No. 97193-5

SUPREME COURT
OF THE STATE OF WASHINGTON

BARNES, INC., Petitioner,

v.

MAINLINE ROCK & BALLAST, INC., Respondent,

On Appeal from:

Spokane County Superior Court
Cause No. 17-2-03345-1
Judge Tony Hazel

Division III
No. 35767-8
No. 35890-9

RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF

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I. IDENTITY OF RESPONDENT

Mainline Rock & Ballast, Inc. ("Mainline") is the Respondent in this appeal and hereby answers new issues raised by the Inland Pacific Chapter of the Associated Builders & Contractors ("Inland Pacific ABC") in its Amicus Curiae Brief filed on July 11, 2019.

II. STATEMENT OF THE CASE

In its Amicus Brief, Inland Pacific ABC attempts to recite facts from a record that is *not* the record that was presented to the arbitration panel and that is almost entirely incomplete with respect to the merits of the dispute. This lack of a record for review is one of the main reasons that the scope of judicial review of arbitration awards is very narrow.

Inland Pacific ABC erroneously assumes that the one-sided facts that Barnes, Inc. ("Barnes") introduced before the trial court are undisputed. Inland Pacific ABC avoids the fact that there was substantial and relevant evidence presented to the arbitration panel relating to negotiations surrounding the contract terms, the course of performance between the parties, and the reasonableness of competing interpretations of contract terms, none of which is recited in the Statement of the Case. Consequently, Inland Pacific ABC's Statement of the Case is merely an argumentative introduction to support its stated goal of expanding the well-established scope of limited judicial review of arbitration awards.

III. ARGUMENT

Expanding the scope of judicial review to allow courts to second-guess findings and conclusions of arbitrators, when there is no evidentiary record before the reviewing court, undermines the efficiencies and the finality of arbitration, which are its main public policy benefits. Expanding the scope of judicial review will likely cause parties to abandon arbitration as an alternative to litigation, because there will no longer be any meaningful benefits to use arbitration if parties have to undergo the same formalities to create a record for review and if parties can anticipate years of post-award judicial proceedings. Therefore, this Court should reject Inland Pacific ABC's invitation to expand the scope of judicial review by denying the petition for review of Division III's decision in *Mainline Rock & Ballast, Inc. v. Barnes, Inc.*, 8 Wn.App.2d 594, 439 P.3d 662 (2019).

Even if this Court wants to revisit the established scope of judicial review of arbitration awards, the outcome in this case should not change. For the reasons set forth in Mainline's Answer to the Petition for Review and its briefing before Division III, a tribunal is permitted to consider extrinsic evidence under the context rule adopted in *Berg v. Hudesman*, 115 Wn.2d 657, 678–79, 801 P.2d 222 (1990), and it was not an error of law for the arbitration panel to consider extrinsic evidence in this case.

A. The Appellate Court's Ruling Is Consistent with the Established Scope of Judicial Review of Arbitration Awards.

Inland Pacific ABC argues that Division III erred because it refused to consider "anything but the arbitrator's award." (Amicus Brief, p. 8) By advancing this argument, Inland Pacific ABC is inviting this Court to deviate from years of well-established caselaw in which this Court has consistently held that that the scope of judicial review of an arbitration award is limited to an error of law on the face of the arbitration award. *See Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 239, 236 P.3d 182 (2010); *Davidson v. Hensen,* 135 Wn.2d 112, 119, 954 P.2d 1327 (1998); *Barnett v. Hicks*, 119 Wn.2d 151, 157, 829 P.2d 1087 (1992).

Inland Pacific ABC argues that Division III should have looked behind the face of the award and considered the language of the Master Blasting Agreement and the Torrance Work Order to determine if an error of law was committed by the arbitration panel. Inland Pacific ABC erroneously suggests that this scope of review could be limited to a single issue (i.e., whether the contract was integrated) by analysis of the contract language, to the exclusion of all other evidence considered by the arbitration panel. However, this is really an invitation to the Court to review the merits of the entire case, including the arbitration panel's many

determinations as to: (i) whether the contracts were fully integrated; (ii) whether the contracts were ambiguous; (iii) whether specific terms needed further evidence to aid in interpretation; (iv) whether consideration of extrinsic evidence was appropriate under the circumstances; (v) what were the nature and use of certain materials; (vi) whether the competing methodologies for computing quantities of rock were reasonable under the circumstances; etc.

Opening the door to reviewing evidence outside the face of the award is a slippery slope. Consideration of the contract in a vacuum often does not answer specific issues presented in any given case, particularly if there is a significant amount of relevant evidence concerning negotiations over the contract terms, the course of performance between the parties, and the reasonableness of competing interpretations of contract terms.

In this case, the arbitration panel clearly felt that such evidence was relevant and material to its determination of the issues presented, and if this Court were to second guess those decisions—without the benefit of knowing what any of that evidence was—it creates a fundamentally unfair process of review. All of the time and expense that Mainline and Barnes went through to present their evidence would be wasted, if the arbitration award can be undone by a reviewing court that does not—and cannot (due

to the lack of a record for review)—consider the evidence that was actually considered by the arbitration panel.

In its Amicus Brief, Inland Pacific ABC appears to advocate for a much broader scope of review that includes a "mistake of fact or law." (Amicus Brief, p. 11) It argues that if contracting parties are unable to obtain judicial review of a mistake of fact or law, parties will lose faith in arbitration and will not include arbitration clauses in their contracts.

Arbitration is a matter of contract. If a contracting party believes that it is more important to maintain its right of appeal in court, it always has the choice to select litigation as its forum for dispute resolution. However, if contracting parties mutually determine that the benefits of arbitration—including finality—outweigh the formalities and extended appeals of litigation, the parties should be held to their bargain.

B. An Expanded Scope of Review Will Eliminate the Benefits of Arbitration, Causing Parties to Abandon Arbitration.

"Arbitration seeks to avoid the formalities, delay, expense, and vexation of litigation in court." *Mainline*, 8 Wn.App.2d at 608. Arbitration is attractive as an alternative to litigation specifically because of its finality, and "its desirable qualities would be heavily diluted, if not expunged," under a broad scope of judicial review. *Id*.

In other words, Inland Pacific ABC's request to expand judicial review must necessarily lead to a full review of the entire record of evidence that is presented to an arbitration panel. Simply considering the language of the contract does not necessarily end the inquiry if a reviewing court is going to reconsider the merits of an arbitration decision. Under the approach proposed by Inland Pacific ABC, parties will have to spend money on court reporters or other services to create and preserve a full record, significantly adding to the cost of arbitration. In addition, in order to obtain and preserve a record for a more complete scope of review, parties will necessarily avoid informalities relating to the discovery of information and the introduction of evidence, in order to ensure that a full foundation is established for future review and to preserve objections to evidence considered by the arbitration panel.

Finality of arbitration goes hand in hand with the informalities and efficiencies of arbitration. If finality is lost, so are the other benefits of arbitration. Once these benefits are lost, parties will abandon arbitration as a forum for resolution of their disputes.

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C. Whether a Dissenting Opinion Should Be Considered Part of an Award Is not an Issue that Needs to Be Decided in this Case.

Inland Pacific ABC correctly notes that Division III did not decide whether a minority arbitrator's dissenting opinion should be considered part of an award for purposes of determining whether a facial error exists. (Amicus Brief, p. 13) It was not necessary to reach the issue because the dissenting opinion did not change Division III's ultimate conclusion that there is no legal error on the face of the award. *Mainline*, 8 Wn.App.2d at 612.

As Division III correctly noted, elevating a dissenting opinion to the same level of the majority arbitration award presents significant concerns because the minority decision may misstate or misconstrue the majority's analysis or findings. *Id*. Giving a dissenting opinion equal consideration could also allow a party-appointed arbitrator (such as the one in this case) an avenue to try to undermine an otherwise valid award by making unsupported assertions about the majority's reasoning or decision-making process.

In the event this Court determines that the issue should be reached, there are a few cases in other jurisdictions that have considered dissenting opinions in arbitration and the decisions do not provide clear guidance. For example, in *Klatz v. Western States Ins. Co.*, 701 N.E.2d 1135 (Ill.

App. 1998), the Illinois Court of Appeals overturned the lower court's decision to vacate the arbitration award because the sole evidence relied upon to vacate the award was the dissenting arbitrator's opinion. *Klatz v. Western States Ins. Co.*, 701 N.E.2d 1135, 1139 (Ill. App. 1998). In doing so, the Illinois court declined to elevate the dissenting opinion to the same level of evidence as the arbitration award. *Id*. at 1138 (stating that "the statement of the dissenting arbitrator is neither a court record nor evidence as to what actually occurred before the arbitration panel"). On the other hand, a few federal court decisions have considered dissenting opinions in the context of a motion to vacate an arbitration award. *See, e.g., Petition of Fertilizantes Fosfatados Mexicanos, S.A.*, 751 F.Supp. 467 (S.D.N.Y. 1990) (court considered "several hundred pages of dissenting 'awards'" but declined to vacate arbitration award); *Amicizia Societa Navegozione v. Chilean Nitrate and Iodine Sales Corp.*, 184 F.Supp. 116, 118 (S.D.N.Y. 1959) (court considered dissenting arbitrator opinion when denying motion to vacate arbitration award); *Columbian Fuel Corp. v. United Fuel Gas Co.*, 72 F.Supp. 843, 844 (S.D.W.Va. 1947) (court considered dissenting arbitrator opinion when refusing to vacate award). In each instance, the reviewing court still gave deference to the majority opinions over the dissenting opinions when refusing to vacate the awards.

IV. CONCLUSION

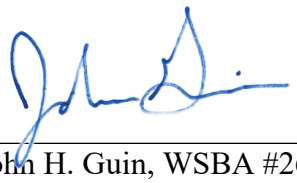
All cases reach a point of finality. The only issue is whether the parties have mutually agreed to reach finality sooner through arbitration, in a more expeditious, efficient, and informal manner. A limited scope of judicial review is the established vehicle to ensure finality in arbitration. Parties who agree to arbitration clauses know, or should know, that finality means giving up rights to a full appeal.

Division III's decision is consistent with this well-established scope of limited judicial review of arbitration awards. Inland Pacific ABC's invitation to this Court to significantly expand the scope of judicial undermines the finality that arbitration provides to parties. By eliminating finality and creating a risk of expanded judicial review, parties to arbitration will be compelled to forego the efficiencies and informalities that currently exist in arbitration, in order to ensure that they have a complete and documented record for review. As a result, virtually all benefits of commercial arbitration will be lost if an expanded scope of review is adopted. Under an expanded scope of review, parties who currently use arbitration will flock to the courts, further congesting the judicial system.

The petition for review, which seeks to expand the scope of judicial review, should be denied.

DATED this 13th day of August, 2019.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of August, 2019, I electronically served a true and correct copy of the forgoing document to the following:

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August 13, 2019 - 8:58 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97193-5
Appellate Court Case Title:	Mainline Rock and Ballast, Inc. v. Barnes, Inc.
Superior Court Case Number:	17-2-03345-1

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