

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

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

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**PLAINTIFF’S RESPONSE IN OPPOSITION TO  
DEFENDANT’S MOTION TO DISMISS COMPLAINT**

Plaintiff International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 289 (the “Union”), respectfully submits this memorandum of law in response to Defendant Verizon South, Inc.’s (“Verizon”) motion to dismiss the complaint. Because national labor policy strongly favors arbitration as the means for resolving labor disputes, courts must apply a presumption of arbitrability to collective bargaining agreements that contain arbitration provisions, and direct the parties to arbitrate unless the parties have expressly agreed not to arbitrate a particular matter. Any doubt or ambiguity regarding arbitrability is to be resolved in favor of arbitration.

Here, the parties’ collective bargaining agreement 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. Moreover, to the extent the settlement agreement is ambiguous about permitting Pollard’s grievance to be

arbitrated, that ambiguity must be construed in favor of arbitration. Therefore, defendant's motion to dismiss should be denied, and plaintiff's motion to compel arbitration – filed this same day – should be granted.

## **STATEMENT OF THE FACTS**

### **I. The Parties and Their Collective Bargaining Agreement**

The Union and Verizon have a long standing collective bargaining relationship. (Complaint, ¶ 10.) Verizon operates a billing distribution center located at 3632 North Roxboro Road, Durham, North Carolina, 27704, which employs machine operators who are represented by the Union. (Complaint, ¶ 4.) Prior to the current collective bargaining agreement, the Union and Verizon entered into a collective bargaining agreement effective from October 9, 2005, to October 9, 2010 (the "Labor Agreement" or "CBA"). (Complaint, ¶ 10, Ex. A.) More recently, the Union and Verizon entered into a collective bargaining agreement effective from October 10, 2010, to October 5, 2013. (Complaint, ¶ 11.) The relevant provisions of this agreement are identical to those in the 2005-2010 CBA. (Complaint, ¶ 11.)

Several provisions of the CBA bear on this case. Article 4 of the CBA provides the procedure for the parties to follow to peaceably resolve grievances that arise between either the Union or an employee and Verizon. (Complaint Ex. A, pp. 4-5.) The CBA defines a "grievance" as "any alleged violation of the terms, or the application of the terms of this Agreement covering the employee or employees concerned, or any alleged action by the Company or its representatives which causes an employee to lose his/her job or any benefits arising out of his/her job." (Complaint Ex. A, p. 4.)

If a dispute is not resolved through the grievance procedure, then Article 5 of the CBA provides for the grievance to be submitted to an impartial arbitrator. (Complaint Ex. A, pp. 5-6.)

The process is initiated by the Union's notice that it is seeking arbitration, and the parties then jointly select the arbitrator. (Complaint Ex. A, pp. 5-6.) Article 5 further provides: "The decision of the arbitrator will be final, and the Company and the Union agree to abide by such decision." (Complaint Ex. A, p. 6.)

Article 6 of the CBA governs seniority, which is defined as the "the rights accruing to employees through length of service which entitles them to preferences provided for in this Agreement." (Complaint Ex. A, p. 6.) Seniority affects many aspects of employment. For instance, seniority is "the deciding factor in matters affecting choice of tours [i.e., line of work and shift at particular time] and vacations." (Complaint Ex. A, p. 7.) As further specified in Article 16, employees with more seniority are assigned their choice of tours. (Complaint Ex. A, pp. 25-26.) Under Articles 6, 7, and 8, seniority is also a key factor in decisions promoting or transferring employees. (Complaint Ex. A, pp. 6-13.) "In making promotions or reclassifications within the bargaining unit, the senior qualified employee shall be promoted or reclassified." (Complaint Ex. A, p. 7.) In addition, seniority controls the order in which employees are laid off and rehired after a layoff. (Complaint Ex. A, pp. 7-8.)

Article 17 of the CBA contains special provisions that apply to new employees. "All new employees of the Company shall serve a probationary period of seven (7) months." (Complaint Ex. A, p. 28.) 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. (Complaint Ex. A, p. 28.) With regard to the latter, a new employee is not given seniority until "satisfactory completion" of the probationary period. (Complaint Ex. A, p. 28.)

Finally, Article 27 provides, in part, that Verizon cannot discharge employees without “just cause.” (Complaint Ex. A, p. 33.)

## **II. The Settlement Agreement for Brian Pollard**

In 2009, there arose a dispute regarding Verizon’s discharge of employee Brian Pollard and six other employees, all of whom were represented by the Union. (Complaint, ¶ 15.) Prior to being discharged in 2009, Mr. Pollard had already completed his seven-month probationary period when he was a new employee. (Complaint, ¶ 15.) The Union filed grievances regarding each of the seven employees’ terminations. (Complaint, ¶ 15.)

On March 23, 2010, the Union and Verizon settled the grievances by agreeing to have the seven employees be rehired by Verizon as Machine Operators. (Complaint, ¶ 16, Ex. B.) The parties’ settlement was memorialized in a written agreement, which specified various terms of the employees’ reemployment, including their rate of pay, ineligibility for back pay, and right to leave under the Family and Medical Leave Act. (Complaint Ex. B, pp. 1-2.)

Two provisions of the settlement agreement are particularly relevant. Paragraph 8 addresses the applicability of all benefits under the CBA, and states in full: “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.)

Paragraph 10 of the settlement agreement addresses seniority in particular, and states in full: “The grievants’ seniority will be restored, including the period of his/her separation of employment. However, it will not be applicable until the employees have completed the required seven (7) month probationary period.” (Complaint Ex. B, p. 2.)

### **III. Verizon's Refusal to Arbitrate Pollard Grievance**

On August 6, 2010, Verizon terminated Pollard's employment again. (Complaint, ¶ 19.) On August 11, 2010, pursuant to Article 4 of the CBA, the Union submitted a grievance to Verizon, alleging that Pollard had been terminated without just cause in violation of the CBA, and seeking that he be reinstated to his position. (Complaint, ¶ 20, Ex. C.)

On August 24, 2010, Verizon preliminarily denied the Pollard Grievance. (Complaint, ¶ 21.) Pursuant to the CBA, Verizon and the Union met on September 27, 2010, in an effort to resolve the grievance. (Complaint, ¶ 21.) Following the meeting, on September 29, 2010, Verizon issued a final decision denying the Pollard Grievance. (Complaint, ¶ 21, Ex. D.)

On October 15, 2010, the Union initiated the arbitration procedure under Article 5 of the CBA for the Pollard Grievance by requesting a list of arbitrators from the American Arbitration Association, and by notifying Verizon of its request. (Complaint, ¶ 22, Ex. E.) On November 3, 2010, Verizon informed the Union of its position that the Pollard Grievance is not subject to arbitration, and that Verizon would not proceed to arbitration of the grievance. (Complaint, ¶ 23, Ex. F.) Having no other recourse, the Union filed this action on April 29, 2011, in order to compel Verizon to arbitrate the Pollard Grievance.

#### **STATEMENT OF THE QUESTION PRESENTED**

Whether plaintiff has stated a valid claim because Verizon should be compelled to arbitrate the grievance regarding Brian Pollard's termination where the parties agreed in their collective bargaining agreement to arbitrate disputes such as the Pollard grievance, and did not agree otherwise in the settlement agreement for Pollard's reemployment.

## ARGUMENT

The parties agreed in their CBA to arbitrate disputes such as the Pollard Grievance, and did not agree otherwise in the settlement agreement for Pollard's reemployment. With regard to whether a termination of Pollard's employment could be arbitrated, the settlement agreement maintained that benefit of the CBA by explicitly specifying that Pollard was being brought back to work as a "rehire" and not a "new employee." While the settlement agreement did refer to a probationary period for Pollard upon his reemployment, it did so only in the context of reinstating his seniority. Should there be any question about how to interpret the settlement agreement, it must be resolved in favor of arbitration under the governing standard for deciding the arbitrability of labor disputes, which strongly favors arbitration and creates a presumption of arbitrability. Verizon cannot point to any express agreement not to arbitrate, which is required to overcome the presumption. And at the very least, the settlement agreement is susceptible to an interpretation favoring arbitration, which means the parties must be ordered to arbitrate. Therefore, Verizon's motion to dismiss the complaint should be denied and it should be compelled to proceed to arbitration.

### **I. Courts Must Apply a Presumption of Arbitrability to Collective Bargaining Agreements that Contain Broad Arbitration Provisions.**

The Supreme Court first established the principles for deciding the arbitrability of labor disputes in the *Steelworkers Trilogy* set of cases,<sup>1</sup> and has since reaffirmed them in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986) ("AT&T"). First, "arbitration is a matter of contract and a party cannot be required to submit to arbitration

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<sup>1</sup> The *Steelworkers Trilogy* consists of *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960) ("Warrior & Gulf"); and *United Steelworkers of America v. Enterprise Wheel & Car Corporation*, 363 U.S. 593 (1960).

any dispute which he has not agreed so to submit.” *AT&T*, 475 U.S. at 648 (quoting *Warrior & Gulf*, 363 U.S. at 582). Second, “unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.” *AT&T*, 475 U.S. at 649. Third, “in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims.” *Id.*

Finally, and most significantly for this case, “where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that ‘an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.’” *Id.* at 650 (quoting *Warrior & Gulf*, 363 U.S. at 582-83) (emphasis added). “Doubts should be resolved in favor of coverage.” *AT&T*, 475 U.S. at 650 (quoting *Warrior & Gulf*, 363 U.S. at 583). Moreover, 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.” *AT&T*, 475 U.S. at 650 (quoting *Warrior & Gulf*, 363 U.S. at 584-85).

The Court explained that “[t]his presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements.” *AT&T*, 475 U.S. at 650. The presumption also “furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties’ presumed objectives in pursuing collective bargaining.” *Id.*

The presumption of arbitrability also covers separate settlement agreements negotiated between a union and the employer. “Settlement agreements . . . between parties to a collective

bargaining agreement containing a broad arbitration clause are arbitrable when the underlying disputes are arbitrable, except when the parties expressly exclude the settlement agreements from arbitration.” *United Steelworkers of Am. v. Lukens Steel Co.*, 969 F.2d 1468, 1475 (3d. Cir. 1992) (citing *Niro v. Fearn International, Inc.*, 827 F2d 173, 175 (7th Cir 1987)). Furthermore, “the party contesting the presumption of arbitrability bears the burden of producing strong and forceful evidence of an intention to exclude the matter from arbitration.” *Lukens Steel*, 969 F.2d at 1475.

The foregoing principles are binding on this Court and, as shown below, require that Verizon’s motion to dismiss be denied and it be ordered to proceed to arbitration.

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

Articles 4 and 5 of the CBA clearly and unequivocally provide that grievances regarding employee discharges, such as the Pollard Grievance, are subject to arbitration. The definition of “grievance” is expansive, encompassing “any alleged violation” of the CBA, as well as “any action” that causes an employee to lose his job. Absent some other express provision restricting arbitrability, there can be no question that the Pollard Grievance is arbitrable under the CBA.

Defendant contends that the settlement agreement providing for the reemployment of Pollard contains such an express provision because it refers to a “probationary period” for the rehired employees. Defendant, however, misreads the plain language of the settlement agreement, which refers to a probationary period only in the context of reinstating seniority for the rehired employees, and in no way restricts the application of the CBA’s arbitration process to Pollard’s subsequent termination.

Indeed, the relevant provision of the settlement agreement safeguards the rights of the rehired employees to have any job termination be subject to the arbitration process in the CBA. 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.”

The right to have an arbitrator review a termination is obviously a contractual benefit. In fact, it is perhaps the most important benefit to employees in a collective bargaining agreement because it prevents unjustified or improper terminations of a job. Paragraph 8 of the settlement agreement protects this benefit by specifying that the former employees are to be treated as rehired, as opposed to new employees. Because, under Article 17 of the CBA, “new employees” are the only employees without the ability to arbitrate a termination, Pollard and the others deemed “rehires” retained their arbitration rights under the settlement agreement.

Paragraph 10 of the settlement agreement is not to the contrary, and, properly read, is entirely consistent with paragraph 8. 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. Paragraph 10 nowhere mentions arbitration or what matters are arbitrable; it is solely focused on the restoration of seniority.

Interpreted in this context, the reference to a probationary period can be properly understood. *See Int’l Union, United Auto., Aerospace, and Agric. Implement Workers of Am.,*

*UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983) (holding that when interpreting a collective bargaining agreement, “[t]he intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion.”) 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. Paragraph 10 thus applies the second part of Article 17 to the employees rehired under the settlement agreement. They 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.

The rehiring arrangement specified in the settlement agreement is quite sensible. 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. Contrary to defendant’s assertion, this interpretation of the settlement is consistent with both the form and substance of the agreement.

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,” the CBA’s broad arbitration provision remains in force for Pollard, and Verizon is obligated to arbitrate the grievance concerning his 2010 termination. *See AT&T*, 475 U.S. at 650; *Warrior & Gulf*, 363 U.S. at 584-85; *Lukens Steel*, 969 F.2d at 1475.

### **III. Because the Settlement Agreement Is, At Least, Susceptible to the Union’s Interpretation, It Must Be Construed 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.

Courts have consistently heeded this directive, and ordered arbitration if there is any interpretation of the agreement that supports arbitrability of the dispute. *See, e.g., 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”); *Washington Mailers Union No. 29 v. Washington Post Co.*, 233 F.3d 587, 591-92 (D.C. Cir. 2000) (reversing district court and concluding dispute arbitrable even if “the arguments made by both sides as to the proper reading of the contract were at least equally plausible”); *Teamsters Local Union, No. 507 v. Am. Red Cross Blood Servs.*, 2011 U.S. Dist. LEXIS 53610, No. 1:10-cv-01478, at \*12-15 (N.D. Ohio May 19, 2011) (ordering arbitration where both parties’ interpretations of the relevant provision “have some merit”).<sup>2</sup>

The Third Circuit’s decision in *United Steelworkers of America v. Lukens Steel Company*, 969 F.2d 1468, 1475 (3d. Cir. 1992), is particularly instructive. In this case, three employees committed serious infractions, but instead of being discharged, they each agreed to a conditional reinstatement agreement, denominated a “Last Chance Agreement.” *Id.* at 1470. Each was later discharged for allegedly violating that agreement. *Id.* When the employees attempted to grieve

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<sup>2</sup> This unpublished opinion is included as an attachment to this response.

their discharges, the company refused, claiming that the last chance agreements precluded the employees from pursuing the grievance and arbitration procedures established in the CBA. *Id.* The union then filed suit to compel arbitration. *Id.* at 1470-71.

The last chance agreements each stated that if the employee was suspended for violating the agreement, “he will be afforded an opportunity to plead his case before the Disciplinary Committee. The disposition of the Disciplinary Committee shall be final. Neither [the employee] nor the Union shall have recourse through the arbitration/grievance procedure to protest the suspension or disposition invoked by the Disciplinary Committee.” *Id.* at 1473. The company contended that this language clearly and unambiguously precluded the employees from grieving their discharges. *Id.* The Union contended, however, that the provision only waives arbitration with regard to the penalty imposed by the Disciplinary Committee, but not for the threshold question of whether the agreement had been violated by an infraction. *Id.*

The Third Circuit concluded that the language in question was “equally consistent with both parties’ positions.” *Id.* at 1476. Thus, the arbitrability of the threshold question of whether the agreement was violated was not “expressly” excluded. *Id.* Accordingly, in light of the presumption in favor of arbitrability, the court ordered the parties to arbitration as the union had requested. *Id.* at 1477-78.

This case is even more compelling than *Lukens Steel*. Here, the settlement agreement for Pollard’s rehiring is best interpreted as retaining his right to arbitration over his termination, even during the seven-month probationary period. *See* Section II, *supra*. However, the Court need not definitely resolve this question of contract interpretation if the presumption of arbitrability is taken into account. At the very least, it is reasonably possible to interpret the settlement agreement not to eliminate arbitrability of the Pollard grievance. Compared to the operative

language in *Lukens Steel*, which explicitly spoke of curtailing access to the grievance and arbitration procedures, the language relied upon by Verizon here – Paragraph 10 of the settlement agreement – does not even mention access to arbitration. Therefore, the agreement in this case, must be construed in favor of arbitrability, just as the less compelling agreement was in *Lukens Steel*. See *AT&T*, 475 U.S. at 650; *Warrior & Gulf*, 363 U.S. at 582-83; *Lukens Steel*, 969 F.2d at 1477-78.

Finally, defendant’s reliance on *United States Postal Service v. American Postal Workers Union, AFL-CIO*, 204 F.3d 523 (4th Cir. 2000) (“USPS”), is misplaced because the operative contractual language there differed significantly from the agreement here. At issue in that case was the probationary employee provision in the parties’ collective bargaining agreement, which expressly excluded probationary employees from the grievance-arbitration procedure to contest a separation. *Id.* at 525. The provision stated: “The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto.” *Id.* Given this explicit language, the court unsurprisingly vacated an arbitrator’s award because the express language in the agreement foreclosed any right to arbitration. *Id.* at 531.

The language in *USPS*, however, is nothing like the language used in the settlement agreement before the Court. In establishing the terms of Pollard’s rehiring, the settlement agreement did not explicitly prohibit the rehired employees from accessing the grievance and arbitration procedures of the CBA. Instead, the agreement only mentioned a probationary period in the context of when seniority would be reinstated. Because this is not an “express” exclusion of the right to arbitrate, and the settlement agreement can easily be interpreted to permit

arbitration, *USPS* has no persuasive force, and Verizon should be compelled to arbitrate the Pollard Grievance.

### CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the Court deny defendant's Motion to Dismiss and grant plaintiff's Motion to Compel Arbitration, which has been filed this same day.

Dated: August 11, 2011.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Response in Opposition to Defendant's Motion to Dismiss was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to Gregory A. Hearing, C. Grainger Pierce, Jr., and Dedria L. Harper, Attorneys for Defendant.

Dated: August 11, 2011.

/s/ Narendra K. Ghosh

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