]utual manifestation of assent, whether by written or spoken word or by conduct . . . " (emphasis added). *Specht v. Netscape*, 306 F.3d 17, 29 (2d. Cir. 2002), quoting from *Binder v. Aetna Life Ins.*, 75 Cal.App.4th 832, 848 (1999). *See also* the general discussion of California law on this point in *Specht* at pp. 28-30.

tration in this case—whether the relevant agreement was ratified—is one that is peculiarly appropriate for arbitration. The asserted ratification allegedly occurred during a meeting of Union members for a discussion of the agreement reached by the parties at the bargaining table. This is a setting well within the experience and expertise of a labor arbitrator to determine what was said, what was meant, and what, if anything, was concluded. As stated in *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 85 (2002):

> [F]or the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy - a goal of arbitration systems and judicial systems alike.

In the present case, the arbitration clause reflects the mutual desire and expectation of the parties that all disputes arising under the agreement would be resolved through arbitration. It would seem self-apparent that a party committed to the existence of such an agreement would be expected to comply with it.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

DUANE B. BEESON
Counsel of Record
for Teamsters Local 287
BEESON, TAYER & BODINE
1404 Franklin Street
5th Floor
Oakland, CA 94612
(510) 625-9700