

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

CAPE FEAR PUBLIC TRANSPORTATION AUTHORITY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	File No. 7:11-cv-00046-BO
	)	
AMALGAMATED TRANSIT UNION LOCAL UNION 1328,	)	
	)	
Defendant.	)	
	)	

**DEFENDANT’S RESPONSE IN OPPOSITION TO PLAINTIFF’S MOTION  
TO VACATE OR MODIFY ARBITRATION AWARD**

Defendant Amalgamated Transit Union Local Union 1328 ( “ATU Local 1328” or the “Union”), respectfully submits this memorandum of law in response to plaintiff’s motion to vacate the arbitration award entered *In the Matter of the Arbitration between Professional Transit Management of Wilmington, Inc. and Amalgamated Transit Union, Local Union 1328*, FMCS No. 10-02497-6.

First and foremost, the motion should be dismissed because of plaintiff’s failure to comply with the Federal Rules of Civil Procedure and its lack of standing, as outlined in defendant’s motion to dismiss and accompanying memorandum of law filed this same day. Notwithstanding these fatal procedural defects that deprive this Court of jurisdiction, plaintiff’s claim also fails on its merits, as this memorandum demonstrates. Under the applicable standard of review, among the narrowest in the law, plaintiff’s motion should be denied because (1) the arbitrator correctly determined that Professional Transit Management of Wilmington, Inc.

(“PTM”) violated the controlling collective bargain agreement in terminating the grievant, and (2) her decision to reinstate the grievant does not violate any clearly established public policy.

## STATEMENT OF THE FACTS

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

Wave Transit is the public transit system in Wilmington, North Carolina. (Pl. Ex. A, PTM’s Post-Hearing Brief, ECF Doc. #1-2, p. 4.) Plaintiff Cape Fear Public Transportation Authority (“CFPTA”) formerly contracted with First Transit, Inc. (“First Transit”) to manage the transit system as the private employer. (*Id.*) The bus operators at Wave Transit are collectively represented by defendant ATU Local 1328. (*Id.*) Plaintiff is required to contract with a private employer to manage the transit system because North Carolina law, N.C. Gen. Stat. § 95-98, prohibits state agencies from contracting with unions.

As of 2009, management-employee relations at Wave Transit were governed by the collective bargaining agreement (“CBA”) between ATU Local 1328 and PTM. The CBA in force was originally contracted between ATU Local 1328 and PTM’s predecessor, First Transit, and was effective from July 1, 2007, through June 30, 2010. (Pl.’s “Joint Exhibit 1,” Memorandum of Agreement Between First Transit and ATU Local 1328, ECF Doc. #1-3, pp. 27-52.) PTM subsequently replaced First Transit as the management company for Wave Transit, and has succeed First Transit as the party to the CBA. Plaintiff CFPTA is not and never has been a party to the CBA. (*Id.*)

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.” (*Id.* at 42.) Prior to 2009, the alcohol and substance abuse policy incorporated into the CBA was one agreed to by the Union and First Transit. 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. (Pl.’s “Joint Exhibit 3,” PTM Drug and Alcohol Abuse Policy, ECF Doc. #1-3, pp. 60-73.)

The 2009 Drug and Alcohol Abuse Policy states in bold: “All parts of this policy are set under the mutual agreement of management and Amalgamated Transit Union (ATU) Local 1328.” (*Id.* at 60.) It further states:

The purpose of this policy is to assure worker fitness for duty and to protect our employees, passengers, and the public from the risks posed by the use of alcohol and prohibited drugs. This policy is also intended to comply with all applicable Federal regulations governing workplace anti-drug and anti-alcohol programs in the transit industry.

(*Id.*) The face of the policy indicates that it “supersedes” a prior policy, and it states that this policy “is effective 3/01/09.” (*Id.*)

Section 6.0 of the Policy, entitled “Testing for Prohibited Substances,” states in relevant part:

Any employee that has a confirmed positive drug test or alcohol test will be removed from his/her position, informed of educational and rehabilitation programs available, and evaluated by a Substance Abuse Professional (SAP). A positive drug and/or alcohol test will also result in disciplinary action up to and including termination as provided in this policy.

(*Id.* at 62.)

Appendix B of the Drug and Alcohol Abuse Policy then specifies the appropriate disciplinary action for various infractions of the policy. (*Id.* at 67-69.) The relevant infraction here is for “Any employee that has a positive alcohol test result of 0.04 or greater on a promotion test, random test or a reasonable suspicion test.” (*Id.* at 68.) For the first offense, the mandated discipline is: “Suspension from duties without pay, (denial of promotion in case of promotion test), referral to SAP, and re-entry to work following negative test result, the completion of re-

entry contract, and depending on position availability.” (*Id.*) For the second offense within ten years of the first, the mandated discipline is termination. (*Id.*)

PTM also unilaterally promulgated an employee Handbook that includes “Rules and Regulations” and a “Code of Performance.” (Pl.’s “Company Exhibit 4,” PTM Rules and Regulations, ECF Doc. #1-2, pp. 33-65.) The introduction to the Handbook contains the following note in bold:

This handbook applies to Employees represented by a labor union, to the extent that the Handbook’s policies, procedures, rules and discipline are not in conflict with a specific term or condition stated in the labor agreement. To the extent that the Handbook is in conflict with a term or condition of the Employee’s applicable labor agreement, the provision in the labor agreement shall take precedence.

(*Id.* at 39 (emphasis added).) In the Code of Performance section of the Handbook, it states that for a “Violation of the Company policy on drug abuse and alcohol misuse,” the first offense results in discharge. (*Id.* at 54.)

## **II. The Termination of Marion Davis**

The arbitration decision at issue here arose out of a grievance filed by ATU Local 1328 against PTM regarding the termination of PTM employee and ATU Local 1328 bargaining unit member Marion Davis. Grievances and arbitrations are governed by Article 39 of the CBA. (Pl.’s “Joint Exhibit 1,” ECF Doc. #1-3, pp. 46-48.) Section 4, part D, of Article 39 specifies that when a grievance is submitted to an arbitrator, “The Findings of the impartial arbitrator [are] to be final and binding on the parties thereto.” (*Id.* at 48.)

On November 20, 2009, Davis was sent for a reasonable suspicion drug and alcohol test by a manager and her blood alcohol content was over the permissible limit. (Pl. Ex. B, Arbitrator Opinion and Award, ECF Doc. #1-2, p. 14.) Although this was her first offense, Davis was terminated from her employment on December 3, 2009, for failing the alcohol test.

(Pl.'s "Joint Exhibit 2," Termination Letter, ECF Doc. #1-3, p. 54.) The Union filed a grievance, protesting the termination on the grounds that PTM had failed to adhere to the Drug and Alcohol Policy, which mandated evaluation, treatment, and re-entry for a first alcohol offense. (Pl.'s "Joint Exhibit 2," Grievance, ECF Doc. #1-3, p. 55.) The grievance could not be resolved with PTM, and thus proceeded to arbitration. (Arbitrator Opinion and Award, ECF Doc. #1-2, p. 14.)

Following her termination, Davis worked to rehabilitate herself. (*Id.* at 17.) She has consumed no alcohol since February 2010. (*Id.*) She completed a substance abuse assessment on July 27, 2010, and six hours of education as required by the North Carolina Department of Transportation ("NCDOT"). (*Id.*) Her commercial drivers license was reinstated by NCDOT on October 14, 2010. (*Id.*)

### **III. Arbitrator Gold's Opinion and Award**

Arbitrator Charlotte Gold held a hearing on October 15, 2010, in which the Union and PTM were the only participants. (*Id.* at 13.) PTM and the Union agreed that the issue to be resolved was: "Did the Company have just cause to terminate the Grievant? If not, what shall the remedy be?" (*Id.*) Testimony, evidence, and argument were received by the arbitrator from both sides. (*Id.*) Plaintiff CFPTA was in no way involved with the arbitration.

On November 14, 2010, the arbitrator issued an Opinion and Award in favor of the Union. The arbitrator recognized that there was a conflict between the 2009 Drug and Alcohol Policy, which mandated reinstatement of first-time offenders following rehabilitation, and PTM's unilateral Code of Performance, which called for the immediate discharge of first-time offenders. (*Id.* at 17-19.) The arbitrator resolved this conflict by drawing her award from the essence of the CBA itself, noting that the 2009 Drug and Alcohol Policy was negotiated by and between PTM and the Union, and that it was incorporated into the CBA by Article 29. (*Id.* at 19-

20.) Thus, the 2009 Drug and Alcohol Policy takes on the force of a contractual term in the CBA. (*Id.* at 20.)

PTM tried to argue that the CBA incorporated First Transit's older drug and alcohol policy. (*Id.*) The arbitrator rejected this argument because PTM, as the current employer, had voluntarily agreed to less harsh discipline for first-time offenders in the 2009 Drug and Alcohol Policy. (*Id.*) Because the CBA was not altered, it incorporated the revised policy that had been agreed to by PTM and the Union. (*Id.*)

The arbitrator also concluded that PTM's Code of Performance could not override the 2009 Drug and Alcohol Policy because it was phrased in terms of and "pays deference to" the Drug and Alcohol Policy. (*Id.* at 21.) Specifically, a "violation of the Company policy on drug abuse and alcohol misuse" must exist to warrant a discharge under the Code of Performance. (*Id.*) Therefore, the "Company did not follow the dictates of its Drug and Alcohol Abuse Policy and thus this grievance must be sustained." (*Id.*)

Accordingly, in her remedy, the arbitrator ordered that Davis be reinstated with back pay from October 14, 2010, the date on which her commercial driver's license was reinstated. (*Id.* at 22.) The Union had argued for a longer period of back pay, but the arbitrator found it too speculative to conclude that Davis could have been rehabilitated and re-hired earlier than October 14. (*Id.* at 21.) The arbitrator also noted that Davis's reinstatement was contingent on passing a return-to-work physical and that she will be subject to random testing by PTM. (*Id.* at 22.) To date, Davis has not been permitted to return to work.

On February 11, 2011, plaintiff purported to initiate this case under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, by filing its Motion to Vacate or Modify Arbitration Award. No complaint commencing an action under the Federal Rules of

Civil Procedure has ever been properly filed or served, as the law requires. Defendant's motion for extension of time to respond by June 24, 2011, was granted by the Court on June 17, 2011. (ECF Doc. #10.)

## **ARGUMENT**

Arbitrator Gold's Opinion and Award unequivocally drew its essence from the CBA between the Union and PTM, and in no way violated any established public policy. Therefore, under the applicable standard of review – among the narrowest in the law – the Court should deny plaintiff's motion to vacate. The Arbitrator correctly determined that PTM violated the CBA by terminating Davis because the Drug and Alcohol Policy, which had been mutually agreed to in March 2009, mandated reinstatement of first-time offenders of the policy following rehabilitation. As she was obliged to conclude under the CBA, the 2009 Drug and Alcohol Policy was incorporated into the CBA, and thus could not be overridden by PTM's unilaterally promulgated Code of Performance. Because the Drug and Alcohol Policy was explicitly written to comply with federal regulations concerning alcohol misuse by transit workers, and the arbitrator simply enforced that policy, her decision furthers, not contradicts, public policy. Plaintiff's attempt to subvert a drug and alcohol policy that was agreed to just nine months before Davis's termination should be rejected.

### **I. The Court's Scope of Review of the Award is Extremely Narrow.**

“[J]udicial review of arbitration awards is . . . ‘among the narrowest known to the law.’” *U.S. Postal Serv. v. Am. Postal Workers Union*, 204 F.3d 523, 527 (4th Cir. 2000) (quoting *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 91 (1978)). The Supreme Court has held that “[j]udicial review of a labor-arbitration decision” in particular is not merely limited, but “very limited.” *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (per

curiam). “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); *see also UGL UNICCO v. Local Lodge #2541, Int’l Assoc. of Machinists and Aerospace Workers*, 723 F. Supp. 2d 844, 847 (E.D.N.C. 2010) (“In general, courts favor a broad discretion in the arbitrator . . . to reach a fair solution of a problem.” (quoting *Lynchburg Foundry Co. v. United Steelworkers of America, Local 2556*, 404 F.2d 259, 261 (4th Cir. 1968))). Therefore, the Court must “determine only whether the arbitrator did his job – not whether he did it well, correctly, or reasonably, but simply whether he did it.” *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int’l Union*, 76 F.3d 606, 608 (4th Cir. 1996).

Under the deferential standard applicable here, an arbitration award must be sustained if it “draws its essence” from the parties’ agreement. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). An arbitration award draws its essence from the labor agreement if “[t]he arbitrator [does] not ignore the plain language of the contract.” *Misco.*, 484 U.S. at 38; *Norfolk & W. Ry. Co. v. Transp. Commc’ns Int’l Union*, 17 F.3d 696, 700 (4th Cir. 1994) (observing that “an award that ignores the plain and unambiguous language of the arbitration contract does not ‘draw its essence’ from the agreement”). Moreover, “mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award.” *Enter. Wheel*, 363 U.S. at 598. 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.” *Misco*, 484 U.S. at 38.

**II. Arbitrator Gold Correctly Determined that PTM Breached the CBA in Terminating Davis Because the 2009 Drug and Alcohol Policy Mandated Rehabilitation and Reinstatement for First-Time Offenders.**

Arbitrator 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 Davis's failed alcohol test, and that PTM's failure to comply with the policy violated the CBA and could not be sustained. No other conclusion would draw its essence from this particular CBA. 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." (Memorandum of Agreement Between First Transit and ATU Local 1328, 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. (PTM Drug and Alcohol Abuse Policy, 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.)

Appendix B of the 2009 Drug and Alcohol Abuse Policy specifies the appropriate disciplinary action for various infractions of the policy. (*Id.* at 67-69.) The relevant infraction here is for "Any employee that has a positive alcohol test result of 0.04 or greater on a promotion test, random test or a reasonable suspicion test." (*Id.* at 68.) For the first offense, the mandated discipline is: "Suspension from duties without pay, (denial of promotion in case of promotion test), referral to SAP, and re-entry to work following negative test result, the completion of re-entry contract, and depending on position availability." (*Id.*) This is the discipline that should have been imposed on Davis for her alcohol test infraction.

Arbitrator Gold reached just this conclusion by finding the 2009 Drug and Alcohol Policy was negotiated by and between PTM and the Union, and concluding that it was incorporated into the CBA by Article 29. (Arbitrator Opinion and Award, ECF Doc. #1-2, p. 19-20.) Thus, the 2009 Drug and Alcohol Policy takes on the force of a contractual term in the CBA, and must be applied. (*Id.* at 20.) Accordingly, the arbitrator's decision was firmly based on the plain language of the CBA, drew its essence from the CBA, and cannot be disturbed.

Plaintiff's primary argument to this Court is that the CBA incorporated First Transit's older drug and alcohol policy, and that this policy could not be amended or superseded by the parties to the CBA. PTM made the same argument to Arbitrator Gold. (*Id.*) The arbitrator rejected this argument because PTM, as the current employer, had voluntarily agreed to less harsh discipline for first-time offenders in the 2009 Drug and Alcohol Policy. (*Id.*) Because the CBA was not altered, it incorporated the revised policy that had been agreed to by PTM and the Union. (*Id.*)

Accepting plaintiff's argument would lead to the absurd result that the negotiated 2009 Drug and Alcohol Policy was an exercise in futility by PTM and the Union because they were somehow forever stuck with First Transit's old policy. No evidence supports that, and both PTM and the Union obviously did not believe that to be the case, or they would not have enacted the new policy.

Plaintiff's position not only defies common sense, but also the plain language of Article 29. Article 29 incorporated the drug and alcohol policy that "the Company has," and which had been agreed to by the Union. In March 2009, PTM replaced the drug and alcohol policy and its change was agreed to by the Union. Therefore, after March 1, 2009, the Company still "has" a

drug and alcohol policy which had been agreed to by the Union. It is the new 2009 Drug and Alcohol Policy which is thus part of the CBA after its enactment.

Plaintiff simply disagrees with the arbitrator's interpretation of Article 29 of the CBA, and seeks to undo the change effected by the 2009 Drug and Alcohol Policy, even though it was mutually agreed upon. But, because there is no plain language compelling (or even supporting) any other interpretation, the arbitrator's interpretation is binding. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 48 (1987) ("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").

Plaintiff's secondary argument is that the arbitrator should have reached a different result because of PTM's Code of Performance. The employee handbook, which contained the Code of Performance, makes clear, however, that it cannot override the CBA. The handbook states up front, "To the extent that the Handbook is in conflict with a term or condition of the Employee's applicable labor agreement, the provision in the labor agreement shall take precedence." (PTM Rules and Regulations, ECF Doc. #1-2, p. 39.) Therefore, as the arbitrator concluded, the Code of Performance must give way to the binding 2009 Drug and Alcohol Abuse Policy, which was incorporated into the CBA.

Finally, plaintiff relies on two cases that are in no way relevant, *Clinchfield Coal Co. v. District 28, United Mine Workers of Am.*, No. 98-1052, 1998 U.S. App. LEXIS 29937 (4th Cir. 1998) (unpublished), and *Morgan Services, Inc. v. Local 323, Chicago & Cent. States Joint Bd., Amalgamated Clothing and Textile Workers Union, AFL-CIO*, 724 F.2d 1217 (6th Cir. 1984). In both of these cases, the arbitrator had issued a decision that was flatly contrary to explicit language in the controlling CBA. *See Clinchfield Coal*, 1998 U.S. App. LEXIS 29937, at \*3-4

(concluding that the arbitrator “ignored the plain language of Article XXII(i)(4)”); *Morgan Services*, 724 F.2d at 1223 (concluding that the arbitrator contravened “unambiguous language” in the CBA). In this case, however, there is no explicit language in the CBA that is contrary to Arbitrator Gold’s decision. Article 29 did not specifically refer to First Transit’s old policy, as it could have. Instead, using 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.

Because Arbitrator Gold’s conclusion that PTM had violated the labor agreement was eminently reasonable and – more to the point – based on the plain language of Article 29 and the 2009 Drug and Alcohol Policy, her decision must be upheld. *See Norfolk & W. Ry. Co. v. Transp. Comm’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”).

### **III. Arbitrator Gold’s Decision is Consistent With Federal Regulations, and In No Way Violates Any Established Public Policy.**

Arbitrator Gold’s award does not violate any clearly established public policy, but is instead entirely consistent with governing federal regulations. In no way whatsoever does Arbitrator Gold’s award menace the public, as plaintiff suggests, by handing over the keys to the bus to a drunken operator. Quite to the contrary, the arbitration award carefully protects the public by insuring that Davis be returned to work only after going through rehabilitation, re-obtaining her license, and proving that she is sober just like any bus driver should be. In short, Arbitrator Gold fulfilled her duty under the CBA while making sure that the paramount interest in public safety would be fully protected. Plaintiff’s insistent argument based on public safety

and the “keys to the bus” should be seen for what it really is – a refuge from a legal position that is simply and clearly indefensible under governing law.

In order to be reversed under the narrow public policy exception, an arbitration award must explicitly conflict with other laws or regulations. Here, plaintiff has failed to allege any statutory or regulatory provision prohibiting Davis’s reinstatement following her rehabilitation. No such provision exists because the 2009 Drug and Alcohol Policy, and the arbitrator’s decision enforcing it, is fully consistent with federal and state regulation of public transit drivers.

In *W.R. Grace & Co. v. Rubber Workers Local*, 461 U.S. 757 (1983), the Supreme Court recognized a narrow exception to the enforcement of arbitration awards when the contract as interpreted would violate “some explicit public policy.” *Id.* at 766. Such a public policy “must be well defined and dominant, and is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’” *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

Subsequent Supreme Court decisions have reiterated that the public policy exception is extremely narrow. In *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29 (1987), the Court reversed a judgment vacating as contrary to public policy an arbitrator’s reinstatement of a bus driver found to possess marijuana. *Id.* at 44-45. The Court emphasized that *W.R. Grace* “turned on our examination of whether the award created any explicit conflict with other laws and legal precedents,” and found no such conflict in the case at hand. *Id.* at 43.

The Supreme Court most recently addressed the public policy exception in *Eastern Associated Coal Corp. v. Mine Workers District 17*, 531 U.S. 57 (2000). In that case, an arbitrator had ordered an employer to reinstate a truck driver who had twice tested positive for marijuana. *Id.* at 60-61. The company seeking to vacate the award relied upon the Omnibus

Transportation Employee Testing Act of 1991 and the federal Department of Transportation's ("DOT") implementing regulations, which it claimed "embody a strong public policy against drug use by transportation workers." *Id.* at 63-64.

Rejecting the company's position, the Court held that "the question to be answered is not whether [the employee's] drug use itself violates public policy, but whether the agreement to reinstate him does so." *Id.* at 62-63. Looking at the entire DOT regulatory scheme at issue, the Court easily answered its question in the negative. The DOT regulations specifically permitted a driver who has tested positive for drugs to return to a safety-sensitive position if they are evaluated by a substance abuse professional, certifiably complete a rehabilitation program, pass a return-to-duty test, and are subject to future random drug tests. *Id.* at 64-65 (citing 49 C.F.R. § 382.605). The Court thus concluded that "[n]either the Act nor the regulations forbid an employer to reinstate in a safety-sensitive position an employee who fails a random drug test once or twice," and thus the arbitrator's award "violates no specific provision of any law or regulation." *Id.* at 65-66. To the contrary, the arbitrator's award was consistent with the DOT regulations, which encouraged rehabilitation. *Id.* at 66.

Because "[n]either Congress nor the Secretary [of Transportation] has seen fit to mandate the discharge of a worker who twice tests positive for drugs," the Court declined to infer such a public policy. *Id.* at 67. Moreover, while the Court recognized "that reasonable people can differ as to whether reinstatement or discharge is the more appropriate remedy here," it emphasized that "both employer and union have agreed to entrust this remedial decision to an arbitrator." *Id.* Accordingly, it affirmed the Fourth Circuit's rejection of the company's public policy challenge to the arbitration award. *Id.*

*Eastern Associated Coal* is directly on point and unequivocally rejects plaintiff's position here. Contrary to the Supreme Court's requirement, plaintiff fails to specify any explicit law or legal precedent that prohibits PTM from reinstating Davis. The regulations cited by plaintiff require that "[e]ach employer shall prohibit a covered employee from using alcohol while performing safety-sensitive functions," and specify that such an employee may not be returned "to duty to perform a safety-sensitive function" unless the employee passes a series of "return-to-duty" tests. (Pl.'s Br. at 12 (citing 49 C.F.R. §§ 655.32, 655.46, 40.305)) While these regulations would void an arbitration award mandating that PTM allow Davis to consume alcohol while driving a bus or prohibiting Davis from taking "return-to-duty" tests, the arbitration award at issue does neither. To the contrary, Arbitrator Gold explicitly required Davis to pass a return-to-duty test, be subject to future random alcohol tests by PTM, and only ordered her put back to work after her commercial drivers license was reinstated by NCDOT.

Plaintiff further cites regulations establishing that employers "are not required to return an employee to safety-sensitive duties because the employee has met these conditions. That is a personnel decision that you have the discretion to make, subject to collective bargaining agreements or other legal requirements." 49 C.F.R. § 40.305(b) (emphasis added). By claiming this provision supports its position, plaintiff ignores the plain meaning of the text. Reinstating Davis certainly "violates no specific provision of any law or regulation" when the law explicitly contemplates and accepts that collective bargaining agreements will at times mandate that such employees be reinstated. *See Eastern Associated Coal*, 531 U.S. at 66.

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, but "require[s] only that the above-stated prerequisites to reinstatement be met" before an employer does so.

*See id.* at 65. Arbitrator Gold’s decision is thus not contrary to federal and state regulatory policy, but instead perfectly consistent with it. This happy result should be expected because Arbitrator Gold simply enforced the 2009 Drug and Alcohol Abuse Policy, which had been crafted to follow all applicable federal and state regulations.

Remarkably, plaintiff fails to reference a single Supreme Court case exploring the bounds of the public policy exception. Plaintiff instead asserts that this case should be controlled by two circuit court opinions predating the Supreme Court’s decision in *Eastern Associated Coal*. (Pl.’s Br. at 8-10 (citing *Delta Air Lines, Inc. v. Air Line Pilots Assoc., Int’l*, 861 F.2d 665 (11th Cir. 1988) and *Exxon Shipping Co. v. Exxon’s Seamen’s Union*, 993 F.2d 357 (3rd Cir. 1993)) In light of *Eastern Associated Coal*, these decisions are no longer good law, and their holdings have been repeatedly rejected in the wake of *Eastern Associated Coal*.

For instance, the Fifth Circuit recently rejected an invitation to ignore Supreme Court precedent as plaintiff would have the Court do here. In a case strikingly similar to *Delta Airlines*, that court refused to vacate an arbitration award reinstating an airline pilot who had refused to submit to alcohol tests. *Cont’l Airlines, Inc. v. Air Line Pilots Ass’n, Int’l*, 555 F.3d 399 (5th Cir. 2009). Appreciating the Supreme Court’s narrow reading of the public policy exception, the court recognized that the plaintiff had “cited no cases after *Eastern Associated Coal*, nor are we aware of any, in which we have set aside an arbitration award on the grounds of public policy implicated by reinstating a safety-sensitive employee who habitually abuses drugs or alcohol.” *Id.* at 418.

Recent opinions by district courts in this circuit support the Fifth Circuit’s conclusion. *See, e.g., Consolidation Coal Co. v. United Mine Workers*, No. 1:09-cv-11, 2010 U.S. Dist. LEXIS 54239, at \*13-14 (N.D. W. Va. June 3, 2010) (refusing to vacate an award reinstating an

employee discharged for testing positive for marijuana);<sup>1</sup> *Mylan Pharms., Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, Local 8-957*, 548 F. Supp. 2d 252, 259-60 (N.D. W. Va. 2008) (refusing to vacate an award reinstating an employee discharged for manipulating data related to prescription drug manufacturing); *see also Boston Med. Ctr. v. SEIU, Local 285*, 260 F.3d 16, 25 (1st Cir. 2001) (reversing a district court's order vacating an arbitration award that reinstated a nurse who was fired after an infant in her care died of septic shock). Unsurprisingly, plaintiff fails to cite a single case decided after *Eastern Associated Coal* supporting its public policy argument.

Because there is no public law or legal precedent that prohibits the reinstatement of an employee in Davis's position – a first time alcohol-policy offender who participated in rehabilitation and had her commercial drivers license reinstated by the NCDOT – Arbitrator Gold's Opinion and Award cannot be vacated as contrary to public policy.

### CONCLUSION

For the foregoing reasons, defendant respectfully requests that the Court deny plaintiff's Motion to Vacate or Modify Arbitration Award.

Dated: June 24, 2011.

/s/ Narendra K. Ghosh

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<sup>1</sup> This unpublished decision is included as an attachment to this response.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Response in Opposition to Plaintiff's Motion to Vacate or Modify Arbitration Award 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: June 24, 2011.

/s/ Narendra K. Ghosh

Narendra K. Ghosh

NC Bar No. 37649