

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION**

INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS, AFL-CIO,)	
LOCAL UNION No. 289,)	
)	
Plaintiff,)	Case No. 1:11-cv-334
)	
v.)	
)	
VERIZON SOUTH, INC.,)	
)	
Defendant.)	

**PLAINTIFF’S REPLY BRIEF IN SUPPORT
OF ITS MOTION TO COMPEL ARBITRATION**

Plaintiff International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 289 (the “Union”), respectfully submits this reply brief to Defendant Verizon South, Inc.’s (“Verizon”) response to plaintiff’s motion to compel arbitration. Contrary to defendant’s repeated assertions, the plain language of the parties’ collective bargaining agreement (“CBA”) and separate settlement agreement for grievant Brian Pollard require arbitration of the grievance regarding Pollard’s termination because Pollard was not a “new employee” when he was rehired in 2010. Defendant bases its argument on the reference to a “probationary period” in the settlement agreement, but this provision by its express terms only controls the reinstatement of Pollard’s seniority, and not his right to arbitrate a discharge. Indeed, the relevant provision of the settlement agreement – paragraph 8 – safeguards the rights of the rehired employees to have any job termination be subject to the arbitration process and must be given effect. Therefore, plaintiff’s motion to compel arbitration should be granted.

ARGUMENT

I. The Pollard Grievance Is Arbitrable Under the Plain Language of the CBA and Separate Settlement Agreement.

In its response, defendant repeatedly asserts that the parties' CBA excludes from arbitration all grievances regarding the termination of a probationary employee. (Def.'s Resp. at 8-10.) Defendant, however, overlooks a significant limitation in the CBA. The "Probationary Period" provision in Article 17 of the CBA to which defendant refers is expressly confined to "new employees." As both common sense and the language of the CBA dictate, Brian Pollard was reemployed by Verizon in 2010 as a rehired employee and not as a "new employee." Thus, Pollard's subsequent discharge is subject to arbitration under the terms of the CBA.

Because the CBA contains a broad arbitration clause that applies to Pollard's discharge, defendant can only prevail if the settlement agreement explicitly excludes this matter from arbitration. The settlement agreement, in fact, does just the opposite. It confirms Pollard's right to arbitration because it specifies that Pollard was reemployed as a "rehire" with regard to all benefits under the CBA, and its reference to a probationary period is specifically limited to the reinstatement of seniority.

A. Under the CBA, Only "New Employees" Are Without the Right to Arbitrate Discharges, and Pollard Was Not a New Employee in 2010.

Article 17 of the CBA includes a provision entitled, "Probationary Period." The first sentence of the provision states: "All new employees of the Company shall serve a probationary period of seven (7) months." (Complaint Ex. A, p. 28 (emphasis added).) The provision thus only applies to "new employees." The second and third sentences then explain how the probationary period for new employees affects two aspects of their employment: their right to arbitration in case of termination and seniority. With regard to the former, termination of a new

employee during the probationary period is not subject to the arbitration provisions in the CBA. (*Id.*) With regard to the latter, a new employee is not given seniority until “satisfactory completion” of the probationary period. (*Id.*)

The plain meaning of “new employee” is an employee who has not previously worked at Verizon’s facility in Durham. *See* Oxford English Dictionary (3d ed. 2003 & online version 2011) (defining “new” as “not previously known or experienced; now known or experienced for the first time.”). This commonsense interpretation is supported by the use of the term “new employee” elsewhere in the CBA. In Article 6, Section 3.6, the CBA specifies that a previously laid-off employee is to be recalled to employment before “new employees” are hired. (Complaint Ex. A, p. 8.) Similarly, in Article 13, Section 2, the CBA specifies that an employee on a leave of absence is to be re-employed before “new employees” are hired. (Complaint Ex. A, p. 20.) An individual that once worked at Verizon’s facility and then returns to work after an interim period is thus not a “new employee” under the CBA. Therefore, when Pollard was reemployed by Verizon in 2010, he was not a “new employee,” and Article 17 of the CBA did not apply to him.

If the “Probationary Period” provision had been intended to cover rehired employees in addition to new employees, it would have included explicit language to that effect, as is included in many other collective bargaining agreements. *See, e.g., Venzel v. United States Steel Co.*, 209 F.2d 185, 186 (6th Cir. 1953) (including in probationary period “those hired after a break in continuity of service”); *Williams v. Pepsi-Cola General Bottlers, Inc.*, No. 06-C-6392, 2009 U.S. Dist. LEXIS 58327, at *3 (N.D. Ill. July 6, 2009) (same).¹ The omission of this standard language makes clear that Pollard was not covered by Article 17 of the CBA in 2010.

¹ This unpublished case is included as an attachment to this brief.

Pollard's status as a rehired employee instead of a new employee distinguishes this case from *United States Postal Service v. American Postal Workers Union, AFL-CIO*, 204 F.3d 523 (4th Cir. 2000) ("USPS"). The grievant in *USPS* was a new postal employee who had not yet served her initial probationary period. *Id.* at 525-26. For this reason, there was no question that the probationary-period clause in the collective bargaining agreement applied to the grievant. *Id.* at 531. In this case, Pollard had already served a probationary period when he was first hired as a new employee, well before 2010. (Complaint, ¶ 15.) Defendant thus errs in contending that *USPS* applies here, (Def.'s Resp. at 9-10), because Pollard was not a new employee in 2010, and so was not covered by the plain language of the CBA's "Probationary Period" provision.

B. Rather Than Exclude Arbitration for Pollard, the Settlement Agreement Confirms Pollard's Right to Arbitration as a "Rehire."

Because the CBA contains a broad arbitration clause that applies to all discharges, and Pollard is not a "new employee" under the CBA, Pollard's termination is arbitrable unless the 2010 settlement agreement explicitly excludes this matter from arbitration. *See AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986) ("AT&T") (holding that when a collective bargaining agreement contains a broad arbitration clause, and there is no "express provision excluding a particular grievance from arbitration, . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."). In fact, the plain language of the settlement agreement does not exclude this matter from arbitration, but rather confirms Pollard's right to arbitration as a "rehired" employee.

The provision covering arbitration rights is paragraph 8, which addresses all benefits under the CBA not otherwise adjusted, and states: "For eligibility of all contractual benefits including, but not limited to, vacation and tour preferences, guidelines, and record-tracking

purposes former employees/grievants will be treated as a rehire.” (Complaint Ex. B, p. 2 (emphasis added).) As discussed, the CBA repeatedly distinguishes between rehired employees and new employees. Because, under Article 17, “new employees” are the only employees without the ability to arbitrate a termination, the settlement agreement’s designation of Pollard as a “rehire” maintained his arbitration rights.

Paragraph 10 of the settlement agreement is not to the contrary, and certainly does not explicitly preclude arbitration. Paragraph 10 solely addresses the reinstatement of seniority for the rehired employees. The first sentence of paragraph 10 provides that the rehired employees’ seniority would be restored, including the period from their initial discharge to their rehiring. The second sentence then specifies *when* seniority would be restored, and states that it will not occur until the completion of a seven-month probationary period. While defendant bases its entire argument on the mere use of the phrase “probationary period,” the context in which it is used cannot be ignored. Paragraph 10 nowhere mentions arbitration or what matters are arbitrable; it is solely focused on the restoration of seniority.

Moreover, no other provision in the settlement agreement address arbitrability or conflicts with paragraph 8. Therefore, because there is no “express provision excluding a particular grievance from arbitration” and no other “forceful evidence of a purpose to exclude the claim from arbitration,” Verizon is obligated to arbitrate the grievance concerning Pollard’s termination. *See AT&T*, 475 U.S. at 650; *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960) (“Warrior & Gulf”).

It is on this point that *United Steelworkers of America v. Lukens Steel Company*, 969 F.2d 1468, 1475 (3d. Cir. 1992), is particularly instructive. Because the parties’ settlement agreement did not expressly exclude from arbitration the question of whether the grievant had violated the

agreement, and in light of the presumption in favor of arbitrability, the court ordered the parties to arbitration as the union had requested. *Id.* at 1476-78. The same logic applies with equal force here. Defendant argues that *Lukens Steel* is inapplicable because the CBA itself excludes Pollard's termination from arbitration. (Def.'s Resp. at 8.) As discussed, however, the CBA does not exclude Pollard's termination from arbitration because he was not a new employee in 2010. And, as the settlement agreement reaffirms Pollard's status as a "rehire" and does not otherwise limit his right to arbitration, the Court should compel Verizon to engage in arbitration. *See Lukens Steel*, 969 F.2d at 1477-78.

II. The Union's Interpretation of the Settlement Agreement Properly Gives Effect to All Language in the Agreement, and Also Should Be Presumed Correct.

As with the CBA, defendant's arguments regarding the interpretation of the settlement agreement are off the mark. First, defendant contends that the Union's interpretation renders the second sentence of paragraph 10 meaningless. (Def.'s Resp. at 8, 10-11.) Second, defendant contends that the second sentence of paragraph 10 supersedes the provision in paragraph 8 because it is more specific. (Def.'s Resp. at 11-12.) Both arguments plainly lack merit. Moreover, the paramount principle of contract interpretation in this case is that the Court must order arbitration if there is any interpretation of the agreement that supports arbitrability of the dispute. The Union's interpretation is at least reasonable, and thus must be given effect.

A. Paragraph 10 Controls the Reinstatement of Seniority, Even Though It Does Not Limit the Right to Arbitration.

Under Article 17 of the CBA, the probationary period for a new employee delays two distinct contractual benefits: (1) the right to arbitrate a termination and (2) seniority rights. By its express terms, Paragraph 10 of the settlement agreement applies the second part of Article 17

to the employees rehired under the agreement. Pollard and the other rehired employees will have to work seven months before having any seniority recognized, which means for that time they are without the benefits of seniority, such as priority choice of work tours and priority in scheduling vacation time. The right to arbitrate a termination, however, is completely distinct, and not affected by paragraph 10. If the parties had intended paragraph 10 to alter the right to arbitration, they could have easily added language to that effect.

Contrary to defendant's assertions, the reference to a "probationary period" is not rendered meaningless by this plain reading of the agreement. As in the CBA, it provides a requirement that must be satisfactorily completed before the employees have seniority rights. When rehired in 2010, Pollard could not utilize the benefits of seniority until he served the special probationary period prescribed by paragraph 10.

This rehiring arrangement makes perfect practical sense. Because the covered employees had already worked for Verizon, Verizon was assured of their basic competence, unlike with new employees. Thus, it is appropriate that the rehired employees retain arbitration rights to ensure any termination is for just cause. On the other hand, because the rehired employees are moving into a new position as Machine Operators, it is appropriate for them to put in some initial time before being able to exercise seniority rights to pick better tours or shifts over other employees already in that department. Defendant has not explained how this understanding of the settlement agreement is implausible, or even unreasonable, because it cannot do so.

B. Paragraph 10 Is Not More Specific Than Paragraph 8 Because It Does Not Refer to Arbitration Rights.

As discussed, Paragraph 8 of the settlement agreement safeguards the rights of the rehired employees to have any job termination be subject to arbitration by specifying that they are going

to be employed as “rehires” instead of new employees. *See* Section I.B, *supra*. There can be no doubt that Paragraph 8 applies to the right to arbitration because it covers “all contractual benefits” under the CBA. In contrast, paragraph 10 focuses only on the restoration of seniority, and nowhere mentions arbitration or what matters are arbitrable. Therefore, paragraph 10 cannot supersede paragraph 8 on the question of arbitration rights.

Defendant’s reliance on the rule of contract interpretation involving specific terms is misplaced here. Under this rule of interpretation, “Where general and specific clauses conflict, the specific clause governs the meaning of the contract.” 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts*, § 32:10 (4th ed. 1999 & Supp. 2010) (emphasis added). In this case, there is no conflict between paragraphs 8 and 10 because the latter is only concerned with the restoration of seniority. Thus, the rule of construction is inapplicable. *See Panecasio v. Unisource Worldwide, Inc.*, 532 F.3d 101, 111 (2d Cir. 2008) (rejecting use of rule where there is no inconsistency between general and specific clauses).

C. Any Question Regarding the Proper Interpretation of the Agreement Must Be Resolved in Favor of Arbitrability.

The Supreme Court has repeatedly held that if the arbitration provision in a collective bargaining agreement is at all “susceptible of an interpretation that covers the asserted dispute,” then the parties must be ordered to arbitrate. *AT&T*, 475 U.S. at 650; *Warrior & Gulf*, 363 U.S. at 582-83. “Doubts should be resolved in favor of coverage.” *AT&T*, 475 U.S. at 650; *Warrior & Gulf*, 363 U.S. at 583; *see also United Steelworkers of Am. v. Ret. Income Plan for Asarco, Inc.*, 512 F.3d 555 (9th Cir. 2008) (affirming order to compel arbitration where, regardless of “whether the Union’s interpretation is the more persuasive of the two, it is at the very least a reasonable interpretation of the relevant language”).

The Union's interpretation of the CBA and settlement agreement faithfully follows the plain language of both documents and best reflects the intent of the parties. Should the Court have any doubts about the proper interpretation, however, those doubts must, as a matter of settled federal policy, be resolved in favor of arbitrability. At the very least, the Union's interpretation is reasonable. Thus, regardless of whether the Court might find any merit in defendant's position, the parties should nonetheless be ordered to proceed to arbitration.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the Court grant its Motion to Compel Arbitration.

Dated: September 21, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Brief in Support of Plaintiff's Motion to Compel Arbitration was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to Gregory A. Hearing and Dedria L. Harper, Attorneys for Defendant.

Dated: September 21, 2011.

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