

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION**

**CAPE FEAR PUBLIC TRANSPORTATION
AUTHORITY,**

Plaintiff,

v.

**AMALGAMATED TRANSIT UNION
LOCAL UNION 1328,**

Defendant.

File No. 7:11-cv-00046-BO

**DEFENDANT’S REPLY TO PLAINTIFF’S RESPONSE TO THE
MOTION TO DISMISS PLAINTIFF’S CLAIM AND FOR ATTORNEYS’ FEES**

Defendant Amalgamated Transit Union Local Union 1328 (“ATU Local 1328” or the “Union”), respectfully submits this reply to plaintiff’s response to defendant’s motion to dismiss the claim filed by plaintiff Cape Fear Public Transportation Authority (“CFPTA”) and for attorneys’ fees. Plaintiff’s underwhelming response to defendant’s motion leaves no doubt that its claim should be dismissed on multiple grounds.

First, plaintiff’s claim should be dismissed for failure to timely effect service because plaintiff did not properly serve defendant before the 120-day deadline elapsed, and had no good cause for its failure to do so. Second, plaintiff’s claim should be dismissed because plaintiff CFPTA was not a party to the arbitration decision that it seeks to vacate, has no standing to challenge the decision, and has provided no relevant authority to demonstrate that it is permitted to bring this suit under 28 U.S.C. § 185.

Third, plaintiff’s claim should be dismissed for failure to state a valid claim to vacate the arbitration decision. The arbitrator correctly determined that Professional Transit Management

of Wilmington, Inc. (“PTM”) violated the controlling collective bargain agreement (“CBA”) in terminating the grievant, and to the extent there was ambiguity in the operative language of the CBA, the arbitrator’s interpretation cannot be disturbed by the Court. Under the standard enunciated by the Supreme Court, plaintiff has also failed to show how the arbitrator’s decision to reinstate the grievant violates any clearly established public policy. For all these reasons, the Court should award defendant its reasonable attorneys’ fees incurred in this litigation because plaintiff’s motion to vacate the arbitration award has no arguable basis in the law.

ARGUMENT

I. Plaintiff’s Claim Should be Dismissed Pursuant to Rule 12(b)(2), (4), and (5) Because Plaintiff Failed to Timely Serve Defendant Without Good Cause.

Belatedly recognizing that it needed to effect service under Rule 4, plaintiff finally served defendant on July 11, 2011, when it filed an executed waiver of service form. *See* Fed. R. Civ. P. 4(d)(4) (“When the plaintiff files a waiver, . . . these rules apply as if a summons and complaint had been served at the time of filing the waiver.”). In violation of the 120-day deadline to effect service under Rule 4(m), however, plaintiff did not serve defendant until 150 days had elapsed since the filing of its complaint on February 11, 2011. Plaintiff has not demonstrated any good cause for its delay in serving defendant, and the Court should not permit its late service in the absence of good cause.

To find good cause, a court must find that the plaintiff “acted in good faith and demonstrate[d] some form of due diligence in attempting service.” *Elkins v. Broome*, 213 F.R.D. 273, 276 (M.D.N.C. 2003). Simple inadvertence or ignorance of the rules usually does not suffice, and some showing of “good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified is normally required.” *See*

Winters v. Teledyne Movable Offshore, Inc., 776 F.2d 1304, 1306 (5th Cir. 1985); *Vincent v. Reynolds Memorial Hosp., Inc.*, 141 F.R.D. 436, 437 (N.D. W.Va. 1992).

In this case, plaintiff cannot demonstrate due diligence or any reasonable basis for its failure to effect service within 120 days. Plaintiff attempts to show good cause on the basis of it having mailed its pleading to Gary Rauen, even though Rauen is not an employee of defendant, is not an attorney and has never been defendant's attorney, and defendant has not otherwise consented to Rauen accepting service on its behalf. Plaintiff has presented no legal grounds for its mistaken belief that it could serve defendant through Rauen. Moreover, plaintiff's attempted service through Rauen was plainly deficient because plaintiff neither obtained nor served a summons as required by Rule 4.

Had plaintiff exercised reasonable diligence, there was no obstacle to it properly effecting service because it knew how to contact defendant. In fact, included in the exhibits to plaintiff's original motion are letters from ATU Local 1328 that specify the Union's mailing address and the names of several employees. (Ex. to Pl.'s Mot., ECF Doc. #1-3, p. 55.) Thus, plaintiff could have made proper service under Rule 4, but chose not to.

Plaintiff further failed to exercise due diligence when defendant informed plaintiff of its deficiency. On May 26, 2010, defendant filed its motion for extension of time to respond, which specified how plaintiff had failed to effect service. This was *before* the 120-day period had elapsed. Upon receiving the motion, plaintiff could have promptly served defendant and still been within the 120-day period. But, plaintiff inexplicably did not make any efforts to serve defendant until June 30, 2011. Having been notified of its deficiency, and there being no obstacle to it serving defendant, plaintiff's unexplained failure to effect service within 120 days reflects a complete lack of diligence or any "good cause" for its delay.

While the Court may have discretion to permit plaintiff's late service even in the absence of good cause,¹ the Court should not do so given plaintiff's prolonged and inexplicable flouting of the Rules of Civil Procedure. Plaintiff is not proceeding *pro se*, and had ample opportunity to comply with Rule 4. Its failure to follow the rules should not be excused, and the complaint should be dismissed.

II. Plaintiff's Claim Should be Dismissed Pursuant to Rule 12(b)(1) and (6) Because Plaintiff Was Not a Party to the Arbitration Decision That it Seeks to Vacate.

Under controlling authority from the Fourth Circuit, only a party to a labor arbitration decision has standing to challenge it in federal court, with the exception of an employee who has suffered from a union's breach of the duty of fair representation. Plaintiff has not proffered any authority that allows a non-party to challenge an arbitration award absent a breach of the duty of fair representation, either in the context of Section 301 of the Labor Management Relations Act ("LMRA") or in any other context. Because plaintiff was not a party to the arbitration at issue, and it has not and cannot allege any breach of the duty of fair representation, plaintiff has no standing under Section 301 to bring this suit.

In *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124 (4th Cir. 2002), the Fourth Circuit held that the "general rule" is that a plaintiff that was not a party to a labor arbitration "does not have standing to challenge, modify, or confirm an arbitration award." *Id.* at 131. "The exception to this general rule is when the union has breached its duty of fair representation by failing to

¹ Arguably, the Fourth Circuit's decision in *Mendez v. Elliot*, 45 F.3d 75, 78-79 (4th Cir. 1995), requires a district court to dismiss a complaint in the absence of good cause. While this decision has been called into question due to the change in the language of Rule 4, *Mendez* has been enforced by some courts as the law of the circuit. See, e.g., *Burns & Russell Co. of Baltimore v. Oldcastle, Inc.*, 166 F. Supp. 2d 432, 438 n.7 (D. Md. 2001) (noting that "the Fourth Circuit's continued demand that plaintiffs demonstrate 'good cause' has been widely criticized; nevertheless, district courts in this Circuit are bound by *Mendez*.")

enforce the award on the employee's behalf," in which case an employee is permitted to seek to enforce the award. *Id.* All other circuits addressing this issue have reached the same conclusion. *See, e.g., Cleveland v. Porca Co.*, 38 F.3d 289, 296-97 (7th Cir. 1994) (holding that employees represented by union generally lack standing to enforce arbitration award because they are not parties to either the collective bargaining agreement or union-company arbitration); *Katir v. Columbia Univ.*, 15 F.3d 23, 24-25 (2d Cir. 1994) (per curiam) (same); *Bacashihua v. USPS*, 859 F.2d 402, 405-06 (6th Cir. 1988) (same); *Local 13, Int'l Longshoremen's and Warehousemen's Union v. Pacific Maritime Assoc.*, 441 F.2d 1061, 1064 (9th Cir. 1971) (holding that because a local union was not a party to an arbitration, it could not challenge the arbitration decision under Section 301 or the Federal Arbitration Act).

Moreover, all other statutes enabling challenges to arbitration awards restrict such challenges to parties to the arbitration. *See, e.g., Psarianos v. Standard Marine*, 12 F.3d 461, 465 (5th Cir. 1994) ("The relevant provisions of the Federal Arbitration Act, 9 U.S.C. §§ 201-08 (1993), do not confer such standing on parties not participating in arbitration."); 9 U.S.C. § 10 (allowing "order vacating" an arbitration award "upon application of any party to the arbitration" (emphasis added)); N.C. Gen. Stat. § 1-569.23 (permitting court to vacate arbitration award upon "motion to the court by a party to an arbitration proceeding" (emphasis added)).

Plaintiff has not provided any authority that allows a non-party to challenge an arbitration award absent a breach of the duty of fair representation. Plaintiff relies only on *Wooddell v. International Brotherhood of Electrical Workers, Local 71*, 502 U.S. 93 (1991), but *Wooddell* did not even involve a labor arbitration. The plaintiff in *Wooddell* brought suit to challenge provisions in a union constitution that governed relations between an international and local union. *Id.* at 100. In its decision, the Supreme Court held that individual employees may bring

such a suit, but did not address whether any other third party – such as plaintiff here – could do so. *Id.* at 101-02. Moreover, the Court explicitly noted that the plaintiff’s standing was not a question before it. *Id.* at 99 n.4. Because *Wooddell* did not involve or discuss challenges to labor arbitration decisions, and did not address third parties other than individual employees, it has no bearing on the case at hand.

In this case, plaintiff CFPTA was neither a party to the arbitration at issue nor to the underlying collective bargaining agreement. Plaintiff has not alleged that either ATU Local 1328 or plaintiff’s supposed agent, PTM, breached a duty of fair representation. Therefore, plaintiff plainly lacks standing to challenge the arbitration decision here under Section 301.

III. Plaintiff’s Claim Should be Dismissed Pursuant to Rule 12(b)(6) Because the Arbitrator’s Decision was Correct and Did Not Violate Public Policy.

A. The Arbitrator’s Decision Was Firmly Based on the Plain Language of the CBA, Reasonably Interpreted the CBA, and Cannot Be Disturbed.

Arbitrator Charlotte Gold was undoubtedly correct in concluding that the 2009 Drug and Alcohol Policy agreed to by and between PTM and the Union should have governed the discipline for the grievant’s failed alcohol test, and that PTM’s failure to comply with the policy violated the CBA and could not be sustained. While plaintiff continues to disagree with the arbitrator’s interpretation of the CBA, the parties to the CBA bargained to have an arbitrator make this decision, and her decision cannot be disturbed.

Article 29 of the CBA specifically addresses alcohol and substance abuse, and states in full: “The Company has an Alcohol and Substance Abuse Policy, which has been accepted by the Union.” (ECF Doc. #1-3, p. 42.) On March 1, 2009, the Union and PTM agreed to and enacted a new alcohol and substance abuse policy, which was thus incorporated into the CBA. (ECF Doc. #1-3, pp. 60-73.) The policy plainly states that it was agreed to by PTM and the

Union, indicates that it “supersedes” prior policy, and states that it “is effective 3/01/09.” (*Id.* at 60.) Because Article 29 uses the present tense “has” in its text, the CBA refers to and incorporates the company’s *current* policy, which changed by mutual agreement on March 1, 2009. This is the policy that should have been applied to the grievant.

In its reply brief, plaintiff states that the arbitrator’s decision would be correct if Article 29 had read: “The Company has an Alcohol and Substance Abuse Policy, *as amended from time to time*, which is deemed accepted by the Union.” (Pl.’s Reply Br. at 6.) The same can be said of plaintiff’s position, which would be correct if Article 29 had read: “The Company has an Alcohol and Substance Abuse Policy, *which cannot be amended*, and which is deemed accepted by the Union.”

Because the actual text of Article 29 does not contain either helpful phrase, however, it was up to the arbitrator to interpret the CBA. The arbitrator quite reasonably interpreted Article 29 to incorporate the revised policy. This is the process the parties bargained for, and her decision cannot be questioned. “Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept.” *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987). Indeed, “as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” *Id.* at 38; *see also Norfolk & W. Ry. Co. v. Transp. Commc’ns Int’l Union*, 17 F.3d 696, 700 (4th Cir. 1994) (explaining that where an arbitrator confines herself to the plain language of a contract, the arbitration award should be confirmed unless “wholly baseless and completely without reason”). Therefore, under the governing standard of review, the arbitration decision must be confirmed.

B. The Arbitrator's Decision In No Way Violates Any Established Public Policy Under the Supreme Court's Standard.

Arbitrator Gold's decision to reinstate the grievant – a first time alcohol-policy offender who participated in rehabilitation and had her commercial driver's license reinstated by the NCDOT – is entirely consistent with federal and state regulation of transit drivers, and does not conflict with any public policy. In its reply brief, plaintiff futilely maintains its public policy argument by continuing to ignore the Supreme Court's clear holding in *Eastern Associated Coal Corporation v. United Mine Workers District 17*, 531 U.S. 57 (2000).

In that case, the Court held that for the public policy exception, “the question to be answered is not whether [the grievant's] drug use itself violates public policy, but whether the agreement to reinstate him does so.” *Id.* at 62-63 (emphasis added). “To put the question more specifically, does a contractual agreement to reinstate [the grievant] with specified conditions . . . run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests?” *Id.* at 63.

In its reply brief, the only public policy ascertained by reference to positive law that plaintiff identifies is the state law criminalizing driving while intoxicated. (Pl.'s Reply Br. at 1-2.) While important, this policy is entirely beside the point. It has no bearing on whether a one-time alcohol-policy offender who participated in rehabilitation can be reinstated to a transit position. In fact, the regulations actually relevant to the question of reinstatement support the arbitrator's decision. Under state law, the grievant's commercial driver's license was reinstated following her rehabilitation and before she was put back to work. Under federal law, DOT regulations explicitly permit the reinstatement of drivers who fail drug or alcohol tests following rehabilitation. *See* 49 C.F.R. §§ 655.32, 655.46, 40.305. Just as in *Eastern Associated Coal*, the applicable regulatory scheme does not prohibit an employer from reinstating an employee who

reported to work under the influence, and thus the arbitrator's decision must be confirmed. *See Eastern Associated Coal*, 531 U.S. at 65-66.

Having no legal support for its position in light of *Eastern Associated Coal*, plaintiff highlights the fact that the grievant reported to work intoxicated, and then proceeds to rely on cases decided before *Eastern Associated Coal*. (Pl.'s Reply Br. at 4-5.) The cases cited by plaintiff, however, use the framework that was rejected by *Eastern Associated Coal* as they focus on public policies prohibiting drug or alcohol use, rather than policies prohibiting reinstatement of the employee. *See, e.g., Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 363-64 (3d. Cir. 1993) (rejecting the public policy framework that questions whether there is "a rule of positive law which forbids reinstatement of the employee" in favor of questioning whether the employee's drug use itself violates public policy).

The fact that the grievant reported to work intoxicated does not alter the relevant analysis under *Eastern Associated Coal* because plaintiff cannot identify any public policy prohibiting the reinstatement of an employee who had previously reported to work while intoxicated. Cases since *Eastern Associated Coal* uniformly reach this conclusion. *See, e.g., Cont'l Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 555 F.3d 399, 418 (5th Cir. 2009). For instance, in *Space Gateway Support, LLC v. International Union of Security Police Profs. of America*, No. 6:05-cv-208 , 2005 U.S. Dist. LEXIS 19088 (M.D. Fla. Sept. 1, 2005) (unpublished),² a police officer was discharged for being intoxicated *while on duty*, and was subsequently reinstated by an arbitrator. *Id.* at *3-7. Properly applying *Eastern Associated Coal*, the court found the reinstatement to be consistent with federal law, and not contrary to any public policy. *Id.* at *20-21. In this case, the Court should reach the same conclusion, and uphold the arbitrator's decision.

² This unpublished decision is included as an attachment to this reply.

IV. Defendant Should be Awarded Its Attorneys' Fees for This Litigation Because Plaintiff's Claim Has No Arguable Basis in the Law.

The absence of legal support for plaintiff's position in its response and reply underscores the need to award attorneys' fees in this case. As discussed, plaintiff still has not cited any relevant authority to support its contention that it has standing to challenge the arbitration award here because there is no "arguable basis in the law" for its position. And because the arbitrator adopted an entirely reasonable interpretation of Article 29 of the CBA, there is no arguable basis for overturning her decision under the governing standard of review. Finally, plaintiff has no support for its position that the arbitrator's decision violates public policy in light of the Supreme Court's decision in *Eastern Associated Coal*. Therefore, defendant is entitled to its attorneys' fees for the costs of this unjustified litigation. *See United Food & Commercial Workers v. Marval Poultry Co.*, 876 F.2d 346, 351 (4th Cir. 1989).

CONCLUSION

For the reasons stated above, in Defendant's Memorandum in Support of its Motion to Dismiss, and in Defendant's Response to Plaintiff's Motion to Vacate, defendant respectfully requests that the Court enter an order granting the instant motion, dismissing plaintiff's claim, and awarding defendant its reasonable attorneys' fees incurred in this litigation.

Dated: August 4, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply to Plaintiff's Response to Defendant's Motion to Dismiss Plaintiff's Claim and for Attorneys' Fees was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to George J. Oliver and Matthew Nis Leerberg, Attorneys for Plaintiff.

Dated: August 4, 2011.

/s/ Narendra K. Ghosh

Narendra K. Ghosh

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