UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15-1438

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION,
ON BEHALF OF ADRIAN PETERSON

Plaintiff-Appellee,

v.

NATIONAL FOOTBALL LEAGUE, NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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INTRODUCTION

Faced with the "extraordinary deference" owed to labor arbitration awards, the NFLPA attempts to disguise its challenge to the merits of the Hearing Officer's decision. Most glaringly, the NFLPA accuses the Hearing Officer of having "disregarded" the "law of the shop," consisting in its view of a select handful of past arbitration decisions, when the NFLPA really means that he (allegedly) "misinterpreted" or "misapplied" that law. But a difference in interpretation or application is not *disregard* of the law. Over fifty years of Supreme Court and Circuit precedent preclude the vacatur of a labor arbitration award on the ground that the arbitrator supposedly misinterpreted or misapplied the governing law. *See* NFL Br. 21-23. If the law were otherwise, the extraordinary deference accorded arbitration awards would, in reality, be no deference at all.

Although a court may not second-guess *de novo* the proper interpretation or application of the law of the shop, the Hearing Officer's decision is not only reasonable but also correct. The NFLPA's chief authority, the *Rice* arbitration decision, resolved an issue of "double discipline" (A053)—whether a player's original punishment could be changed or "*increased*" (A062)—not whether the discipline policy could be applied retroactively in the first instance. And the *Rice* arbitrator's observation that a player could be subject to indefinite suspension for domestic violence under the preexisting policy defeats the NFLPA's claim of a

two-game "maximum" penalty. As the Hearing Officer here found, if Peterson's discipline was greater than most, it was only because his conduct—child abuse—was worse than most.

The NFLPA's argument that the Hearing Officer exceeded his authority fares no better. The Hearing Officer did not "impose" new discipline under the preexisting policy; he "affirmed" the discipline that had already been imposed. Unlike in the authority cited by the NFLPA, moreover, the parties here did not define by stipulation the issues before the Hearing Officer; he thus had discretion to determine the precise scope of the issues presented. The NFLPA admits that it asked the Hearing Officer to reduce Peterson's suspension to a level consistent with its view of the preexisting policy (two games). That request permitted, if not required, the Hearing Officer to evaluate the range of discipline available under the preexisting policy. The Hearing Officer therefore did what he was tasked to do.

ARGUMENT

I. THE HEARING OFFICER APPLIED, AND DID NOT "DISREGARD," THE CBA AND THE "LAW OF THE SHOP"

The NFLPA's mantra on appeal (Br. i, 2, 3, 6, 24, 25, 26, 27, 28, 33, 34, 36, 37, 38, 41, 42, 43, 44, 45, 47, 48, 53, 54, 60) is that the Hearing Officer "ignored" or "disregarded" the "law of the shop." Repeating the mantra does not make it true. The NFLPA misunderstands the concept of the "law of the shop" under the Labor Management Relations Act, misreads the labor arbitration decisions that it

cites and that the Hearing Officer considered, and misconstrues how retroactivity and notice operate within the confines of the parties' collectively bargained agreement.

A. Determining The "Law Of The Shop" Is Within The Province Of The Hearing Officer, Not The Court

The NFLPA's use of "law of the shop" misunderstands the meaning and purpose of this labor-law concept, which provides a justification for *judicial deference* to labor arbitration awards, not a ground for *judicial second-guessing*.

More than half a century ago, the Supreme Court recognized the critical role that labor arbitrators play when, in resolving labor disputes, they fill "[g]aps" left unresolved in CBAs "by reference to the practices of the particular industry and of the various shops covered by the agreement." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-582 (1960). That role arises out of "the parties' confidence in [the arbitrator's] knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment." *Id.* at 582.

For that reason, "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract": unless the terms of the CBA clearly resolve the issue, he may look to the custom and practice of the parties and industry, too. *Warrior & Gulf*, 363 U.S. at 581-582. That, in turn, explains why federal courts defer to labor arbitrators: even "[t]he ablest judge cannot be expected to bring the

same experience and competence to bear upon the determination of a grievance[.]" *Id.*; *see American Nat'l Can Co. v. United Steelworkers of Am.*, 120 F.3d 886, 889 (8th Cir. 1997) (arbitrator's knowledge of the "common law of the shop" part of justification for "extreme judicial deference").

The NFLPA stands this concept on its head, transforming a rule of *deference* into an asserted ground for *vacatur.* Flouting fifty years of precedent, the NFLPA anoints the *district court*—rather than the Hearing Officer—as the expert on the "law of the shop." *See* NFLPA Br. 36 ("*As the district [court] held*, the established law of the shop here 'unequivocally recognized that the New Policy cannot be applied retroactively[.]'") (emphasis added). The NFLPA then asks this Court to select the district court's "correct[]" interpretation of the law of the shop (Br. 42) over the Hearing Officer's "wrongful[]" one (Br. 37).

Contrary to the NFLPA's premise, federal courts "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Rather, "the sole question . . . is whether the arbitrator (even arguably) interpreted the parties' [CBA], not whether he got its meaning right or wrong." *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013). If the NFLPA is correct that the "law of the shop" is "equally a part of the" CBA, Br. 27, the only question for this Court is whether the Hearing

Officer was at least "arguably" construing that law. *American Nat'l Can*, 120 F.3d at 889.

B. The Hearing Officer's Distinction Of Other Arbitration Decisions Does Not Constitute Disregard Of The Law Of The Shop

The NFLPA contends (Br. 36-45) that the Hearing Officer "disregarded" the law of the shop by "disregarding" a handful of arbitration awards—first and foremost, the *Rice* decision. The NFLPA does not contend that the Hearing Officer literally ignored the *Rice* decision. Nor could it responsibly do so: the Hearing Officer's opinion discusses *Rice* in the central part of its analysis (ADD021-022). Rather, the NFLPA *disagrees* with how the Hearing Officer addressed *Rice*, deeming inadequate the "distinction" drawn from and weight accorded to that decision. *See* NFLPA Br. 37 (asserting that "Henderson's purported factual distinction . . . was no distinction at all").

To "ignore" or "disregard" the law of the shop must mean more than reaching a conclusion with which counsel—or the court—disagrees. If federal courts were permitted to decide for themselves *de novo* whether an earlier arbitration award should have controlled a subsequent one, it would frustrate the "congressional desire to promote efficient resolution of industrial disputes." *Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp.*, 380 F.3d 1084, 1101 (8th Cir. 2004). Virtually every award would be challenged in court, and an award would be vacated whenever a party could persuade a federal court that an

arbitrator "disregarded" (read: "misinterpreted" or failed to apply to the court's satisfaction) a prior arbitration decision.

That is why an unbroken line of precedent—including the cases cited by the NFLPA—recognizes that labor arbitrators, not federal courts, "determine whether a prior award is to be given preclusive effect." *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1425 (8th Cir. 1986); *accord Air Line Pilots Ass'n Int'l v. Trans States Airlines, LLC*, 638 F.3d 572, 579 (8th Cir. 2011); *American Nat'l Can*, 120 F.3d at 892. As the Supreme Court has explained, because an arbitrator's "conclusion that he was not bound by [an earlier] decision" is the type of judgment that the parties "delegated to the arbitrator," "[a] federal court may not second-guess it." *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 764-65 (1983); *see* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 11-20 (Kenneth May et al. eds., 7th ed. 2012) ("Courts and arbitrators alike agree that the weight to be given to" awards, including those "between the same parties [under] the same contract [provision]," "lies within the discretion of the arbitrator.").[1]

[1] *See, e.g., Int'l Union v. Dana Corp.*, 278 F.3d 548, 557 (6th Cir. 2002) ("[T]he preclusive effect of an earlier arbitration award is to be determined by the arbitrator" absent a contractual provision stating otherwise.); *El Dorado Technical Servs., Inc. v. Union General De Trabajadores de Puerto Rico*, 961 F.2d 317, 321 (1st Cir. 1992) ("It is black letter law that arbitration awards are not entitled to the precedential effect accorded to judicial decisions. Indeed, an arbitration award is not considered conclusive or binding in subsequent cases involving the same

If this Court were to affirm vacatur on the ground that an arbitrator had considered but insufficiently or incorrectly distinguished prior arbitration awards on their facts, it would be the first time that this Court—and perhaps any court of appeals—has done so. The NFLPA cites no such decision. Although the NFLPA points to *Trailways*' critique of an arbitrator's failure to discuss the "similar nature" of a factually "identical" decision (Br. 44), *Trailways* specifically cautioned that this issue was "*not the basis of [the Court's] decision.*" 807 F.2d at 1425 (emphasis added). This Court did so in acknowledgement that it is the arbitrator, not the court, who is permitted to determine a prior decision's "preclusive effect." *Id.* Nor are the other statements from *Trailways*—relating to whether the arbitrator "ignored" the law of the shop by failing to discuss "past practices" despite CBA language providing "that the Company 'shall' continue to enjoy all 'past practices,'" *id.* at 1423—apposite here.

The NFLPA in this case, as did the challenger in *American National Can*, essentially alleges an "inconsistency between the [Hearing Officer's] decision and the . . . prior arbitral decisions" he distinguished. 120 F.3d at 893. But that is "not

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contract language but different incidents or grievances."); *accord IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 543 (7th Cir. 1998); *Hotel Ass'n of Washington, D.C., Inc. v. Hotel & Rest. Employees Union, Local 25, AFL-CIO*, 963 F.2d 388, 389 (D.C. Cir. 1992); *Connecticut Light & Power Co. v. Local 420, Int'l Bhd. of Elec. Workers, AFL-CIO*, 718 F.2d 14, 20 (2d Cir. 1983); *Little Six Corp. v. United Mine Workers of Am., Local Union No. 8332*, 701 F.2d 26, 29 (4th Cir. 1983).

enough" to support vacatur. *See id.* at 892 (quotations omitted). Indeed, although the Hearing Officer in this case *distinguished* certain prior arbitration decisions, *American National Can* demonstrates that his decision would not be reviewable on the merits even if he had expressly "declined to accord preclusive effect" to a decision "involving the same contract language and a similar issue." *Id.*; *see id.* (arbitrator "is not bound to follow" previous decisions, and ultimately remains free to "determin[e] the same or a similar issue anew") (quoting *Westinghouse Elevators of Puerto Rico, Inc. v. S.I.U. de Puerto Rico*, 583 F.2d 1184, 1187 (1st Cir. 1978)); *see also* ELKOURI 11-21 ("[E]very circuit court that has considered the issue has ruled that unless the collective bargaining agreement provides that arbitration awards are to have precedential effect, an award in one case is not binding on arbitrators considering subsequent disputes involving the same contract language, but different incidents.") (citing, *inter alia*, *American Nat'l Can*, 120 F.3d at 892).[2]

Even *Trailways*—which pre-dates *American National Can*—recognizes that "there may be situations where an arbitrator will refuse to defer to a prior award," such as when the earlier decision involves "an instance of bad judgment," 807 F.2d at 1425-1426. Given that an arbitrator's *refusal to follow* an earlier precedent is

[2] The NFLPA does not contend that the parties' CBA expressly accords prior arbitration decisions binding effect in future disputes. For good reason: the CBA provides that arbitration decisions will be "binding" on the NFL and NFLPA only "with respect to *that dispute*." Art. 46, § 2(d) (emphasis added).

both permissible and unreviewable, it follows *a fortiori* that an arbitrator's reasoned *distinction of* earlier precedent is both permissible and unreviewable.

C. The Hearing Officer Correctly Construed The Law Of The Shop

Even if this Court finds that it has authority to determine the "correct[]" meaning and scope of prior arbitral decisions (NFLPA Br. 42), it should choose the Hearing Officer's reading over the district court's.

1. *The Hearing Officer properly interpreted and applied the* Rice *decision*

The NFLPA's chief arbitration authority, both in this Court and below, is *In re Ray Rice.* The NFLPA asserts (Br. 34) that *Rice* stands for the blanket rule that "the New Policy cannot be applied retroactively." The Hearing Officer rejected that reading because *Rice* involved two rounds of discipline for the same incident: a two-game suspension imposed in July, followed by an indefinite suspension imposed in September. Thus, the "sole issue in this matter"—according to the *Rice* arbitrator herself—was "double discipline," *i.e.*, whether Rice's alleged misstatements in a pre-discipline meeting could justify "the imposition of a second suspension based upon the same incident." A054; *see* NFL Br. 32-33.

The NFLPA's brief, like the district court's opinion, nevertheless treats *Rice*'s double-discipline posture as legally irrelevant. The NFLPA characterizes the holding (Br. 11) as one broadly about "the players' right to advance notice of changes in disciplinary policies." But the *Rice* decision characterizes the "sole

issue" as whether Rice's alleged deceptions justified a "second" suspension, without any mention of "notice." Moreover, *Rice* ultimately vacates the second suspension solely "[b]ecause Rice did not mislead the Commissioner," A062, not on far-reaching "notice" or "retroactivity" grounds. Even the snippets of the *Rice* decision that the NFLPA quotes (Br. 37-38)—all simply characterizations of Commissioner Goodell's testimony and not in any sense "holdings"—confirm that the case turned on the "double discipline" of Rice. *See Rochester Methodist Hosp. v. Travelers Ins. Co.*, 728 F.2d 1006, 1015 (8th Cir. 1984) (noting that it is "perilous . . . to cite general statements in judicial opinions out of context").

At a minimum, the Hearing Officer acted within his discretion in reading the *Rice* decision to reflect its double-discipline dimension instead of following the NFLPA's acontextual interpretation. *See Trailways*, 807 F.2d at 1425 (arbitrator has "power to determine whether a prior award is to be given preclusive effect"); pp. 5-9 & n.1, *supra* (collecting authorities). The Hearing Officer in no way "disregarded" or "ignored" *Rice*.

The NFLPA further contends that the *Rice* arbitrator "held" that a two-game suspension was "the maximum for a first-time domestic violence offender under the previous Policy." Br. 20; *see also id.* at 12, 16, 17. But that contention cannot be reconciled with *Rice* itself, which acknowledged only (in a background footnote) that two games was "likely" the maximum for many (but not all)

domestic violence cases. A050 n.4 (noting exceptions). Indeed, the arbitrator stated in her legal analysis that "[i]f this were a matter where the first discipline imposed was an indefinite suspension, an arbitrator would be hard pressed to find that the Commissioner had abused his discretion." A060-61. The Hearing Officer explicitly accepted the *Rice* arbitrator's determination that an indefinite suspension would have been permissible, even under the preexisting policy, if the player (like Peterson) had not been previously disciplined for the same conduct. ADD021.

The NFLPA all but ignores this aspect—the most salient one here—of the *Rice* decision. But if *Rice* is "law of the shop," the Hearing Officer was entitled to rely on it; the NFLPA does not get to pick and choose the parts with which it agrees. If anything, the existence of such a dispute underscores that it is the Hearing Officer's duty to reconcile the law of the shop and that federal courts may not substitute their own judgments. *See PSC Custom, LP v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, Local No. 11-770*, 763 F.3d 1005, 1009 (8th Cir. 2014) ("It was for the arbitrator to harmonize any possibly discordant provisions within the CBA[.]").[3]

[3] The Hearing Officer also relied on an arbitration decision for the proposition that if the Commissioner "should determine that the current level of discipline imposed for certain types of conduct has not been effective in deterring such conduct, it is within his authority to increase discipline in such cases," as he is "not forever bound to historical precedent." ADD021. Again, the NFLPA's apparent disagreement with that proposition does not make it is any less a part of

The NFLPA additionally argues (Br. 45) that certain statements made by Commissioner Goodell during the *Rice* arbitration "independently warrant affirmance." The NFLPA cites no authority for such bootstrapping, and none exists. Despite its expansive view of what constitutes "the law of the shop," not even the NFLPA contends that the Commissioner's testimony from a separate case becomes part of the CBA.

In any event, just as the NFLPA's interpretation of *Rice* is both mistaken and ultimately irrelevant, so too is its interpretation of Commissioner Goodell's testimony. The Commissioner's comments naturally should be read in the double-jeopardy context in which they arose, yet the NFLPA jettisons that context. For instance, based solely on the Commissioner's testimony that the new policy "didn't impact on [Rice]" and that "[h]e was given his discipline and we moved forward," the NFLPA leaps to the conclusion that the Commissioner "knew that prior CBA arbitral decisions, constituting the law of the shop, prevented retroactive application of the New Policy to any player whose alleged misconduct predated its announcement." Br. 15. There is no support for this suggestion, and the Hearing Officer was not bound to make that same leap.

The NFLPA's interpretation, moreover, assumes an arbitrary "about-face" (Br. 23, 31, 56) from the Commissioner's testimony in *Rice* to the discipline he

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the "law of the shop." *Cf.* Br. 46 n.14 (arguing that this decision "could not undermine" the law of the shop as described by the NFLPA).

imposed on Peterson two weeks later. That strained assumption overlooks the far better explanation that the Hearing Officer adopted: although the Commissioner believed he could not re-discipline the already-disciplined Rice, the Peterson situation was different because, in the words of the *Rice* arbitrator, it was "the first discipline imposed." ADD022 (holding that the *Rice* "case differs from this one in that it turned on a second, later discipline more severe than the first," whereas "[t]he discipline challenged here is 'the first discipline imposed'") (quoting A060-A061). Even if the NFLPA's interpretation of the Commissioner's testimony were plausible—a factual question—the Hearing Officer acted well within his discretion in declining to adopt it. *See Misco*, 484 U.S. at 39 (court cannot vacate award despite allegations of "improvident, even silly, factfinding").[4]

2. *The Hearing Officer did not "disregard" the other decisions cited by the NFLPA*

Although the district court faulted the Hearing Officer only for his interpretation of *Rice* and the Commissioner's testimony, the NFLPA also complains about his alleged "disregard"—in reality, distinction—of a handful of

[4] The NFLPA's characterizations of Troy Vincent's testimony (Br. 20-21)—also well within the province of the Hearing Officer to evaluate—collide head-on with the Hearing Officer's contrary findings. *See* ADD024 ("I find no reason to doubt the veracity of [Vincent's] testimony, and in fact no evidence was offered to contradict or challenge any of his testimony," which was "consistent with the voice recordings of his two telephone conversations.").

arbitration decisions other than *Rice*. Those precedents do not undermine the Hearing Officer's decision.

There is no dispute that Peterson was on notice that his behavior constituted "conduct detrimental"; his claim of inadequate notice involves only the *degree of potential punishment* for that behavior. Yet all four cases the NFLPA cites—*Coles*, *Brown*, *Langhorne,* and *Bounty*—involved inadequate notice of whether *specific conduct* violated League or Club rules. *See Langhorne*, A142-143 (player "not advised" that sitting out final 15 minutes of practice would subject him to $15,000 fine); *Coles*, A245 (finding that "it is not unreasonable" for player to assume "that a failure to weigh-in after practice . . . would not be cause for discipline"); *Brown*, A298-299 (concluding that the employer did not establish that player was "on notice that his conduct"—missing a mandatory weigh-in—"was prohibited"); *Bounty*, A394-395 (players "may not have [had] a clear understanding that such behavior is prohibited").

In addition, as the Hearing Officer found, three of those cases are "distinguishable" as involving minor, team-related issues, such as "a fine for missing the last few minutes of a Thursday practice." ADD023. None of those

three involved conduct determined by the League Commissioner to be conduct detrimental.[5]

Although *Bounty* did involve conduct detrimental, it too concerned the question of whether players were on notice that specific conduct was prohibited—namely, a pay-for-performance or "bounty" system—and not whether they were on notice of the range of potential discipline (as here). The NFLPA argues (Br. 39) that the opinion was based "principally" on the fact that the players "did not receive notice of their potential punishments," but that claim is belied by the opinion's explanation that the players "may not have [had] a clear understanding that such behavior is prohibited or where the lines are between permissible and impermissible conduct." A394-A395. Indeed, the main focus of *Bounty* is not "retroactivity" (a word the opinion never uses), but rather the pervasive involvement of the Club's coaching staff in encouraging the detrimental conduct. A383; *see id.* (emphasizing unique nature of case and cautioning that it "should not be considered a precedent" in evaluating future discipline).

[5] Unlike this case, moreover, *Coles* involved a violation of the *express* notice requirements for Club discipline. *See* A238 ("All Clubs must publish and make available to all players at the commencement of pre-season training camp a complete list of the discipline which can be imposed for designated offenses within the limits set by the maximum schedule referred to in Section 1(a) above.") (citing 2006 CBA Art. VIII, § 2). According to the arbitrator, the Club could "not rely on any language similarity between prior rules and new rules as a basis for adequate notice" if it had failed to comply with Section 2. A241.

Although the NFLPA criticizes the Hearing Officer for failing to provide a fuller explanation of why those decisions were distinguishable, an arbitrator's failure to "explain" a decision to the satisfaction of a disappointed litigant is not a basis for vacatur. *See United Steelworkers of Am.*, 363 U.S. at 598 ("Arbitrators have no obligation to the court to give their reasons for an award."); *see* NFL Br. 26-27. The district court, moreover, vacated the Award with a *more* truncated explanation of those other cases. *See* ADD013, Order 13 n.4 ("[*Rice* is] consistent with prior NFL arbitration decisions recognizing the importance of notice in advance of discipline."). The fact that the district court afforded those decisions such cursory treatment reinforces their ancillary nature.

D. The Hearing Officer Faithfully Applied Notice And Retroactivity Principles Under The CBA

Even though it is undisputed that a decision draws its essence from the CBA if the Hearing Officer was "arguably" construing the CBA and law of the shop, and even though it makes no difference whether he was "right or wrong," it is also the case here that the Hearing Officer's decision is sound on the merits.

The NFLPA contends (Br. 27) that *any* application of *any* "new disciplinary policies" to antecedent conduct would be impermissible and must be vacated—even if (as here) the discipline imposed is at a level that could have been imposed under the "old" policy. But such an absolute rule would not conform to the underlying principle of "fair notice" upon which the NFLPA itself relies, *e.g.*,

protecting against a "sharp change in sanctions," Br. 39 (quoting *Bounty* at A386); requiring "a clear understanding that [the] behavior is prohibited," *id.* (quoting *Bounty* at A395); and providing "clear notice of both what the employer expects as well as the range of penalties that may be imposed," Br. 41 n.12 (quoting ELKOURI at 15-71).

Accordingly, the principal question of retroactivity before the Hearing Officer was bound up with whether, at the time of the "conduct detrimental," Peterson had fair notice of the potential discipline (*i.e.*, an indefinite suspension). Answering that question requires first determining the range of punishment permissible at the time of the conduct detrimental. If a player received a level of punishment that he could have received under the preexisting policy, he has no claim that he lacked fair notice or was subject to an impermissibly retroactive punishment. *See* NFL Br. 28-30 (citing, *inter alia*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-271 (1994)).[6]

Here, it is beyond dispute that neither the terms of the CBA nor the terms of the preexisting Policy placed any limit on the length of Peterson's suspension. On the contrary, the NFL Constitution and Bylaws and the Player Contract (both part of the CBA) provide notice of the Commissioner's authority to suspend a player

[6] Although *Landgraf* involved "*statutory* retroactivity" (NFLPA Br. 46), it articulates broader principles of "fair notice" and remains the Supreme Court's leading precedent on "ordinary judicial principles concerning the application of new rules to pending cases and preenactment conduct." 511 U.S. at 280.

"indefinitely." NFL Br. 5. Based on his analysis of the CBA, the preexisting Policy, and the law of the shop (including the *Rice* arbitration decision and others), the Hearing Officer correctly determined that Peterson could have received the same suspension under either policy for his particularly "egregious" and "brutal" conduct. ADD022. That factual determination properly informed the Hearing Officer's legal conclusion that Peterson had "fair notice" and that the penalty was not impermissibly retroactive. The NFLPA makes no attempt, moreover, to rebut the Hearing Officer's finding that the record was devoid of evidence that Peterson understood that discipline for domestic violence under the preexisting policy was limited to two games; nor did the NFLPA offer any evidence to suggest that Peterson "ever relied in any way on the level of discipline that would be imposed for conduct such as his." ADD022-023.

The NFLPA's position is based on its view that two games was the "likely maximum" punishment for all forms of domestic violence under the preexisting policy. But for the reasons explained (*see* pp. 10-11, *supra*), the Hearing Officer—consistent with the *Rice* arbitrator's observation—was well within his discretion to find otherwise. The NFLPA also argues (Br. 52-53) that the Commissioner's testimony in *Rice* "foreclose[s] any claim that the Policies are really the same." That misses the point. The Hearing Officer did not hold that the *Policies* were the

same; he held that, under either Policy, the "*result* is the same." ADD022 (emphasis added).

II. THE HEARING OFFICER DID NOT EXCEED HIS AUTHORITY BY ADDRESSING THE ISSUE THAT THE NFLPA RAISED

The NFLPA argues that the Hearing Officer's decision should be vacated on the ground that he exceeded his authority in considering the length of suspension available under the preexisting policy. But the "scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator," *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 765 (1983), and "all doubts [are] resolved in favor of the arbitrator's authority," *Lackawanna Leather Co. v. United Food & Commercial Workers Int'l Union, AFL-CIO & CLC*, 706 F.2d 228, 231 (8th Cir. 1983); *see also* NFL Br 34-35.

The NFLPA suggests that the Hearing Officer did not actually affirm Peterson's discipline but instead impermissibly "impose[d] discipline of his own." Br. 49-50. That is simply wrong. The Hearing Officer explicitly "affirmed" (ADD025) the discipline that had been imposed on Peterson under CBA Article 46, as the NFLPA acknowledges in the first line of its brief. *See* Br. i ("This case arises out of an arbitration decision affirming" Peterson's discipline.). The NFLPA appears to confuse the Hearing Officer's *rationale* (that Peterson's discipline was not retroactive because *the Commissioner* could have imposed the same

punishment under the preexisting policy, *see* ADD022) with his *holding* (that "the discipline [be] affirmed," ADD025). But there is no dispute that the Hearing Officer had the authority, at a minimum, to "affirm or vacate" (NFLPA Br. 50) the discipline that the Commissioner had imposed on Peterson. That is precisely what the Hearing Officer did.

The NFLPA next argues that the Hearing Officer impermissibly recast "how the parties . . . framed the issue." *John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, AFL-CIO*, 913 F.2d 544, 561 (8th Cir. 1990). But the cases cited by the NFLPA involve issues for arbitrator decision that had been defined by stipulation and agreement of the parties. In *John Morrell*, "the arbitrator framed the issue before him in the terms agreed upon by the parties," and only exceeded his authority when he answered an entirely different question that the parties had not (a) "submitted," (b) "referred to" in briefs, (c) "offered any evidence on," or (d) even "believed" would be arbitrated. *Id.* at 560*; see also Trailways*, 807 F.2d at 1423 (arbitrator "completely altered the *stipulated* issue for decision"); *Local 238 Int'l Bhd. of Teamsters v. Cargill, Inc.*, 66 F.3d 988, 990-91 (8th Cir. 1995) ("*both parties* explicitly asked the arbitrator to" address issue) (emphases added). To be sure, "[w]hen *two parties* submit an issue to arbitration, it confers authority upon the arbitrator to decide *that* issue." *Id.* (first emphasis

added). But the NFLPA consistently omits (Br. 3, 29, 51) the first half of that quotation.[7]

Here, "the parties" did not stipulate to the precise issues for arbitration. The NFLPA framed the issue as "whether it is fair and consistent for the league to retroactively apply the new policy to the May conduct." Br. 22 (emphasis added). The NFL framed it differently: whether the discipline was "retroactive" at all, given that the Commissioner "had the discretion to impose the very discipline that he imposed here even under the old policy." A090. Even the NFLPA does not assert that the parties *agreed* to a particular statement of the issue, and the NFLPA cites no authority for the proposition that the Hearing Officer was tethered to the NFLPA's skewed framing of the issue. To the contrary, "[i]t is appropriate for the arbitrator to decide just what the issue was that was submitted to it and argued by the parties." *Nat'l Gypsum Co. v. Oil, Chem. & Atomic Workers Int'l Union*, 147 F.3d 399, 402 (5th Cir. 1998) (alteration in original) (internal citation omitted).

Even if the Hearing Officer had been confined to answering the NFLPA's chosen question "'yes' or 'no'" (NFLPA Br. 50 n.15), doing so would have entailed an evaluation of the permissible range of punishment for Peterson's conduct under

[7] Tellingly, the lone decision the NFLPA cites (Br. 50 n.15) not involving a stipulated issue did *not* find that the arbitrator had exceeded his authority, but rather that he had "ignore[d] the agreement's express provision" and "rewrote" the CBA. *See Int'l Paper Co. v. United Paperworkers Int'l Union*, 215 F.3d 815, 817-818 & n.1 (8th Cir. 2000).

the preexisting policy, as already explained. *See* pp. 16-19, *supra*; NFL Br. 28-29, 37. In any event, the NFLPA *did* ask the Hearing Officer to resolve whether Peterson's discipline was permissible under the preexisting policy, and its protests to the contrary are unavailing. *First*, the NFLPA suggests (Br. 51) that its written notice of appeal did not frame the issues for arbitration because it was merely a statement to the Commissioner and because the Hearing Officer "had not yet been designated." The notice of appeal, however, was directed to the Commissioner in his capacity as the *presumptive Hearing Officer*. *See* ADD008 (district court recognizing that notice of appeal "identified the issues presented" to the arbitrator).

Second, the NFLPA tries to downplay the statements that its counsel made to the Hearing Officer as "*oral* snippets." Br. 52. But there were no written briefs in the Peterson arbitration; along with its notice of appeal, these "oral snippets" were the method by which the NFLPA "framed" for the Hearing Officer its view of the issue.

Third, the NFLPA states (Br. 52) that, "[r]ead in context, [NFLPA's counsel's] statements in no way invited [the Hearing Officer] (or gave him authority) to apply discipline under the previous Policy." That is beside the point. No one suggests that the NFLPA asked the Hearing Officer to "apply discipline" under the previous Policy; rather, the dispute is over whether the NFLPA put into issue the scope of possible punishment under the previous Policy. At the very

least, the NFLPA did so when it asked the Hearing Officer to "*reduce* the discipline here" to the purportedly "maximum" two-game penalty under the "previous policy." A080 [53:2-5] (emphasis added).

The NFLPA accuses the NFL of taking its counsel's statements out of context, but then offers no alternative explanation for what this could mean: "Our arguments are based on the legal errors we believe that required the suspensions be overturned as they – *I shouldn't say 'overturned,' that they be reduced to two games time served and two game checks.*" A099-A100 [131:24-132:2] (emphasis added); *see* A080 [52:22-53:16] (telling Hearing Officer that it was "within [his] authority" to reduce the penalty to that "maximum"). In other words, the Hearing Officer was not asked to *vacate* supposedly retroactive discipline, but rather to "reduce" it to the "maximum" under the "old" policy—a task which necessarily required evaluating the maximum suspension Peterson *could have received* under that policy.

III. THE NFLPA'S ALTERNATIVE GROUNDS FOR VACATUR FAIL AS A MATTER OF LAW

The NFLPA's two other grounds for vacatur not adjudicated below—that the Hearing Officer was "evidently partial" and that the award violates "fundamental fairness"—depend on no disputed facts and should be rejected by this Court.

A. The Hearing Officer Was Not "Evidently Partial"

The NFLPA does not deny that the ultimate question of "evident partiality" is a legal one reviewed *de novo* with the burden on the NFLPA "to show that this partiality had a prejudicial impact on the arbitration award." *Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549, 552-553 (8th Cir. 2007) ("The mere possibility of prejudice is insufficient to justify setting aside the award."). The NFLPA nevertheless contends (Br. 54) that the district court on remand should resolve the claim because it may require "factual findings." Although evident partiality may depend on certain underlying facts, the NFLPA points to no facts that the district court needs to find here.

The only "factual determination[s]" the NFLPA offers as examples simply rehash the NFLPA's *legal* arguments. *See* Br. 59-60 (citing, as possible "evidence" of partiality, the Hearing Officer's alleged "disregard of the law of the shop and his unwillingness to adjudicate the veracity of Commissioner Goodell and Mr. Vincent"). Indeed, the NFLPA has already conceded that it is arguing only that the Hearing Officer could be "*viewed* as evidently partial" and that it has no "evidence as to whether . . . [he is] improper or not." A071 (emphasis added); *see Williams v.*

Nat'l Football League, 582 F.3d 863, 885 (8th Cir. 2009) (evident partiality "not made out by the mere appearance of bias") (citation omitted).[8]

On the merits, the NFLPA's "evident partiality" claim is foreclosed by this Court's decision in *Williams*. This Court held that the NFLPA could not show that the NFL's sitting General Counsel was a biased arbitrator, even though he had allegedly engaged in *ex parte* conversations with the players' Club while discipline was pending. 582 F.3d at 886. The NFLPA (Br. 59) tries to distinguish *Williams* as turning only on the NFLPA's failure to object during the arbitration. But as the NFL pointed out in its opening brief (Br. 40), this Court also held that the NFLPA "waived its objection to [the General Counsel's] serving as arbitrator *by agreeing in the CBA that the Commissioner's designee . . . could serve as arbitrator*." *Id.* (emphasis added). The NFLPA offers no response.[9]

The NFLPA acknowledges (Br. 58) that parties can "ask no more impartiality than inheres in the method they have chosen," *Williams*, 582 F.3d at 885 (citation omitted), but argues that the "ordinary" rule should be supplanted

[8] The NFLPA acknowledges that Hearing Officer Henderson has reduced player discipline in the past. *See* A587; *see also* A179-182.

[9] The NFLPA's out-of-circuit cases—*Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972), and *Morris v. N.Y. Football Giants, Inc.*, 575 N.Y.S.2d 1013 (N.Y. Sup. Ct. 1991)—are distinguishable as not involving discipline under a collective bargaining agreement and, in any event, do not trump *Williams*. *See also Alexander v. Minnesota Vikings Football Club LLC*, 649 N.W.2d 464, 467 (Minn. Ct. App. 2002) (*Morris* is "not precedential legal authority" and "we do not find it to be persuasive.").

because this case is "unique" and "unusual" in that it concerns the conduct of League executives (Br. 56-58). That is incorrect for at least two reasons.

First, the NFLPA's argument ignores the text of the CBA, which provides the "exclusive[]" (Br. 9) procedures for "conduct detrimental" discipline and gives the Commissioner the discretion to "appoint one or more designees to serve as hearing officers." Art. 46, § 2(a). Other than the requirement (not disputed here) that the Commissioner "consult[] with the Executive Director of the NFLPA," *id.*, there are no limitations on that designation power, which has been in place for decades through successive labor agreements and was specifically carried forward during the last round of CBA bargaining. As the NFLPA's own cited precedent makes clear (Br. 58), "an arbitrator's decision will not be set aside for asserted biases that are either inherent in the method of selection or otherwise known prior to the selection of the arbitrator." *Nat'l Hockey League Players' Ass'n v. Bettman*, No. 93 Civ. 5769, 1994 WL 738835, at *13 (S.D.N.Y. Nov. 9, 1994). The NFLPA, having bargained for the Commissioner to either resolve or delegate grievance appeal decisions, including after this Court's decision in *Williams*, "cannot now be heard to complain about this asserted bias." *Id.* at *14; *see Williams*, 582 F.3d at 886 ("[T]he Union cannot reasonably claim to be surprised that such discussion occurred given [arbitrator's] position as general counsel for the NFL.").

Second, there is nothing "unique" or "unusual" about this "conduct detrimental" appeal. The CBA gives the Commissioner power both to determine "conduct detrimental" discipline *and* to hear "any appeal" of that discipline "at his discretion." Art. 46 § 2(a). If the Commissioner were forced to recuse himself (or to appoint a "neutral" arbitrator) every time the NFLPA asserted a dispute over the "credibility, integrity, and testimony of league executives" (Br. 56), his bargained-for right to hear conduct detrimental appeals would be a dead letter.

If the NFLPA wishes to have a third party adjudicate appeals of conduct detrimental discipline going forward, it is free to secure that right at the bargaining table—just as it has done for other dispute-resolution procedures under the CBA. *See* NFL Br. 3-4. But "[i]t is not for this court to rewrite the clause in the way [the NFLPA] now wishes it was written," and thus "cut out the very heart of" the parties' dispute resolution procedures. *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 809 F.2d 483, 492 (8th Cir. 1987).

B. The NFLPA Lacks Any Independent Claim For "Fundamental Unfairness"

The NFLPA asks this Court to vacate the arbitration award on "fundamental fairness" grounds. Despite the NFLPA's contention that this Court has not "categorically reject[ed]" such a claim, it all but has: given that the Supreme Court recently "eliminated judicially created vacatur standards under the FAA," *Air Line Pilots*, 638 F.3d at 578 (citing *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S.

576, 586-87 (2008)), the judicially created "fundamental unfairness" standard is presumably no longer viable. *See Hoffman v. Cargill, Inc.*, 236 F.3d 458, 462 (8th Cir. 2001) (recognizing, even before *Hall Street*, that "our narrow construction of extra-statutory review militates against such a standard").

In any event, a district court's fundamental unfairness ruling is also a legal issue reviewed *de novo*. *Hoffman*, 236 F.3d at 461. Although the NFLPA seeks remand for "fact-finding" (Br. 60), it again fails to specify what "facts" the district court could find that would affect the legal determination. Nor could it: a fundamental unfairness claim would go, at most, only to whether the conduct of the hearing *itself* was procedurally unfair. *See id.* at 463 (Even "[i]f a 'fundamental unfairness' standard exists, it must apply to *arbitration schemes* so deeply flawed as to preclude the possibility of a fair outcome.") (emphasis added); 9 U.S.C. § 10(a)(3) (referring to arbitrator misconduct in "refusing to postpone the hearing," to "hear evidence," or involving similar "prejudice[]"); *see also* NFL Br. 39-40. All of the NFLPA's out-of-circuit cases involve *procedural* unfairness alone. *See* Br. 61 (citing, *inter alia*, *Int'l Union, UMW v. Marrowbone Dev. Co.*, 232 F.3d 383, 389-390 (4th Cir. 2000), which vacated an award where an arbitrator called for hearing but "issued his award without ever holding that hearing"). Moreover, any unfairness in the conduct of the hearing itself would be part of the existing record

without any need for further "fact-finding." Yet the NFLPA has never alleged any such unfairness.

CONCLUSION

For the foregoing reasons, and those stated in the NFL's opening brief, the judgment of the district court should be reversed and the case remanded with instructions to reinstate the Award and dismiss the petition to vacate with prejudice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure (FRAP), the undersigned certifies that this brief complies with the type-volume limitations of FRAP 32(a)(7)(B) and Eighth Circuit Rule 28A(c).

1. Exclusive of the exempted portions identified in FRAP 32(a)(7)(B)(iii), the brief contains 6,999 words. (The undersigned is relying on the word-count utility in Microsoft Word 2010, the word-processing system used to prepare the brief, consistent with Federal Rule of Appellate Procedure 32(a)(7)(C)(i).)
2. The brief was produced with Microsoft Word 2010 software in Times New Roman 14-point typeface.

Dated: June 9, 2015

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Reply Brief for Appellants was filed electronically with the Clerk of the United States Court of Appeals for the Eighth Circuit to be served via the court's electronic filing system on this 9th day of June, 2015, upon the parties listed below:

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VIRUS CERTIFICATION

The undersigned hereby certifies that a digital copy of Appellant's Brief submitted herewith has been scanned for viruses and that it is virus-free.

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