UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60761

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 20 (ILA),

Plaintiff-Appellee,

versus

CONTAINER TERMINAL OF GALVESTON (CTG),

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas
(CA G-94-66)

January 9, 1996

Before GARWOOD, DUHÉ and PARKER, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Appellant-defendant Container Terminal of Galveston, Inc. (CTG) appeals from a judgment vacating an arbitration award in its favor on the grounds that the arbitrator lacked jurisdiction. Because we find that the district court erred in its construction of the underlying collective bargaining agreement, we reverse.

Facts and Proceedings Below

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[*] Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

This dispute arises out of a work stoppage at the Port of Galveston. On October 15, 1993, CTG, a marine terminal operator, received a piece of heavy lift cargo on behalf of a steamship company. The cargo arrived on a flatbed truck and needed to be transferred from the truck to the dock by crane to await loading aboard the steamship company's vessel which was to call ten to fifteen days later. On October 18, 1993, CTG ordered two "hook-on" men from the International Longshoremen's Association Warehouse Local 1504-8 and two certified Paceco-type crane operators from appellee International Longshoremen's Association Local 20 (ILA). While the workers appeared at the appointed time, the crane operators refused to perform the work in a "split gang" situation with the warehouse labor.

Having failed to persuade the crane operators to perform the work, CTG requested that an immediate Step 1 Spot Grievance Committee hearing be convened to resolve the dispute. A hearing was held the same afternoon, but the Grievance Committee was unable to reach a resolution. CTG then elected to waive the Step 2 grievance procedure and requested that an arbitrator be appointed by the Federal Mediation and Conciliation Service to hear the grievance on an expedited basis pursuant to the terms of a collective bargaining agreement known as the "Deep Sea and Coastwise Longshore and Cotton Agreement" (Deep Sea agreement). Meanwhile, CTG made arrangements with an independent contractor to perform the work at a cost of $3,553.78.

On October 21, 1993, an arbitration hearing was held before

Arbitrator Ernest E. Marlatt. At the outset of the hearing, the arbitrator entertained several objections to the arbitrability of the dispute raised by ILA's counsel, Mr. Griffin. The nature of one of these objections is now disputed by the parties, and lies at the heart of the issue before us today. The arbitrator took the disputed objection to jurisdiction under advisement and the parties proceeded to present testimony on the merits of the dispute. On October 22, 1993, the arbitrator issued an opinion which found: (1) the dispute was arbitrable; (2) that an unauthorized work stoppage had occurred in violation of Rule 42 of the Deep Sea agreement; and (3) that CTG was entitled to recover $3,553.78 in actual and compensatory damages.

ILA then filed a motion to vacate the arbitration award in the court below, the United States District Court for the Southern District of Texas, on the grounds that the arbitrator lacked jurisdiction to hear the dispute because CTG was not a party to the Deep Sea agreement. CTG answered and responded by filing its own motion to confirm and enforce the arbitration award. The district court found that CTG was not a party to the Deep Sea agreement, and entered a judgment vacating the award. CTG now brings this appeal.

Discussion

The sole question which requires our decision is whether the district court erred in vacating the arbitration award in favor of CTG on the grounds that the arbitrator was without jurisdiction to

hear the dispute.[1] CTG advances three arguments which it contends warrant reversal of the district court's judgment: (1) ILA waived its ability to object to the arbitrability of the dispute in the district court on the grounds that CTG was not a party to the Deep Sea agreement by failing to raise the objection before the arbitrator; (2) even if ILA did not waive its objection, the arbitrator's determination that the dispute was arbitrable is entitled to the same deference as an arbitrator's decision on the merits because ILA submitted the issue to the arbitrator for decision; and (3) the district court's finding that CTG was not a party to the Deep Sea agreement was in error.

As a preliminary matter, we note that this Court reviews a district court's judgment vacating an arbitration award *de novo*. *Gulf Coast Indus. Workers Union v. Exxon Co.*, 991 F.2d 244, 248 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 441 (1993); *E.I. DuPont de Nemours & Co. v. Local 900*, 968 F.2d 456, 458 (5th Cir. 1992).

While it is undisputed that ILA raised some objection to arbitrability at the arbitration hearing, the parties disagree as to the precise nature of this objection. According to CTG, ILA's

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[1] We do not address another point of error raised by CTG which is that the district court lacked subject matter jurisdiction over ILA's motion to vacate the award because determination of this point would have no bearing on the ultimate outcome of this case. Even assuming that the district court lacked subject matter jurisdiction over ILA's motion to vacate, the court clearly possessed subject matter jurisdiction over CTG's motion to confirm and enforce the award. Therefore, the district court could properly deny CTG's motion to enforce the award even if it lacked jurisdiction to vacate the award pursuant to ILA's motion. As counsel for CTG conceded at oral argument, the end result is the same. Therefore, we decline to address this point of error.

objection before the arbitrator was that a prior arbitrator's finding that no contract existed between the parties with respect to diesel mechanics, electricians, and crane maintenance personnel established that no contract existed between the parties with respect to crane operators because the same persons performed the dual function of maintaining and operating the cranes. Therefore, the dispute was non-arbitrable because there was no contractual relationship between the parties with respect to the crane operators. It is clear from the arbitrator's decision that he also understood this to be the basis of ILA's objection.[2] CTG maintains that ILA only recast its complaint to be that CTG was not a party to the Deep Sea agreement when the dispute reached the district court. ILA, on the other hand, contends that the arbitrator

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[2] In his opinion, the arbitrator noted:

> "The Union next moved to dismiss the grievance as non-arbitrable on the grounds that the two Paceco Crane Operators were not covered by the multi-employer Contract. The Union offered evidence that following a representation election, the National Labor Relations Board had certified a separate bargaining unit consisting of diesel mechanics, crane maintenance, and electricians. It was argued that all crane maintenance work is in fact being performed by the certified Paceco Crane Operators.
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> This argument has no contractual validity. Crane Operation and Crane Maintenance are separate classifications. The Contract specifically lists Paceco Crane Operators as one of the covered classifications and provides Union wage scale for their work. The fact that a Crane Operator may be qualified to perform crane maintenance and may be hired from the same Hiring Hall for such work does not remove Paceco crane operations from the scope of the original contract. In this case, the employees were directed to perform operation, not maintenance, work. Indeed, if the Union's contention were correct, CTG could hire nonunion labor to operate the crane."

misunderstood its objection which was that no contract of any sort existed between the parties. ILA characterizes its objection as being that the dispute was non-arbitrable because the contract governing diesel mechanics had not been executed and CTG was not a party to the Deep Sea agreement.

Our determination of the true nature of ILA's objection before the arbitrator is a matter of some importance as it controls the level of deference that the district court was obligated to give to the arbitrator's finding of arbitrability, and indeed whether the district court should have reviewed the issue at all. The Supreme Court recently detailed the steps which a federal court must follow in reviewing an arbitrator's determination of arbitrability in *First Options of Chicago, Inc. v. Kaplan*, 115 S.Ct. 1920 (1995). In *First Options*, the Court explained that the standard of review to be applied by the courts will turn on whether or not the parties have agreed to submit the question of arbitrability to the arbitrator for decision. If the parties have agreed to submit the question of arbitrability to the arbitrator, then the courts should review the arbitrator's determination under the same highly deferential standard as an arbitrator's determination on the merits "giv[ing] considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." *Id*. at 1923 (citation omitted). However, if the parties have not agreed to submit the question of arbitrability to the arbitrator, then the courts should exercise independent review of this decision. *Id*. at 1924. Ordinarily, the courts should resolve the question of

whether the parties agreed to submit the question of arbitrability to the arbitrator by reference to the state law of contracts. *Id*. However, Supreme Court precedent has established the additional requirement that there be "clear and unmistakable" evidence that the parties agreed to arbitrate the issue of arbitrability. *Id*. (*citing AT&T Technologies v. Communication Workers*, 106 S.Ct. 1415, 1418-19 (1986); *Steelworkers v. Warrior & Gulf Navigation Co.*, 80 S.Ct. 1347, 1353 n. 7 (1960)). Therefore, generally judicial review of an arbitrator's determination will be a matter to be resolved by reference to the agreement of the parties.

However, this Circuit has recognized that a party may forfeit the opportunity for any judicial review of the arbitrability of a dispute by failing to raise the issue before the arbitrator. *Piggly Wiggly Warehouse Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Truck Drivers Union, Local No. 1*, 611 F.2d 580, 583-84 (5th Cir. 1980) (holding that a party will not be allowed to raise arbitrability for the first time in the district court after having lost on the merits whether the basis for the surrender is waiver, estoppel or new contract). A party who fails to raise the issue of arbitrability before the arbitrator will not be permitted to challenge the arbitrator's authority in the federal courts after having lost on the merits. *Id*.

We first address the question of whether ILA waived its objection to arbitrability on the grounds that CTG was not a party to the Deep Sea agreement by failing to raise this objection before the arbitrator. The answer to this question is not clear-cut as

the record of the arbitration hearing reveals that ILA's objection was convoluted at best.[3] As we noted earlier, it is clear that ILA

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MR. GRIFFIN: On the 19th of June, 1990 there was an arbitration between South Atlantic and its affiliate Local 20 and West Gulf Maritime with respect to Container Terminal of Galveston or CTG, Inc. And it was an Expedited Arbitration Hearing. I have previously given you what has been marked or should be marked as Exhibit No. 2 which is the letter dated June 19 of 1990 . . . The Exhibit 1 will be the Diesel Mechanics, Crane Maintenance and Electricians is [sic] a contract terminating March 31, 1996. If you will make reference to the last page of the document, it is an unsigned contract. It has not been signed by this local, Local 20. If you would be directed to the June 19th, '90 decision by the arbiter, which I think is binding upon the parties, it was held and [sic] because of the lack of a contract, then the complaints raised by the local could not be heard with respect to CTG, Inc. . . And ultimately there was negotiation with respect to the contract which has never been signed and is still subject to negotiation. So if in fact we're going to be consistent with respect

to the prior rulings concerning disputes among these parties, in that there has been a previous ruling that there is no relationship between these parties, then we are improperly before this body. There should not be an arbitration, there is no contract and absent and [sic] proving up the contract to somehow get around this June 19th, 1990 decision which [sic] they prevail under the same argument. And I think there are some problems there and we would object on that basis also.

MR. MARLATT: So you're taking the position that Local 20 is not the bargaining representative for these employees?

MR. GRIFFIN: I'm taking the position that there is no contract between CTG, Inc. and Local 20. And if it says in this opinion "It is the Arbitrator's opinion that neither the Agreement nor any past practice is set forth that 'diesel mechanics' were to be governed by the terms and conditions of the Deep Sea and Coastwise Longshore and Cotton Agreement effective October 1, 1990 [sic] and terminating November 30, 1990. As such, the incident in question is not arbitrable." Therefore, if in fact there has been

a previous ruling that the relationship of these parties absent a contract, absent this what has been -- and we can -- there are a number of those documents -- excuse me. A number of contracts floating around. We would like one of them admitted as an exhibit.

MR. MARLATT: The one you gave me a second ago?

MR. GRIFFIN: No. I'm talking about -- I'm asking about the black book. I'm talking about the contract, the Deep Sea Longshore contract at Texas Ports in [sic] Lake Charles. Absent there being an applicational relationship between CTG and I.L.A. Local 20, then this body has no authority to me and so just on a jurisdictional basis alone, once the arbitrator has decided on June 19th, 1990 that it was not arbitrable and [sic] the dispute earlier when I.L.A. Local 20 came to resolve a dispute that it had with CTG, then I think the consistency or the rule of law binds this body to say I don't have authority to hear this. Absent you proving up the contract. And what we've given you is Exhibit 1 which is the contract that has not been executed. There has not been an agreement of the parties. The parties worked through the problem. There is [sic] still some problems with this contract. It has not been signed off on by the local. It has not been signed off by the

raised some objection to the arbitrability of the dispute but the precise grounds for the objection are uncertain. This confusion stems primarily from ILA's reliance on an arbitrator's opinion in

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South Atlantic. There is no -- and so absent there being some kind of proof, its just not arbitrable and I think they should be bound by the same rule of law in terms of the position they took before the arbitration when we tried to come before this body to say, "Look, there's a problem here. It needs to be arbitrated." and [sic] this body turned us away and said , "No. No contract in existence, no relationship and therefore go work out a contract. . . . They've still got to go to the second level and execute the cont of 42 -- this body's previous decision. And I think that's my point.

> MR. MARLATT: Well, when you say that you had not waived the Step 2, the Step 2 would be coming out of that contract though; would it not? Are you recognizing that there is a Step 2 procedure even though there's no --
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> MR. GRIFFIN: Even in the Step 2 procedure we were going to argue that there's no authority to hear it.
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> MR. MARLATT: Okay. Your position is not inconsistent.
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> MR. GRIFFIN: It's not an inconsistent position. All I'm saying is let's assume their position is correct. We can ask for an emergency hearing that calls for work stoppage and let's jump passed [sic] Step 2 and get before this body. For argument purposes, let's agree with that. And once it's agreed, does this body have

jurisdiction to hear it. And we're saying that it does not and I think that's where we are and our position is consistent.

an earlier dispute between the parties as support for its objection that the current dispute was not arbitrable. The arbitrator in the earlier dispute concluded, "that neither [in] the Agreement nor any past practice is [it] set forth that 'diesel mechanics' were to be governed by the terms and conditions of the Deep Sea and Coastwise Longshore and Cotton Agreement." ILA argued that this previous arbitration established "the lack of a contract" and "that there is no relationship between these parties." Therefore, ILA argued that the present dispute was not arbitrable.

If ILA's objection was truly that there was no contract whatsoever between the parties, its logic in relying on the previous arbitrator's opinion was fundamentally flawed. The previous arbitration concluded only that there was no contract between the parties with respect to diesel mechanics, not that there was no contract of any sort. Indeed, the previous arbtirator's conclusion presumes that CTG and ILA were parties to the Deep Sea agreement. This must be the case otherwise the question of which job classifications fell within the scope of the Deep Sea agreement would be wholly irrelevant.

This flaw in ILA's logic led both the arbitrator and CTG to reasonably conclude that ILA's objection that there was "no contract" meant that there was no contract with respect to Paceco-type crane operators. ILA's counsel made no effort to clarify his objection even when it became apparent that it had been

misunderstood.[4] When the arbitrator advised the parties that he

[4] The following exchange clearly reflects that CTG's counsel, Mr. Jensen, and the arbitrator understood ILA's objection to be that the Paceco-type crane operators were not covered by the Deep Sea agreement:

> MR. JENSEN: Well, I think the easy answer to the objection and to the motion that has been lodged by Local 20's counsel is that this arbitration before arbitrator Milden J. Fox dealt with a group of permanent employees employed upon CTG's premises known as diesel mechanics, electricians and crane maintenance personnel. In this arbitration, we took the position that those employees were not covered under Exhibit 1, the Deep Sea and Coastwise Longshore and Cotton Agreement. It's not within the scope of the work as defined in that contract. The arbitrator agreed with that. As a result, those court [sic] group of employees in that bargaining unit were not covered by any collective bargaining agreement. Local 20 then moved the National Labor Relations Board for Certification election which was held. The bargaining has continued. The question whether or not there is or is not a contract for that court [sic] group of employees is immaterial to this proceeding. It has nothing to do with the scope of work and the

would have to defer ruling on ILA's objection until he could "determine what employees were actually involved in this work

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> parties to the black contract which we introduced as Exhibit 1 which is the Deep Sea and Coastwise Longshore and Cotton Agreement under which the parties who are both parties to that contract were operating at the time

that this dispute and work stoppage occurred.

> MR. MARLATT: So you're saying that the employees represented by Local 20 are covered by this contract except for those certain occupational groups which were found not to be covered?
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> MR. JENSEN: And not covered under the scope of work. That's exactly correct, Your Honor.
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> MR. MARLATT: Then we're going to have to get into the merits of the case to determine what employees were actually involved in this work stoppage before I can determine whether or not his objection is --
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> MR. JENSEN: If that is the union's position. That is correct.
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> MR. MARLATT: Then I will tentatively defer ruling on the union's objection of jurisdiction until we get into the facts and find out what employers [sic] we're actually talking about here . . .

stoppage," this misunderstanding should have become apparent to ILA's counsel. If ILA's position was that there was no contract between the parties, an inquiry into which employees were involved in the work stoppage was superfluous.

ILA's failure to clearly present its objection to arbitrability to the arbitrator even when it became evident that it had been misunderstood was arguably tantamount to failing to present the objection at all. Therefore, were determination of the question necessary to resolve this appeal, we might well be inclined to hold that ILA waived its right to review of the arbitrator's determination of arbitrability. We do not come to that, however, because our disposition of this case need not rest on that basis.

CTG next argues that by objecting and arguing the issue of arbitrability to the arbitrator CTG submitted that issue to him for decision. Therefore, CTG argues, regardless of the basis of the objection, the arbitrator's determination that the dispute was arbitrable is entitled to the same degree of deference as an arbitrator's decision on the merits. We believe that this argument is foreclosed by the Supreme Court's recent decision in *First Options, supra*. In *First Options*, the Supreme Court held on similar facts that objecting to arbitrability and arguing that issue to the arbitrator did not constitute "clear and unmistakable" evidence that the Kaplans had agreed to submit the issue of arbitrability to the arbitrator for decision, but rather sufficed to preserve the issue for independent judicial review. *First*

Options, 115 S.Ct. at 1925. Because *First Options* appears to be controlling on the facts of this case, we must reject this particular argument of CTG.[5]

Therefore the dispositive issue is whether the district court erred in its determination that CTG was not a party to the Deep Sea agreement. At issue is the construction of the preamble of the Deep Sea agreement which reads:

> **AGREEMENT**
> **ENTERED INTO BETWEEN**
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> "The Owners and/or Operators and/or Agents and Stevedores of all deep sea and coastwise vessels arriving at and/or departing from all Ports in Texas and the Port of Lake Charles, Louisiana, subscribed for by the West Gulf Maritime Association, and their respective regular and associate members, hereinafter styled First Parties, and the South Atlantic and Gulf Coast District, International Longshoremen's Association, and affiliated deep sea locals . . . to wit, Local No. 20 of Galveston, Texas . . ."

The district court held that while it was undisputed that CTG was a member of the West Gulf Maritime Association (WGMA), the Deep Sea agreement did not indicate that members of the WGMA were themselves governed by the agreement. The district court held that only owners, operators, agents, and stevedores subscribed for by the WGMA or subscribed for by the "regular and associate members" of the WGMA were parties to the agreement. The court then concluded

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[5] We note, without deciding, that *First Options* suggests that deferential review of an arbitrator's determination of arbitrability will only be appropriate where the parties have clearly and explicitly agreed either in the underlying contract, in the submission agreement, or in the record of the arbitration proceeding to submit the issue to the arbitrator. The Court rejected the argument that it was necessary for the objecting party to seek to enjoin the arbitration or force the other party to seek a motion to compel in order to preserve the issue for independent judicial review. *First Options*, 115 S.Ct. at 1925.

that since CTG was not an owner, operator, agent or stevedore, it was not a party to the agreement. Therefore, the dispute was not arbitrable.

Both in its brief and at oral argument, CTG challenged the district court's construction of the Deep Sea agreement. CTG argued that it is a party to the agreement by virtue of its membership in the WGMA alone. However, CTG also argued that as a terminal operator it regularly received and held cargo on behalf of its clients, thereby making it an "agent" within the terms of the Deep Sea agreement as well.

We understand the term "First Parties" to encompass two groups: (1) "Owners and/or Operators and/or Agents and Stevedores . . . subscribed for by the West Gulf Maritime Association"; and (2) the "regular and associate members" of the West Gulf Maritime Association. The comma separating the clause "and their respective regular and associate members" from the previous clause dealing with subscription indicates that the members of the WGMA are themselves to be considered parties to the Deep Sea agreement in addition to those owners, etc. "subscribed for" by the WGMA. Under the district court's construction of the contract, the clause should read "subscribed for by the West Gulf Maritime Association and their respective regular and associate members."

Our construction of the contract finds additional support in a later clause in the Deep Sea agreement which refers to the "members of the West Gulf Maritime Association who are Owners or

Operators or Agents or Stevedores . . ." The district court's construction of the agreement would mean that members of the WGMA, some of whom are themselves owners, operators, agents or stevedores, are subscribing for other owners, operators, agents or stevedores. We believe the sounder construction is that the First Parties to the contract are owners, agents, operators and stevedores subscribed for by the WGMA as well as members of the WGMA some of whom are owners, operators, agents or stevedores. As it is undisputed that CTG is a member of the WGMA, we find that CTG is also a First Party to the Deep Sea agreement regardless of whether CTG acts as an agent. Even assuming arguendo that the district court was correct that it was necessary for CTG to be an agent (as well as a WGMA member) in order to be a party to the Deep Sea agreement, we are nevertheless satisfied that CTG's role as a marine terminal operator receiving and holding cargo on behalf of its vessel customers makes it an agent as that term is generally understood. *See Whitcombe v. Stevedoring Serv. of Am.*, 2 F.3d 312, 316 (9th Cir. 1993) ("A terminal operator may be both an agent of the carrier and a bailee of the cargo for the cargo owner.")[6]

Therefore, we conclude that the district court erred in finding that the dispute was not arbitrable because CTG was not a

[6] At oral argument, ILA asserted that the contract language required CTG to be both "agent and stevedore" to be a party to the Deep Sea agreement. Given the fact that stevedores generally act as agents for third parties in the loading and unloading of cargoes, the construction urged by ILA would be redundant. We find that "and" is being used disjunctively, rather than conjunctively as urged by ILA. Therefore, we believe that the discrepancy between the use of "and/or" and "and" is simply the result of imprecise drafting.

party to the Deep Sea agreement.

The district court's judgment is accordingly reversed and the cause is remanded for further findings consistent herewith.

REVERSED AND REMANDED.