NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITE HERE LOCAL 30, Plaintiff-Appellant, v. VOLUME SERVICES, INC., DBA CENTERPLATE, INC., Defendant-Appellee.	No. 16-55528 D.C. No. 3:15-cv-01670-MMA-WVG MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding

Argued and Submitted December 4, 2017
Pasadena, California

Before: CALLAHAN and BEA, Circuit Judges, and WHALEY,** District Judge.

Unite Here Local 30 (the "Union") appeals from the district court's dismissal of its action against Volume Services, Inc., d/b/a Centerplate, Inc., under

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

the Labor Management Relations Act, seeking to compel arbitration of a grievance concerning the termination of a union member.

The denial of a motion to compel arbitration is reviewed de novo. *Pipe Trades Council of N. Cal., U.A. Local 159 v. Underground Contractors Ass'n of N. Cal.*, 835 F.2d 1275, 1278 (9th Cir. 1987).

1. On a motion to compel arbitration, the courts have the duty to determine whether the agreement requires the parties to arbitrate a particular grievance. *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648–50 (1986) (citing *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582–83 (1960)). "Although the arbitration clause itself may appear to order arbitration, other provisions of the contract may clearly and unambiguously negate or limit the applicability of the arbitration clause." *Pipe Trades Council of N. Cal., U.A. Local 159*, 835 F.2d at 1278 (citation omitted).

Here, although the Collective Bargaining Agreement (the "CBA") provides for arbitration, it does not require arbitration of all disputes, only those disputes that are not resolved through one of the other dispute resolution processes outlined in the CBA. The CBA provides the option of either mediation or arbitration to resolve a dispute between the parties. As such, mediation is not a procedural step in the grievance process the parties must fulfill in order to continue to arbitration; rather, it is an alternative process through which the parties may settle the dispute.

The court is required to determine whether the arbitration agreement encompasses the dispute or whether the mediation of the dispute has removed the grievance from the scope of the arbitration agreement. Thus, it was proper for the district court to determine whether the parties' mediation precluded arbitration.

2. While the CBA allows the parties to elect mediation rather than arbitration on a case by case basis to settle a dispute, the CBA clearly states: "[t]he Mediator shall render a [] decision" and "[a]ll decisions of the Mediator shall be binding." Simply stated, once the parties have elected mediation, the mediation is binding. Moreover, the CBA states, "[i]n the event that the Federal or State Mediator has reasonable doubt based upon the evidence heard, he or she shall abstain from making a decision, and then either party may submit [the] issue in dispute to an impartial arbitrator." In other words, once the parties have chosen mediation the parties may continue to arbitration only when the mediator abstains from entering a mediation decision because the mediator had reasonable doubt the evidence drove a particular decision.

Here, the parties clearly selected a mediator and voluntarily chose to proceed to mediation. After the mediation, pursuant to the CBA, the mediator did not abstain on account of reasonable doubt as to the evidence. Rather, the mediator made and issued a decision regarding the underlying grievance. The decision is specific, detailed, and clearly intended to cover the underlying dispute.

The oral statement made by the Union representative just before mediation began, that the Union wanted the mediation to be non-binding, is rejected as it conflicts with the unambiguous written terms of the CBA. There is no mention or indication of a procedure in which nonbinding mediation can be utilized, nor is there an option for one party unilaterally to render a binding mediation nonbinding; rather, the plain language of the CBA is clear that mediation is binding. Under the parol evidence rule, extrinsic evidence offered to vary or contradict the provision's clear meaning may not be considered by the court. *See Int'l Bhd. of Teamsters, Local No. 839 v. Morrison-Knudsen Co.*, 270 F.2d 530, 536 (9th Cir. 1959) (parol evidence may not be used to vary the unambiguous terms of a written contract); *see also NLRB v. Int'l Bhd. of Elec. Workers, Local 11,* 772 F.2d 571, 575 (9th Cir. 1985) (where contractual provisions are unambiguous, extrinsic evidence need not be considered, and parol evidence is therefore not only unnecessary but irrelevant).

Pursuant to the CBA, the parties voluntarily selected the option to mediate the dispute, the mediator issued a decision, and the decision by the mediator is binding. The dispute was thus resolved, and no grievance remains that would be subject to arbitration. The district court did not err in concluding that the CBA does not require arbitration of the grievance because the mediator issued a decision that is final and binding on the parties.

AFFIRMED.

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CALLAHAN, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that it was proper for the district court to determine whether the parties' mediation precluded arbitration of the grievance. However, I would vacate the district court's decision and remand for further proceedings because the CBA is reasonably susceptible to the interpretation offered by the Union. Although the CBA defines a mediation procedure that results in a binding decision by the mediator, the provision does not preclude the parties from informally resolving the grievance through a negotiated settlement or from engaging a neutral to help facilitate such a settlement (i.e., "mediation" as it is traditionally understood). Section 25(d) of the CBA states that the mediation procedure described therein "shall be used on a case by case basis if mutually agreed to by the Employer and the Union." The statement by the Union representative at the outset of the parties' mediation that the Union was not agreeing to binding mediation raises a fact question as to whether the parties in fact "mutually agreed" to the mediation procedure described in Section 25(d).

I respectfully dissent.

United States Court of Appeals for the Ninth Circuit

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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- The proceeding involves a question of exceptional importance; or
- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....*(Rev. 12-1-09)*

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

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Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk