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

BRIEF FOR DEFENDANTS-APPELLANTS

Joseph G. Schmitt
Peter Gray
Nilan Johnson Lewis PA
120 South Sixth Street
Suite 400
Minneapolis, MN 55402
(612) 305-7500 (phone)
(612) 305-7501 (fax)

Daniel L. Nash
Pratik A. Shah
Stacey Eisenstein
Marla S. Axelrod
James E. Tysse
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000 (phone)
(202) 887-4288 (fax)

Attorneys for Defendants-Appellants

SUMMARY OF THE CASE

This appeal challenges the district court's vacatur of an arbitration award upholding the NFL's discipline of a player, Adrian Peterson, for what nobody disputes was "conduct detrimental"—corporal punishment of his four-year old son so severe that it led to a criminal indictment and a subsequent plea—subject to the Commissioner's discretionary discipline under a collective bargaining agreement ("CBA"). By substituting its judgment as to the correct result, the district court failed to accord the award the "extraordinary" deference to which it is entitled.

The district court premised vacatur on two grounds: (1) the arbitration award departed from "the essence of the CBA" by "ignor[ing]" applicable retroactivity principles, and (2) the arbitrator "exceeded his authority" by resolving the "hypothetical question" of whether the discipline could be sustained under a "previous" disciplinary policy. ADD011-ADD016. Both grounds suffer from the same fundamental misunderstanding of the arbitrator's reasoned retroactivity analysis. As part of that analysis, the arbitrator considered—consistent with established retroactivity principles—whether the same discipline could have been applied under the preexisting policy that Appellee argues must govern.

Oral argument will assist this Court in correcting the district court's violation of core principles of deference governing labor arbitration awards. Appellants thus request 20 minutes of oral argument time.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellants state the following:

The National Football League ("NFL") is an unincorporated association of 32 member clubs organized under the laws of New York. The National Football League Management Council ("NFLMC"), the sole and exclusive collective bargaining representative of the NFL member clubs, is a not-for-profit association made up of the NFL member clubs. The member clubs of the NFL and NFLMC are:

CLUBS	ENTITIES
Arizona Cardinals	Arizona Cardinals Football Club LLC; Arizona Cardinals Holding Company LLC
Atlanta Falcons	Atlanta Falcons Football Club, LLC
Baltimore Ravens	Baltimore Ravens Limited Partnership; Baltimore Football Company LLC (general partner)
Buffalo Bills	Buffalo Bills, Inc.
Carolina Panthers	Panthers Football, LLC; P.F.F., Inc. (general partner)
Chicago Bears	The Chicago Bears Football Club, Inc.
Cincinnati Bengals	Cincinnati Bengals, Inc.
Cleveland Browns	Cleveland Browns Football Company LLC
Dallas Cowboys	Dallas Cowboys Football Club, Ltd.; JWJ Corporation (general partner)
Denver Broncos	PDB Sports, Ltd. d/b/a Denver Broncos Football Club; Bowlen Sports, Inc. (general partner)
Detroit Lions	The Detroit Lions, Inc.
Green Bay Packers	Green Bay Packers, Inc.
Houston Texans	Houston NFL Holdings, L.P.; RCM Sports and Leisure, L.P. (general partner); Houston NFL Holdings G.P., L.L.C. (general partner of RCM Sports)

CLUBS	ENTITIES
Indianapolis Colts	Indianapolis Colts, Inc.
Jacksonville Jaguars	Jacksonville Jaguars, LLC; TDJ Football, Ltd. (general partner); Dar Group Investments, Inc. (general partner of TDJ Football)
Kansas City Chiefs	Kansas City Chiefs Football Club, Inc.
Miami Dolphins	Miami Dolphins, Ltd.; South Florida Football Corporation (general partner)
Minnesota Vikings	Minnesota Vikings Football, LLC
New England Patriots	New England Patriots LLC
New Orleans Saints	New Orleans Louisiana Saints, L.L.C.; Benson Football, Inc. (general partner)
New York Giants	New York Football Giants, Inc.
New York Jets	New York Jets LLC
Oakland Raiders	The Oakland Raiders; A.D. Football, Inc. (general partner)
Philadelphia Eagles	Philadelphia Eagles, LLC
Pittsburgh Steelers	Pittsburgh Steelers LLC
St. Louis Rams	The St. Louis Rams, LLC
San Diego Chargers	Chargers Football Company, LLC; Alex G. Spanos (general partner)
San Francisco 49ers	Forty Niners Football Company LLC; San Francisco Forty Niners, LLC (general partner)
Seattle Seahawks	Football Northwest LLC
Tampa Bay Buccaneers	Buccaneers Limited Partnership; Tampa Bay Broadcasting, Inc. (general partner)
Tennessee Titans	Tennessee Football, Inc.; Cumberland Football Management, Inc. (general partner)
Washington Redskins	Pro-Football, Inc.

No publicly held corporation owns 10 percent or more of any of the above-listed entities' stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 and the Labor Management Relations Act of 1947, 29 U.S.C. § 185 *et seq.* The district court entered a final order and judgment on February 26 and 27, 2015, respectively. Appellants filed a timely notice of appeal from the district court's final order. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred in vacating a labor arbitration award, which sustained discipline of a player who undisputedly engaged in conduct prohibited under the parties' collective bargaining agreement, on the ground that the arbitrator did not adequately explain or support to the district court's satisfaction his merits ruling rejecting a claim of retroactivity.

- *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987)
- *American Nat'l Can Co. v. United Steelworkers of Am.*, 120 F.3d 886 (8th Cir. 1997)
- *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 (8th Cir. 2014)

2. Whether the district court erred in vacating the same award on the ground that the arbitrator exceeded his authority by answering a question not before him, when in fact both parties raised that question and its resolution was part-and-parcel of a proper analysis of the retroactivity claim.

- *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987)
- *Midwest Div.-LSH, LLC v. Nurses United for Improved Patient Care*, 720 F.3d 648 (8th Cir. 2013)

STATEMENT OF THE CASE

A. Disciplinary Framework Under The Collective Bargaining Agreement

1. *The NFL-NFLPA Collective Bargaining Agreement*

The National Football League Players Association ("NFLPA") is a union of professional football players who play in the National Football League ("NFL" or "League"). The NFLPA is party to a comprehensive collective bargaining agreement with the NFL Management Council, the sole and exclusive collective bargaining representative of the NFL's 32 member clubs. *See* Collective Bargaining Agreement between NFL and NFL Players Ass'n (2011) ("CBA"), *available at* https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf. That CBA, which is effective through the end of the 2020 season, governs all aspects of the parties' relationship. *Id.* Art. 69. It comprises 71 separate Articles, the standard NFL Player Contract, the NFL Constitution and Bylaws, the Policy and Program for Substances of Abuse, and other documents. *See* CBA; A012-A020; *see also, e.g.*, A104-A106; A107-A117; National Football League Policy and Program for Substances of Abuse (2014) ("Substance Abuse Policy"), *available at* https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Active%20Players/Drug_SOA_Policy_9-29-14.pdf.

The 2011 CBA includes a number of negotiated grievance and dispute-resolution procedures that require binding arbitration. These arbitration provisions

include detailed procedures for resolving non-injury-related grievances (Article 43), injury-related grievances (Article 44), and grievances related to "Commissioner Discipline" (Article 46)—at issue in this case. *See* CBA at 187-99, 204-06; A009-A011.

The arbitration procedures vary depending on the nature of the grievance. Both non-injury grievances and injury grievances are heard by third-party arbitrators "whose appointment must be accepted in writing by the NFLPA and the Management Council." Art. 43 § 6; Art. 44 § 7. By contrast, as relevant here, Article 46 recognizes the longstanding and plenary authority of the NFL Commissioner both in the imposition of certain forms of discipline and in the adjudication of internal appeals of such discipline. *See* A009 [Art. 46 § 1].

As to the former, the Commissioner has broad authority under the CBA to impose discipline, including "a fine or suspension," on a player who engages in "conduct detrimental to the integrity of, or public confidence in, the game of professional football." A009 [Art. 46 § 1(a)]. The CBA does not otherwise define what constitutes "conduct detrimental," or provide for presumptive or maximum discipline for engaging in such conduct.[1]

[1] CBA provisions governing other forms of sanctionable conduct do provide for presumptive or maximum discipline. For instance, the Substance Abuse Policy, which is negotiated between the NFLMC and NFLPA and incorporated into the CBA, sets forth a schedule of fixed fines and suspensions for different violations of the Policy. *See* Substance Abuse Policy § 1.5.2(b) (providing for a

The Commissioner's disciplinary authority derives from the NFL Constitution and Bylaws. That document, which is part of the CBA, affords the Commissioner "complete authority" to discipline players, including by imposing fines, suspending players for definite periods "or indefinitely," or by terminating a Player's Contract. A111-A116 [Art. VIII § 8.13]. The Constitution further "authorize[s]" the Commissioner to "take or adopt appropriate legal action or such other steps or procedures as he deems necessary and proper in the best interests of either the League or professional football, whenever [any NFL player or employee] is guilty of any conduct detrimental either to the League, its member clubs or employees, or to professional football." A110 [Art. VIII § 8.6]. The standard NFL Player Contract, which is also a part of the CBA and signed by every player, acknowledges "the detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players" from conduct detrimental. A017 ¶ 15. It recognizes the Commissioner's disciplinary authority "to suspend [the] Player for a period certain or indefinitely; and/or to terminate this contract." *Id.*

Article 46 also provides an internal appeal process involving an arbitrator called a "Hearing Officer." A009-A010 [Art. 46 § 1(a), 2(a)]. A player may

---

set "suspension without pay of four (4) regular and/or postseason games" for certain offenders).

initiate an internal appeal by filing an "appeal in writing to the Commissioner" within three business days of receiving discipline. *Id.* § 1(a). "The Commissioner may serve as hearing officer in any appeal . . . at his discretion." *Id.* § 2(a). Alternatively, the Commissioner, after "consultation with the Executive Director of the NFLPA," may "appoint one or more designees to serve as hearing officers." *Id.* The Hearing Officer (or the Commissioner himself) must schedule an appeal hearing within ten days, and issue a decision "[a]s soon as practicable." *Id.* § 2(d), 2(f)(i). The Hearing Officer's decision then constitutes "full, final and complete disposition of the dispute" that is "binding" on all parties, as well as the NFLMC and the NFLPA. *Id.* § 2(d). No further appeal or process is contemplated or permitted.

2. *Personal Conduct Policy*

As noted, the CBA recognizes the Commissioner's broad and longstanding authority to define what constitutes "conduct detrimental to the integrity of and public confidence in the National Football League." A009 [Art. 46 § 1(a)]. The CBA likewise recognizes the Commissioner's broad authority to determine the type and level of discipline for such conduct. A111-A116 [Art. VIII § 8.13]. Pursuant to his authority under the League's Constitution as recognized by the CBA, the Commissioner has issued a Personal Conduct Policy to explain the types of behaviors that will be subject to discipline, as well as the types of discipline that

players can expect. The Personal Conduct Policy has been updated on multiple occasions over the course of the League's history.

The Personal Conduct Policy effective June 1, 2013 ("the Policy") "applies to players, coaches, other team employees, owners, game officials and all others privileged to work in the National Football League." A021. The Policy provides notice that all NFL personnel are "subject to discipline" for a range of "conduct detrimental" to professional football, including but not limited to "criminal activity," which "is clearly outside the scope of permissible conduct" even absent a conviction. *Id.* It specifically covers crimes involving "the use or threat of violence," including "domestic violence," as well as any other "[c]onduct that undermines or puts at risk the integrity and reputation of the NFL, NFL clubs, or NFL players." *Id.*[2]

The Policy provides that "the Commissioner will have full authority to impose discipline as warranted," and lists examples of "fines, suspension, or banishment from the League." A022. The Policy also allows the Commissioner to impose "a probationary period and conditions that must be satisfied prior to or following reinstatement." *Id.* Since 2007, the Policy has included a section called "Evaluation, Counseling and Treatment," which provides that persons who engage

[2] The Personal Conduct Policy was re-issued on June 1, 2014. A024. It is undisputed that the re-issued Policy "is identical to the previous version for 2013." ADD021.

in prohibited conduct "generally will be required to undergo a formal clinical evaluation," and "may be encouraged or required to participate in an education program, counseling or other treatment deemed appropriate by health professionals." A021-A022.

Nothing in that Policy identifies a fixed, maximum, or presumptive disciplinary penalty. Instead, the Policy puts NFL personnel on notice that "[t]he specifics of the disciplinary response will be based on the nature of the incident, the actual or threatened risk to the participant and others, any prior or additional misconduct (whether or not criminal charges were filed), and other relevant factors." A022. In all cases, the Policy requires the League to "be advised promptly of any incident that may be a violation of this policy, and particularly when any conduct results in an arrest or other criminal charge," with such failures to notify promptly "taken into consideration in making disciplinary determinations under this policy." A023.

Finally, the Policy preserves various procedural rights for disciplined players, including the right to timely NFLPA notification and involvement, representation by counsel and the NFLPA, and the right to a prompt internal appeal of the disciplinary decision. A022.

3. *The Commissioner's August 2014 Letter*

In August 2014, the NFL Commissioner, Roger Goodell, issued a memorandum to NFL personnel and an accompanying letter to NFL owners announcing measures to "reinforce and enhance" the Personal Conduct Policy and other League programs related to domestic violence (collectively, the "August 2014 Letter"). A027-A031. That letter recognized that although "[o]ur Personal Conduct Policy has long made clear that domestic violence and sexual assault are unacceptable," the NFL would be taking actions "to improve our response to domestic violence and sexual assault." A031. These actions included "new and enhanced educational programs on domestic violence and sexual assault," "increase[d] . . . outreach to college and youth football programs," and detailed information for families "about available services and resources." *Id.*

In addition, the NFL announced "enhanced discipline" under the Policy in the form of a presumptive six-week suspension for domestic violence involving physical force. A031. The Commissioner emphasized in the August 2014 Letter that the enhanced discipline was meant to be "consistent with our Personal Conduct Policy." A029. Just as the prevailing Policy required that any discipline take into account all "relevant factors," the presumptive six-game suspension is subject to adjustment based on mitigating or aggravating factors. *See* A022, A031.

All the actions announced in the August 2014 Letter, including the presumptive penalty, became "[e]ffective immediately." A029.

B. Factual Background

1. *Peterson Is Indicted And Arrested For Felony Child Abuse*

Adrian Peterson is a running back for the Minnesota Vikings professional football team. ADD018. In May 2014, while residing in Texas, Peterson severely beat his four-year-old son with a tree branch. *Id.* A Texas grand jury indicted Peterson for felony "Injury to a Child." ADD026. The indictment described the incident as follows: "[O]n May 18, 2014, Mr. Peterson repeatedly struck his four-year old son with a branch from a tree, inflicting multiple welts and lacerations on the child's legs, hands, buttocks and back, and bruises and abrasions on his scrotum." ADD018; *see also* A032-A033 (describing incident). His son's injuries were so severe that a local pediatrician in Minnesota, after examining the boy, felt compelled to report child abuse to the police. ADD027; *see also* A032-A033. Media reports described the injuries as "extensive" and as "clinically diagnostic of child physical abuse." *Id.*

Around the same time, public statements and text messages from Peterson revealed a lack of remorse and admissions that he had punished his children in similar ways in the past. ADD027. For example, he reportedly made statements

that he would not "eliminate whooping my kids" and that he felt "very confident with my actions because I know my intent." ADD028; *see also* A033.

Shortly after his September indictment, Peterson was arrested and then released on a $15,000 bond. A032. Peterson, the NFLPA, and the NFL promptly entered into an agreement to place Peterson on the "Commissioner's Exempt" list, which put him on paid leave pending resolution of his criminal case. ADD026; A105-A106 [Art. XVII § 17.14(A)]. The parties agreed that the NFL would not "process or impose any discipline" on Peterson during that period. A050.

2. *Peterson Pleads To A Criminal Charge And Is Disciplined Under The Policy*

On November 4, 2014, Peterson pleaded *nolo contendere* to "reckless assault." ADD019; ADD026. As part of the plea agreement, Peterson acknowledged that he was "criminally responsible for the offense charged." ADD026. The state court accepted the plea and entered a "Deferred Adjudication Judgment and Order." *Id.* As part of the Judgment, the court found "substantial evidence to support the Defendant's guilt of the Class 'A' offense, Reckless Assault." *Id.*

Shortly after his criminal charges were resolved, the NFL notified Peterson that a pre-disciplinary meeting was scheduled for November 14. A034. The NFLPA and Peterson declined to participate on that date, citing scheduling conflicts and concerns about outside "experts" who would be in attendance. A035-

A036. The NFL offered to reschedule the meeting to the following day, or to allow for Peterson to participate by teleconference or videoconference, but the NFLPA refused, and the meeting never took place. ADD020.

On November 18, 2014, based on his *nolo contendere* plea and the related evidence, the Commissioner disciplined Peterson pursuant to Article 46 of the CBA for engaging in conduct detrimental to the NFL in violation of the Policy. ADD026-ADD028. The Commissioner notified Peterson that he was suspended without pay for the remainder of the 2014 football season (six games). ADD028. The Commissioner found several aggravating factors justifying the discipline, including that Peterson's child was only four years old; that he used a tree switch, which was the functional equivalent of a weapon; and that he had shown no meaningful remorse for his conduct. *Id.* Because "[t]he well-being of [Peterson's] children is of paramount concern," the Commissioner also required Peterson to participate in counseling with an expert trained in treating individuals who have committed child abuse. ADD029. Assuming Peterson's cooperation with counseling and no further violations of the Policy, the letter explained, Peterson would be eligible for reinstatement beginning April 15, 2015. *Id.*

3. *Peterson Appeals His Discipline*

The next day, Peterson appealed his discipline pursuant to the terms of the CBA and Policy. A038-A042. In accordance with the CBA, Commissioner

Goodell designated Harold Henderson to serve as the Hearing Officer in Peterson's appeal. A009 [Art. 46 § 2(a)]; A043. Henderson had previously served as a hearing officer in numerous appeals under the Policy, as well as in appeals under the collectively bargained Substance Abuse Policy and Steroid Policy. A064.

The NFLPA moved the Hearing Officer to recuse himself because of his employment with the League, including his prior position as Executive Vice President of Labor Relations and his continuing role as a consultant. A044-A045. The Hearing Officer denied the recusal motion. A063-A064. He found that "[a]uthority for the commissioner to designate persons to be hearing officers, in his sole discretion and without limitation, appears to be what was bargained for and agreed over several terms of the CBA spanning many years." A064. The Hearing Officer also noted his "history of hearing dozens of player appeals, nearly all of which had NFLPA participation without objection to my serving as arbitrator," concluding that "it is late to complain now and any such objection is waived." *Id.*

At the December 2014 hearing, the NFLPA did not dispute the facts underlying Peterson's discipline, that he engaged in conduct detrimental, or that the Commissioner could suspend him for his conduct. ADD020; A072 [20:7-17]. Instead, the NFLPA argued that the discipline he received was not "fair and consistent" with prior discipline received by other players for engaging in similar conduct. A080 [52:22-53:5]; ADD020.

In particular, the NFLPA argued that the Commissioner's reference to the August 2014 Letter in imposing discipline meant that he had applied a "new" Policy that post-dated Peterson's May 2014 assault of his son, and thus Peterson's discipline was impermissibly retroactive and imposed without proper notice. A041. According to the NFLPA, "any punishment must be assessed and imposed consistent with the Policy and practices prior to August 28." *Id.* In the NFLPA's view, that meant Peterson could be subject to no more than a "two-game maximum" suspension for his conduct, and the NFLPA therefore asked that his suspension be "reduced to two games time served and two game checks." A075-A076 [32:16-36:7]; *see also* A080-A081 [55:15-56:2]; A099-A100 [131:24-132:2].

In response, the NFLMC argued, *inter alia*, that Peterson's discipline was not impermissibly retroactive because he could have received the same discipline under the policy in effect at the time of his assault on his son, and that Peterson had been on notice under that policy and under the CBA that he might receive even an indefinite suspension for engaging in actions that were admittedly "conduct detrimental." A090-A091 [94:12-18; 95:2-96:21].

4. *The Arbitration Award*

The Hearing Officer issued an eight-page Award that considered each of the NFLPA's arguments but ultimately affirmed Peterson's discipline. ADD018-ADD025.

First, the Hearing Officer noted that the NFLPA conceded that Peterson's conduct constituted "conduct detrimental" in violation of the Policy, and that the only issue before him was whether the discipline was "fair and consistent." ADD020.

Second, in a section titled "Retroactive Application of Policy," the Hearing Officer addressed the NFLPA's argument that the League improperly applied a "new" policy to Peterson. ADD020-ADD022. After a "careful reading" of both the Policy and the Commissioner's August 2014 Letter regarding discipline, the Hearing Officer expressed serious doubt that the August 2014 Letter was a "new" policy at all. ADD021. He explained that "the August communications do not constitute a change of the [Policy], but rather reinforce that policy with initiatives to explain and enhance it," and reflect the Commissioner's "current thinking on domestic violence and other incidents involving physical force." *Id.*

But regardless of whether the August 2014 Letter constituted a "new" policy, the Hearing Officer reasoned, Peterson's discipline was not retroactive because he was eligible to receive the same discipline under the preexisting Policy. *See* ADD022 (Peterson's "discipline fits either or both [policies], and one need not pick one or the other to conclude it was entirely 'fair and consistent.'"). Citing prior decisions interpreting the Policy, the Hearing Officer recognized the Commissioner's "broad discretion to impose appropriate discipline for violations

of the Personal Conduct Policy"—particularly in cases involving "domestic violence": "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. He is not forever bound to historical precedent." ADD021 (citing Appeal Decision dated September 21, 2010 [ECF No. 1-8, Ex. 103] at 3). The Hearing Officer further relied on another recent arbitration precedent stating that, if the Commissioner had suspended a player even indefinitely under the preexisting Policy, the Hearing Officer "would be hard pressed to find that the Commissioner had abused his discretion." ADD021-ADD022 (citing *In re Ray Rice* (Nov. 28, 2014) (Jones, Arb.)).

The Hearing Officer rejected the NFLPA's argument that Peterson's suspension should be "reduced" to two games. A099-A100 [131:24-132:2]. Although he acknowledged that the discipline was greater than in most prior cases, he reasoned that

> this is arguably one of the most egregious cases of domestic violence in this Commissioner's tenure – the severe beating of a four year old child, with a tree branch, striking him repeatedly about the body and inflicting injuries visible days later . . . . While this particular offense is rare among NFL employees, the discipline imposed here is consistent with that in the most egregious violations of the Policy. There is no comparing this brutal incident to the typical violence against another adult. Therefore, I find no basis to conclude, as the player's counsel

> has argued, that the discipline imposed is either unfair or inconsistent.

ADD022.

Third, in a section titled "Notice," the Hearing Officer rejected the argument that the discipline was improperly retroactive because Peterson was not properly afforded notice of the discipline that could be imposed. ADD022-ADD023. The Hearing Officer found "no indication that [Peterson] ever relied in any way on the level of discipline that would be imposed for conduct such as his. His counsel never suggested that Mr. Peterson might not have inflicted those injuries on his young son if he had known he could be suspended six weeks rather than two." *Id.* The Hearing Officer also found "distinguishable" all of the NFLPA's precedent on notice. ADD023.[3]

C. District Court Decision

The NFLPA filed a petition to vacate the arbitration decision in federal district court. Petition to Vacate Arbitration Award (ECF No. 1). The district court granted the NFLPA's petition and vacated the award on two grounds. *See* ADD001-ADD016.

First, the district court held that the Hearing Officer departed from "the essence of the CBA" by "ignor[ing]" and "disregard[ing] the law of the shop"

[3] The Hearing Officer rejected the NFLPA's other arguments as well. *See* ADD022-ADD025. The district court did not address them.

when he upheld "retroactive" discipline. ADD012-ADD014. In the district court's view, the arbitration decision in *In re Ray Rice* compelled the conclusion that the "enhanced discipline" announced in the August 2014 Letter could not be applied retroactively to anyone. ADD012-ADD013. Although the district court acknowledged that the Hearing Officer had distinguished *Rice* as a "double discipline" case, it found "no valid basis to distinguish this case from the *Rice* matter." ADD013. The district court concluded that the Hearing Officer did not "explain why the well-recognized bar against retroactivity did not apply to Peterson." *Id.*

Second, the district court found that the Hearing Officer "exceeded his authority" by upholding the discipline on the ground that it was consistent with both existing and prior policy. *See* ADD014. The court held that "the record belies the NFL's argument" that the NFLPA had actually "submitted that issue" to the Hearing Officer. *Id.* According to the district court, "[n]othing in the record supports a finding that the NFLPA asked [the Hearing Officer] to determine whether the discipline imposed was consistent with the [pre-August 2014] Policy." ADD015.

Given its disposition of these two issues, the court declined to reach the NFLPA's additional arguments for vacatur: that the Hearing Officer was "evidently partial" or that the Award violated "fundamental fairness." ADD016.

The court "remand[ed] the matter for further proceedings before the arbitrator as permitted by the CBA." *Id.*

SUMMARY OF THE ARGUMENT

Despite the "extraordinary" deference owed to labor arbitration awards, the district court vacated such an award that sustained the Commissioner's discipline of Adrian Peterson under the NFL's collective bargaining agreement. Both grounds on which the district court relied suffer from the same fundamental misunderstanding of the arbitrator's reasoned retroactivity analysis and fall far short of the extreme circumstances warranting vacatur.

I. A court may not vacate an arbitration award if the arbitrator was even arguably construing or applying the CBA. Even a court's firm conviction that the arbitrator committed serious error in that construction or application does not justify overturning the award. The parties bargained for the arbitrator's judgment, and federal law requires courts to respect that bargain.

II. Notwithstanding its recognition that the arbitrator interpreted the CBA and arbitration precedent, the district court usurped the arbitrator's role by rejecting his conclusion that Peterson's discipline was not impermissibly "retroactive." The district court's disagreement with the arbitrator's merits determination or underlying legal analysis does not entitle the court to substitute its own judgment. Far from ignoring applicable law or failing to explain his analysis,

the arbitrator's determination comports with established retroactivity principles and NFL arbitration precedent.

III. The district court similarly erred when it held that the arbitrator exceeded his authority by considering whether the discipline Peterson received was consistent with the version of the Personal Conduct Policy in effect at the time of his conduct. Contrary to the court's determination, the record demonstrates that the NFLPA submitted precisely that question to arbitration: in the NFLPA's notice of disciplinary appeal, and throughout Peterson's appeal hearing, the NFLPA repeatedly asked the arbitrator to decide that issue. Even aside from the NFLPA's explicit requests, the arbitrator had to consider the issue in order to decide the NFLPA's central claim—whether Peterson's discipline was "retroactive." Determining the extent of permissible discipline under the preexisting Policy is a necessary predicate to resolving the retroactivity claim here.

IV. This Court should reverse the district court's vacatur and remand with instructions to dismiss the NFLPA's petition. Although the district court declined to decide the two additional grounds for vacatur raised by the NFLPA—evident partiality and fundamental fairness—those purely legal issues are ripe for this Court's resolution now. Consistent with this Court's disposition in similar cases, the goals underlying labor arbitration disfavor a remand for further district court

proceedings on the reserved issues at the risk of another appeal resulting in further delay and wasteful consumption of judicial resources.

ARGUMENT

I. FEDERAL COURTS OWE LABOR ARBITRATION AWARDS AN "EXTRAORDINARY" LEVEL OF DEFERENCE

This Court reviews *de novo* the district court's order vacating a labor arbitrator award. *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, 1008 (8th Cir. 2014).

By contrast, the underlying arbitration award itself is entitled to "an extraordinary level of deference." *PSC Custom*, 763 F.3d at 1008. This case arises under the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), which strongly favors "settling labor disputes by arbitration" and "without the intervention of government." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 37 (1987) (citation omitted); *see* 29 U.S.C. § 173(d) (private dispute resolution "desirable method" for settling labor grievances). Given this strong federal policy, review of labor arbitration awards is "extremely limited," *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 507 (2001), and is in fact "among the narrowest known to the law." *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 91 (1978) (per curiam).

A court may not disturb a labor arbitration award as long as the "arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." *Misco*, 484 U.S. at 38*; see Midwest Div.-LSH, LLC v. Nurses United for Improved Patient Care*, 720 F.3d 648, 650 (8th Cir. 2013); *PSC Custom*, 763 F.3d at 1008 (courts determine only whether "(1) the parties agreed to arbitrate; and (2) the arbitrator had the power to make the award"). 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." *Misco*, 484 U.S. at 38. As a result, an arbitration award must be upheld even if the court is convinced that the arbitrator committed "serious error." *Id.* at 39 ("improvident, even silly, factfinding" does not provide a basis for a reviewing court to refuse to enforce the award).

Vacating an arbitration award is appropriate only in extreme circumstances. A court may do so when the decision fails to "draw[] its essence from the collective bargaining agreement," *PSC Custom*, 763 F.3d at 1009 (quoting *Misco*, 484 U.S. at 36) (alteration in original), such as when the arbitrator "appl[ies] the wrong" CBA, relies "heavily on parol evidence of the parties' bargaining history rather than the unambiguous terms of the agreement itself," or "disregard[s] and ignore[s]" the plain language of the CBA. *Alcan Packaging Co. v. Graphic Commc'n Conference, Int'l Bhd. of Teamsters & Local Union No. 77-P*, 729 F.3d 839, 842-43 (8th Cir. 2013) (citing cases). In such cases, the arbitrator has strayed

so far from the agreement that he exceeds his authority and effectively "dispense[s] his own brand of industrial justice." *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

II. THE HEARING OFFICER'S DECISION DREW ITS ESSENCE FROM THE COLLECTIVE BARGAINING AGREEMENT

A. The Hearing Officer Applied The CBA And Other Applicable Authority

The Hearing Officer rendered an Award fully consistent with the CBA. In accordance with custom and practice, and at the NFLPA's urging, the Hearing Officer recognized that Peterson's discipline must be "fair and consistent." ADD020. He then analyzed the discipline under that standard, considering (among other things) the Commissioner's broad disciplinary authority under the CBA, the Personal Conduct Policy issued under that authority (as well as the August 2014 Letter), and the parties' custom and practice under the CBA. *See* ADD020-ADD025.

The Hearing Officer dedicated a significant portion of his legal analysis to the NFLPA's claim that the discipline was not "fair and consistent" because it was "retroactive." ADD020-ADD022 (section titled "Retroactive Application of Policy"); *see also* ADD022-ADD023 (section titled "Notice"). Although the Hearing Officer was "convinced" that the August 2014 Letter did not "constitute a change of the" Policy, he explained that it ultimately made no difference to the

NFLPA's retroactivity claim. ADD020-ADD022. Given the Commissioner's "broad discretion" to impose discipline for what was undisputedly "conduct detrimental," the Hearing Officer reasoned, Peterson could have received the exact same discipline under the "old" policy as well. ADD022. The upshot of that analysis is that Peterson's punishment was not "retroactive" at all—or at least not impermissibly so. *See id.* ("I need not make a finding on whether we are looking at a single policy or two, or which one was applied, because the result is the same in either instance. . . . [Peterson's] discipline fits either or both[policies], and one need not pick one or the other to conclude it was entirely 'fair and consistent.'").

The Hearing Officer distinguished the NFLPA's primary authority, *In re Ray Rice* (Nov. 28, 2014) (Jones, Arb.), on the ground that it addressed a different issue—specifically, double jeopardy (*i.e.*, a "second" discipline). ADD021-ADD022. The question in *Rice* was not whether a player could be disciplined based on the August 2014 Letter for conduct pre-dating that letter; rather, it was whether the Commissioner could impose a "second" (additional) penalty for conduct that has already been punished *regardless of which policy applied*. *See* ADD022. If anything, the Hearing Officer explained, *Rice* stood for the proposition that even an "indefinite suspension" for "conduct detrimental" of this type would have been permissible under the preexisting Policy. ADD021-ADD022.

Throughout his analysis, the Hearing Officer considered and addressed each of the NFLPA's arguments, and distinguished the NFLPA's cited authority. ADD020-ADD025. Even the district court acknowledged that the Hearing Officer (1) evaluated the extent of the Commissioner's "discretion" to impose discipline under the CBA and Personal Conduct Policy; (2) recognized that such discipline must be "fair and consistent" with prior discipline; (3) analyzed how, notwithstanding past punishments, "egregious facts justified harsher punishment" here; and (4) "rel[ied] on factual differences between [the NFLPA's key authority] and this case" in rejecting the NFLPA's argument on retroactivity. ADD008-ADD009; ADD013.

The Hearing Officer's careful analysis more than satisfied the requirement that he at least "arguably" construe and apply the CBA. As such, the Award could not be vacated even if the district court was convinced the Hearing Officer committed "serious error." ADD010 (quoting *Misco*, 484 U.S. at 38).

B. The District Court Erred In Substituting Its Own Judgment On The Retroactivity Claim

Despite acknowledging the extraordinary deference owed to the Hearing Officer's decision, the district court gave it none. Instead, on the central issue of retroactivity, the district court committed clear legal error when it "disagree[d]" with the Hearing Officer's analysis, questioned his statement of facts, criticized him for not "valid[ly]" distinguishing arbitration precedent, and faulted him for

failing to "explain" his legal conclusion. ADD012-ADD013. Courts do not "second guess" labor arbitration awards. *Bureau of Engraving, Inc. v. Graphic Commc'n Int'l Union, Local 1B*, 284 F.3d 821, 825 (8th Cir. 2002). A court "may not set an award aside simply because [it] might have interpreted the agreement differently or because the arbitrators erred in interpreting the law or in determining the facts." *Hoffman v. Cargill, Inc.*, 236 F.3d 458, 462 (8th Cir. 2001) (citation omitted). As long as an arbitrator's analysis and application of the CBA is "plausible"—*i.e.*, not "completely irrational"—judicial review is at an end. *McGrann v. First Albany Corp.*, 424 F.3d 743, 749 (8th Cir. 2005).

In deciding that the award "fails to draw its essence from the CBA" with respect to the retroactivity claim, the district court lost sight of those basic principles. Its undisguised re-adjudication of the merits invades the Hearing Officer's role and cannot survive a straightforward reading of the arbitration decision.

1. The district court stated that the Hearing Officer neither "directly addressed the NFLPA's retroactivity argument" nor "explain[ed] why the well-recognized bar against retroactivity did not apply to Peterson." ADD009; ADD013. That statement is flawed for at least two reasons. As an initial matter, "[a]rbitrators have no obligation to the court to give their reasons for an award." *United Steelworkers of Am.*, 363 U.S. at 598; *accord Stroh Container Co. v. Delphi*

Indus., Inc., 783 F.2d 743, 750 (8th Cir. 1986) (noting that courts may not infer from "the absence of express reasoning by the arbitrators . . . that they disregarded the law"); *Lincoln Nat'l. Life Ins. Co. v. Payne*, 374 F.3d 672, 675 (8th Cir. 2004) (the "terseness of an award" is not grounds for vacatur). The Hearing Officer was under no obligation to create a record sufficient to satisfy the district court, which does "not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *Misco*, 484 U.S. at 38.

In any event, the district court's characterization of the award ignores the Hearing Officer's detailed analysis of the "Retroactive Application of Policy" (ADD020-ADD022) and "Notice" (ADD022-ADD023) issues. Indeed, the Hearing Officer provided *two* independent rationales for rejecting the NFLPA's retroactivity claim: (1) the August 2014 Letter's articulation of "enhanced discipline" did not give rise to a "new" policy; and (2) even if it were a new policy, it did not cause an impermissibly retroactive effect because the preexisting policy supported the same discipline. *See* ADD021; ADD022; *see also* pp. 14-17, *supra*.[4]

[4] Based on his decision, the Hearing Officer had no occasion to determine whether the Commissioner's broad disciplinary authority under the CBA included the power to impose even explicitly retroactive discipline "on a going-forward basis where the arrest and disposition come to the League's attention" after a new policy is announced. A089 [88:6-13]; *see also* A088-A089 [87:8-88:13] (citing multiple arbitration decisions in which "conduct detrimental" discipline was upheld where players were disciplined for conduct they engaged in even before joining the League).

2. The district court erred again when, after asserting a failure to "explain," it proceeded to resolve the issue itself. ADD013. As this Court has specifically recognized, the district court "improperly subvert[s] the proper functioning of the arbitral process" when it chooses to "substitute its own judgment for the arbitrator's [even where] the arbitrator chooses not to explain the award." *Lincoln*, 374 F.3d at 675. Still worse, the district court reached out to decide *de novo* the retroactivity claim that it acknowledged was the central disputed merits issue in the arbitration. *See* ADD014-ADD015 (describing issue before Hearing Officer as "whether the New Policy could be applied retroactively").

Although this Court's role is not to evaluate the merits either, the Hearing Officer—not the district court—applied the right law and reached the right result. The Hearing Officer's analysis comports fully with traditional retroactivity principles: Application of a new rule to past conduct operates "retroactively" only when it imposes "new legal consequences" for past conduct. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-270 (1994); *cf., e.g.*, *Molina Jerez v. Holder*, 625 F.3d 1058, 1069-1070 (8th Cir. 2010) (application of statute enacted while appellant's asylum application was pending did not have impermissible retroactive effect). The determination of whether a party is facing "new legal consequences," moreover, is guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270.

In this case, the Hearing Officer decided on the merits that Peterson faced no new legal consequences for his past actions. *See* ADD022 ("I need not make a finding on whether we are looking at a single policy or two, or which one was applied, because the result is the same in either instance."). Especially given the "brutal" and "egregious" nature of his conduct, "the discipline imposed here is consistent with that in the most egregious violations of the Policy." *Id.* (discipline imposed "greater than in most prior cases" but this is "arguably one of the most egregious cases of domestic violence in this Commissioner's tenure"). The Hearing Officer further recognized that under arbitration precedent, the Commissioner has "authority to increase discipline in [domestic violence] cases" beyond past practice because "[h]e is not forever bound to historical precedent." ADD021 (citing Appeal Decision dated September 21, 2010 [ECF No. 1-8, Ex. 103] at 3).

In addition, the Hearing Officer rejected the NFLPA's arguments on notice and reasonable reliance. *See* ADD022-ADD023 (finding "no evidence . . . that Mr. Peterson knew, at the time he engaged in the misconduct, what level of discipline had been imposed on prior cases of domestic violence under the Policy" or "that he ever relied in any way on the level of discipline that would be imposed for conduct such as his"). Right or wrong, these holdings are (at a minimum) "plausible"

applications of the CBA that a court may not second-guess. *McGrann*, 424 F.3d at 749.

3. The district court erred a third time in relying on its view that the Hearing Officer did not "valid[ly]" distinguish the arbitration decision in *In re Ray Rice* (Nov. 28, 2014) (Jones, Arb.). ADD013; *see id.* (although Hearing Officer relied on differences from *Rice*, "he did not explain how those differences would justify a different result").

At the outset, it is the arbitrator's job, not the court's, to determine whether "to accord preclusive effect to a prior arbitrator's award." *American Nat'l Can Co. v. United Steelworkers of Am.*, 120 F.3d 886, 892 (8th Cir. 1997). Indeed, under this Court's precedent, "[t]he arbitrator may consider prior awards between the same parties or between other parties if offered in the proceeding before him," but he "*is not bound to follow them.*" *Id.* at 892 (quoting *Westinghouse Elevators of Puerto Rico, Inc. v. S.I.U. de Puerto Rico*, 583 F.2d 1184, 1187 (1st Cir. 1978)) (emphasis added). Because it is the arbitrator's opinion that was bargained for, he is free to distinguish the prior cases or resolve the issue anew.

In *American National Can*, the company sought to vacate an arbitration award by making the same argument the NFLPA made below: that the "issue was controlled by . . . previously issued arbitration awards," and that the arbitrator erred in failing to validly distinguish them. 120 F.3d at 890. This Court rejected that

argument. It was sufficient that the arbitrator had properly identified what he believed were the "critical factual differences between the arbitral decisions cited . . . and the case before him," even though they involved "the same contract language and a similar issue." *Id.* at 892. The company had relied on the same authority the district court relied on below, *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1424 (8th Cir. 1986). *See* ADD014. But this Court distinguished *Trailways* on multiple grounds, including that the arbitrator in that case did not even "explain the reasons" for his failure to follow a prior, relevant arbitration precedent. *American Nat'l Can*, 120 F.3d at 891 (quoting *Trailways*, 807 F.2d at 1425). *Trailways* itself recognized that an arbitrator may properly "refuse to defer to a prior award" even when it "involv[es] the same issue," if he "at least explain[s] the reasons for doing so[.]" *Trailways*, 807 F.2d at 1425-1426.[5]

Here, as in *American National Can* (and unlike in *Trailways*), there is no dispute that the Hearing Officer "rel[ied] on factual differences between *Rice* and

[5] The *Trailways* arbitrator committed a number of additional errors leading inescapably to the conclusion that his decision turned on his "'personal notions of what was proper'" rather than an interpretation of the CBA. *American Nat'l Can*, 120 F.3d at 891 (quoting *Trailways*, 807 F.3d at 1426). Among other failings, the arbitrator failed to "discuss anywhere in his opinion" two CBA provisions despite their "obvious relevance to the issue" in dispute. *Trailways*, 807 F.2d at 1423. He also contradicted the plain language of the CBA "by copying analysis from an earlier opinion involving totally different facts and a dissimilar collective bargaining agreement." *Id.* at 1424 (holding that arbitrator "*literally* manifested an infidelity to his obligation as an interpreter of the specific collective bargaining agreement before him").

this case." ADD013. No more was required. *See American Nat'l Can*, 120 F.3d at 890. The district court should not have second-guessed that bargained-for interpretation. *See Misco*, 484 U.S. at 38.

In any event, the district court seriously misinterpreted *Rice* when it found it "undisputed" that *Rice* "unequivocally recognized that the New Policy cannot be applied retroactively." ADD012-ADD013. That is incorrect; the issue was not even before the *Rice* arbitrator. Rather, as the *Rice* arbitrator explained, "[t]he sole issue" involved a double-jeopardy question: whether Rice's alleged misstatements in a pre-discipline meeting could justify "the imposition of a second suspension based upon the same incident[.]" A081. The district court erred in citing *Rice* for the categorical proposition that "the New Policy cannot be applied retroactively," ADD012-ADD013 (citing *Rice* at 16); all the arbitrator held was that "there were no new facts on which the Commissioner could base his increased suspension." A062.

Notably, the *Rice* arbitrator also recognized that under the preexisting Policy, the Commissioner likely had the authority to impose even an indefinite suspension on *Rice* in the first instance: "If 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-A061. Although that was "not the case before" the *Rice* arbitrator (A061), it was the case

before the Hearing Officer here (as he recognized). *See* ADD021-ADD022 (citing *Rice*). As explained above, if the Commissioner possessed the authority to impose the same discipline under the "old" policy as the "new" one, applying the latter cannot be impermissibly retroactive.

It was equally inappropriate for the district court to substitute its own factual findings as to the meaning of the Commissioner's testimony from the separate *Rice* matter. *See, e.g.*, ADD013 (citing excerpts from Commissioner Goodell's testimony in *Rice*); ADD014 (same); ADD015 (same); *see also id.* (citing transcript of Goodell press conference). That error is particularly pronounced here, given that all of that testimony, like the *Rice* decision itself, concerned a legally distinct double-jeopardy issue on different facts. *See Misco*, 484 U.S. at 45 (holding that it is improper for a court to draw factual inferences unfavorable to an arbitrator's decision because "[t]he parties did not bargain for the facts to be found by a court," and "[i]f additional facts were to be found, the arbitrator should find them"); *Union Pac. R. Co. v. United Transp. Union*, 3 F.3d 255, 257 n.3 (8th Cir. 1993) ("[W]e may not make or rely on factual findings that the [Railway Labor Act arbitrator] has not made.").[6]

[6] Consistent with the double-jeopardy focus in *Rice*, the Commissioner told Rice his existing "punishment would remain unchanged" when the August 2014 Letter was issued. A061. Similarly, his testimony about how the August 2014 Letter would be "forward looking" (ADD013) is consistent with what he did: apply the policy only for new discipline, including in the Peterson matter, rather

Although the district court obviously disagreed with the Hearing Officer's determination on the central issue of retroactivity, that should make no difference. Nor should it make a difference even if this Court similarly disagrees. What matters is that the Hearing Officer directly addressed the issue and resolved it under the applicable provisions of the CBA. *See* ADD020-ADD022. All that leaves is a disagreement between a federal court and an arbitrator about whether an award was "right or wrong," which is not a question for judicial resolution. *Misco, Inc.*, 484 U.S. at 36; *see McGrann*, 424 F.3d at 748 (courts "have absolutely no authority to reconsider the merits of an arbitration award").

III. THE HEARING OFFICER DID NOT EXCEED HIS AUTHORITY IN ANSWERING THE QUESTION THE NFLPA ASKED

An arbitrator "exceed[s] his authority" only when he ignores the issues the parties ask him to decide and instead "dispens[es] his own brand of industrial justice." *Midwest Div.-LSH*, 720 F.3d at 650 (citation omitted). For example, if the parties ask the arbitrator to fashion a remedy only if he or she first determines that a CBA violation occurred, the arbitrator may not fashion a remedy in the absence of a CBA violation. *See Northern States Power Co., Minnesota v. Int'l Bhd. of Elec. Workers, Local 160*, 711 F.3d 900, 902 (8th Cir. 2013). But the

---

than revisit previously imposed punishments. Although the Commissioner stated that the August 2014 Letter included "changes" to the existing Policy, ADD015 (citing ECF No. 1-7 [Ex. 65 at 1]), he elsewhere made clear that the "changes" were "'consistent with our [existing] Personal Conduct Policy.'" ADD022 (quoting August 2014 Letter).

"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 award," *Walsh v. Union Pacific Railroad Co.*, 803 F.2d 412, 414 (8th Cir. 1986).

The district court held that the Hearing Officer "exceeded his authority" because "[n]othing in the record supports a finding that the NFLPA asked [the Hearing Officer] to determine whether the discipline imposed was consistent with the previous Policy." ADD015. Not so. In its notice of appeal to the Commissioner, the NFLPA raised that very question:

> Because the August 28 Personal Conduct Policy cannot retroactively be applied to Mr. Peterson's May 2014 conduct, *any punishment must be assessed and imposed consistent with the Policy and practices prior to August 28.*

A041 (emphasis added). An "assess[ment]" of whether Peterson's punishment was "consistent with" the preexisting Policy is tantamount to a request "to determine whether the discipline imposed was consistent with the previous Policy." *See* A061; A023.

Any doubt about this conclusion was removed at the hearing, where the NFLPA reiterated that any "fair and consistent" penalty must be examined in light of the Policy in effect at the time of Peterson's conduct. *E.g.*, A073 [27:22-23] ("To be fair and consistent, you must apply the old policy."). The NFLPA, instead

of asking the Hearing Officer to *vacate* the ostensibly retroactive discipline and remand to the Commissioner to re-discipline Peterson, instead demanded that he "*reduce* the discipline here" to the maximum penalty permissible under the "old" policy. A080 [53:2-5]; *id.* [55:16-19] ("[W]hat I said the penalty should be . . . I will say it again, the penalty should be a two-game suspension which he already served, so it's two game checks."); A080-A081 [55:25-56:2] ("I will be very clear. It's the two-game maximum which he already served, so it's two game checks."). The NFLPA specifically denied that it wanted the penalty "overturned." *See* A099-A100 [131:24-32:2] ("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.*") (emphasis added).

In light of the foregoing, the district court erred in holding that the *only* issue before the arbitrator was "'the pure legal issue' of whether the New Policy could be applied retroactively." ADD014-ADD015. The NFLPA *also* demanded that the Hearing Officer evaluate and apply the discipline Peterson *would have received* had he been disciplined under the "old" policy. As the NFLPA itself argued, evaluating Peterson's discipline to ensure that it was no greater than what he would have received under the "old" policy was "within [the Hearing Officer's] authority" (A080 [52:22-53:16])—hardly, as the district court found, in excess of

that authority. Although the district court once again disagreed with the Hearing Officer's conclusion, the Hearing Officer plainly did not "stray[] beyond the issues submitted by the NFLPA" when he answered the NFLPA's question. ADD015; *see Midwest Div.-LSH*, 720 F.3d at 651 (A court "will not give credence to [a party's] argument that the arbitrator had no authority to decide an issue it agreed to submit.") (citation omitted).

Even if the NFLPA had not explicitly asked the Hearing Officer to evaluate Peterson's conduct under the preexisting Policy, he would have had to do so anyway. Determining whether Peterson's discipline was "fair and consistent"—the ultimate issue in the arbitration, *see* ADD020—naturally encompasses consideration of potential discipline under the preexisting Policy. More directly, the NFLPA asked the Hearing Officer to determine "whether the New Policy could be applied retroactively." ADD014-ADD015. As explained (p. 28, *supra*), whether a rule operates "retroactively" depends on whether Peterson faced "new legal consequences." *Landgraf*, 511 U.S. at 269-270. The League pressed that same inquiry. *See, e.g.*, A089-A090 [88:20-93:24]. Given the nature of the NFLPA's claim, the Hearing Officer was not just *permitted* to determine whether the discipline would have been proper under the "old" policy; he was *required* to do so. In other words, the only way for the Hearing Officer to be sure Peterson's discipline was not "retroactive" was to conclude that Peterson could have received

the same discipline under the preexisting Policy. That is exactly what the Hearing Officer did. *See* ADD022.

IV. THIS COURT SHOULD ORDER DISMISSAL OF THE NFLPA'S PETITION

Not only should this Court reverse the district court's order vacating the Award, it should order the NFLPA's petition to be dismissed. To be sure, the district court declined to reach two additional grounds for vacatur raised by the NFLPA: that the Hearing Officer was "evidently partial" and that "the award violates fundamental fairness." ADD016. But this Court can and should resolve those issues directly and confirm the arbitration award—just as it has done in similar cases. *See, e.g.*, *Delta Mine Holding Co. v. AFC Coal Properties, Inc.*, 280 F.3d 815, 823 (8th Cir. 2001) (reversing vacatur and remanding with instructions to confirm arbitration awards after rejecting appellee's alternative arguments for vacatur that were not first addressed by the district court); *PaineWebber Grp., Inc. v. Zinsmeyer Trusts P'ship*, 187 F.3d 988, 995 (8th Cir. 1999) (same); *see also Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 218 (2d Cir. 2002) (disposing of alternative arguments for vacatur on appeal where those arguments were "fully briefed" and "without merit").

Although ordinarily this Court does not decide disputed issues in the first instance, this Court has discretion to do so in circumstances "where the proper resolution is beyond any doubt," or where "the argument involves a purely legal

issue in which no additional evidence or argument would affect the outcome of the case." *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314-1315 (8th Cir. 1991); *United States Dep't of Labor v. Rapid Robert's Inc.*, 130 F.3d 345, 348 (8th Cir. 1997) (resolving questions for the first time on appeal where the record was "well-developed and amenable" to review); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."). Both criteria are met here: the NFLPA's remaining arguments involve purely legal issues that were fully briefed below, and Eighth Circuit precedent forecloses both of them.

First, the NFLPA's assertion that the Award "violates fundamental fairness" has no merit because this Court has "never recognized 'fundamental unfairness' as a basis for vacating an arbitration award." *Hoffman*, 236 F.3d at 462 (noting that precedent "militates against such a standard"). Even if such a standard did exist, it would only "apply to *arbitration schemes* so deeply flawed as to preclude the possibility of a fair outcome." *Id.* (emphasis added). Thus, any allegation of fundamental unfairness could prevail (if at all) only where the petitioning party challenges the conduct of the arbitration hearing, rather than merely raising an "error of law." *El Dorado Sch. Dist. No. 15 v. Continental Cas. Co.*, 247 F.3d 843, 848 (8th Cir. 2001) (arbitrator's error cannot be "simply an error of law" but

instead must "so affect[] the rights of a party that it may be said that he was deprived of a fair hearing"). But the NFLPA did not contest that the arbitration hearing itself was conducted fairly. *See generally* NFL Opp. to Petition to Vacate (ECF No. 31) 25-27.

Second, the NFLPA's argument that the Hearing Officer was "evidently partial" (Petition to Vacate 60-66) is foreclosed by this Court's decision in *Williams v. National Football League*, 582 F.3d 863 (8th Cir. 2009). This Court held that the NFL's sitting general counsel was not an "evidently partial" arbitrator because the NFLPA, at a minimum, "waived its objection to [the NFL general counsel] serving as arbitrator by agreeing in the CBA that the Commissioner's designee . . . could serve as arbitrator." *Id.* at 886. As this Court has held, when parties choose "their method of dispute resolution," they "can ask no more impartiality than inheres in the method they have chosen." *Winfrey v. Simmons Food, Inc.*, 495 F.3d 549, 551 (8th Cir. 2007). Given that *Williams* involved the same League, the same union, and a virtually identical arbitration procedure, it controls the "evident partiality" question here. *Williams*, 582 F.3d at 886.[7]

[7] Since *Williams* was decided, the parties have negotiated a new CBA that contains the identical arbitration—and arbitrator selection—provisions. *See* A009-A011. In any event, rather than requiring a new arbitrator, the district court remanded for further proceedings before the same Hearing Officer. That not only undercuts the claim of "evident partiality," but also increases the risk of further delay and waste of resources by postponing resolution of that claim.

Because the CBA "entitles the parties to select interested arbitrators," moreover, a party seeking to vacate an arbitration award must show actual prejudice—not a mere appearance of bias. *Williams*, 582 F.3d at 885 ("[Evident partiality] standard 'is not made out by the mere appearance of bias.'") (citation omitted). But the NFLPA did not even try to make an "actual prejudice" showing against Hearing Officer Henderson, who has served as a Hearing Officer in dozens of appeals without any prior objection. A064. On the contrary, the NFLPA conceded below that they were relying on a mere "appearance of bias" standard and could not show actual prejudice. *See* A071 [18:10-15] (NFLPA Counsel: "I want to make it clear that the argument we made was based on an objective standard, in other words that you would be *viewed* as evidently partial, not that, in fact, you know, we have evidence as to whether or not you are, you know, improper or not.") (emphasis added). *See generally* NFL Opp. to Petition to Vacate 31-33.

In sum, the parties have briefed these legal issues, no relevant facts are in dispute, and clear Circuit precedent controls their resolution "beyond any doubt." *Universal Title*, 942 F.2d at 1314. The circumstances thus counsel in favor of deciding these issues now, rather than remanding and risking an inefficient second appeal, more delay, and further waste of judicial and party resources.

CONCLUSION

For the foregoing reasons, 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,

By: s/ Daniel L. Nash

Daniel L. Nash
Pratik A. Shah
Stacey Eisenstein
Marla S. Axelrod
James E. Tysse
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 887-4000

Joseph G. Schmitt
Peter Gray
Nilan Johnson Lewis PA
120 South Sixth Street
Suite 400
Minneapolis, MN 55402
(612) 302-7500

Attorneys for Defendants-Appellants

April 8, 2015

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 9,269 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: April 8, 2015

s/ Daniel L. Nash
Daniel L. Nash
Attorney for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing 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 8th day of April, 2015, upon the parties listed below:

Barbara Podlucky Berens
Justi Rae Miller
Berens & Miller
80 South Eighth Street
Suite 3720
Minneapolis, MN 55402

David Greenspan
Jeffrey L. Kessler
Winston & Strawn
200 Park Avenue
New York, NY 10166

Steffen N. Johnson
Winston & Strawn
1700 K Street, NW
Washington, DC 20006-3817

s/ Daniel L. Nash
Daniel L. Nash

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.

s/ Daniel L. Nash