

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA**

**INTERNATIONAL UNION OF
OPERATING ENGINEERS
LOCAL 542, ET AL.**

Plaintiffs,

v.

WILLIAMS EQUIPMENT CORP.

Defendant.

CIVIL ACTION NO. 05-CV-5498

MEMORANDUM AND ORDER

Tucker, J.

September 19, 2006

Presently before the Court are Defendant's Motion to Dismiss and Vacate Arbitration Award (Doc. 3), Plaintiff's Response in Opposition and Cross-Motion for Partial Summary Judgment (Doc. 4), and Defendant's Reply/Response (Doc. 5). For the reasons set forth below, this Court will deny Defendant's motion and grant Plaintiffs' motion.

Plaintiff Union and its Employee Benefit Funds ("Union") brings this action to enforce an arbitration award issued pursuant to grievance provisions contained in a collective bargaining agreement between the Union and Defendant, Williams Equipment Corporation ("Williams"). The Union alleges that both it and Williams were parties to a Collective Bargaining Agreement ("CBA"), which establishes the wages, hours, and terms and conditions of employment for certain employees. Furthermore, the Union alleges that the CBA contains a grievance and arbitration procedure providing for the final and binding resolution of disputes between parties.

It is the grievance and arbitration provision of the CBA that forms the basis of this litigation. The pertinent facts are as follows. According to the Union, after Williams began work on a long-term construction project in York, Pennsylvania in 2003, Williams committed several violations of

the CBA. In accordance with the grievance procedure contained in the CBA, the Union filed a grievance protesting Williams's contractual violations. Williams did not respond to the grievance. In further accordance with the CBA, the Union filed a grievance on November 20, 2003 protesting Williams's contractual violations. Again, Williams did not respond to the grievance.

On December 17, 2003, the Union submitted the grievance to the American Arbitration Association (AAA) for processing to Arbitration in accordance with the CBA. Williams wrote a letter on September 7, 2004 stating that it did not acknowledge the existence of an agreement to arbitrate the matter; the day before the hearing Williams's attorney wrote to AAA stating that Williams would not "participate in person in this proceeding" because Williams believed it was not a party to any CBA with the Union and that AAA lacked jurisdiction. (Compl. ¶ 18.)

The hearing took place as scheduled in AAA's offices in Philadelphia on May 3, 2005; the Arbitrator issued his award on June 18, 2005, which AAA mailed to the parties on June 21, 2005. Williams has not implemented or complied with any portion of the Award, nor has it filed any legal action to vacate, set aside, or modify the award.

1. Defendant's Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted and Plaintiffs' Cross-Motion for Summary Judgment

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988) (citations omitted), *cert. denied*, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The question is whether the plaintiff can prove any set of facts consistent with his allegations that will entitle him to relief, not whether he will ultimately prevail. See Hishon v. King & Spalding,

467 U.S. 69, 73 (1984). Moreover, the claimant must set forth sufficient information to outline the elements of his claims or to permit inferences to be drawn that these elements exist. See FED. R. CIV. P. 8(a)(2); Sadrudin v. City of Newark, 34 F. Supp. 2d 923, 925 (D.N.J.,1999) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). A motion to dismiss may be granted only “if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley, 355 U.S. at 45-46 (1957).

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. R. 56(c). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis of its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant’s initial Celotex burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” Id. at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. R. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of an element essential to that party’s case,

and on which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322. “[I]f the opponent [of summary judgment] has exceeded the ‘mere scintilla’ [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant’s version of events against opponent, even if the quality of the movant’s evidence far outweighs that of its opponent.” Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

Whether the Court must dismiss the Union’s complaint either summarily or for failure to state a claim turns first on whether this Court finds that Defendant agreed to submit to arbitration under a CBA through some course of conduct or otherwise that established a mutual intent to be bound. See Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1509 (3d Cir. 1994), *affirmed at* 514 U.S. 938 (1995) (directing district courts to independently decide whether an arbitrator has jurisdiction over the merits of a dispute on the basis of the court’s analysis of the agreement between the parties). Furthermore, in order to prevail on its motion, Defendant must show that the Union cannot prove any set of facts in support of its claim that the arbitration award is enforceable against Defendant.

Because Defendant did in fact object to the arbitration proceeding at a time prior to its completion, it has preserved the right to have the Court consider that objection to the proceeding in the instant Motion. See id. at 1510 (“A party does not have to try to enjoin or stay an arbitration proceeding in order to preserve its objection to jurisdiction. . . . A jurisdictional objection, once stated, remains preserved for judicial review absent a clear and unequivocal waiver.”) If Defendant was not subject to the arbitration provision, the Court must vacate the arbitrator’s award.

2. Collective Bargaining Agreement (CBA) and Arbitration Provision – Count I

Defendant has filed a Motion to Dismiss and to Vacate the Arbitration Award. In the Motion, Defendant asserts that the Union's attempt to enforce the arbitration award should be dismissed for lack of subject matter jurisdiction and failure to state a claim, and further requests that the court vacate the arbitration award at issue because there was no agreement to arbitrate and because the contract violations the Union alleged against Defendant were contained in an unsigned document that was never executed between the parties.

Specifically, Defendant states that (1) it did not enter into a CBA with the Union to arbitrate any disputes and (2) the CBA served with and incorporated in the Complaint is unsigned and therefore the Complaint fails to state a claim upon which relief can be granted. (Mot. Dismiss 1.) Defendant relies on the law as articulated in First Options of Chicago, Inc. v. Kaplan, which instructs that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.” 514 U.S. 938, 943 (1995) (citing AT & T Techs., Inc. v. Commc’ns Workers, 475 U.S. 643, 649 (1986)). In addition, Defendant also attacks the substance of the arbitration because the actual award was based on the same CBA to which it is allegedly not a party. Id. at 3.

In response, the Union requests that the Court summarily enter judgment on the pleadings in their favor to enforce the arbitrator's award. The Union relies heavily upon Seventh Circuit case law that broadly states that the nature of a CBA distinguishes it enough from an ordinary contract to allow “course of conduct” to dictate the parties intent to be bound where terms of a CBA are in dispute. The Union states further that even though Defendant did not sign the CBA containing the arbitration provision, the parties' course of conduct proves that Defendant intended to be bound by

all the terms of the CBA, including the arbitration provision. The Union also relies heavily upon the arbitrator's statements during the arbitration proceeding that Defendant intended to be bound to the CBA.

Defendant replies that the issue is not simply that Defendant did not sign the CBA, but more importantly that the agreement upon which the Union bases this action does not itself contain an arbitration provision at all.

It is clear from the papers that the parties dispute the existence of an agreement to arbitrate labor disputes. As such, the proper inquiry before the Court is not simply whether Williams agreed to arbitrate arbitrability, but rather whether Williams was a party to an agreement subjecting it to, among other things, arbitrate disputes with the Union. To the extent that whether Williams was in fact subject to an arbitration provision contained either in an existing agreement or through some course of conduct is a question of fact, the undisputed evidence of record that accompanies the Union's Cross-Motion for Partial Summary Judgment supports this Court's conclusion that Williams was in fact subject to arbitration to resolve any labor-related disputes.¹

The Supreme Court has held that "whether or not [a] company [is] bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964). "[A] collective bargaining agreement is not an ordinary contract The collective agreement covers the whole employment relationship. It calls into being . . . the common law of a particular industry or

¹At the July 19, 2006 Rule 16 Scheduling teleconference held before the Court, the Court advised the parties to proceed with limited discovery to further develop the record. However, the parties informed that Court that further discovery would not be productive as the record is complete, and requested that the Court dispose of the case upon the motions filed. Thus the Court will consider the arbitrator's findings of fact and any dispute of material fact created therein, as well as affidavits, and other supporting documents filed by the parties as evidence properly before the Court in deciding the Motion for Summary Judgment.

of a particular plant.” Id. at 550 (citing United Steel Workers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79 (1960)). Furthermore, “although the duty to arbitrate . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that [the corporate employer] did not sign the contract being construed.” Id.

In the context of industrial labor relations and management, and in the absence of binding authority in this jurisdiction, the common law of the courts of the Seventh Circuit is persuasive. As such, this Court will look to the Seventh Circuit for guidance in deciding the issues presented here. There is a well-established principle that a collective bargaining agreement is not dependent on the reduction to writing of the parties’ intention to be bound by the given terms of the agreement. Gariup v. Birchler Ceiling & Interior Co., 777 F.2d 370, 373 (7th Cir. 1985); see Wilkes Barre Printing Pressmen & Assistants’ Union, No. 137 I.P.P. & A. E. v. Great N. Press, 522 F. Supp. 106, 110-11 (M.D. Pa. 1981) (“[A] collective bargaining agreement may be binding even if all or some of its terms are unwritten.”). When such a writing does exist, however, a signature is not a prerequisite to finding that an employer is bound to the collective bargaining agreement so long as sufficient conduct exists to manifest a party’s intent to be bound to the agreement. Bricklayers Local 21 of Illinois Apprenticeship & Training Program & Masonry Inst. v. Banner Restoration, Inc., 385 F.3d 761, 767 (7th Cir. 2004); see Wilkes Barre Printing, 522 F. Supp. at 111 (“[L]abor agreements are governed by the ‘objective theory’ of contracts . . . the central inquiry is whether the actual conduct . . . would have manifested offer and acceptance to a reasonable observer, regardless of the subjective intent of the negotiators.”).

Among the considerable factors in evaluating whether a party’s course of conduct suggests

an intention to be bound by the terms of a collective bargaining agreement are payment of union wages, remission of union dues, payment of fringe benefit contributions, the existence of other agreements evincing assent, or the submission of the employer to union jurisdiction, such as those created by grievance issues. Id. (citing Robbins v. Lynch, 836 F.2d 330, 332 (7th Cir. 1988) (finding an employer who refused to sign a collective bargaining agreement adopted the agreement by paying the union scale, turning over dues under a check-off system, negotiating grievances, and making some pension and welfare contributions)); Gariup, 777 F.2d at 376 (finding an employer became a party by paying wages at union rates, contributing to pension funds, returning unsigned Acceptance of Working Agreement forms, and signing an Assent of Participation form); Brown v. C. Volante Corp., 194 F.3d 351, 354-56 (2d Cir. 1999) (finding employer who did not sign two subsequent collective bargaining agreements intended to adopt the agreement by paying contributions and wages at rates prescribed by the agreements). This enumeration of factors does not seem to be exhaustive, but simply a list of specific examples which may suggest a party's intent to be bound by the terms of a collective bargaining agreement.

Thus, a party's conduct may contractually bind it to a collective bargaining agreement even though its actual signature is absent from the written documents themselves. The Union states and Williams does not deny that Williams acknowledged its obligation to make contributions to Plaintiff Funds as required by the CBA in an August 22, 2003 letter signed by its President (Compl. ¶ 31, Ex. C.) If Williams had informed the Union before the arbitration dispute arose on May 2, 2005 (see Mot. Dismiss 2; Aff. H. Arthur Williams, dated Nov. 18, 2005), that it did not intend to be bound by the CBA or that there was no agreement to arbitrate, then its actions could not have manifested final consent to the CBA's provisions in dispute. However, the law does not require, as Williams

argues in response to Union's Cross-Motion for Summary Judgment (Def.'s Br. in Reply 1), that the Union "show that Williams previously submitted to arbitration" to prove an independent, course of conduct acquiescence to arbitrate.

Rather, the arbitrator's findings of fact demonstrate that Williams and the Union entered into negotiations which resulted in the Union agreeing to "certain concessions from the standards set forth in the regular collective bargaining agreement," and Williams signed a document indicating his assent to the modified agreement. (Cross-Mot. Summ. J. 5-6.) Williams does not dispute this. Williams does not dispute the company attempted to conform its signed agreement with the Union with an agreement between Williams and another union, whose procedure for disputes terminated in final and binding arbitration. Williams does not dispute the facts supporting the arbitrator's finding that it was relying on the holidays, and wage and benefit rates listed in "the normal agreement" of the Union, which requires arbitration. *Id.* at 6. Finally, Williams does not dispute the facts upon which the arbitrator relied in concluding that Williams and the Union confirmed the details of their agreement to hire a crane operator in writing, and subsequently implemented the agreement by hiring someone to operate the crane and paying him the rate specified in the written agreement. *Id.* at 7. These actions combined are sufficient to support a conclusion that Williams intended to be bound by the Union's existing requirement that grievances be resolved through binding arbitration. See, e.g., Teamsters Steel Haulers Local Union No. 800 v. Artin Transp. Sys., Inc., 555 F. Supp. 810, 815 (W.D. Pa. 1983) (finding that "the defendant cannot by its acts give the impression it intends to be bound by an agreement . . . and then when liability . . . is asserted, seek to repudiate the agreement.")

Rather than presenting its own evidence that a genuine issue of material fact remains in

dispute, Williams's attempts to dissuade the Court from considering the arbitrator's undisputed findings as part of the record as a whole in evidence and in support of the Union's Motion. (Def.'s Br. in Reply 2-3.) Given that Williams has not shown that the Union cannot prove any set of facts in support of its claim that the arbitration award is enforceable, Williams's Motion to Dismiss must be denied. Furthermore, Williams has failed to rebut the Union's position by making a factual showing sufficient to establish the existence of an element essential to Williams's case, and the undisputed facts of record support this Court's conclusion that Williams was subject to the terms of the CBA, including the arbitration provision.

3. Enforcement of the Arbitration Award – Count II

Having concluded that Defendant's conduct manifested an intent to be bound by the arbitration provision, the Court has subject matter jurisdiction over this action to confirm or vacate the arbitration award under 28 U.S.C. § 1332 and 9 U.S.C. § § 9, 10. This duty to determine the enforceability of the arbitration award once the arbitrator's jurisdiction is independently confirmed is two-fold in that the Court must: (1) give some deference to the arbitrator's substantive decision so long as both parties had notice and an opportunity to be heard, and the award is supported by the record; and (2) consider whether Defendant's request to vacate the award was timely filed. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995). As explained above, both parties to this litigation had notice and an opportunity to be heard by the arbitrator before he rendered his final decision, and the award is supported by the record (Pl.'s Cross-Mot. Attach. 1.)

While Defendant preserved his right to object to the arbitrator's jurisdiction over the original labor dispute, Defendant has waived its right to object to the substance of the actual award. Under Pennsylvania law, a party has thirty days to bring an action to modify, vacate, or correct an

arbitrator's award. 42 PA. CONS. STAT. ANN. § 7314(b). The Third Circuit has held that "if a defendant has important defenses to an arbitration award, he should raise them within the period prescribed for actions to vacate rather than wait to raise them a defenses in a confirmation proceeding . . . and under the Pennsylvania statute applicable . . . the failure to raise objections . . . which could have been raised in a motion to vacate, modify, or correct the awards bars raising them in confirmation proceedings held thereafter." Serv. Employees Int'l Union v. Office Ctr. Servs. Inc., 670 F.2d 404, 412 (3d Cir. 1982).

The hearing took place as scheduled in AAA's offices in Philadelphia on May 3, 2005; the Arbitrator issued his award on June 18, 2005, which AAA mailed to the parties on June 21, 2005. The last day to file a corrective motion and/or objections to the arbitrator's award was July 18, 2005. Williams never filed any legal action to vacate, set aside, or modify the award, and raised its first defenses to the arbitration award in the instant confirmation proceedings, initiated by the Union on October 21, 2005. Furthermore, Defendant has not identified any exceptional circumstances that would warrant relaxing the rule of this Circuit. Because Defendant was subject to arbitration, the Court will also enforce the award and without further inquiry.

Count II relies on the applicability of the CBA to Defendants, and the Court has concluded that the Defendant was bound to the terms of the CBA. Furthermore, Defendant had notice of the arbitration proceeding and ample opportunity to be heard. Finally, Defendant failed to timely raise and objection to the arbitration award on its merits. Therefore, the arbitration was valid and the arbitrator's award, as supported by the record, shall be enforced in its entirety. An appropriate order follows.

BY THE COURT:

/S/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.

**IN THE UNITED STATES DISTRICT COURT FOR
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WILLIAMS EQUIPMENT CORP.

Defendant.

CIVIL ACTION NO. 05-CV-5498

ORDER

AND NOW, this ____ day of September, 2006, upon consideration of Defendant’s Motion to Dismiss and Vacate Arbitration Award (Doc. 3), Plaintiff’s Response in Opposition and Cross-Motion for Partial Summary Judgment (Doc. 4), and Defendant’s Reply (Doc. 5), **IT IS HEREBY ORDERED and DECREED** that Defendant’s Motion (Doc. 3) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff’s Cross-Motion (Doc. 4) is **GRANTED. JUDGMENT IS ENTERED** in favor of Plaintiff and against Defendant as follows:

- (1) The Arbitrator’s Award is enforced in full with respect to Count I of the Complaint.
- (2) With respect to the ERISA claim set forth in Count II, judgment is granted for the principal amount due the Plaintiffs, plus interest, counsel fees and liquidated damages, and costs.
- (3) The parties are directed, through discovery or otherwise, including performing an audit if

demanded by Plaintiffs, to determine the principal amounts owed by Defendant within sixty (60) days of the date of this Order.

BY THE COURT:

/S/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.